

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1600 Davie Limited Partnership v. Metal Yapi Holdings A.S.*,  
2026 BCSC 169

Date: 20260203  
Docket: S213857  
Registry: Vancouver

Between:

**1600 Davie Limited Partnership and  
1600 Davie Commercial Holdings Ltd.**

Plaintiffs

And

**Metal Yapi Holdings A.S.**

Defendant

And

**ITC Construction Management BC Inc., 1600 Davie Limited Partnership and  
1600 Davie Commercial Holdings Ltd.**

Defendants by way of Counterclaim

And

**Westbank Projects Corp., Siber Facade Installations Ltd., and ITC  
Construction Management BC Inc.**

Third Parties

Before: The Honourable Justice Morishita

On appeal from: An order of the BCSC, dated March 20, 2025 (*1600 Davie Limited Partnership v. Metal Yapi Holdings A.S.*, 2025 BCSC 720, S213857).

## Reasons for Judgment

Counsel for the Appellant (Metal Yapi Holdings A.S.):

D.H. Lehrer

Counsel for the Respondents (1600 Davie Limited Partnership, 1600 Davie Commercial Holdings Ltd. And ITC Construction):

M. Sveinson

Place and Date of Hearing:

Vancouver, B.C.  
October 9, 2025

Place and Date of Judgment:

Vancouver, B.C.  
February 3, 2026

### **Introduction and Background**

[1] This is an appeal of an Associate Judge's costs decision following an application by the appellant/defendant Metal Yapi Holdings A.S. to adjourn the 60-day trial of this action, which was set to start on April 7, 2025.

[2] The action arises out of the construction of a mixed residential-commercial project, located at 1611 Davie Street, Vancouver, B.C. (the "Project").

[3] The third-party and defendant by way of counterclaim, Westbank Projects Corp., is the owner of the Project. Westbank incorporated two companies, the plaintiffs and defendants by way of counterclaim, 1600 Davie Commercial Holdings Inc. and 1600 Davie Limited Partnership, solely to act as the owners on record for the Project.

[4] The plaintiffs engaged the third-party and defendant by way of counterclaim, ITC Construction Management BC Inc., to act as the construction manager for the Project.

[5] ITC entered into a subcontract agreement with Metal Yapi, under which Metal Yapi was to supply certain materials and work to the Project, including the residential curtain wall, window wall, tower glazing, metal panels, and related materials.

[6] The plaintiffs engaged the third-party Siber Façade Installations Ltd. to install the material supplied by Metal Yapi.

[7] On April 16, 2021, the plaintiffs filed the notice of civil claim, alleging, among other things, that Metal Yapi breached the subcontract by providing materials that were defective and deficient, and caused the project to be delayed. In addition, the plaintiffs also alleged that Metal Yapi was negligent in the performance of the subcontract. The plaintiffs allege that they have suffered loss and damage as a result of Metal Yapi's breach of contract and negligence.

[8] On October 18, 2023, the plaintiffs filed a notice of trial, setting the action down for a 60-day trial, starting April 7, 2025.

[9] On March 7, 2025, one month before the start of the trial, Metal Yapi filed a notice of application seeking to have the trial adjourned generally. In the notice of application, Metal Yapi estimated that the application would take 60 minutes.

[10] Siber filed its application response on March 14, 2025, and the plaintiffs and ITC filed their application response on March 17, 2025. The plaintiffs, ITC, and Siber opposed the adjournment.

[11] The hearing of the adjournment application occurred on March 20, 2025, in general Associate Judge's Chambers.

[12] The associate judge gave oral reasons for judgment from the bench that same day.

