

CITATION: Behold Control Equipment Inc. v. Race Mechanical Systems Inc.,
2026 ONSC 4327
COURT FILE NO.: CV-19-00633450-0000
DATE: 20260724

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BEHOLD CONTROL EQUIPMENT INC.)
)
Plaintiff)

– and –)

RACE MECHANICAL SYSTEMS INC.)
and 2700009 ONTARIO INC. (C.O.B. as)
ACQUIRE FACILITIES MANAGEMENT)
SERVICES))

Defendants) *Derek D. Ricci, Maureen Littlejohn and*
) *Rui Gao, for the Plaintiff/ Defendant by*
) *Counterclaim*
)

AND BETWEEN:)

RACE MECHANICAL SYSTEMS INC.) *Manjit Singh, for the Defendants/*
and 2700009 ONTARIO INC. (C.O.B. as) *Plaintiffs by Counterclaim*
ACQUIRE FACILITIES MANAGEMENT)
SERVICES))

Plaintiffs by Counterclaim)

– and –)

BEHOLD CONTROL EQUIPMENT INC.)
and ~~TREVOR STRAUSS~~)

Defendants by Counterclaim)

HEARD: In Writing)

)

ENDORSEMENT
ON COSTS AND PRE-JUDGMENT INTEREST

A.A. SANFILIPPO J.

Overview

[1] In Reasons for Decision issued December 19, 2025, I rendered judgment in this action: *Behold Control Equipment Inc. v. Race Mechanical Systems Inc.*, 2025 ONSC 7129 (the “Reasons”). I granted judgment to the Plaintiff, Behold Control Equipment Inc. (“Behold”), in the amount of \$2,608,798.00, payable by Defendants, RACE Mechanical Systems Inc. (“RACE”) and 2700009 Ontario Inc., c.o.b. as Aquire Facilities Management Services (“Aquire”), jointly and severally, plus pre-judgment interest and post-judgment interest in accordance with ss. 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”). I dismissed the counterclaim brought by RACE and Aquire (collectively, the “Defendants”) against Behold. The Defendants had abandoned their counterclaim against Trevor Strauss at trial.

[2] Regarding the issue of costs, I ordered that costs of this action and counterclaim shall be determined in writing, in accordance with a process established at a Case Conference, unless resolved by the parties. As the parties were unable to resolve the issue of costs, a Case Conference was conducted and a timetable was established for the delivery of written submissions on the issue of costs, consistent with Rule 57.01(7) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[3] In addition, the parties reported that they could not agree on the quantification of pre-judgment interest and asked that this be determined by the Court on their written submissions. On consent, I ordered that the amount of pre-judgment interest be determined in writing and that the parties deliver their written submissions together with their submissions on costs.

[4] The parties have now delivered their written submissions on the issue of costs and on the quantification of pre-judgment interest.¹ For the reasons that follow, I award the

¹ Behold Costs and Prejudgment Interest submissions, dated March 3, 2026, Case Center bundle (15), Docs. A:122-A:134; Defendants’ Pre-Judgment Interest and Costs Submissions, dated March 3, 2026, Doc.

Plaintiff, Behold, costs of this action and counterclaim, on a partial indemnity basis, payable by RACE and Aquire on a joint and several basis, fixed in the amount of \$1,900,000.00, all inclusive of fees, disbursements and applicable taxes. I order, as well, that the pre-judgment interest awarded to Behold is quantified in the amount of \$161,866.13.

I. THE ISSUE OF COSTS

A. Behold's Position on Costs

[5] Behold's claim for an award of costs is based on Behold's success in obtaining judgment against the Defendants and in defeating the Defendants' counterclaim. Behold's Bill of Cost sets out Behold's quantification of costs on a partial indemnity basis of \$1,884,168.29, all inclusive of fees, HST and disbursements,² or on a substantial indemnity basis in the amount of \$2,650,747.68, all inclusive.³

[6] Behold submitted that the costs should be fixed on a substantial indemnity basis on the allegation that the Defendants' conduct was "reprehensible, scandalous or outrageous", alleged to arise primarily from the Defendants' flawed approach to their discovery obligations, their unfounded attacks on Mr. Strauss' character and honesty, and their meritless counterclaim.

B. The Defendants' Position on Costs

[7] The Defendants submitted that the Court should make a distributive costs analysis and find that no costs of this action or counterclaim should be awarded. The Defendants maintained that the trial involved the determination of 21 issues, and that the Defendants were successful on 11.7 of the questions (taking into consideration sub-questions) and that the Plaintiff was successful on 9.3 of the questions. The Defendants submitted, further, that the Plaintiff recovered about 15% of the damages that were claimed against the Defendants, and therefore contended that the Defendants were 85% successful in the defence of the action.

[8] The Defendants submitted that if costs are awarded to the Plaintiff, they should be fixed on a partial indemnity basis, as the threshold for an award of costs on a substantial indemnity basis has not been met. And, the Defendants emphasized that the

B-1:4; Behold Responding Submissions, dated March 17, 2026, Doc. A:135; Defendants' Pre-Judgment Interest and Costs Reply Submissions, dated March 17, 2026, Doc. B-1:5.

² Partial Indemnity Costs consisting of legal fees of \$1,356,777.68 plus HST of \$176,381.10 and disbursements of \$351,009.52.

³ Substantial Indemnity Costs consisting of legal fees of \$2,035,166.51 plus HST of \$264,571.65 and disbursements of \$351,009.52.

costs sought by the Plaintiff are excessive, disproportionate, and beyond the amount of costs reasonably expected by the Defendants.

C. Analysis – The Issue of Costs

[9] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides the court with discretion in the determination of costs. The exercise of this discretion is guided by the principles set out in Rule 57.01, and applicable jurisprudence, having regard for the overriding principles of reasonableness, fairness and proportionality. The starting point is determination of whether a party has established an entitlement to costs.

