IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MIRAMICHI

2025 NBKB 177 (CanLII)

Citation: ***Probilt Industries Inc. v. City of Miramichi et al*****, 2025 NBKB 177**
Date: July 31st, 2025 **Docket: NC-42-2014**

Between:

Probilt Industries Inc.

Plaintiff

- and -

City of Miramichi, Csaba Kazamer, Michael Noel, Colleen Bawn and The Attorney General of Canada

Defendants

Before: **Justice Fred Ferguson**

Date of hearing: **April 29th, 2025**

Date of decision: **July 31st, 2025**

Appearances:

Dan Jardine **For the Plaintiff**

Kaitlin Stevens **For the Attorney General**

Laura Rhodes

FERGUSON J.

INTRODUCTION

[1] This is an application by the Plaintiff requesting an order pursuant to *Rule* 59.07(3) of *The Rules of Court of New Brunswick* (the *Rules*) that the Registrar of this court, or her designate pursuant to *Rule* 59.10(2)(b), conduct an assessment of costs pursuant to *Rule* 59.11 related to 'the termination' of a Motion for summary judgment filed with this court in June of 2018; said assessment asserted to be on a solicitor and client basis. The Motion was 'terminated' at the behest of the moving party, The Department of Justice Canada (the AGC) by purported "Notice of Withdrawal" filed by the AGC on May 8th, 2024 with the Clerk of this court in Miramichi and executed by Ms. Kaitlin Stevens, counsel on behalf of the AGC.

[2] Counsel for the Plaintiff asserts that the *Rules* do not allow for the Moving party to withdraw a motion it has filed. Mr. Jardine posits that *Rule* 59.07(1) disposes of motions that do not proceed by deeming them to have been abandoned. He contends that the only positive action the Moving party may take under *Rule* 59 in not proceeding with a

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motion filed is to issue a Notice of Countermand (of the filed Motion) under *Rule* 59.07(2) thus triggering the right of the responding party to be: "…entitled to his costs on the motion." That type of Notice has not been engaged in this instance. The Plaintiff asserts what the AGC has done by the filing of a purported Notice of Withdrawal is to effectively abandon the Motion for Summary Judgment thus triggering *Rule* 59.07(3). If he is correct, then that act can engage an assessment of costs by an assessing officer pursuant to *Rule* 59.11. That is the Plaintiff's wish.

[3] As a consequence of that AGC's action the Plaintiff filed with the Office of the Clerk for this judicial district a request for an assessing officer to issue a Notice of Appointment to Assess Costs (Form 58(A)) and serve the opposite party such Notice.

[4] The AGC responds that costs of the motion for summary judgment should be: "in the cause" implying that the court should wait until the end of the trial in this matter, whenever that may be, in order to assess what impact the final outcome should have on the costs on this motion, or else determined at my discretion pursuant to Rule 59.01 now.

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THE PROCEDURAL HISTORY OF THIS LITIGATION

[5] The underlying proceeding began in 2014 with the filing of an action against several Defendants relating to the decision by the Government of Canada to locate the National Pay Centre on property it purchased from the Miramichi Agricultural Exhibition. The only qualified competing property was owned by Probilt Industries inc. (Probilt). A panoply of allegations of civil wrongdoings were the bases of that lawsuit. Since that time the Plaintiff has settled its claims against all of the Defendants save for the AGC.

[6] In June of 2018 the AGC filed a motion for summary judgment that wandered its way forward in proceedings over several years. Indeed, since the motion was filed there have been 36 scheduled, held or cancelled appearances on, and other issues related to, this litigation. Counsel for the AGC rightly points out that a number of these are attributable to the underlying action and not this motion.

[7] At one point, not long after the motion was filed, then counsel for the Plaintiff, Mr. Peter Mockler Q.C., brought what I labelled as 'a prematurity motion' that asked the parties be ordered into an examination for discovery, in

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lieu of hearing the summary judgment motion, as too many disputes of fact existed to allow a proper consideration of the merits of the summary judgment motion. See: *Probilt Industries Inc. v. City of Miramichi et al*, 2018 NBQB 228. That judgment ordered an examination for discovery to proceed and put on hold the summary judgment motion until completion of that step. No Motion for Leave To Appeal that motion judgment was taken by any of the Defendants.

