

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nouhi v. Pourtaghi*,  
2025 BCSC 327

Date: 20250225  
Docket: S184410  
Registry: Vancouver

Between:

**Massimo Aki Nouhi**

Plaintiff

And

**Nahid Pourtaghi and Naki Enterprises Inc.**

Defendants

And

**Massimo Aki Nouhi**

Defendant by way of Counterclaim

Before: The Honourable Mr. Justice Veenstra

## Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff/Defendant by way  
of Counterclaim:

C. Dennis, K.C.

The Defendant, Nahid Pourtaghi, appearing  
in personal capacity and as Representative  
for the Defendant, Naki Enterprises Inc.:

N. Pourtaghi

Also appearing as a Representative of the  
Defendants, with leave of the Court:

A. Salehirad

Place and Date of Hearing:

Vancouver, B.C.  
February 20, 2025

Place and Date of Judgment:

Vancouver, B.C.  
February 25, 2025

[1] The plaintiff applies for an order staying the assessment of special costs ordered in favour of the defendants, based on alleged non-compliance by the defendants with a document production order made by Registrar Gaily at two pre-hearing conferences, and followed up on at two further pre-hearing conferences.

[2] By way of background, this action was commenced in April 2018, with the defendants filing a counterclaim later that year. When the action went to trial before Justice Harvey commencing on October 4, 2021, the plaintiff filed a discontinuance of his claims. The trial proceeded with respect to the counterclaim. In reasons for judgment released on May 16, 2022, and indexed at 2022 BCSC 807, Justice Harvey granted the defendants judgment against the plaintiff for US \$400,000 plus CA \$12,700. He gave the parties leave to apply with respect to costs.

[3] I was advised at the hearing before me that the plaintiff, who was described by Justice Harvey as a very wealthy man who resides primarily in Europe, has not made any payment on the judgment, nor has he been available to be examined in aid of execution. It is not clear whether steps have been taken to execute on the judgment in jurisdictions in which the plaintiff has assets.

[4] There was a hearing as to costs in October 2022. Justice Harvey gave reasons for judgment on costs on March 2, 2023, which are indexed at 2023 BCSC 306. He awarded the defendants:

- a) costs of the claim as special costs, other than with respect to one application as to which costs had already been fixed;
- b) costs of the counterclaim on Scale B times 1.5; and
- c) costs of the costs hearing on Scale B.

[5] Justice Harvey noted at para. 55 that the defendants had asked that Justice Harvey tax the special costs on a summary basis. The defendants noted that they had retained different counsel for the costs application, who had reviewed the fees charged by trial counsel, concluding they were reasonable. It was argued that

Justice Harvey could rely on that “independent” review. As Justice Harvey explained at paras. 57–58:

[57] The argument advanced in favour of this admittedly unique approach to the assessment of special costs is founded on the findings I am asked to make concerning the plaintiff’s motivation and the inference(s) I am to draw that the taxation of the various accounts of the defendants’ solicitors will result in delay and significantly more expense to the defendants.

[58] The plaintiff is not a resident of British Columbia and it is unclear to me whether he has any remaining assets exigible in Canada. The defendants argue that the bills, as is apparent on their face, have already been discounted in many instances by the lawyers issuing them and that the sum claimed, approximately \$500,000, is reflective of the value of the work performed by those solicitors for the defendants or, alternatively, I am invited to exercise my discretion to further discount bills and set a lump sum for costs so as to avoid the need of taxation and what are perceived as the consequent costs thereof.

[6] Justice Harvey declined to summarily assess the costs, concluding at para. 82:

[82] For reasons that will become apparent, the matter will have to proceed to taxation before the registrar. Even were I to conclude special costs were warranted throughout for both the claim and counterclaim, which I do not, I am not persuaded that there is sufficient evidence before me that I could assess costs as special costs as is sought by the defendants.

[7] He also noted at paras. 124–125 that:

[124] In any event, I adopt, in the main, the submissions of the plaintiff in this regard that it is inappropriate, absent extensive affidavit material from the solicitor tendering the bills that are before me, to ascertain their reasonableness regardless of whether they apply to the claim or to the counterclaim.

[125] As such, I am of the view that the Registrar is in the best position to assess costs in this matter.