(a) Determination of Success

[10] It is well-established that absent special circumstances, “costs follow the event”: *Bell Canada v. Olympia & York Developments Ltd.* (1994), 17 O.R. (3d) 135 (Ont. C.A.); *Yelda v. Vu*, 2013 ONSC 5903, at para. 11, leave to appeal refused, 2014 ONCA 353; *St. Jean v. Cheung*, 2009 ONCA 9, at para. 4. Although there is no absolute entitlement to costs, the successful party is entitled to a reasonable expectation of an award of costs in the absence of exceptional circumstances: *Bell Canada*, at p. 596; *Wesbell Networks Inc. v. Bell Canada*, 2015 ONCA 33, at para. 22.

[11] The distributive costs analysis, or issue-by-issue costs analysis, sought by the Defendants has rarely been applied by the Court. As summarized in *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*, 2021 ONSC 753, at paras. 20-24, the origins of distributive cost orders can be traced to *Godfrey v. Good Rich Refining Co.*, [1939] 2 D.L.R. 779 (Ont. H.C.), which relied on *Reid, Hewitt & Co. v. Joseph*, [1918] A.C. 717, in determining costs on an issue-by-issue basis and setting off the costs allocated to the plaintiff on successful issue against those allocated to the defendant on claims that the plaintiff failed to establish. This was commented on by Carthy, J.A., in *Oakville Storage and Forwarders Ltd. v. CNR* (1991), 84 D.L.R. (4th) 326 (Ont. C.A.), who held, at para. 19, that while it was unnecessary to determine “whether a distributive award is ever appropriate under our present rules and, while I find it difficult to imagine that it could be, this was certainly not the proper case.” In *Skye v. Matthews* (1996), 87 O.A.C. 381 (C.A.), at p. 7-8, the Court of Appeal commented that “[w]hile Carthy J.A. did not totally foreclose the possibility of resort to a distributive costs order in *Oakville Storage*, he came close to doing so.” In *Eastern Power Limited v. Ontario Electricity Financial Corporation*, 2012 ONCA 366, at para. 18, the Court of Appeal reinforced that “[t]his court has restricted the use of distributive cost awards to the rarest of cases and has noted that ‘[i]ndividual issues can be dealt with more appropriately under the general discretion and explicit guidance set forth in rule 57.01(1)’.”

[12] Our Courts have applied this guidance and have held that while a distributive cost award cannot be entirely foreclosed, it is highly doubtful that it is ever appropriate under the present Rules: *Ford Motor Company of Canada Limited v. Ontario (Municipal*

Employees Retirement Board) (2005), 3 B.L.R. (4th) 306 (Ont. S.C.), at para. 51; *Ontario Realty Corporation v. P. Gabriele & Sons Limited*, 2009 CanLII 68828, at paras. 27-35; *McLaughlin v. Airston Realty Corp.*, 2004 CanLII 18174 (Ont. S.C.), at paras. 9-10. In the recent case relied on by the Defendants, *Wai-Cheong Sin v. Kela Medical Inc.*, 2025 ONSC 5519, the Court affirmed, at para. 14, that an order for distributive costs “will only be appropriate in rare circumstances” and, like the earlier decisions, held, at para. 15, that “[t]his is not such a case.”

[13] This is not one of those rare instances where a distributive costs analysis is appropriate. I decline to determine costs on an issue-by-issue basis. Rather, the costs of this action and counterclaim shall be determined by consideration of the overall success achieved by the parties, consistent with the direction provided by the Court of Appeal in *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 381, at para. 10: “Costs are not to be determined by considering success on an issue by issue basis. Rather, they are to be based on the overall success achieved by a party”, citing *Wesbell*, at para. 21. A similar finding was made by the Court of Appeal in *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 787, at para. 6, and in *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2025 ONCA 56, at para. 73.

[14] Behold was the successful party in this trial. Behold was successful in obtaining an award of damages and Behold was successful in obtaining a dismissal of the Defendants’ counterclaim. This is not even a case of divided success. The Defendants failed in their counterclaim and failed to defend the main claim advanced by Behold. The Defendants’ submission that Behold realized less damages than it sought is material to my assessment of proportionality and to my consideration of Rule 57.01(1)(a), but not to my determination of entitlement to costs. And the fact that certain of Behold’s alternate causes of action were dismissed does not derogate from Behold’s success in its main claim for misuse of confidential information.

[15] Behold has established an entitlement to an award of costs.

(b) Applicable Principles in Fixing the Amount of Costs

[16] In *100 Bloor Street West Corporation v. Barry's Bootcamp Canada Inc.*, 2025 ONCA 447, at para. 71, the Court of Appeal summarized the applicable principles in fixing costs, as follows:

- The overarching objective is to fix an amount of costs that is objectively reasonable, fair, and proportionate ... rather than to fix an amount based on the actual costs incurred” by the party entitled to costs: *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, at para. 61.