[8] Eventually the examination for discovery was held despite significant delays occasioned by, among other things, the challenges of the COVID 19 pandemic. Once it was completed, the summary judgment motion was reactivated and continued on until May of 2024 when, after some prodding by me based upon the unchallenged findings in the above cited judgment, the AGC purported 'to withdraw' its motion. See: "Notice of Withdrawal" filed May 08, 2024. The prodding related to whether there still existed important disputes of fact that could only be resolved by a trial on the merits of the Plaintiff's claim and the now lone Defendant's response.

[9] Once it became clear what the AGC had done, counsel for the Plaintiff objected to such a maneuver (the filing of The

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Notice of Withdrawal) asserting that the *Rules* did not allow for a withdrawal of the motion.

[10] This position taken by the Plaintiff related to whether the issue of costs on the motion should be dealt with by me or referred to the Registrar/assessing officer pursuant to *Rules* 59.07 and 59.10(2)(b). As shall be seen, that request must pass muster with me because cost assessments of the sort requested are only vested in the Registrar if the court accepts they ought to be assessed, as asserted by the Plaintiff, on a solicitor-client basis. See: *Rule* 59.10(2). The court acts as a threshold gatekeeper for such a request.

[11] The AGC counters that costs on the motion should be in the cause or determined at my discretion under Rule 59.01. The reason for this dispute is that now counsel for the Plaintiff, Mr. Dan Jardine, (the former counsel Mr. Peter Mockler Q.C. having passed away some years ago) believes he can ask the Registrar, or her designate for solicitor-client costs. As said the threshold gatekeeper on such a request is the motion judge.

[12] At this point I am being asked whether the Plaintiff should be allowed to choose his route of travel in order to

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obtain costs on the 'terminated' motion. That is, whether costs should be assessed by me employing my discretion on awarding costs, pursuant to *Rule* 59.01, postponed it until the litigation is finally determined, or by the Registrar, or her designate, pursuant to *Rule* 59.10(2)(b) or by the Clerk of this court pursuant to Rule 59.10(1)(b).

[13] If the first route is used the parties shall be asked to return to court and make submissions on the quantum of costs that should be ordered, or I could order that costs be assessed in the cause at the end of proceedings. If *Rule* 59.10(2)(b) is available, an order directing the Registrar, or her designate, the Clerk of this court, shall be made that the hearing be carried out by her, or that designate. That is so because correspondence dated August 27th, 2024 to the parties and filed with the court from Emily Ploude, who signed her letter as Legal Officer of this court, indicates she will not carry out the assessment of costs of this motion unless she receives an order to that effect from this court or a consent order from the parties. The specifics of her request are that such an order delineate whether this would be a hearing on costs on a "party and party" basis or on a "solicitor and client" basis. The request also asks

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whether disbursements would be intended to be included in the assessment.

THE EWVIDENTIARY AND LEGAL FRAMEWORK

[14] Much of what needs to be said about how the parties arrived at this point of the proceeding has been set out in the INTRODUCTION to this judgment. The underpinning is principally composed of the *Rules of Court* applicable to the issue at hand. Once those Rules have been set out, the ANALYSIS portion of this judgment will focus on judgments that help guide the last step in the disposition of the costs aspect of this motion.

[15] The assertion of Mr. Jardine that this should be sent to the Registrar or her designate or an assessing officer for an assessment of costs on the motion relies, as said, on *Rules* 59.07 and 59.10(2)(b). They read:

> 59.07 Costs of Abandoned Motion, Application or Appeal
>
> (1) Where a party serves a Notice of Motion and fails to proceed thereon, he shall be deemed to have abandoned the motion and, unless ordered otherwise, the party upon whom the notice has been

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served is entitled to his costs on the motion.

(2) A party who serves a Notice of Motion may countermand it by notice served on the opposite party, who is then entitled to his costs on the motion.

(3) The costs of an abandoned motion may be assessed under Rule 59.11, upon production of the Notice of Motion together with an affidavit that the party who served the Notice of Motion failed to proceed thereon, or upon the production of the notice of countermand, and, if the costs are not paid within 7 days after assessment, the party entitled may enforce the certificate of assessment in the same manner as a judgment.

59.10 Assessing Officer

(1) Where it is necessary to have costs assessed on a party and party basis, the assessing officer shall be

(a) in the Court of Appeal, the Registrar, and

(b) in the Court of King’s Bench, the clerk of the judicial district in which the proceeding has been conducted.

