

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK  
TRIAL DIVISION  
JUDICIAL DISTRICT OF MIRAMICHI

**Citation: *Probilt Industries Inc. v City of Miramichi et al*, 2025 NBKB 215**

Court File No. 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

**DECISION ON COSTS AND DISBURSEMENTS**

BEFORE: Rachelle Standing, Ex-Officio Clerk of the Court,  
King's Bench, Trial Division, NB

DATE OF HEARING: September 16, 2025

DATE OF DECISION: September 22, 2025

APPEARANCES: Dan Jardine, For the Plaintiff  
Laura Rhodes, For the Attorney General of Canada

## **INTRODUCTION**

1. This assessment is conducted pursuant to the Order of Justice Ferguson dated July 31, 2025, directing the assessing officer, the Clerk of the Court pursuant to Rule 59.10(1)(b) and Rule 59.11 of the Rules of Court, to assess the Plaintiff's costs arising from the abandonment of the Defendant's motion for summary judgment filed June 20, 2018, and withdrawn May 8, 2024.

## **BACKGROUND**

2. The procedural history of this proceeding is articulated in the decision of Justice Ferguson at paragraphs 5 through 8. In summary, the Attorney General of Canada ("AGC") filed a motion for summary judgment in January 2018. The motion was held in abeyance following the Plaintiff's successful "prematurity motion" (*Probilt Industries Inc. v. City of Miramichi et al.*, 2018 NBQB 228), which required examinations for discovery to be completed first. After the completion of discovery and further procedural steps, the AGC filed a Notice of Withdrawal of its motion on May 8, 2024, following judicial comments on the presence of significant factual disputes requiring trial. The Plaintiff sought costs under Rule 59.07(3), leading to the Order for this assessment.

## **COSTS**

3. What quantum of costs is the Plaintiff entitled to?

## **ARGUMENT**

4. The Plaintiff argued that I should assess costs on a substantial indemnity basis. Counsel referred to the Affidavit of Brian Bowes, dated May 14, 2024 which attached the Plaintiff's legal bills over the period from 2018 to 2024. Counsel totalled the legal bills

incurred in respect of the summary judgment motion and indicated that \$259,042.65 had been paid to, the late Mr. Mockler, KC, the Plaintiff's original lawyer and a further \$65,235.03 had been paid to Mr. Jardine who had assumed carriage of this matter after Mr. Mockler's passing. Counsel emphasized that these expenses included preparation for the summary judgment motion, as well as processes necessary to bring the matter to that stage, such as discovery.

5. Relying on the *Doucet v Spielo*, 2011 NBCA 44 ["*Spielo*"], Plaintiff's counsel suggested that an appropriate cost award would be in excess of \$160,000, representing more than half of the amount expended by the Plaintiff.
6. When pressed for the rationale for awarding such a sum, counsel argued that the Defendant had unnecessarily prolonging the litigation, that the motion was meritless intended to exhaust the Plaintiff's resources, and that the eventual withdrawal of the motion came only after a six-year delay.
7. The Defendant responded that much of the delay was attributable to the COVID-19 pandemic and the difficulty in scheduling three witnesses at the same time, two of whom resided outside of New Brunswick and all of whom were retired.
8. The Defendant took issue with Justice Ferguson's statement found at paragraph 32 of his decision:

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.

9. The Defendant submitted that although there were delays in the litigation, many steps had been taken over the preceding decade. A significant period of time was spent on the pleadings, which were amended four times by the Plaintiff and correspondingly the Defendant between 2014 and 2019. This also involved amendments to Affidavits of Documents. The examination for discovery began prior to the filing of the summary

judgment motion in 2018 and continued between January 2019 and May 2022. As a result of the examinations and settlement with other defendants, time was required for amendments and the production of undertakings. Further, there were adjournments by former Plaintiff's counsel following the death of Mr. Mockler, KC. Counsel advised that there were no less than 36 separate court appearances between 2018 and the present appearance, as Justice Ferguson managed the case at each stage.

10. The Defendant opposed the Plaintiff's request that costs should be awarded on a substantial indemnity basis and suggested an amount between \$8,000 and \$12,000 would be more appropriate based on the factors outlined in Rule 59.02.
11. With these submissions in mind, I turn to the governing principles on costs.