- The party seeking costs bears the burden of proving them to be reasonable, fair, and proportionate”: *Apotex*, at para. 66.
- A proper costs assessment requires a court to undertake a critical examination of the relevant factors”, including but not limited to the result in the proceedings and the other factors identified in r. 57.01 ...: *Apotex*, at para. 60. The court must then “step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable”: *Apotex*, at para. 60, quoting *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 2, at para. 356, citing *Boucher v. Public Accountants Council (Ontario) (2004)*, 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.), at para. 24.
- The reasonable expectation of the parties concerning the amount of the costs award is an important factor: *Sky Clean Energy Ltd. (Sky Solar (Canada) Ltd.) v. Economical Mutual Insurance Company*, 2020 ONCA 558, 152 O.R. (3d) 159, at para. 119. Not all expectations are reasonable. Therefore, the expectations of the parties should not “overwhelm the analysis of what is objectively reasonable in the circumstances of the case”: *Apotex*, at para. 62. Otherwise, the deeper pockets of the more affluent would artificially inflate costs, causing a “chilling effect on access to justice for less wealthy parties”: *Apotex*, at para. 62. This would be contrary to the fundamental objective of the costs system, which exists to facilitate access to justice: *Boucher*, at para. 37. “Although each costs assessment is a fact-driven exercise ... the reasonableness of costs that represent an outlier must be objectively and carefully scrutinized, taking into account the chilling effect on litigation that this kind of award could have”: *Apotex*, at para. 63, citing *Boucher*, at para. 37.
- Costs awards may be elevated where the conduct of a party “lengthen[ed] unnecessarily the duration of the proceeding”, or was “improper, vexatious or unnecessary”: rr. 57.01(e)-(f)(i). A substantial indemnity costs award is justified if “the proceedings are clearly vexatious, frivolous, or an abuse of process” or there is egregious misconduct: *Lewis v. Lewis*, 2019 ONCA 690, 49 E.T.R. (4th) 175, at para. 17; 1588444 Ontario Ltd. v. *State Farm Fire and Casualty Company*, 2017 ONCA 42, 135 O.R. (3d) 681, at para. 53.

[17] Applying these principles, Behold had the burden of proving that the costs they claim are reasonable, fair, and proportionate. Behold has submitted, through their Bill of Costs, that they incurred actual fees of \$3,335,143.50, produced by 3,735.4 hours of professional time, but that they provided a courtesy discount of 600.8 hours to reduce the total number of hours to 3,134.6, producing net actual fees (after discount) of \$3,015,061.50. On a substantial indemnity basis, 3,134.6 hours produced a claim for legal fees of \$2,035,166.51 plus HST (\$264,571.65) for a total of \$2,299,738.16, and on a partial indemnity basis, \$1,356,777.68 plus HST (\$176,381.10) for a total of \$1,533,158.77. Behold also claimed disbursements of \$351,009.52.

[18] In fixing an amount of costs that is objectively reasonable, fair, and proportionate, the actual costs that a party chose to pay their lawyer is but one factor amongst many. In *Barry's Bootcamp*, at para. 86, the Court of Appeal emphasized this point by affirming the holding made in *Apotex*, at para. 65:

Costs that are reasonable, fair, and proportionate for a party to pay in the circumstances of the case should reflect what is reasonably predictable and warranted for the type of activity undertaken in the circumstances of the case, rather than the amount of time that a party's lawyer is willing or permitted to expend.

[19] The analysis in *Barry's Bootcamp* and *Apotex* on this point built on the finding in *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4: "In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant."

[20] While mindful of the actual costs said to have been incurred by Behold, the costs award claimed by Behold must be critically examined with reference to the factors identified in Rule 57.01.

(c) Examination of the Rule 57.01 Factors

[21] Rule 57.01(1) sets out a list of factors that "the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing". Neither party showed that there were any offers to settle that affect the determination of costs. I will explain my analysis of the Rule 57.01(1) factors.

i. Reasonable Expectation of the Defendants

[22] Rule 57.01(0.b) calls for consideration of the "amount of costs that an unsuccessful party could reasonably expect to pay" in relation to this proceeding. At the outset of the trial, I directed that the parties exchange cost outlines so that the parties could have a fair opportunity to understand the costs expectations of the party opposite, and to inform the

analysis of the parties' reasonable expectation of costs for the purposes of Rule 57.01(0.b).

[23] Behold delivered a spreadsheet that showed that, as at the opening of trial, Behold had incurred costs of \$854,044.23, all inclusive, on a partial indemnity scale.⁴ Conversely, the Defendants delivered an interim Costs Outline stating that the Defendants had incurred, as at the start of trial, actual costs of \$1,279,863.84, all inclusive,⁵ that were calculated on a partial indemnity basis as \$767,918.30, all inclusive. Behold delivered a Costs Outline on June 25, 2025, on the eve of the hearing of the oral closing submissions, showing costs of \$1,494,806.54, all inclusive, on a partial indemnity basis,⁶ or \$2,630,822.73 on a substantial indemnity basis.⁷

[24] In their Bill of Costs, dated March 2, 2026, delivered with their written Costs Submissions, the Defendants submitted that they incurred actual costs of \$1,991,840.28, all inclusive,⁸ which quantified on a substantial indemnity basis as \$1,720,333.09, all inclusive, and on a partial indemnity basis as \$1,293,678.92, all inclusive.

[25] These costs summaries show that the Defendants had a reasonable expectation that each side had incurred about \$850,000 in partial indemnity costs at the time that the trial started, equating to about \$1.2 million in actual costs, and that each side would incur at least \$1.0 million in costs during the trial. In my view, the Defendants reasonably expected a cost exposure through to the end of trial of \$1.5 to \$2.0 million, all inclusive.

ii. The Principle of Indemnity

[26] Rule 57.01(1)(0.b) allows for consideration of the principle of indemnity for costs, as considered in the context of the hours spent by the law firm acting for the party entitled to costs and the hourly rates. Behold showed that the amount of time incurred by the Defendants exceeded the amount of professional time incurred by the Plaintiff by almost 1,000 hours. The Defendants' Bill of Costs shows 4,713.95 hours of time incurred in this action and counterclaim, while Behold's Bill of Costs shows docketed time of 3,735.4 hours of which 3,134.6 hours were billed after Behold was provided a voluntary write down of 600.8 hours. I accept Behold's submission that the Defendants have no basis on which to maintain that Behold excessively staffed, or "over-lawyered", this case.