(2) Where it is necessary to have costs assessed on a solicitor and client basis, the assessing officer shall be

(a) in the Court of Appeal, the Registrar, and

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> (b) in the Court of King's Bench
>
> (i) the Registrar, or
>
> (ii) when authorized by the Registrar, the clerk of the judicial district in which the proceeding has been conducted.

They are supplemented by the following *Rule*:

> 59.01(2)(a) Nothing in this rule shall be construed so as to interfere with the authority of the court
>
> (a) to fix the costs of a proceeding, or a step in a proceeding, with or without reference to a tariff, instead of requiring assessment of the costs…

[16] Mr. Jardine posits that since no order fixing costs has been made to date, the procedural right to an assessment of costs by an assessing officer remains open and available to him by choice.

[17] He further points to *Rule* 59.11(1) sets out the procedure to be applied when an assessment of costs by an assessing officer is requested, as it has been here by him. It reads:

> Procedure on Assessment of Costs

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(1) A party entitled to an assessment of costs may file a bill of costs with the assessing officer, obtain from him a Notice of Appointment to Assess Costs (Form 59A), and serve the Notice and a copy of the bill of costs on every party interested in the assessment at least 7 days before the date fixed for assessment.

(2) Where a party is entitled to costs and refuses or neglects to proceed to assessment within a reasonable time, any party liable to pay such costs may obtain from the assessing officer a Notice to Deliver a Bill of Costs for Assessment (Form 59B) and serve a copy on every interested party at least 21 days before the date fixed for the assessment.

(3) Upon being served with a Notice to Deliver a Bill of Costs for Assessment, the person required to deliver his bill of costs shall file it with the assessing officer and serve a copy on every interested party at least 7 days before the date fixed for the assessment.

(4) Repealed: 2018-77

(5) Where under paragraph (2) a party fails to deliver a bill of costs for assessment at the appointed time, to the prejudice of another, the assessing officer may allow the defaulting party a nominal or other sum of costs so as to prevent the other party being prejudiced by such default.

(6) On an assessment of costs, the assessing officer shall certify (Form

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> 59C), as of the date of the assessment of costs, the amount of the costs assessed by him and, subject to appeal, his Certificate is final with respect to all parties who have received notice of the assessment.
>
> (7) Unless ordered otherwise, disbursements, other than fees paid to officers of the court, shall not be allowed unless the payment thereof or the liability therefor is established by affidavit.
>
> (8) An appeal from an assessment of costs may be taken
>
> > (a) on motion to the court within 15 days from the date of the assessment of costs, or
> >
> > (b) if the assessment relates to a matter in the Court of Appeal, on motion to a judge of the Court of Appeal in accordance with Rule 62.30.

[18] The provisions of *Rule* 1.04, Definitions, read in part:

> *Action* means a proceeding commenced by issuing a Notice of Action…
>
> *Motion* means an interlocutory motion or preliminary motion…
>
> *Origination process* means a document by which a proceeding is commenced under these rules and includes…

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> but does not include
>
> …
>
> (i) a Notice of Motion or Preliminary Motion

[19] Mr. Jardine further asserts that support for his position is inferentially found in Form 25 of *The Rules of Court*:

> Form 25A, APPENDIX OF FORMS FORM 25A
>
> NOTICE OF DISCONTINUANCE (Court, Court File Number, Style of Proceeding) NOTICE OF DISCONTINUANCE (FORM 25A)
>
> The plaintiff wholly discontinues this action. or, where applicable: The plaintiff discontinues that part of his action relating to . . . . . DATED at . . . . . ., this . . . day of . . , 19 ..
>
> Form 25B, APPENDIX OF FORMS FORM 25B
>
> NOTICE OF WITHDRAWAL (Court, Court File Number, Style of Proceeding) NOTICE OF WITHDRAWAL (FORM 25B)
>
> The defendant withdraws his Statement of Defence. or, where only part of the Statement of Defence is withdrawn: The defendant withdraws that part of his Statement of Defence relating to. . . . . DATED at . . . . ., this . . . day of . . . , 19 . .

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[20] Mr. Jardine also points to *Rule* 59.08(7). He says that by operation of Rule 59.07(1) the AGC, as the moving party on the motion, has "failed to proceed thereon" thus engaging the next part of that Rule that stipulates "…shall be deemed to have abandoned the motion…" That deemed disposition, he says, is not a disposition contemplated by Rule 59.08(7) that reads:

> Where a proceeding is discontinued or settled before judgment or where Rule 26.05(10), 49.09(2) or 62.15.1(9) applies, the party and party costs relating to fees for solicitors' services shall be assessed in accordance with Tariff "C".