[13] The associate judge granted the adjournment and ordered that the next trial date would be peremptory on Metal Yapi. With respect to costs, the associate judge ordered the following:

- a) That Metal Yapi pay the plaintiffs, ITC, and Siber for their costs thrown away for the preparation of the 60-day trial.
- b) That the costs be fixed and assessed at a lump sum of \$36,960, which was calculated based on five units per day for 60 days of trial preparation for a total of 300 units (at Scale B) plus tax. Metal Yapi was to make two payments of this amount, one to the plaintiffs and ITC collectively, and one to Siber individually, for a total of \$73,920. The deadline to make the payment was May 26, 2025.
- c) If Metal Yapi failed to pay the costs as ordered, the plaintiffs, ITC or Siber may apply to have the response to civil claim and/or the counterclaim and/or the third-party notice struck.
- d) The plaintiffs, ITC, and Siber are entitled to costs for the adjournment application, in any event of the cause, but not payable forthwith.

[14] Metal Yapi does not appeal the associate judge's orders adjourning the trial on a peremptory basis.

### **Legal Framework**

[15] The parties agree on the applicable standard of review. Both rely on Justice Wilson's recent decision of *Trottier v. Derrickson (dba RMD Group)*, 2025 BCSC 587, where Justice Wilson confirms that the standard of review of a decision of an associate judge on an interlocutory matter is "clearly wrong": at paras. 23-24.

[16] As set out by Justice Gropper in *Genesis Fertility Centre Inc. v. Yuzpe*, 2017 BCSC 1037 at para. 17, a "clearly wrong" decision is made where:

- a. the master abuses her discretion by acting arbitrarily or capriciously;
- b. the master exercises her discretion under a mistake of law;
- c. the master erred in law or principle;
- d. the master misdirected herself;
- e. the master disregards a principle;
- f. the master misapprehends facts or takes into account irrelevant factors; or
- g. the order of the master would result in an injustice.

[17] The scope of appellate review of a presider of first instance's order for costs is limited, as such orders engage a broad discretion by the presider, who is best placed to assess costs-related issues: *Ding v. Canam Super Vacation Inc.*, 2024 BCCA 102, at para. 175; *Trottier* at para. 25.

[18] An appellate court may interfere with a costs order only where the presider misdirected themselves as to the applicable law, made an error in principle, made a palpable error in assessing the facts, or otherwise made an award that is plainly wrong: *Ding* at para. 175.

[19] Nevertheless, the broad discretion accorded to judges in assessing costs must be exercised judiciously: *Ding* at para. 176.

### **Discussion**

[20] Metal Yapi submits that the associate judge erred as follows:

- a) By finding that the plaintiffs, ITC, and Siber were entitled to be paid their trial preparation costs, thrown away;
- b) By finding that the costs thrown away should be payable forthwith;
- c) By finding that the costs thrown away should be assessed summarily and the amount fixed pursuant to Rule 14-1(15) of the *Supreme Court Civil Rules*; and
- d) By fixing the costs thrown away, pursuant to Rule 14-1(15) in the amount of \$36,960 payable to the plaintiffs, and ITC collectively and \$36,960 payable to Siber individually.

### **Did the associate judge err in ordering costs thrown away?**

[21] Metal Yapi concedes that it is the usual approach for the court to order costs thrown away to a respondent in the case of a late adjournment application. Nevertheless, Metal Yapi notes that there are circumstances where such an order is not appropriate. For example, they note that the court has found that trial preparation costs thrown away may not be appropriate where the party opposing the adjournment has been responsible for the circumstances necessitating the adjournment: *Chohan Carriers Ltd. v. City of Maple Ridge*, 2024 BCSC 2400 at paras. 43-44; *Gourlay v. Crystal Mountain Resorts Ltd.*, 2020 BCCA 191 at paras. 77-80.

[22] Metal Yapi submits that the associate judge's award of costs thrown away to the respondents was based on her conclusion, at para. 5 of her reasons, that she did "...not agree that there is any fault on the part of the plaintiffs... ITC, or [Siber] in this case." As I understand it, Metal Yapi argues that this finding was based on a misapprehension of the facts. In this regard, Metal Yapi notes that they sought an adjournment based on the plaintiffs' failure to respond to their document demands, which hindered their ability to serve a responsive expert report. Metal Yapi submits that the associate judge's finding that the plaintiffs had no responsibility for the adjournment request was incongruent with her making no finding as to whether the plaintiffs should have produced the documents demanded by Metal Yapi, and the necessity of those documents for a responsive expert report.