⁴ Consisting of legal fees on a partial indemnity basis of \$530,780.91 plus disbursements of \$225,010.44 plus HST of \$98,252.88.

⁵ Consisting of \$923,993.63 in legal fees plus \$120,119.17 in HST plus \$235,751.04 in disbursements.

⁶ Consisting of \$1,005,324.06 in legal fees plus \$171,968.89 in HST plus \$317,513.59 in disbursements.

⁷ Consisting of \$2,010,648.12 in legal fees plus \$302,661.02 in HST plus \$317,513.50 in disbursements.

⁸ Consisting of \$1,372,982.03 in legal fees plus \$178,487.66 in HST plus \$440,370.59 in disbursements.

[27] However, the actual hourly rates charged by the Defendants' lawyers, throughout, were in the amount of \$400 to \$450 for each lawyer, whereas the actual hourly rates charged by Behold's lawyers were at times as much as two to three times higher, depending on the lawyer. The substantial indemnity rates charged by Behold's lawyers were higher than the actual hourly rates charged by the Defendants' lawyers while the partial indemnity rates charged by Behold's lawyers aligned more closely to the actual hourly rates charged by the Defendants' lawyers.

[28] As stated by the Court of Appeal in *Apotex* at para. 65, costs that are reasonable, fair and proportionate should reflect what is "reasonably predictable and warranted for the type of activity undertaken" rather than the actual cost incurred. While I find that the number of hours billed by Behold's lawyers for the action was reasonable, particularly considering the courtesy discount, I do not accept that the actual costs incurred by the Plaintiff and the hourly rates that produced those costs were reasonably predictable and expected.

iii. The Amount Claimed and the Amount Recovered in the Proceeding

[29] In closing submissions, Behold sought damages of up to \$12,667,600. This was less than the amount of about \$17,350,000 pleaded by Behold in their Amended Statement of Claim. Behold submitted at trial that their claims for Hardware Income Loss and SaaS Income Loss could be quantified using a range of values, and that their claim for loss of opportunity was 1-2% of Pipeline prospects and Management Forecast. As explained, Behold was granted judgment in the amount of \$2,608,798 plus pre-judgment and post-judgment interest.

[30] The principle of proportionality calls for a comparison to be made between the amount claimed for costs relative to the amount recovered in the judgment, as well as the expectations of the parties based on the amount claimed. Here, Behold claims to have incurred actual costs of \$3,758,029.00⁹ to recover \$2,608,798. Behold's claim for substantial indemnity costs, in the amount of \$2,650,747.68¹⁰, all inclusive, would approximate the amount recovered.

[31] In *Dang v. Anderson*, 2017 ONSC 2150, at para. 13, the Court held that "[p]roportionality should not override other considerations when determining costs", in that it "should not be used as a sword used to undercompensate a litigant for costs legitimately incurred". *Dang* relies on the finding in *Aacurate General Contracting Ltd. v. Tarasco*, 2015 ONSC 5980, at para. 15, that "proportionality cannot and should not be

⁹ Consisting of \$3,015,061.50 in legal fees plus \$391,958 in HST plus \$351,009.52 in disbursements.

¹⁰ Consisting of \$2,035,166.51 in legal fees plus \$264,571.65 in HST plus \$351,009.52 in disbursements.

routinely invoked to save litigants from the actual costs of proceedings in circumstances where litigants have put forth a wholly meritorious defence to a legitimate claim or have caused the proceeding to become unduly prolonged or complicated.” Behold showed that courts have held that a claim for costs that amounts to a significant portion of or even exceeds the damages recovered does not, in and of itself, render the cost award inappropriate.¹¹

[32] In *CNH Canada Ltd. v. Chesterman Farm Equipment Ltd.*, 2018 ONCA 637, at para. 89, the Court of Appeal held that the principle of proportionality requires “a decision-maker to consider whether the costs incurred were justified in light of the circumstances of the case” and that the “fact that a costs award exceeds a damages award does not necessarily mean that appellate intervention is warranted.” The question is whether, considering all factors, the costs award is fair and reasonable. The impact of the amount claimed in costs compared to the amount recovered in judgment in this case will be considered as a factor to be balanced with all others in fixing a fair, reasonable and proportionate amount of costs.

iv. The Complexity of the Proceeding

[33] In accordance with Rule 57.01(1)(c), the complexity of this proceeding is a pertinent factor in fixing costs. I saw no dispute that this was a complex proceeding. The trial was preceded by 24 case management or trial management conferences, required 24 days of trial and involved the determination of 21 key issues.

v. The Importance of the Issues

[34] Rule 57.01(1)(d) calls for consideration of the importance of the issues raised by this proceeding. There was no dispute that this case raised important issues for each party.

vi. The Conduct of Any Party that Tended to Lengthen Unnecessarily the Duration of the Proceeding

[35] Both Behold and the Defendants exceeded the time scheduled for the trial. The trial was scheduled to take 14 days.¹² The trial was extended to 24 days. Both Behold

¹¹ *A & A Steelseal Waterproofing Inc. v. Kalovski*, 2010 ONSC 2652, at paras. 2 and 23 (\$48,150 claimed; costs of \$41,661.47); *Dang v. Anderson*, at paras. 1 and 4 (claim for \$72,230; costs of \$24,104.36); *Infor v. Centrilogic*, 2023 ONSC 3375, at paras. 1-3 (judgment of \$689,375.85; costs of \$511,762.220).