[21] He goes on to say that because of the deemed "abandonment" of the motion because the motion was not proceeded upon, it has not been "discontinued" or "settled before judgment." Thus, an assessment contemplated by Rule 59.07 is the appropriate scheme to settle the issue of costs on the motion.

[22] Mr. Jardine concludes his submission by emphasizing that he has chosen to proceed under Rule 59.07 and has complied with Rule 59.11(1) by filing his bill of costs with the assessing officer but has not been able to move further on that request because the assessing officer maintains she

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cannot proceed without a determination by this court on the issue of where costs ought to be determined either by "…court order or direction." The section reads:

> 59.11(1) A party entitled to an assessment of costs may file a bill of costs with the assessing officer, obtain from him a Notice of Appointment to Assess Costs (Form 59A), and serve the Notice and a copy of the bill of costs on every party interested in the assessment at least 7 days before the date fixed for assessment.

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ANALYSIS

[23] In order to deviate from the long-held practice of having the motion judge on a motion or trial judge in the case of a trial assess costs to be awarded there must be good reason for so doing. This case may present such a unique reason because enormous sums of money have been spent on this motion, especially by the Plaintiff, and the parties may be entitled to a full hearing on the issue of costs due the Plaintiff for the motion 'terminated', after many years, unilaterally by the Defendant, the AGC, without a hearing.

[24] In *C.J.G. v. L.T.*, 2011 NBCA 12 the court wrote at paragraph 15:

> It is trite law that costs normally follow the cause. Should a trial judge decide to depart from that rule he or she is required to justify the departure: *Dupuis v. Moncton (City)*, 2005 NBCA 47, 284 N.B.R. (2d) 97, para. 40. In Orkin, *The Law of Costs* (Toronto: Canada Law Book Ltd., 1965), the author states:
>
> > The fundamental principles of costs as between party and party is that they are given by the court as an indemnity to the person entitled to them; they are not imposed as punishment on the person who must pay them. Party and party costs are in effect damages awarded to the successful litigant as compensation for the expense to which he has been put by reason of the litigation. [p. 14]

In *W.L. v. N.D.H.,* 2025 NBKB 100 Doucet J. came to the same conclusion holding at paragraph 114:

> The costs of a proceeding or a step in a proceeding are in the discretion of the court. (See Rule 59.01(1) and *Canada Mortgage and Housing Corp. v. Plourde*, [2023] N.B.J. No. 308 (NBKB), para. 16) Costs normally follow the cause, and should a trial judge decide to depart from that rule, the judge is required to justify the departure. (See *C.J.G. v. L.T.,* [2011] N.B.J. No. 33 (NBCA) para. 15)

[25] In *Dupuis v. Moncton (City)*, 2005 NBCA 47 the court held at paragraph 40:

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> The jurisprudence from this Court has consistently stated that costs follow the event. In Acadia Marble, Tile & Terrazzo Ltd. v. Oromocto Property Developments Ltd. (1998), 205 N.B.R. (2d) 358 Drapeau J.A. (as he then was) addressed the issue of the awarding of costs following an event. It is useful to cite paragraphs 34 and 35 of that decision:
>
> > It is undoubtedly true that, where the trial judge has exercised his or her discretion as to costs, this court will not intervene unless it is satisfied that the exercise of discretion was manifestly wrong. See Williams et al. v. Saint John (City), New Brunswick and Chubb Industries Ltd. (1985), 66 N.B.R. (2d) 10 ... (C.A.). In the present case however, the trial judge's decision is silent on the issue of the costs on the counterclaim. Further, there is nothing in the record to indicate that the trial judge applied her mind to the question. As a result, it cannot be said that we are being asked to interfere with the exercise of a discretionary power since none was exercised.

[26] To begin this section of the judgment, the AGC relies principally upon two judgments in support of his contention that courts in this province have allowed motions to be withdrawn thus avoiding the possibility the Plaintiff can ask that an assessing officer carry out the hearing leading to an award of costs to the Plaintiff. The first of these is *Miramichi (City) v. Chatham Historic Properties Ltd.*, 2013

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NBQB 370, a decision rendered by me. Mr. Jardine strenuously opposes the AGC contention the motion was withdrawn in that instance asserting that he was counsel for the moving party in that proceeding and the motion was not withdrawn. The motion sought to dismiss the Application filed by the City for deficiencies in its pleadings. The motion succeeded and the Application was dismissed. In the second case, *Leblanc v. Doucet,* 2010 NBQB 391, an initial motion was purportedly withdrawn before it was served on the defendants and was replaced by an identical motion with one additional pleading added. Justice Young was not asked about the procedural propriety of that tactic nor asked to rule upon whether there was a genuine intention to appeal the impugned decision on the issue of costs.