[8] Justice Harvey’s order with respect to costs was entered on July 30, 2024. The entered order includes a provision requiring the plaintiff to pay to the defendants special costs of the costs assessment hearing.

[9] The defendants have been self-represented since the fall of 2023.

[10] The plaintiff retained Mr. Dennis, who was not previously counsel in this matter, to represent him with respect to the costs hearing. On October 25, 2023, Mr. Dennis wrote to the defendants advising that he intended to seek orders at a pre-hearing conference that had been scheduled for October 31, 2023, requiring the defendants to prepare bills of costs and to produce their lawyers' files. He stated:

Your lawyers' files will include, among other documents, copies of relevant communications with you and third-parties, finalized and draft pleadings, time-keeping records, opinion letters and notes or memoranda to file. Note that your privilege over such materials is waived by the special costs assessment (see *Gichuru v. Smith*, 2014 BCCA 414 at para. 104 and *Grosz v. Guo*, 2020 BCSC 1073 at para. 139).

[11] On October 26, 2023, the defendants sent bills of costs to Mr. Dennis. On October 31, 2023, there was a pre-hearing conference before Registrar Gaily. The clerk's notes of the orders made at that hearing state:

1. The defendant and plaintiff by counterclaim produce the former counsel's files to counsel for the plaintiff / defendant by counterclaim by Wednesday, November 15, 2023.
2. Counsel for the plaintiff/ defendant by counterclaim provide to the defendant a list of particularized objections and the basis for the objections in writing by Monday, January 15, 2024. In response to the objections, the defendant/plaintiff by counterclaim prepare the affidavit plural of justification and provide them to counsel for the plaintiff/ defendant by counterclaim by Friday, March 1, 2024.
3. The parties have leave to schedule a further pre-hearing conference in this at parties' convenience.

[12] No formal order has been taken out with respect to the October 31, 2023 hearing.

[13] On November 12, 2023, Dr. Pourtaghi wrote to Mr. Dennis, noting the scope of disclosure he had asserted in his October 25, 2023 letter, and advising among other things that:

It is vehemently disagreed that the scope of my previous counsels' files includes what you have stated in your letter dated October 25, 2023, and that privilege over the material is waived by the special costs assessment. That position is contrary to well-established law which has concluded that solicitor-client privilege is a fundamental civil and legal right.

[14] Dr. Pourtaghi then set out a detailed legal argument referencing a number of judgments. She asserted that the *Gichuru* case that Mr. Dennis had referenced in his letter:

... is not authority for an absolute waiver of solicitor-client privilege over a solicitor's entire file by a special cost assessment. Rather, *Gichuru* is authority for the (logical) proposition that the privilege in the legal accounts (bill) is waived.

[15] Mr. Dennis responded on November 15, 2023, setting out his own legal position, with case references, asserting that there had been a waiver of privilege.

[16] On January 3, 2024, Dr. Pourtaghi filed an affidavit reiterating the position she advanced in her November 12, 2023 letter. She noted as well that:

My former counsel's files would contain material subject to solicitor-client privilege, material that relates to and would prejudice my proceedings against Mr. Nouhi in Ontario, Canada, and Michigan, United States, and material that would prejudice the prospects of me successfully enforcing Justice Harvey's judgments against Mr. Nouhi.

[17] A second pre-hearing conference was held on January 11, 2024. Dr. Pourtaghi was again self-represented, although with the assistance of her son Mr. Salehirad. The order made by Registrar Gaily at this pre-hearing conference has been entered. The entered order states:

1. The order made on October 31, 2023, for the production of the files of Sorochan Law and MLT Aikins LLP relating to the claim for special costs (the "Files") is affirmed subject to the following variation in dates:
  - A. the defendants and plaintiffs by counterclaim (the "Defendants") shall produce the Files to the plaintiff and defendant by counterclaim (the "Plaintiff") by February 1, 2024; and
  - B. counsel for the Plaintiff shall, by April 4, 2024, provide to the Defendants, in writing, a list of particularized objections to the amount or items claimed by the Defendants as costs or disbursements and the basis for those objections.
2. The Defendants shall set down a further pre-hearing conference before Registrar Gaily on a date that is mutually agreeable to counsel for the Plaintiffs and that is within four weeks of the Defendants receiving the Plaintiff's written objections.