[23] Metal Yapi submits that it was unclear how the associate judge could reach the conclusion that the plaintiffs were without fault for the need for the adjournment without determining whether their document demand was reasonable and whether those documents were necessary for a responsive report. Metal Yapi argues that in failing to consider these issues, the associate judge failed to apply the principle that costs thrown away should not be awarded when the other party bears or shares responsibility for the adjournment. This failure, they say, is an error in law or principle.

[24] Metal Yapi argues that their position is supported by the fact that, following the adjournment hearing, the plaintiffs and Siber did not oppose their application for production of the documents they sought. At the appeal hearing, Metal Yapi sought leave to introduce fresh evidence in the form of an affidavit of a legal assistant, which attached the plaintiffs' 3<sup>rd</sup> Amended List of Documents, which was served on May 20, 2025, and Siber's Amended List of Documents, which was served on June 10, 2025. Metal Yapi submits that the fact that these parties consented after the adjournment application to producing the documents they sought establishes that their document demands prior to the adjournment application were reasonable and that the documents they sought are relevant.

[25] The plaintiffs oppose the admission of fresh evidence. The parties agreed that the Court could reserve on this issue and address it in the reasons.

[26] In *R. v. Sipos*, 2014 SCC 47, the Supreme Court of Canada re-stated the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 for admitting fresh evidence on appeal. At paragraph 29 of *Sipos*, Justice Cromwell writes, for the Court:

... Generally, fresh evidence should not be received if it could have been obtained at trial by exercising due diligence, although this criterion is not strictly applied in criminal matters when it would be contrary to the interests of justice to do so. The evidence must be relevant in the sense that it relates to a potentially decisive issue and reasonably worthy of belief. Finally, the evidence, if accepted, must reasonably be expected to have affected the result when considered along with the trial evidence.

[27] In other words, in order for fresh evidence to be admitted, the appellant must establish the following:

- a) The evidence could not have been available at trial (or the hearing), despite the exercise of due diligence;
- b) The evidence must be relevant;
- c) The evidence must be credible; and
- d) The evidence, if accepted, would impact the result.

[28] The ultimate question is whether it is in the interests of justice to introduce the fresh evidence: *L.J.B. v. R.W.B.*, 2002 BCSC 1552 at para. 14.

[29] I am not satisfied that the appellant exercised due diligence or that the evidence would reasonably have affected the result of the application before the associate judge.

[30] I pause to note that the due diligence criterion can be more relaxed on an interlocutory appeal: *L.J.B.* at para. 13. Nevertheless, the case law is clear that the *Palmer* criteria cannot be ignored, and the party seeking to admit new evidence must show some degree of diligence on an interlocutory appeal: *Garcia v. Gill*, 2024 BCSC 617 at para. 18.

[31] As indicated, the 60-day trial was set to start on April 7, 2025. Accordingly, the 84-day deadline to serve expert reports fell on January 10, 2025, and the 42-day deadline to file response reports was on February 21, 2025. Metal Yapi made their document demand on January 31, 2025, after they received expert reports from the plaintiffs. They argued at the adjournment application that these documents were essential for their experts to draft reports. They further noted that the plaintiffs' expert reports relied on documents that had not yet been produced. Metal Yapi says their document demands were ignored. Nevertheless, they did not file an application to compel production until March 17, 2025, ten days after they filed the adjournment application and three days before the adjournment application hearing. The document application set the hearing date for March 31, 2025, and was ultimately heard on April 29, 2025, after the adjournment was granted.

[32] While Metal Yapi took some steps to obtain the evidence, that is, filing the document production application on March 17, 2025, in my view, that step did not

constitute due diligence. In essence, Metal Yapi's evidence (both at the adjournment application and in support of the fresh evidence application) is that they did not become alive to the lack of document production until the plaintiffs served their expert reports. Nevertheless, they did not file their document production application until over two months after they received the plaintiffs' expert reports, after the deadline to serve responsive reports had passed, and after they filed the adjournment application.