[27] During oral argument, counsel for the AGC added the judgment in *R. v. Wolfe*, 2024 SCC 34 in support of its contention it had the right to withdraw the motion in this instance by virtue of the modern approach to statutory interpretation. Particular emphasis was placed on the passage of that judgment found at paragraph 105 of the decision of Moreau J., (Côté, Kasirer, Jamal J.J. concurring.) The decision of Moreau J. was the dissent in that case with the majority decision having been written by

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Justice Martin, (Wagner C.J. and Karakatsanis, Rowe, and O'Bonsawin JJ concurring.) That is not to impugn the statements of the law on modern statutory interpretation relied upon by the dissenters. It is simply to point out that their reasoning fell short of the majority necessary to carry the day. Indeed, each sentence of paragraph 105 is supported by Supreme Court authority. It reads:

> Section 320.24(4) must be interpreted according to the modern approach to statutory interpretation. The modern approach requires that the words of a statutory provision are read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 24, citing *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Statutory interpretation entails "discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects" (*Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763, at para. 21; see also *La Presse inc. v. Quebec*, 2023 SCC 22, at para. 22; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 27). The plain meaning of the text is not in itself determinative. To ascertain legislative intent, the text of a provision must be placed in context and tested against other indicators of

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> legislative meaning, including legislative objectives (*La Presse*, at para. 23; *Alex*, at para. 31).

[28] Recently, the Supreme Court has restated the principles that guide statutory interpretation. They coincide with the dissent in *Wolfe*. In *R. v. Kloubakov,* 2025 SCC 25 at paragraphs 61-62 the Supreme Court confirmed the currency of the principles laid down in the iconic decision of the Supreme Court on statutory interpretation in *Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27:

> Statutory interpretation is conducted in accordance with the modern principle, under which "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 117). The modern principle requires courts to interpret legislation "according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *R. v. Downes*, 2023 SCC 6, at para. 24).

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> Supplementing the modern principle is "the presumption that Parliament intended to enact legislation in conformity with the *Charter*" (*Sharpe*, at para. 33). This presumption, sometimes called the presumption of compliance, requires courts to adopt "[a] posture of respect towards Parliament", such that "if legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional" (*R. v. Mills*, [1999] 3 S.C.R. 668, at para. 56; *Sharpe*, at para. 33; *J.J.*, at para. 18; *La Presse inc. v. Quebec*, 2023 SCC 22, at para. 24; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at §§ 16.01[2] and 16.02). Courts should "strive, where possible, to give effect to" Parliament's presumed intention to comply with the *Charter* (*Mills*, at para. 56; *J.J.*, at para. 18).

[29] Ms. Stevens, for her part, principally relies on *Rule* 59.01. It reads:

> 59.01 Authority of the Court
>
> (1) Subject to any Act and these rules, the costs of a proceeding or a step in a proceeding are in the discretion of the court and the court may determine by whom and to what extent costs shall be paid.

[30] She remains steadfast in her position that the issue of costs should await the outcome of the trial so that the court can fully appreciate the whole of the evidence led at the trial. She supports that argument saying that *Rule*

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59.07, by its wording, is intended to apply to those litigants who bring forward motions without having any intention of pursuing them. A hefty costs award under Rule 59.07 in such circumstances provides a healthy deterrent against resort to such tactics. The plain meaning of *Rule* 59.07 does not support such an interpretation.

[31] That submission does not give effect to the enormous sums of money spent by the Plaintiff to defend against the AGC's efforts to stop this litigation "dead in its tracks" by the filing of the 2018 motion for summary judgment. Mr. Jardine, in his effort to have an assessing officer quantify costs, noted during the hearing of this issue that he had voluminous material detailing the legal fees incurred by Probilt since this proceeding began. Most of those fees were paid to Mr. Mockler Q.C. before his untimely death. During the appearance on the motion on May 14th, 2024 he put the costs on the record that are strictly associated with the summary judgment motion. At p. 47 of the transcript of that appearance he told the court the full account for this motion was $259,042.65 before HST was added for the accounts of both himself, and Mr. Mockler Q.C.