¹² Trial Exhibit 2, Trial Management Report.

and the Defendants exceeded the time that they had estimated for witness examination by about five days each.

vii. A Party's Denial of or Refusal to Admit Anything that Should Have Been Admitted

[36] As early as the Case Management Conferences of February 9, 2024 and June 21, 2024, the parties were directed to confer on an Agreed Statement of Facts. At trial, the parties jointly tendered an Agreed Statement of Facts that contained seven of the most basic facts and a list of the names, titles and affiliations of individuals who had a role in the issues raised by the trial.¹³ In Part I of the Reasons, I set out 18 pages of facts that, in my analysis, were not contentious in that they were either admitted in testimony, unchallenged in cross-examination, uncontested by competing testimony or conceded in argument. The parties' failure to present a fulsome, meaningful Agreed Statement of Facts was a missed opportunity to achieve greater efficiency in the trial.

[37] The parties also failed to produce a joint chronology. Behold submitted that they provided the Defendants with a draft chronology but that the Defendants refused to engage. The Defendants submitted that Behold refused to incorporate their suggested events into the chronology. The attribution of fault for the failure to develop a chronology cannot fairly be determined on this record, but the draft chronologies annexed by the parties to the Costs Submissions do not provide enough detail to have been of meaningful assistance at trial, in any event. The failure to present a fulsome chronology was another missed opportunity to achieve greater efficiency in the trial.

(d) The Claim for an Elevated Cost Award

[38] Rule 57.01(3) provides that "[w]hen the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs." Behold submitted that the Defendants should be liable for costs on a substantial indemnity basis on two grounds: first, because the Defendants were found to have breached their documentary production obligations; and second, on the submission that the Defendants made unsubstantiated attacks on Mr. Strauss. The Defendants deny that costs should be fixed on a substantial indemnity basis.

[39] The Reasons set out several areas in which I found that the Defendants, or either of them, breached their documentary production obligations, including regarding the following: (i) the work performed by various third party design firms retained by the Defendants; (ii) the development of Aquire's dashboard; (iii) the 2020 Starbucks Contract; (iv) the installation dates and locations of the Aquire System in Starbucks stores; (v) RACE's financial statements and various financial records of the Defendants; and (vi)

¹³ Trial Exhibit 19, Agreed Statement of Facts; Exhibit 20, Cast of Characters.

amounts billed by the Defendants to Starbucks as part of their counterclaim. The failure by the Defendants to comply with their documentary production obligations unreasonably increased litigation costs because it resulted in multiple, serial objections that unnecessarily occupied court time.

[40] I rejected the Defendants' closing submission that Mr. Strauss' evidence should be disregarded, instead finding that Mr. Strauss was a credible witness in that his testimony was sincere, direct and forthright.¹⁴ Behold submits that the Defendants' attack on Mr. Strauss' credibility in their closing submissions, together with their implication of Mr. Strauss in the counterclaim until its abandonment as against him at trial, justifies an elevated award of costs.

[41] It is well-established that apart from any statutory presumption of elevated costs, which is absent here, costs on an elevated scale are exceptional and are reserved for those situations when a party has displayed reprehensible, scandalous or outrageous conduct: *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), at p. 134.; *Quickie Convenience Stores Corp. v. Parkland Fuel Corporation*, 2021 ONCA 287, at para. 4; *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722, 100 O.R. (3d) 66, at paras. 28-30. In *Davies*, at para. 40, the Court of Appeal instructed that "[a]part from the operation of rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made."

[42] Here, my finding that the Defendants breached their documentary production obligations had consequences to the Defendants. It was within the discretion of the court to draw an adverse inference against RACE and/or Aquire based on incomplete disclosure of material evidence, and it was open to the court to reduce the weight to be attributed to a party's evidence when uncorroborated by material documents that were not available by reason of a party's failure to comply with a discovery obligation.¹⁵

[43] In several material areas, the evidence of the Defendants' witnesses was given less or no weight by reason of their failure to produce material documentary evidence that could have corroborated the witness' testimony. Some examples of this include the following: rejection of the Defendants' Damage Charts;¹⁶ rejection of Mr. Woodward's evidence on the issue of recovery of expenses from Starbucks;¹⁷ less weight on the evidence of Mr. Woodward and Mr. Kilan regarding the Product Development Vendors;¹⁸

¹⁴ Reasons, at paras. 113-114.

¹⁵ Reasons, at para. 130.

¹⁶ Reasons, at para. 201.

¹⁷ Reasons, at para. 207.

¹⁸ Reasons, at para. 314.

and less weight on the Defendants' evidence that the Aquire dashboard and cloud software was not leveraged from the Behold Dashboard, Firmware and Software.¹⁹

[44] Regarding the Defendants' closing submissions, the "purpose of a closing statement is to persuade the trier of fact and 'to present each party's case clearly and in a way that is of help to the court in the performance of its duty to decide the issues before it': *Fiddler v. Chiavetti*, 2010 ONCA 210, 317 D.L.R. (4th) 385, at para. 14. The Defendants' repetitive submissions impugning Mr. Strauss' honesty in their closing argument, unsupported by sufficient foundation in the cross-examination of Mr. Strauss and stated in a conclusory manner untethered to the evidence, were not helpful. These submissions were not accepted, as is apparent from my finding that Mr. Strauss was a credible witness. However, I am not persuaded that this aspect of the Defendants' closing submissions rose to the level of "reprehensible, scandalous or outrageous conduct" on the part of the Defendants.

[45] Similarly, while I found that the Defendants breached their documentary production obligations, and while this cannot be condoned, I did not find that this constituted "reprehensible, scandalous or outrageous conduct" on the part of the Defendants, in the circumstances of this case. The Defendants were subject to reduction in the weight of their evidence or outright rejection when their document production breach impaired their witnesses' testimony. I am not persuaded that Behold's costs for the trial and counterclaim should be fixed on a substantial indemnity basis.