[33] The exercise of due diligence required Metal Yapi to move with haste. In the circumstances – i.e. a looming expert service deadline and an approaching 60-day trial – the exercise of due diligence required Metal Yapi to bring a document production application very soon after receiving the plaintiffs' expert reports, not two months later. While the *Rules* required them to give the plaintiffs and Siber 35 days to respond to their document request, Metal Yapi could have sought an order relieving them of that requirement.

[34] Because I have found that Metal Yapi did not exercise due diligence, it is unnecessary for me to consider the other *Palmer* criteria. While I have the discretion to permit fresh evidence even if that evidence was available at the time of the hearing before the associate judge, the ultimate question is whether it is in the interests of justice to do so. I am not convinced I should permit fresh evidence in this case. The application to admit fresh evidence on appeal is dismissed. Accordingly, the fact that following the adjournment hearing, the plaintiffs and Siber did not oppose Metal Yapi's document production application and produced significant documents is not evidence I can consider on this appeal.

[35] Returning to whether the associate judge erred in awarding costs thrown away, I conclude that she did not.

[36] In her reasons, the associate judge made the following factual findings;

- a) All parties knew that because it was a long trial, the parties needed all hands on deck and needed to employ significant efforts to keep the case on track for trial: para. 2;
- b) Metal Yapi had been dilatory: para. 4;

- c) Metal Yapi was not prepared for trial, and their late demand for documents was not an excuse for not being prepared for trial: para. 4;
- d) That there was no fault on the part of the plaintiffs, ITC, or Siber: para 5; and
- e) Proceeding to trial, given the state the case was in, would create considerable challenges for the trial judge at the start of the 60-day trial: para. 6.

[37] Metal Yapi argues that the associate judge misapprehended the evidence in making the factual finding that the plaintiffs, ITC, and Siber had no fault.

[38] A misapprehension of the evidence may refer to a mistake as to the substance of the evidence, a failure to consider evidence relevant to a material issue, or a failure to give proper effect to evidence: *R. v. Osinde*, 2021 BCCA 124 at para. 17, quoting *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 218.

[39] I did not have a transcript of the hearing before the associate judge. However, I have reviewed the materials filed in the adjournment application, and counsel appearing before me are the same counsel who appeared at that hearing. In the appeal hearing, counsel for each party advised me of many of the submissions they made before the associate judge.

[40] The record and counsel's submissions indicate that Metal Yapi's position at the adjournment hearing centred on the plaintiffs' and Siber's alleged failure to produce requested documents and the impact that had on their ability to obtain a responsive expert opinion. Conversely, the plaintiffs' submissions focused on Metal Yapi's failure to meet deadlines, including court-ordered deadlines, its alleged lack of preparedness, and the lateness of its adjournment request.

[41] I do not accept the submission that the associate judge's decision not to make findings on the reasonableness of Metal Yapi's document demands, or on the necessity of those documents for Metal Yapi's expert report, was inconsistent with her conclusion that the plaintiffs were not at fault for the adjournment. The associate judge was not hearing the document production application and therefore could not determine whether the documents sought were relevant (and thus whether they were necessary for Metal Yapi's expert). As she noted at

paragraph 8 of her reasons, those issues were to be determined at a future application. It was clear from the record that the associate judge was alive to the prospect that the plaintiffs and Siber may have had some role in the necessity for the adjournment due to document production issues. Nevertheless, she concluded based on the evidence before her that they were not at fault for the adjournment.

[42] In essence, the associate judge accepted the plaintiffs' arguments and did not accept Metal Yapi's. I have found no evidence that the associate judge made a mistake as to the substance of the evidence, failed to consider relevant evidence, or failed to give proper effect to evidence. In my view, Metal Yapi is essentially asking this Court to reweigh the evidence before the associate judge and come to a different conclusion. That is not the Court's role on appeal.