[18] A transcript of the January 11, 2024 hearing was before me. In the transcript, Registrar Gaily commented that at the previous hearing “we talked about privilege and this concept of the waiver of privilege that can arise when special costs are to be assessed ... I had referred you to a decision of the Court of Appeal of British Columbia”. Registrar Gaily read out loud several paragraphs from *Gichuru*, then noted that one of the things she would normally expect to see produced is the law firm’s pre-bills. The parties disagreed as to whether pre-bills had been produced. Mr. Dennis said:

The invoices were provided in October. ... And then after the order you made at the pre-hearing conference on October 31<sup>st</sup>, the same invoices were simply provided once more on November 15<sup>th</sup> but nothing more, so no prebills – nothing more than what we already had before your order.

[19] Registrar Gaily then said:

Okay. All right. So, you know, I read out the law from *Gichuru v. Smith*. I’m bound by that. You need to get the prebills to Mr. Dennis so he can see what MLT Aikins and Sorochan Law was basing their bills on; all right?

[20] Registrar Gaily then invited submissions from each party as to what additional documents should be produced from the solicitors’ files. Mr. Dennis referenced para. 104 from *Gichuru*, and the need to be able to examine the other side’s lawyers about the work that was done, while Dr. Pourtaghi’s son made submissions in support of the proposition that all that should be disclosed is any pre-bills that may exist. Registrar Gaily pointed out that she was, in effect, being asked to vary her original order, which she declined to do. She noted that:

... your remedy, if you don’t want to comply with my order, is to appeal it on the basis that it is overbroad or whatever your argument is. In the context of this pre-hearing, I am reiterating the order that I made on October 31<sup>st</sup>. For the purposes of the special costs assessment, you are to disclose the files to Mr. Dennis of your former lawyers ...

[21] Dr. Pourtaghi asked if this required production of her former lawyers’ files with respect to litigation in other jurisdictions. Registrar Gaily responded:

No. It should only be – I mean, the special costs were awarded for the litigation in British Columbia ... You need to go back – you need to speak to Mr. Sorochan and your counsel at MLT Aikens. You have to say, this is

where we're at. Mr. Dennis, who is now representing Mr. Nouhi, is seeking the file. What can we and can we not disclose? If your former counsel take the position that the entire thing is privileged, then there are other forums that they are going to have to argue that; okay?

[22] Registrar Gaily clarified later in the hearing that:

... if they were helping you with proceedings in Ontario or in Michigan, I don't think that is related to the special costs that Justice Harvey ordered.

[23] After a discussion of deadlines, Registrar Gaily stated:

... you need to go back to those lawyers. You need to say, you need to produce the files relevant to the special costs ... ordered by Justice Harvey. If their interpretation – if they raise issues of privilege, that's a different story; all right?

[24] The defendants did not appeal Registrar Gaily's order.

[25] On January 19, 2024, Mr. Lysak of MLT Aikins emailed Mr. Dennis, advising that he had “a USB drive with the files from the Nouri v. Pourtaghi matter”, which would be available at his firm's reception desk. Mr. Lysak subsequently confirmed that the USB stick also included Mr. Sorochan's “files”. Mr. Dennis' office arranged to pick up the USB stick.

[26] On April 2, 2024, Mr. Dennis wrote to Dr. Pourtaghi advising that, upon review of the documents on the USB stick, it appeared that the files that had been produced did not include the following:

1. Correspondence between yourself and your former counsel – this will include letters (if any) and emails;
2. Email correspondence – this will include your former counsel's emails to and from you, co-counsel and firm staff, opposing counsel, experts, witnesses, and all others engaged in the litigation;
3. Separate time-keeping and accounting records; and
4. Pre-bills.

[27] On April 4, 2024, Mr. Dennis wrote a further letter to Dr. Pourtaghi attaching what was described as a “Written List of Objections (Partial)” to the bills that had

been presented, with a note at the top of the list, in bold-face font and underlined, stating:

The Defendants have not complied fully with the Registrar’s order that they produce their counsel’s files. Until they do, the Plaintiff is unable to deliver a complete list of objections. Accordingly, this list is a partial list only and subject to revision.