[46] Even if I had found that Behold had established the basis for costs to be fixed on a substantial indemnity basis, I would not have fixed these costs using the substantial indemnity hourly rates proposed by Behold. The substantial indemnity hourly rates set out in Behold's Bill of Costs range from \$548.29 to \$621.16 in the pleading stage; to \$648.68 to \$741.27 in the discovery stage; to \$638.27 to \$936.94 in the docket-heavy trial preparation and trial stages. I find that these hourly rates were higher than those that could have been reasonably expected in the circumstances of this case, and I would have reduced them had I fixed costs on a substantial indemnity basis. The partial indemnity rates charged by Behold's lawyers align to the actual hourly rates charged by the Defendants' lawyers and, in my view, come within the Defendants' reasonable expectation of cost exposure.

(e) "Stepping Back"

[47] Fixing costs is more than multiplying hourly rates by number of docketed hours. The actual costs incurred by the party entitled to costs is a relevant factor, but only that.

¹⁹ Reasons, at para. 316.

As stated by Armstrong, J.A. in *Boucher*, at para. 26, “the fixing of costs is not simply a mechanical exercise” and it “does not begin and end with a calculation of hours times rates.” In *Zesta Engineering*, the Court instructed, at para. 4, that “the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant”.

[48] After considering all the factors set out in Rule 57.01(1), and the Tariffs referred to in Rule 57.01(3), the Court must “step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable”: *Boucher*, at para. 24; *Barry’s Bootcamp*, at para. 71. This “step back” analysis can be traced to Morden, J.A.’s holding in *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249, that while fixing costs involves “critical examination of the parts which comprise the proceeding”, this does not mean “that the [costs] award must necessarily equal the sum of the parts” because “[a]n overall sense of what is reasonable may be factored into the ultimate [costs] award.”

[49] In “stepping back”, I note that this was a complex case that involved “pull-out-all-the-stops litigation” between sophisticated parties of issues important to them but, as observed by the Court of Appeal in similar circumstances in *Barry’s Bootcamp* at para. 87, this “cannot drive the costs assessment.” I have found that the Defendants have no basis to maintain that Behold excessively staffed this proceeding and the Defendants reasonably expected a cost exposure to the end of trial of \$1.5 to \$2.0 million. This was a lengthy trial made longer by inefficiencies, some shared by the parties in their similar expansion of time for witness examination and by their under-utilization of litigation tools, such as an Agreed Statement of Facts, and some inefficiencies owned purely by the Defendants. Specifically, the Defendants’ breach of their production obligations was the primary contributor to trial inefficiencies and while this does not, in the circumstances of this case, meet the threshold for an award of costs on a substantial indemnity basis, it is a powerful factor in support of fixing costs to the full extent of Behold’s claim on a partial indemnity basis.

(f) Conclusion – The Award of Costs

[50] For these reasons, having considered all the relevant factors and principles, in the exercise of my discretion on costs, I find that it is fair, reasonable and proportion to award Behold costs of this action and counterclaim, on a partial indemnity basis, payable by the Defendants on a joint and several basis, fixed in the amount of \$1,900,000.00, all inclusive of legal fees, disbursements and applicable taxes.

II. THE QUANTIFICATION OF PRE-JUDGMENT INTEREST

[51] I awarded Behold pre-judgment interest on the damages of \$2,608,798.00, consisting of Hardware Income Loss in the amount of \$2,192,865.00²⁰ and a SaaS Income Loss of \$415,933.00.²¹ These damages are past pecuniary loss. In Ontario, pre-judgment and post-judgment interest are governed by ss. 127-130 of the CJA, which provide, in pertinent part, as follows:

Definitions

127(1) In this section and in sections 128 and 129,

...

“prejudgment interest rate” means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point;

PreJudgment Interest

128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

...

(3) If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

...

Discretion of court

130 (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,

- (a) disallow interest under either section;
- (b) allow interest at a rate higher or lower than that provided in either section;

²⁰ Reasons, at paras. 472-473.

²¹ Reasons, at paras. 474-475.

(c) allow interest for a period other than that provided in either section.

[52] The parties could not agree on the calculation of the pre-judgment interest on the damages.

A. Behold's Position on Pre-Judgment Interest

[53] Behold submitted that since the damages constitute past pecuniary loss, section 128(3) of the *CJA* is applicable and provides that prejudgment interest is "calculated on the total past pecuniary loss at the end of each six-month period and the date of the order." Behold submitted that since Behold commenced this action on December 24, 2019, the statutory pre-judgment interest rate is 2%, as established for the third quarter of 2019. Because the past pecuniary loss was found to have been first realized in December 2021, Behold submitted that the pre-judgment interest would be calculated from that point forward "at the end of each six-month period".

[54] Behold submitted that rather than calculate the pre-judgment interest in "arbitrary" six-month intervals, Behold's pre-judgment interest should be calculated in a manner that reflects the timing of Behold's losses over time. Behold thereby submitted that pre-judgment interest on the Hardware Income Loss should be calculated by reference to the number of stores added each month and the resultant Hardware Income Loss. Behold proposed to breakdown the Hardware Income Loss, for purpose of the pre-judgment interest calculation, by dividing the total Hardware Income Loss of \$2,192,865.00 by the number of added stores (826) to produce an average Hardware Income Loss per store. Since the SaaS Income Loss did not lend itself to any other pre-judgment interest analysis, Behold submitted that the SaaS Income Loss be calculated for each six-month period.

[55] Behold submitted that the Defendants' position that a pre-judgment interest rate of 0.5% be applied is not appropriate and that if the Court should find that this pre-judgment interest rate is applicable, then the Court should exercise its discretion, under s. 130 of the *CJA*, to award a higher rate of pre-judgment interest. Behold suggested the use of an average interest rate over the 1,449-day period from December 31, 2021 to the date of the Reasons of 2.16%. This pre-judgment interest rate produced a total pre-judgment interest calculation of \$194,602.39 when applied to the damages incrementally incurred. Behold also showed that if the actual, quarterly statutory interest rate was applied to the incremental pecuniary damages sustained by Behold, the pre-judgment interest would total \$131,175.36.