[43] Further, I do not accede to Metal Yapi's submission that the associate judge erred by failing to apply the principle that costs thrown away should not be awarded when the other party shares responsibility for the adjournment. The reasons show no evidence that the associate judge applied the wrong legal test. The associate judge made factual findings on who was at fault for the adjournment, and as set out above, found that the plaintiffs, ITC, and Siber were not at fault.

[44] In sum, the associate judge did not err in ordering costs thrown away.

**Did the associate judge err in ordering costs thrown away payable forthwith?**

[45] Metal Yapi submits that the associate judge erred by ordering that the costs thrown away be payable forthwith. More specifically, Metal Yapi argues that the presumption is that costs are payable at the end of the proceeding and that the associate judge's reasons in this regard were inadequate and failed to consider the applicable factors or misapplied them when determining whether to depart from the presumption.

[46] The associate judge's reasons on this issue are concise. This is understandable given the circumstances of the hearing. The application was heard in regular chambers. Metal Yapi and the plaintiffs estimated that the hearing would take 60 minutes. Siber's time estimate was 75 minutes. The application record before the associate judge was likely comprised of one four-inch binder (based on

the material before me). The reasons note that the time to hear the application significantly exceeded the parties' time estimate. Thus, it is likely that submissions were completed near the end of the court day. More significantly, the parties needed a decision quickly. Accordingly, the associate judge gave oral reasons for judgment that same day -- likely from the bench.

[47] As the Court of Appeal notes in *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, 2024 BCCA 288, at para. 74:

When an appellate court assesses reasons for sufficiency, it reviews the record in an effort to discern the “what” and the “why” of the decision. If the answers to those questions are clear in the record, there will be no reversible error: *G.F.* at para. 70; *Hague* at para. 21.

[48] Moreover, at para. 80 of *Plaza 500 Hotels Ltd.* the Court of Appeal writes:

...if the “what” and the “why” of a decision are discernible when considered in context, where reasons are delivered orally in regular chambers on the day of the hearing, brevity is a virtue, not a deficit, as it promotes timely and efficient decision-making.

[49] In the reasons, the associate judge indicates, at para. 15, that the purpose of putting the costs orders in place (including that the costs are payable forthwith), was to do as best she could to “get the attention of the defendant that dealing with this case in the required manner is imperative.”

[50] In other words, the associate judge ordered the costs to be payable forthwith (i.e. the “what”) in order to send a message to Metal Yapi to stop being dilatory in its approach to the litigation (i.e. the “why”).

[51] Accordingly, the associate judge's reasons were sufficient. Further, I can find no error in law or principle, nor can I find that she misapprehended the facts or took into account irrelevant factors. Last, ordering costs payable forthwith did not result in an injustice.

[52] Costs represent an important instrument by which courts are able to promote or sanction litigation conduct. Costs considerations are intended to guide counsel and litigants in the choices and strategies they choose to pursue in prosecuting or defending a civil proceeding: *Kakavelakis v. Boutsakis*, 2017 BCCA 396, at para. 94 citing *LeClair v. Mibrella Inc.*, 2011 BCSC 533, at para. 10.

[53] Costs awarded in an interlocutory application are not normally payable until the conclusion of the litigation. There are many reasons for this, including that a costs payable forthwith order may prevent or hinder an unsuccessful party from proceeding with the litigation, and that it is preferable to have a single assessment of costs in an action: *Krafta v. F.L.E.X. Excavating Ltd.*, 2012 BCSC 616, at paras. 48-49. Nevertheless, a costs payable forthwith order is an important tool that the court can use to promote or sanction litigation conduct. An alternative to a costs payable forthwith order is an order for costs in any event of the cause. The challenge with such a costs order is that the end of the litigation could be years down the road – long after the conduct that led to the adverse costs decision occurred. Thus, a costs in any event of the cause order remains a somewhat benign sanction of litigation conduct *during the course of the litigation*, as there is no immediacy of having to pay costs shortly after engaging in conduct that the court seeks to sanction. In other words, a key objective of a costs payable forthwith order is to encourage a party to change their conduct going forward in the proceeding.