[28] Mr. Lysak wrote to Mr. Dennis on April 5, 2024, noting that Dr. Pourtaghi had forwarded to him the April 2, 2024 letter, and commenting that:

Based on a quick review, I do not believe our firm has additional materials whose production was required for the costs assessment.

[Emphasis added.]

He noted that MLT Aikins was only engaged shortly before the plaintiff filed his notice of discontinuance, so had minimal documentation with respect to the plaintiff’s claim (as distinct from the counterclaim). With respect to Mr. Sorochan’s files:

I also do not understand why privileged email communications between Don Sorochan and Nahid would need to be produced. The most recent case I am aware of (*Pyper v. Schuetze*, 2023 BCSC 2321 at para. 27-28) held that it was proper for a Master to deny production of solicitor-client communications, as an award of special costs does not automatically waive privilege with respect to the entirety of a file, and that production can be limited to those materials demonstrated to be necessary to assess the reasonableness of the claimed fees.

[29] The letter does not contain an explanation of what is meant by “whose production was required”. In light of Mr. Lysak’s comments with respect to waiver, and what is set out in a subsequent affidavit (which I will discuss below), it may well be that this reflects that he had not provided documents that he felt were subject to claims of privilege.

[30] Dr. Pourtaghi responded to Mr. Dennis’ April 4 letter on April 9, 2024, stating:

As Mr. Lysak noted in his email, a USB with copies of materials from Don Sorochan and MLT Aikin’s files were provided to you on January 19, 2024. That production satisfied Registrar Gaily’s first order of January 11, 2024.

You have waited 2.5 months after that production to refuse to provide a complete list of objections only two (2) days before your deadline. It is entirely clear that this is another attempt from Mr. Nouhi to frustrate or delay the

proceedings. Accordingly, I press for you to produce a complete list of objections no later than 4 pm on April 12, 2024.

[31] Mr. Dennis responded by letter dated April 12, 2024, confirming that the next available date for a pre-hearing conference was July 5, 2024, and that it had been booked. He asserted that there is “no room for doubt about what the order requires you to produce”, and asserted that:

It is apparent that the disclosure you provided does not comply with the order of Registrar Gaily or the authorities cited above. Without necessarily being exhaustive, what is missing includes the following:

- Correspondence between client and counsel (in any form – there are no emails, letters, etc.)
- Emails (with exception of one email from Spencer Hartigan, your accounting expert, to Don Sorochan on May 18, 2021);
- Pre-bills
- Separate time-keeping records.

[32] Registrar Gaily made further orders at the pre-hearing conference on July 5, 2024. A formal order was eventually taken out, although not until November 2024. Prior to then, the parties proceeded on the basis of the clerk’s notes, as recorded on a Court Summary Sheet.

[33] Given that the order was eventually formalized, I will refer here to the formal order. In that document, para. 1 directed that there be a further pre-hearing conference on September 11, 2024. With respect to the outstanding disclosure issue, Registrar Gaily ordered that:

2. The defendants and plaintiffs by counterclaim, Nahid Pourtaghi (“N. Pourtaghi”) and Naki Enterprises Inc. (“Naki”) shall file an affidavit of each of their former counsel, Dale Lysak and Donald Sorochan, K.C., which shall attest to:
  - a. whether there are additional materials in their respective counsel files (the “Files”) which have not been produced, and if so, a description of that material;
  - b. if there are further materials in The Files, whether privilege is claimed over any such material, and the basis for that privilege; and
  - c. if the Files do not contain email correspondence, communication between lawyers and clients, timekeeping records, or pre-bills, an explanation as to why those materials are absent from the File.

(the “Lawyers Affidavits”).

3. N. Pourtaghi and Naki shall serve the Lawyers’ Affidavits on counsel for the plaintiff and defendant by counterclaim, Massimo Aki Nouhi (“M. Nouhi”) by August 9, 2024.
4. N. Pourtaghi and Naki shall take no further steps in respect of the special costs assessment in this proceeding, except for those steps set out in this Order, until after both of the following have occurred:
  - a. the parties have attended the pre-hearing conference on September 11, 2024; and
  - b. the Lawyers’ Affidavits have been served on counsel for M. Nouhi.