[56] Behold did not provide an arithmetic calculation of pre-judgment interest that would result from Behold's main submission: specifically, statutory pre-judgment interest rate for the fourth quarter of 2019 (2%) as applied to the damages commencing December 2021 and continuing to the date of judgment.

B. The Defendants' Position on Pre-Judgment Interest

[57] The Defendants agreed that s. 128(3) of the CJA is applicable, but submitted that the pre-judgment interest rate is derived from the statutory interest rate in effect in the quarter in which Behold first sustained damages, specifically, the fourth quarter of 2021, which is 0.5%. The Defendants agreed with Behold that the Hardware Income Losses did not fit neatly into six-month intervals, and thereby proposed to divide the Hardware Income Loss (\$2,192,865) in three and allocate equal one-third portions (\$730,955) to three successive six-month intervals commencing December 2021. The Defendants divided the SaaS Income Loss into monthly amounts and then aggregated the SaaS Income Loss into three six-month intervals. The Defendants commenced the calculation of pre-judgment interest from the end of the first 6-month period, thereby computing a maximum of 1,322 days from the end of the first 6-month period (May 31, 2022).

[58] The Defendants showed that the application of a pre-judgment interest rate of 0.5% to the damages allocated to the six-month intervals produced a total pre-judgment interest of \$40,466.54. Last, the Defendants submitted that Behold failed to establish any basis for the Court to exercise its discretion to award a higher pre-judgment interest rate.

C. Analysis

[59] The calculation of pre-judgment interest for past pecuniary damages, under s. 128(3) of the CJA requires the determination of three elements: (a) the statutory pre-judgment interest rate; (b) the damages on which the pre-judgment interest is awarded; (c) the pre-judgment interest period for calculation.

(a) The Statutory Pre-Judgment Interest Rate

[60] The applicable statutory pre-judgment interest rate is defined by s. 127 of the CJA: "the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced": *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 74; *Prowse et al. v. Noroozi*, 2021 ONSC 4774, at paras. 3 and 7; *Razavi v. Golzari*, 2026 ONSC 2686, at para. 85. The Statement of Claim was issued on December 24, 2019. The statutory pre-judgment interest rate is therefore 2.0%.

[61] The Defendants' submission that the statutory pre-judgment interest rate must be derived from the quarter in which the damage was first sustained, namely, the fourth quarter of 2021, is based on their interpretation of the Court of Appeal's guidance in *Celanese Canada Inc. v. Canadian National Railway Company*, [2005] O.A.C. 60. In my view, *Celanese* instructs that the pre-judgment interest on pecuniary damages is calculated from the date on which the past pecuniary loss is incurred but does not direct that the pre-judgment interest rate is derived from the statutory rate in effect in the quarter in which the pecuniary damage was first incurred.

[62] In *Celanese*, the Court of Appeal explained, at para. 17, that the purpose of s. 128(3) is to provide for pre-judgment interest on pecuniary damages not from the time the cause of action arose or from the time that the legal proceeding was commenced but from the time that the pecuniary damage was actually incurred, as follows:

The purpose of s. 128(3) is to achieve fairness in the payment of the prejudgment interest on pecuniary damages by ensuring that a plaintiff will not recover a windfall that would otherwise result were s. 128(1) to be applied. It does so by providing a formula for the accrual of interest on pecuniary damages as they are incurred, in lieu of requiring the court to conduct a series of individual calculations. Section 128(3) accords with the underlying compensatory principle for awarding prejudgment interest, which is to compensate a party for the loss of the use of its money.

[63] The Court of Appeal in *Celanese* stated that the trial judge erred by not calculating the pre-judgment interest on the pecuniary damages on the losses as they were actually incurred. The Court of Appeal instructed, in para. 20, that the trial judge must calculate the prejudgment interest for pecuniary damages in accordance with s. 128(3) “on the total past pecuniary loss at the end of each six-month period and at the date of the order.”

[64] I do not accept the Defendants’ submission that this requires the Court to apply the statutory pre-judgment interest rate that is in effect in the quarter in which the damage was first sustained. This would not only be inconsistent with *Celanese*, but would be inconsistent with the wording of ss. 128(1) and (3) of the CJA. Section 128(1) provides that “[a] person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate”, which is defined by s. 127 to be the “quarter preceding the quarter in which the proceeding was commenced”.

[65] In this case, the “quarter preceding the quarter in which the proceeding was commenced” is the third quarter of 2019, which had a statutory pre-judgment interest rate of 2%. For all damages besides pecuniary damages, s. 128(1) provides that the pre-judgment interest is “calculated from the date the cause of action arose to the date of the order”. In the case of pecuniary damages, s. 128(3) provides that the pre-judgment interest is “calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order”: here, December 2021 to December 2025.

[66] The manner of calculation of the pre-judgment interest is different between non-pecuniary damages and pecuniary damages. But the statutory pre-judgment interest rate is the same.

(b) The Valuation of the Damages into the Six-Month Periods

[67] Section 128(3) calls for calculation of the pre-judgment interest “at the end of each six-month period and at the date of the order”. The damages commenced in December 2021 and accrued through May 2023. The six-month periods would thereby be: (i) December 1, 2021 to May 31, 2022; (ii) June 1, 2022 to November 30, 2022; and (iii) December 1, 2022 to May 31, 2023. The date of Judgment is December 19, 2025.