[54] Finally, as indicated, the presider hearing the interlocutory application is best placed to determine which costs order is necessary in order to achieve the purpose of a costs award, and as such, the scope of appellate review is limited: *Ding* at para. 175.

[55] In sum, the associate judge did not err in ordering that the costs thrown away are payable forthwith.

**Did the associate judge err in summarily assessing and fixing costs thrown away?**

[56] The associate judge summarily assessed the costs thrown away as lump sum costs, based on five units per day for trial preparation for each day of the scheduled 60-day trial. This amounted to 300 units plus tax, for a total of \$36,960. The associate judge ordered that the plaintiffs and ITC, who were represented by one counsel, would get \$36,960 in costs thrown away collectively. Siber, who was represented by a separate counsel, would also get costs of \$36,960. In total, Metal Yapi was ordered to pay \$73,920 to the other parties by May 26, 2025.

[57] Metal Yapi submits that the associate judge erred by summarily assessing and fixing costs. Further, they argue that the associate judge assessed costs in an

amount which they say was intended to penalize them, rather than to compensate the plaintiffs, ITC, and Siber. They say that the associate judge's costs award was more along the lines of an award for special costs.

[58] Metal Yapi argues that the effect of the associate judge's order is that the respondents will receive compensation equal to the maximum entitlement under the tariff for preparation for the adjourned trial. They state that the order was made in the absence of any evidence as to the steps taken by the respondents in preparation for trial. In order to justify such an award, Metal Yapi says that the associate judge was required to make findings of fact that the respondents were fully prepared for trial as of the date of the adjournment application, and that they would be required to repeat the entirety of their trial preparation in advance of the rescheduled trial. In support of their position, Metal Yapi relies on three cases: *Herbison v. Canada (Attorney General)*, 2014 BCCA 461; *Bolin v. Lylick*, 2018 BCCA 127; and *Barrie v. British Columbia*, 2022 BCSC 1122.

[59] In *Herbison*, the plaintiffs challenged the registration of certain tax debts certified by the Canada Revenue Agency and registered as Federal Court judgments against their interests in certain lands in BC. The plaintiffs challenged the registration of the judgments by way of a notice of civil claim naming the federal Crown, the province, and the British Columbia Land Title and Survey Authority as defendants. The defendants all brought applications to strike the notice of civil claim as disclosing no cause of action. In the alternative, they sought summary judgment dismissing the claim. The chambers judge dismissed the action and summarily awarded costs in varying amounts to each of the three sets of defendants. The plaintiffs appealed both the dismissal and the cost awards. Mr. Justice Goepel, for the Court, dismissed the appeal, save and except for varying the costs award. In varying the costs award, Goepel J.A. cited the Court's decision in *Gichuru v. Smith*, 2014 BCCA 414, where it discussed when and how a judge should exercise the authority to fix the amount of costs.

[60] In *Gichuru*, the trial judge summarily ordered lump sum special costs against the plaintiff. The Court of Appeal set aside the special costs order on the ground that there was no evidence before the trial judge permitting a summary assessment. The Court of Appeal specifically rejected the "rough and ready" method of assessing special costs in the absence of evidence of legal fees incurred. In reaching this decision, the Court of Appeal noted:

[100] At the outset, it is important to emphasize that in exercising the power to fix costs a judge cannot act arbitrarily or capriciously. He or she must act in a manner consistent with the *Rules* and the principles that have long governed such awards. In *Stiles v. B.C. (W.C.B)* (1989), 38 B.C.L.R. (2d) 307 (C.A.) at 310, Lambert J.A. articulated the limits on a judge's power to award costs:

...Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230, [1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e. not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.

[101] The principle governing cost assessments under the *Rules* is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant to a final judgement or interlocutory application. This principle follows from the plain and ordinary meaning of the *Rules* and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily.