[34] I have reviewed the transcript of the July 5, 2024 pre-hearing conference. In it, Mr. Dennis asserted that there had been non-compliance with the document production order, and asked that Registrar Gaily “direct that Dr. Pourtaghi not be at liberty to take any further steps in the proceeding until there’s compliance with the order.” There followed a discussion as to whether such a direction was within the jurisdiction of a Registrar. The defendants pointed to Mr. Lysak’s letter of April 5, 2024, and his reference to the *Pyper* case, suggested that what was producible had been produced, and asked that a hearing date be scheduled for the costs assessment.

[35] Registrar Gaily’s remarks near the end of the hearing provide some context for the orders that she made:

I’m also somewhat stymied. I’ve made the orders. They are the orders. If Mr. Dennis says you’re not complying with it, I mean, I don’t know really what else I can do other than just reiterate the order that I made January 11th, 2024 was for production of the file. If they say we’ve produced it, we have nothing more, then, for goodness sake, get an affidavit from them saying we have nothing more.

...

But, you know, it is very odd to me that a lawyer’s file -- and I obviously haven’t seen the USB. I don’t know. Mr. Lysak and Mr. Sorochan haven’t come in here. But it is odd to me as the Registrar not to see pre-bills and not to see some correspondence.

[36] Mr. Sorochan K.C. made an affidavit on August 7, 2024. In it, he made reference to the litigation in Michigan and confirmed that he and Mr. Lysak had coordinated and worked closely with counsel in Michigan because the cases

involved common factual and legal issues. He noted having been provided with a “Court Summary Sheet” in respect of the July 5, 2024 hearing. I note that the relevant wording in that Court Summary Sheet provided that the affidavits of former counsel were to:

... [attest] to the contents of their files that have been disclosed to date in particular whether they claim privilege over solicitor client communication to explain why there is no correspondents or emails in the disclosure and why there are no pre-bills in the disclosure.

[37] Mr. Sorochan objected that he should have been given notice of the proposed order and an “opportunity to respond or challenge the authority of the Registrar” to make the order made. He advised that after he had left his former law firm in 2017, he did not have an “elaborate national billing system” to record time and create pre-bills. With respect to disclosure of his file he stated:

An order that the entire litigation file of Dr. Pourtaghi and Naki obviously breaches their solicitor client privilege, which privilege is now recognized as a constitutionally protected Charter right essential to the Principle of Fundamental Justice with respect to which the Supreme Court of Canada decision in *Goodis v. Ontario (Minister of Correctional Services)*, 2006 SCC 31 (paras. 20-21), held that communications protected by solicitor-client privilege should be disclosed only where “absolutely necessary”, applying “as restrictive a test as may be formulated short of an absolute prohibition in every case”.

[38] Mr. Sorochan noted that he had “a continuing obligation to protect the client’s privileged communications and I hereby do so”. He argued that “great care should be taken before pressuring Dr. Pourtaghi to waive her solicitor client and litigation privileges in order to proceed with the assessment of the special costs”. He concluded:

So, the answer to the question (however inappropriately) asked of me in the “Court Summary Sheet” as to whether “the claim privilege over solicitor client communications is made” is that the fundamental constitutional law is that the solicitor client communications are constitutionally protected without the need for any such claim by me or anyone.

[39] Mr. Lysak also produced an affidavit. In it, he stated that it is not his practice “to routinely retain prebills in our case file, and there were no prebills in our case file for this matter.” With respect to claims of privilege, he stated:

6. With respect to emails or correspondence between Pourtaghi and my firm or Don Sorochan, the Affidavit submitted from Mr. Sorochan ... raises objections based on solicitor-client privilege, as well as procedural objections.
7. I agree with the position stated by Mr. Sorochan that production of privilege solicitor client communications is not required in order to assess the reasonable amount of legal fees required to defend the claims brought by Nouhi against Pourtaghi and Naiki, and that the Supreme Court of Canada has recognized this privilege as a constitutionally protected right.

...

10. It is our former clients, Pourtaghi and Naki, that hold the privilege that applies to these solicitor-client communications. I am able to produce MLT Aikins emails for the period of June to September 2021, but can only do when either instructed by our former clients to waive privilege and produce such communications or in the event the Court, after considering the objections and legal issues raised in Mr. Sorochan's affidavit, issues an order requiring such production after proper notice to our firm.