[68] Behold urged the calculation of pre-judgment interest on an incremental basis (as the damages were actually incurred) rather than in six-month periods for the Hardware Income Loss but that the SaaS Income Loss be calculated on six-month periods. I see no reason to exercise my discretion to depart from the six-month periods for the Hardware Income Loss when calculating pre-judgment interest using the six-month periods for the SaaS Income Loss.

[69] The next step is to quantify the damages within the six-month periods. I accept the Defendants’ submission to divide the total Hardware Income Loss into equal one-thirds for each of the six-month periods as consistent with the findings made in the Reasons. Behold’s proposal to parse the Hardware Income Loss into increments by applying findings made in Mr. Weinstein’s report extrapolates from the Reasons and is based on assumptions that were not set out in the Reasons.

[70] The SaaS Income Loss does not divide easily into six-month intervals. Each party has proposed ways to do so, arithmetically, that are not materially different in terms of value. I will apply the Defendants’ allocation of monthly SaaS Income Loss into the three six-month intervals as aligned with the findings made in the Reasons.

[71] The characterization of the total damages of \$2,608,798 into the three six-month periods produced the following values: (i) for the first six-month period, pecuniary damages of \$815,014.50;²² (ii) for the second six-month period, pecuniary damages of \$883,739.35;²³ and (iii) for the third six-month period, pecuniary damages of \$910,044.17.²⁴

(c) The Calculation of the Pre-Judgment Interest

[72] The Defendants showed that the number of days from the first 6-month period to the date of judgment is 1,322 days; that the number of days from the second 6-month period to the date of judgment is 1,138 days; and that the number of days from the third

²² First Six-Month Period: \$730,955 (Hardware Income Loss) plus \$84,059.50 (SaaS Income Loss) = \$815,014.50.

²³ Second Six-Month Period: \$730,955 (Hardware Income Loss) plus \$152,784.35 (SaaS Income Loss) = \$883,739.35.

²⁴ Third Six-Month Period: \$730,955 (Hardware Income Loss) plus \$179,089.17 (SaaS Income Loss) = \$910,044.17.

6-month period to the date of judgment is 957 days. Once again, there was not a material difference in Behold's calculations.

[73] Applying the statutory pre-judgment interest rate of 2% to the total pecuniary damages for each period resulted in the calculation of pre-judgment interest as follows:

- (a) For the First Six-Month Period, \$59,038.31, calculated as follows:
 $\$815,014.50 \text{ (damages)} \times 2\% = \$16,300.29/365 = \$44.66 \times 1,322 \text{ days.}$
- (b) For the Second Six-Month Period, \$55,106.60, calculated as follows:
 $\$883,739.35 \text{ (damages)} \times 2\% = \$17,674.78/365 = \$48.42 \times 1,138 \text{ days.}$
- (c) For the Third Six-Month Period, \$47,721.22, calculated as follows:
 $\$910,044.17 \text{ (damages)} \times 2\% = \$18,200.88/365 = \$49.86 \times 957 \text{ days.}$

[74] On the basis of these calculations, I find that the pre-judgment interest is calculated as \$161,866.13.²⁵

(d) The Exercise of Discretion Under s. 130 of the CJA

[75] Behold requested that I exercise my discretion to find a higher interest rate of 2.16%, submitted to be the average of all statutory pre-judgment interest rates in the period from December 2021 (date of damage) to December 2025 (date of Judgment). This was an alternative submission in the event that I accepted the Defendants' request to apply a statutory pre-judgment interest rate of 0.5%. As I declined to accept the Defendants' position on this point, having applied the statutory pre-judgment interest rate of 2% rather than the 0.5% claimed by the Defendants, it is not necessary to decide whether I would have exercised my discretion, under s. 130 of the CJA, to allow for a higher interest rate than statutorily provided.

III. DISPOSITION

[76] On the basis of these reasons, I order:

- (a) The Plaintiff, Behold Control Equipment Inc., is granted costs of this action and counterclaim on a partial indemnity basis, payable by the Defendants, Race Mechanical Systems Inc. and 2700009 Ontario Inc. (c.o.b. as Aquire Facilities Management Services), jointly and severally, fixed in the amount

²⁵ $\$59,038.31 + \$55,106.60 + \$47,721.22 = \$161,866.13.$

of \$1,900,000.00, all inclusive of legal fees, disbursements and applicable taxes.

- (b) The pre-judgment interest awarded to the Plaintiff, Behold Control Equipment Inc., is quantified in the amount of \$161,866.13, and is payable by the Defendants, Race Mechanical Systems Inc. and 2700009 Ontario Inc. (c.o.b. as Aquire Facilities Management Services), jointly and severally.

[77] The parties may provide by email to the Court Registrar and my judicial assistant, a draft Judgment, once approved as to form and content, to be brought to my attention.

A.A. Sanfilippo J.

Released: July 24, 2026

CITATION: Behold Control Equipment Inc. v. Race Mechanical Systems Inc.,
2026 ONSC 4327
COURT FILE NO.: CV-19-00633450-0000
DATE: 20260724

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BEHOLD CONTROL EQUIPMENT INC.

Plaintiff

– and –

RACE MECHANICAL SYSTEMS INC. and
2700009 ONTARIO INC. (C.O.B. as
ACQUIRE FACILITIES MANAGEMENT
SERVICES)

Defendants

AND BETWEEN:

RACE MECHANICAL SYSTEMS INC. and
2700009 ONTARIO INC. (C.O.B. as
ACQUIRE FACILITIES MANAGEMENT
SERVICES)

Plaintiffs by Counterclaim

– and –

BEHOLD CONTROL EQUIPMENT INC.
and TREVOR STRAUSS

Defendants by Counterclaim

**ENDORSEMENT
ON COSTS AND PRE-JUDGMENT INTEREST**

A.A. Sanfilippo J.

Released: July 24, 2026