### **APPLICABLE LAW**

12. The Plaintiff bring this motion pursuant to Rule 59.07(3), which reads:

#### ***Rules of Court:***

#### **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 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.

### **59.11 Procedure on Assessment of Costs**

(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 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.

13. Other applicable Rules to the present assessment include:

**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.

(2) 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,

(b) to allow or refuse costs in respect of a particular issue or part of a proceeding,

(c) to order costs to be assessed on a solicitor and client basis, or

(d) where parties are entitled to costs from each other, to order set-off of the costs.

**59.02 Costs of a Proceeding**

In fixing costs, the court may consider

(a) the amount claimed and the amount recovered,

(b) the apportionment of liability,

(c) the complexity of the proceeding,

- (d) the importance of the issues,
- (e) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding,
- (f) the manner in which the proceeding was conducted,
- (g) any step in the proceeding which was improper, vexatious, prolix or unnecessary,
- (h) any step in the proceeding which was taken through over-caution, negligence or mistake,
- (i) the neglect or refusal of any party to make an admission which should have been made,
- (j) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence,
- (k) whether two or more plaintiffs, represented by the same solicitor, initiate separate actions unnecessarily, and
- (l) any other matter relevant to the question of costs.

14. In *Chishti et al v. Northside Pharmacy Ltd. et al*, 2021 NBQB 193 at paragraph 6, Justice Morrison summarized the key principles outlined in New Brunswick’s leading case on costs, *Doucet v Spielo Manufacturing Inc*:

- a) It is a “loser pay” system where, absent special circumstances, the purpose is to provide the successful party with partial indemnification of legal fees (par. 117);
- b) Costs awards are not intended to provide substantial compensation (par. 164);

- c) A costs award must balance two competing principles: the award should properly compensate the successful party but not deter plaintiffs from pursuing meritorious claims (pars. 117 and 158);
- d) The tariff provides certainty and predictability and is sufficiently flexible to ensure that costs awards are meaningful and achieve the overarching principle of access to justice (pars. 120 and 123);
- e) The tariff is the presumptive basis for a costs award in cases involving quantifiable claims and judges who deviate from it in such cases must be able to defend the decision with articulated criteria (pars. 124 and 147);
- f) A lump sum award is appropriate in cases where the determination of the amount involved is too complicated or where the amount involved cannot be determined because the issue of damages was severed from the issue of liability (par. 137).

15. In the recent decision of *Reilly v. The Estate of Carl Merrill*, 2025 NBCA 43 the Court of Appeal discusses costs awarded by judges in summary judgment motions. The appeal arose from a successful partial summary judgment motion in which the plaintiff recovered damages on the issue of liability, but the action continued on a determination of damages. The motion judge awarded the plaintiff only modest costs, declining to impose an elevated or punitive award. On appeal, the plaintiff argued that the costs should have been significantly higher to reflect the culture shift endorsed in *Hryniak v. Mauldin*, 2014 SCC 7 and to discourage unmeritorious defences.

16. The Court of Appeal confirmed that cost awards on summary judgment motions remain within the broad discretion of the motion judge and are not subject to a special or enhanced regime simply because of the “culture shift.” While a party may argue that costs should be elevated to discourage unjustified defences or delays, the court held that any departure from typical costs must be grounded in evidence, such as proof of time spent or expenses incurred. The Court of Appeal emphasized that proportionality and fairness require principled, evidence-based cost awards, and absent such an evidentiary foundation, modest costs consistent with jurisprudence remain appropriate.

17. At paragraph 42, the Court clarified that costs on a partial summary judgment motion are not to be fixed in accordance with Tariff ‘A’, as this would only apply to a motion for judgment.
18. Finally, at paragraph 43, the Court of Appeal went on to quote directly from the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, the leading authority respecting summary judgment motions:
- [...] the new rule [on summary judgment] eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure. [Emphasis added; paras. 31-32 and 43]
19. The Supreme Court is referring to the Ontario Rules of Civil Procedure and the amendments to the rule respecting summary judgment motions changing the test from asking whether the case presents a ‘genuine issue for trial’ to whether there is a ‘genuine issue requiring a trial’.
20. Although, counsel for the Defendant initially suggested that costs should be awarded in accordance with Tariff ‘A’, the case law is clear that in circumstances where the proceeding continues following summary judgment, as in the present case, assessing costs in accordance with Tariff ‘A’ is not appropriate.
21. At the hearing, it was discussed whether the assessment was being conducted under Tariff ‘C’, which was suggested by the Court. Tariff ‘C’ is applicable where a proceeding is discontinued or settled before judgment or where Rule 26.05(10), 49.09(2) or 62.15.1(9) applies (see Rule 59.08(7)). It is clear that none of the listed Rules are applicable in this case. The only consideration is whether an abandoned motion is comparable to a discontinuation.
22. The Defendant filed a Notice of Withdrawal on May 8, 2024 in order to discontinue its motion.