[102] The *Rules* specifically set out two scales of costs: party and party and special costs. In an award of special costs, R. 14-1(3)(a) requires a registrar to allow only those fees that were proper or reasonably necessary to conduct the proceeding. Rule 14-1(3)(b) sets out a non-exhaustive list of factors for a registrar to consider in determining whether fees were proper and reasonably necessary. While a judge when fixing costs under R. 14-1(15) may not necessarily follow the same procedure as a registrar, the ultimate award of costs must be consistent with the award that a registrar would make in similar circumstances. Thus, in making a determination of special costs a judge must consider the non-exhaustive list of factors in R. 14-1(3)(b). The quantum of the award should not depend on the identity of the assessor.

[61] In *Herbison*, Goepel J.A. cites these paragraphs from *Gichuru*, and adds:

[31] While R. 14-1(15)(a) authorizes a judge to fix the amount of costs, such costs cannot be assessed in a vacuum. A party asking a judge to assess costs summarily must arm the judge with the evidence necessary to

make the award. In the case of party and party costs that would normally require an affidavit attaching a draft bill of costs. A party seeking special costs must provide evidence of its actual legal fees.

[62] In *Bolin*, the plaintiff applied for a late adjournment. The chambers judge granted the adjournment but declined to order costs thrown away in favour of the defendant. The defendant successfully appealed the costs order. In ordering costs thrown away to the defendant, Madam Justice Saunders noted that there was no apparent reason to depart from the usual approach to costs in circumstances of a late adjournment. Madam Justice Saunders declined to determine the degree of the wasted costs in the circumstances, and noted, at para. 19, that what fits within the waste captured by the term “costs thrown away,” was properly a matter for the trial court’s determination.

[63] In *Barrie*, Chief Justice Hinkson dealt with an application for costs flowing from the plaintiffs’ application to strike the response to civil claim of a defendant. *Barrie* was a wrongful death action stemming from the death of a tourist visiting a provincial park. The plaintiffs brought the claim naming a number of defendants, including the province and various local governments. Approximately nine months before trial, the plaintiffs brought an application seeking to strike the defence of the province. The chambers judge struck the province’s response, granted judgment against the province, and ordered the province to pay special costs of the application to the plaintiffs. The chambers judge subsequently ordered the trial to be adjourned. The province appealed the chambers judge’s orders and was in large part successful. The special costs order was, however, upheld.

[64] At the hearing before Hinkson C.J.S.C., who was not the chambers judge, the plaintiffs sought a reconsideration of the chambers judge’s special costs order, and in particular, sought special costs and disbursements incurred from the date the action was commenced to the date of the strike application. In effect, the plaintiffs sought all of their costs of the entire action against the province to date, as costs thrown away.

[65] At para. 58 of the reasons, Hinkson C.J.S.C. found that he was unable to determine the costs thrown away sought by the plaintiffs. He writes:

[58] While “costs thrown away” is a matter for this Court to determine, I find that I am unable to do so. Without specific evidence of what the plaintiffs are forced to re-start or re-do in this litigation, there is no

evidentiary basis upon which I could determine the plaintiffs' expenses that are said to have been thrown away.

[66] The respondents submit that the cases relied on by Metal Yapi are distinguishable. In my view *Herbison* (and *Gichuru*) are distinguishable, as they are cases where the parties sought costs to be assessed summarily and fixed from the start of the proceeding to judgment, and further did not involve costs thrown away. Moreover, *Gichuru* involved the assessment of special costs, and not party and party costs. *Barrie* is also distinguishable; it also involved the assessment of special costs.

[67] *Bolin*, however, is analogous, as it involved party and party costs thrown away as a result of a trial adjournment. Accordingly, I agree with Metal Yapi's submission that an associate judge (or trial judge) summarily assessing and fixing costs thrown away must determine the degree of wasted costs.