[Emphasis added.]

[40] I pause here to note that it seems clear to me that both Mr. Sorochan and Mr. Lysak appear to have been provided with the Court Summary Sheet for July 5, 2024. Mr. Lysak also appears to have been provided with Mr. Dennis' letter of April 2, 2024. It seems doubtful that either of them was aware that Registrar Gaily had already made an order for production of the solicitors' files.

[41] There was a further pre-hearing conference before Registrar Gaily on September 11, 2024. I have reviewed the transcript of the September 11, 2024 hearing. It is clear from the transcript that Registrar Gaily had not been provided with the affidavits of Mr. Sorochan and Mr. Lysak. That of course made it impractical for Registrar Gaily to gauge whether there had been proper compliance with her orders.

[42] Mr. Dennis, in his submissions, asserted that there had been "a doubling down by Dr. Pourtaghi on the refusal to comply with" the document production order, and suggested that the matter should go back before Justice Harvey. The defendants, on the other hand, asserted that the lawyers' affidavits adequately explained that all that was properly producible had been produced, and asked that a hearing be set down and Mr. Dennis ordered to finalize his list of objections. The

defendants went on to question the Registrar's earlier ruling with respect to production of files, in response to which the Registrar made clear that she was aware of the *Pyper* decision referenced by the defendants.

[43] There was a brief discussion during the hearing about simply starting the hearing and cross-examining the lawyers, with an adjournment if it turned out there were documents that had not been produced. Mr. Dennis objected to this as being a highly inefficient approach, and it was not pursued further.

[44] There was some further discussion near the end of the pre-hearing conference about scheduling the costs assessment for several months down the road. It is clear to me that those discussions were premised on the assumption that any production and privilege issues would be resolved in advance of any hearing proceeding.

[45] At the conclusion of the hearing, the only order made (other than as to who should sign the formal order) was that:

1. The audio recordings of the pre-hearing conferences conducted in this proceeding on October 31, 2023; January 11, 2024; July 5, 2024; and September 11, 2024 (the "Pre-Hearing Conferences") be released for the purposes of obtaining written transcripts of the Pre-Hearing Conferences.

[46] Registrar Gaily explained the order as follows:

I'm granting leave or I'm ordering that a transcript of the pre-hearing conference proceedings be provided to the parties. Mr. Dennis has indicated that his client, Mr. Nouhi, will bear that expense. Once you have copies of those transcripts and you can review the orders that were made, the discussions that were had -- I mean, there's two options here. You can come back before me and I can -- you know, with enough time I can ask and insure that all the materials that I need are before me so that I can then decide whether or not the orders for production have been complied with, or [the matter can be referred to a Justice].

[47] No further steps were taken prior to the filing on January 30, 2025, of the Notice of Application that I heard on February 20, 2025.

**Positions of the Parties**

[48] The plaintiff says that it is clear from the affidavits filed that Dr. Pourtaghi has not given the lawyers the instructions they would need to comply with Registrar Gaily's orders. He says that the order for production of solicitor's files is well supported by authority, that it was made twice by Registrar Gaily, including in an order that has been formally entered, and that the defendants – despite being advised by Registrar Gaily that if they did not agree with the order, their remedy was to appeal – chose not to appeal. The order is thus binding and should not be subject to collateral attack.

[49] The plaintiff says that the production orders have been outstanding for 15 and 13 months respectively, that the defendants' refusal to comply has unreasonably delayed the entire proceeding, and that the appropriate remedy for the Court is to stay the costs proceedings such that no further steps need be taken unless and until the defendants comply with the production orders. The plaintiff submits that authority for such an order can be found in the judgment of Justice Southin (as she then was) in *Axis International PLC v. Wheels International Rent-A-Car Ltd.*, [1987] B.C.J. No. 1622 (S.C.).

[50] The defendants' submissions began with a detailed recitation of the past litigation history, the conduct giving rise to the special costs order, the failure of Mr. Nouhi to pay the judgment, and his failure to make himself available for an examination in aid of execution.

[51] The defendants' submissions with respect to document production seemed somewhat inconsistent. At one point, it was argued that the files have been produced. At another point, it was argued that what was necessarily and appropriately producible has been produced, and that the defendants should not be required to produce privileged documents. It was also argued that full disclosure is not feasible given that there is ongoing litigation in other jurisdictions.