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[32] It is noteworthy that other than this motion for summary judgment, and the attendant examination for discovery order made by me, little else has been accomplished since this litigation began in 2014, some eleven years ago, except that the Plaintiff has settled with peripheral Defendants who had little to do with what is the main grievance here, namely, that the federal government breached several fundamental legal obligations, the Plaintiff says it had, to treat Probilt fairly in the bidding process leading up to the decision where the National Pay Centre would be built.

[33] Indeed, getting the Defendant's principal witnesses to an examination for discovery was, to an extent, arduous. Excuses were advanced that at least one of the witnesses was COVID 19 anxious during the pandemic, yet Mr. Jardine pointed out that the same witness had vacationed not long before in the sunny south. At one point it was threatened that the court might be asked to issue an order to attend the examination for discovery for the Defendant's witnesses. That did not materialize.

[34] Mr. Jardine's plea is that after hundreds of thousands of dollars has been spent to defend this step in the action

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filed, the Plaintiff should not have to continue to finance this litigation without serious costs compensation for legal fees expended because this journey has been enormously expensive and has been disrupted by the now aborted motion brought by the AGC.

[35] Earlier in this motion history, on May 3, 2024, Mr. Jardine contextualized the size and complexity of this file saying that when the file was transferred to him from Mr. Mockler's office it was comprised of thirty-four banker's boxes of materials. In that same general time period Ms. Stevens, who has been counsel on this file for years, offered to settle the costs issue by offering Probilt $12,000.00 in costs on the motion. Since that time, she has resiled from that position now saying that a thorough review of the summary judgment motion file leads her to believe that was too generous and offer. She has withdrawn it.

[36] Mr. Jardine points to the rocky procedural the story of this motion in his brief accusing the AGC of "obstructionist tactics" and "by filing a meritless motion" to exhaust the Plaintiff of legal resources. It is true that the history of this motion has been rocky. For example, an affidavit filed by then Plaintiff co-counsel Erica Brown August 21, 2018

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detailed the difficulties encountered getting this motion and the examination for discovery moving to the actual taking of testimony.

[37] The current tariff of costs in civil proceedings were put into effect in this province in 1982. They have not been revised since then. Mr. Jardine posits, I believe correctly, that they: "…constitute a relic of the past from an economic period that has come and gone."

[38] In support of this contention is the judgment of Robertson J.A. in *Doucet vs. Spielo Manufacturing*, 2011 NBCA 44 at paragraphs 148-152:

> The question of whether the 1982 Tariff was intended to provide substantial indemnification has not been the subject of judicial comment in New Brunswick. Curiously, our 1982 Tariff was adopted in Nova Scotia in 1989 and remained in force in that Province until replaced by the "2004 Tariff". As explained in *Landymore v. Hardy*, [1992] N.S.J. No. 79 (S.C.) (QL), the 1989 Tariff was adopted on the underlying principle that costs should represent substantial contribution towards the successful parties' reasonable expenses. In *Williamson v. Williams*, *supra*, the Nova Scotia Court of Appeal suggested that a range for party-and-party costs between two-thirds and three-quarters of the lawyers' bill with respect to time spent on the matter would be compatible

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with the notion of "substantial". The Court went on to observe that there had been considerable "slippage" since the adoption of the 1989 Tariff because of escalating legal fees, and that awards of costs representing a much lower ratio had become standard and accepted practice except in cases involving misconduct or special circumstances. The reason for the Court's excursion into the law of costs is instructive. The plaintiff lost on the issue of liability at trial, but was successful on appeal, and the matter was remitted to the trial judge for an assessment with respect to damages. The trial judge had assessed damages at $75,000 and awarded costs of $8,500 under Scale 5 [[1998] N.S.J. No. 12]. The plaintiff's lawyer had "booked-time" equivalent to $80,000 in fees through to the end of the first trial. The Court of Appeal increased the damages award to $97,000. Costs under the Tariff, including costs on appeal, totalled $14,000 which the Court held to be insufficient. The costs award was augmented by $30,000.