[68] That said, contrary to Metal Yapi's submissions, in my view, the above case law does not establish that summarily assessing and fixing party and party costs thrown away requires a *detailed* and *specific* assessment of what portion of the trial preparation steps actually undertaken will need to be repeated and therefore wasted. Certainly, the case law establishes that this is required when assessing special costs. Further, the case law indicates that when summarily assessing and fixing costs thrown away, the presider needs an evidentiary basis to determine what expenses (i.e. disbursements) are thrown away: *Barrie* at paras. 58-59.

[69] Nevertheless, as indicated, a presider has significant discretion and flexibility in how they summarily assess and fix costs, as they are not required to follow the same procedure as a registrar, but their ultimate award of costs must be consistent with the award that a registrar would make in similar circumstances: *Gichuru* at para. 102. Thus, in my view, while the presider may consider detailed and specific evidence of wasted party and party costs when summarily assessing and fixing costs thrown away, they are not required to do so. This principle is consistent with the purposes of costs awards. As indicated above, an order for costs payable forthwith is an important tool the court can use to sanction litigation conduct. That tool is less effective if it frequently leads to further costly and time-consuming steps in the litigation to assess those costs. Accordingly, presiders should be encouraged to summarily assess and fix costs where appropriate.

Moreover, associate judges are particularly well placed to do so, as they commonly sit as registrars in costs assessments.

[70] I am mindful that costs thrown away are meant to be compensatory and not punitive. They reflect the fact that the party opposing the adjournment has incurred wasted costs due to the adjournment. Ordering these costs payable forthwith, and not at the end of the litigation, furthers the compensatory goal of these costs, as some parties may face barriers in continuing with the litigation if these wasted costs are not recoverable immediately. Thus, if the presider can summarily assess and fix the costs thrown away, they should not be discouraged from doing so, as this also furthers the compensatory objective of costs thrown away. More specifically, it allows the party to obtain these costs quickly, without having to go through the expense, time, and delay associated with an assessment.

[71] Overall, summarily assessing and fixing costs furthers the object of the *Supreme Court Civil Rules*, which is to secure the just, speedy, and inexpensive determination of every proceeding on its merits.

[72] Moving to the circumstances of this case, the associate judge summarily assessed the costs using a somewhat “rough and ready” approach. More specifically, she summarily assessed the costs thrown away by multiplying the allowable tariff amount for trial preparation, which is five units per day of trial, by the number of scheduled trial days, which was 60 days.

[73] Metal Yapi submits that the associate judge erred in law by using this approach and in not undergoing a detailed and specific assessment of what portion of the trial preparation steps were wasted. In my view, the associate judge was not clearly wrong in using this approach. As indicated, the law does not require the associate judge in these circumstances to engage in a detailed and specific assessment. Such an approach would mirror the approach that a registrar would take in a registrar’s hearing, which the case law specifically says is not required: *Gichuru* at para. 102.

[74] That said, the case authority mandates that the presider must determine the degree of wasted costs. This required the associate judge to make a finding of what proportion of trial preparation was complete at the time of the hearing and would be wasted.

[75] Metal Yapi further submits that the associate judge did not have any evidence before her to make findings as to the degree of wasted trial preparation efforts. I disagree with this submission. The associate judge did have some evidence, including the materials before her and the fact that the trial, which was lengthy, was only two-and-a-half weeks away. Nevertheless, I agree with Metal Yapi's submission that at the hearing, there was no evidence before the Court to support a finding that the respondents had completed all of their trial preparation, and that all of their trial preparation would need to be repeated. Thus, the order granting the respondents 100% of their tariff item costs thrown away was, in my respectful view, clearly wrong.

### **Conclusion and Costs**

[76] The associate judge did not err in ordering costs thrown away, payable forthwith, and by engaging in a summary assessment and fixing of those costs.

[77] The associate judge erred in the assessment of those costs by not determining and assessing the degree of wasted trial preparation costs.

[78] As such, the appeal is allowed in part, and the order assessing and fixing the costs at \$73,920 is set aside. The matter is remitted back to the associate judge to assess and fix the costs.

[79] Success on this appeal has been divided. Accordingly, costs of this appeal will be in the cause.

“Morishita J.”