[52] The defendants said that at the September 11, 2024 pre-hearing conference, Registrar Gaily talked about scheduling a hearing date for the assessment. They say

that the only thing preventing that hearing from going ahead is the plaintiff's failure to provide a full list of particularized objections. They say that it would be inappropriate to stay these proceedings.

[53] In Reply, the plaintiff took a different view of this, saying that Registrar Gaily gave leave to obtain transcripts as a foundation for further steps to be taken to secure compliance with the orders that have been made.

**Analysis**

[54] I begin by noting that the special costs assessment in this matter will be a complex one. It will involve review of the various steps taken over a 3½-year period from the time the action was commenced until the plaintiff discontinued his claim. For most of those 3½ years, the defendants' counsel would have been working concurrently on advancing their counterclaim – for which they are entitled to tariff costs only. Presumably, all time entries would have been recorded on one file, yet the Registrar will be required not only to determine what portion of each time entry related to the claim, as opposed to the counterclaim, but also the reasonableness of the work performed and time recorded. As Registrar Gaily noted during the September 11, 2024, hearing:

When Justices do that, when they chop things up and have special costs, party and party costs, increased costs for different periods, it really is challenging as a presider not to have very clear cut chunks of information from the lawyers who worked on this.

[55] Knowing the task ahead of her, Registrar Gaily made a document production order. Her jurisdiction to do so is provided by Supreme Court Civil Rule 23-6(5)(a). Her orders have not been appealed, despite her having pointed out to the defendants that that was their available remedy. I agree with the plaintiff that those orders should not be subject to collateral attack.

[56] All of that said, I am not satisfied that this matter is at a point where a stay is appropriate. In my view, there has been no judicial determination to this point as to whether the defendants have complied with Registrar Gaily's order, and that is something that is properly done by the Registrar. As well, Registrar Gaily has

indicated a willingness to consider the producibility of documents that may be in possession of Mr. Sorochan and Mr. Lysak that relate to litigation in other jurisdictions. There has been no opportunity for Registrar Gaily to decide that issue, nor any mechanism established to have any such documents identified in a manner that will facilitate her decision-making.

[57] In my view, this matter is best referred back to Registrar Gaily for a further pre-hearing conference to consider these issues. I suspect that dealing with the specific issues I have identified will require at least a half-day, and so the substantive hearing with respect to document production should be scheduled accordingly. Whether there is merit to having a prior pre-hearing conference, limited to the usual 30 minutes, to discuss how the substantive hearing will proceed, is something that I will leave to the parties and to Registrar Gaily.

[58] I will direct that Registrar Gaily be provided with a record in advance of the next pre-hearing conference that should contain all of the affidavits that were put before me, and including all of the transcripts that were obtained pursuant to the order she made on September 11, 2024.

[59] I intend to have my oral reasons for judgment transcribed. I will direct that a copy be provided to Registrar Gaily so that she is aware of my reasoning. The transcribed reasons will also facilitate the defendants obtaining legal advice with respect to their position, should they choose to do so.

[60] I do not intend to make a costs order at this time. I note that Justice Harvey ordered that the defendants have their special costs of the costs assessment hearing. Given the issues that I have dealt with in this judgment, and depending on Registrar Gaily's conclusions as to compliance with the document production orders, it may be appropriate at some point to consider carving out from that order some portion of the steps taken to this point in respect of the costs assessment hearing. That question was not specifically raised in the application materials, and in any event is something best assessed at a later date.

[SUBMISSIONS]

[61] What I would like you to do is to send the draft order to Dr. Pourtaghi, and give her a week to respond with comments on it. If you accept her comments and you both sign the order, that's great. If not, then the draft order can be provided to me along with Dr. Pourtaghi's comments on it and I'll make the decision. I don't think we need a further hearing to do that.

[SUBMISSIONS]

[62] I've said that this is not the time for a stay. In that sense it probably is being adjourned generally, and I'm giving a bunch of directions. I haven't said that a stay will never be appropriate. I wouldn't want it to be dismissed in a way that would prejudice you from at some point renewing an application along those lines. But hopefully we never get to that point.

"Veenstra J."