The extent to which the 1989 Tariff failed to reflect present day exigencies concerning the true cost of litigation in Nova Scotia was addressed by trial judges of that province. For example, in *Morash v. Burke*, 2007 NSSC 68, [2007] N.S.J. No. 95 (QL), the 1989 Tariff would have generated costs of $9,200 applying Scale 3 and an amount involved of $162,000 in circumstances where the successful party had incurred legal fees and disbursements of around $60,000. The trial judge opted not to apply the Tariff. Instead, he ordered a lump sum payment of $22,500 in lieu of taxed costs under the Tariff, plus allowable disbursements (30% partial indemnification). The trial judge went

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on to note that had the revised 2004 Tariff applied, it would have produced a similar result which, in his view, reinforced the appropriateness of the lump sum award. As to the revised "2004 Tariff", there are a few aspects worth noting. There are only three scales which deal with amounts from less than $25,000 to $1 million. If the amount involved is more than $1 million, the "Basic Scale" (Scale 2) is derived by multiplying the amount involved by 6.5%. The length of the trial is an additional factor. For each day of trial, as determined by the trial judge, an additional $2,000 is to be added to the Tariff award.

The Nova Scotia jurisprudence has developed to the point that if it is felt the Tariff will not produce a result which is compatible with the principle of substantial indemnity, the courts will not select an "artificial" amount involved in order to make the Tariff serve the principle. Therefore, when either the scale or reasonable approaches to the amount involved fail to produce a substantial indemnity, the court may exercise its discretion to make a lump sum award. To determine what an appropriate lump sum is, the court will have regard to the actual hourly billed fees facing the successful party, or the time expended by counsel. The courts, however, have avoided adopting percentages. As it is the court's responsibility to assess the fairness and reasonableness of the effort expended, it is expected that counsel will outline the amount of time spent on the file and the total fees charged the client, preferably in the form of a short affidavit filed with the court. As Saunders J. (as he then was) stated in *Landymore v. Hardy*: "Only then will a

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judge be able to assess whether those expenses were "reasonable before going on to decide whether the costs to be awarded will in fact represent a significant contribution to such expenses" (para. 18). The pre-2004 Nova Scotia jurisprudence is conveniently collected and discussed in *Campbell v. Jones*, 2001 NSSC 139, [2001] N.S.J. No. 373 (QL), paras 54-69; rev'd on other grounds at 2002 NSCA 128, [2002] N.S.J. No. 450 (QL). See also *Morash v. Burke*, paras. 21-24, and *Bevis and Karela v. CTV Inc., Burns and Kelly*, 2004 NSSC 209, [2004] N.S.J. No. 454 (QL), para. 13.

Until the present case, the largest reported costs award in New Brunswick was $500,000. In *Khoury v. Khoury* (1994), 149 N.B.R. (2d) 1, [1994] N.B.J. No. 188 (Q.B.) (QL), each party to the divorce proceedings incurred legal fees of $1.25 million. The trial lasted 12 weeks, there were 11 pre-trial motions and the defendant husband was found to have pursued the litigation with the object of winning at any cost. The trial judge applied Scale 5 of the Tariff and awarded costs of $500,000 (40% indemnification) but without referring to an amount involved. The husband's net worth was around $8.5 million. The successful party received an equalization payment of $532,000 and a lump sum of $2.5 million. Despite the relative magnitude of the costs award, it does not approach the level of substantial indemnification contemplated in Nova Scotia (2/3 to 3/4).

If one examines the 1980s jurisprudence in New Brunswick surrounding the application of the Tariff, one appreciates that the amounts involved were relatively small when compared to

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> the type of large scale commercial litigation that is more frequently encountered today. In 1982 claims of $100,000 to $200,000 were considered "rich". At best, the Tariff was looked upon as providing fair but not substantial compensation, but undoubtedly there are those who would even disagree with this benign statement. The one constant in all of this is that the Tariff was designed to ensure access to justice.

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[39] More recently, costs and the departure from tariffs has been the subject of comment by Chief Justice DeWare first in *Maritime Dover MHC General Partner Inc. v. Dieppe (City)*, [2024] N.B.J. No. 49, where she held at paragraphs 56-57:

> The Plaintiff referred the Court to Justice LeBlanc's discussion on costs in *Darling v. Best et al.*, 2020 NBQB 183 (CanLII), at paragraphs 106 and 107 where she stated:
>
> > [106] Rules 59.01 and 59.02 of the *Rules of Court* provide this Court with a wide discretion regarding the allowance of costs.
> >
> > [107] Justice LeBlanc in the case of *Canadian National Growers v. Irishview Estates Ltd.*, 2019 NBQB 86 (CanLII) stated the following regarding costs:
> >
> > > 28.Case law in New Brunswick also supports the proposition

> that in addition to providing a successful party with indemnification, another policy consideration is that of using an award of costs as a tool to influence the way in which the parties conduct themselves and to prevent abuse of the court's process (see Doucet v. Spielo Manufacturing Inc., 2011 NBCA 44; Algo Enterprises and NBP Enterprises v. REPAP New Brunswick Inc., 2013 NBQB 176).

> I agree that the Plaintiff is entitled to significant costs in this matter; however, I am not of the view that the necessary threshold for solicitor-client costs has been met. Taking into consideration all of the circumstances, in particular the litigation history, the Plaintiff is entitled to costs of $12,500.00 plus all taxable disbursements payable by the Defendant within 30 days of the date of this decision.

[40] It is asserted by counsel for the AGC that, while the AGC did not proceed on the motion, it didn’t fail to proceed, it withdrew the motion. I cannot accede to such an interpretation of the *Rule* despite the high quality advocacy Ms. Stevens has consistently produced over the many years she has piloted this file. With respect, her position advances an argument that invites a distinction without a difference.

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[41] I believe that a proper interpretation of the action of the AGC in discontinuing the motion by the simple "out-of-court" filing of a Notice of Discontinuance of the summary judgment motion with the Clerk of this court, based on current rules of statutory interpretation, is to consider that the AGC has simply "failed to proceed" on the Notice of Motion as filed. Thus, considering *Rule* 59 wholistically, and reading the Rule's provisions in plain meaning language, the motion ought to be deemed to have been abandoned by virtue of the AGC having unilaterally failed to proceed on it after having it under the court's management for six years.

[42] That finding triggers the application of *Rule* 59.07(3). To repeat it:

> The costs of an abandoned motion may be assessed under Rule 59.11, upon production of the Notice of Motion together with an affidavit that the party who served the Notice of Motion failed to proceed thereon, or upon the production of the notice of countermand, and, if the costs are not paid within 7 days after assessment, the party entitled may enforce the certificate of assessment in the same manner as a judgment.

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[43] Mr. Jardine has complied with that *Rule* by requesting such an assessment. I believe it would not be fair and just to await the outcome of the trial in this action as requested by the AGC before the cost award for this motion is determined. Mr. Jardine has specifically asked for this court not to fix the cost award due to the Plaintiff on the Motion. Given the enormous sums spent to date on this motion the Plaintiff should at least have the discretion to choose the forum for that determination since the court has not exercised its discretion to fix those costs. I consider the circumstances surrounding the history of this motion sufficiently unique to not determine the legal costs entitlement issue due Probilt myself.

[44] It is important to now characterize the overall conduct of the AGC, the losing party to the motion because Mr. Jardine requests that this be sent for an assessment of costs on a solicitor and client basis. In order to meet the threshold for me to send the cost assessment in that direction it must be established that this motion falls into a category that: "*is reserved for the exceptional case where the conduct of the unsuccessful party is reprehensible, scandalous or outrageous*. See: *Young v. Young*, [1993] 4 S.C.R. 3 at paragraphs 251-252. That is the stringent test

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that must be met for solicitor and client costs to be awarded. I have been the judge on every court appearance since this action began. The conduct of the AGC does not meet that standard. That is not to say that Probilt is not entitled to a very significant costs order given the circumstances surrounding this motion and its history.

[45] First, while some of the reluctance to participate in the examination for discovery in this matter evinced "foot-dragging" on the part of some key principal witnesses to the Defendant's case, the overall behaviour does not meet the stringent test to engage solicitor and client costs. It is, noteworthy that after all of the delay getting to the point the Notice of Withdrawal was filed, the motion was effectively abandoned without a hearing. That said, I accept that I encouraged that decision because: a) the motion had been lingering for so long and b) the findings in the judgment rendered in 2018 NBQB 228 made the likelihood of success on the motion slim.

[46] Whether the Plaintiff will do better before an assessing officer than a judge of this court on the issue of the cost award is unknowable. In any event, if either side is dissatisfied with the ruling of the assessing officer an

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appeal is open to the losing party pursuant to *Rule* 59.11(8).

[47] The assessing officer, as defined in *Rule* 59.10((1)(b), is hereby ordered to carry out an assessment under *Rule* 59.11 of the costs to be awarded on the motion, but not as specifically requested by Plaintiff's counsel in their brief on a solicitor and client basis, rather on a party and party basis. In addition, allowable disbursements are ordered to be considered in the assessment.

Fred Ferguson J.C.K.B.

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