23. The withdrawal of a motion does not, in itself, constitute a settlement, nor a discontinuance of the proceeding.
24. In these circumstances, the Rules do not provide clear direction on the applicable Tariff. While the Defendant's motion has been abandoned, this does not equate to a discontinuance of the proceeding within the meaning of Tariff "C," nor does it fall within any other specific provision of Rule 59.
25. Although Rule 59.07(3) governs abandoned motions, it does not specifically reference any applicable Tariff. This is consistent with the general approach to motions, other than motions for judgment which are expressly addressed elsewhere. In the absence of an applicable Tariff, I, therefore, turn to the Rule 59.02 factors.

## **ANALYSIS**

26. I have considered all of the factors enumerated under Rule 59.02 in fixing costs. Not all factors are engaged on the facts of this case, but the following are particularly relevant in light of the parties' submissions.
27. With respect to Rule 59.02(a) and (b), the amount claimed in this proceeding is significant — the Plaintiff seeks \$1,764,000 plus compounded interest and other damages — but no recovery has yet been determined, nor has liability been apportioned. These considerations therefore carry limited weight at this stage.
28. Rule 59.02(c) and (d) are engaged. There was ample evidence before me, including the affidavit of Brian Bowes and the volume of materials filed, that the issues raised on the summary judgment motion were legally and factually complex. Counsel conceded as much. The motion alone generated seven banker's boxes of material held in the Clerk's office. The quantum of the claim and the protracted history of the litigation further highlight the significance of the issues for both parties.
29. Turning to Rule 59.02(e), (f), (g) and (h), the Plaintiff contended that the Defendant's conduct unnecessarily prolonged the matter, characterizing the motion as meritless and

designed to exhaust resources. It is certainly unusual for a summary judgment motion to remain unresolved for nearly six years, and then, after such delay, to be abandoned altogether. The Defendant, however, attributed delays to the COVID-19 pandemic, the logistical difficulties of scheduling multiple retired witnesses, adjournments following the death of Mr. Mockler, K.C., and the need to amend pleadings and affidavits of documents. I accept that while some delay is attributable to the Defendant, a portion of the delay arose from factors outside its control. Accordingly, these provisions may warrant a modest upward adjustment in costs, but they do not justify the extraordinary award sought by the Plaintiff.

30. Rule 59.02(1) permits the Court to consider any other relevant matter. I take account of the four appearances before Justice Ferguson directly tied to the summary judgment motion since 2018, as well as the exceptional challenges posed by the pandemic. While these considerations also support a slightly elevated award of costs, they do not, in my assessment, provide a basis for awarding costs on a substantial indemnity basis.
31. We must now turn our attention to the actual legal fees incurred by the Plaintiff and their relevance in this cost assessment.
32. Counsel was asked to provide authority for an assessment of costs that was conducted on a party and party basis that considered the actual legal fees expended and counsel referred to the decision in *Spielo*.
33. *Spielo* involved an action alleging negligent misrepresentation, bad faith bargaining, oppressive conduct, and wrongful dismissal. The action was ultimately dismissed following a multi-week trial and the trial judge calculated costs based on Scale 5 of Tariff 'A' under Rule 59 in the amount of \$745,325 plus reasonable disbursements. The Court of Appeal set aside an additional increase in the cost award based on a rejected offer to settle.
34. The Court noted that the cost decision in *Spielo* was in regards to a lengthy trial and not an abandoned summary judgment motion, which counsel conceded. When asked for case law to support the proposition that a party is entitled to substantial indemnity on an abandoned summary judgment motion, no case law was provided.

35. In *Spielo*, the Court of Appeal makes a number of observations regarding whether New Brunswick ever intended to adopt a cost scheme of substantial indemnification.

36. At paragraph 19:

The fact the varied award approaches 40% of the lawyer's bill is in conformity with the understanding that, in New Brunswick, such awards are not intended to provide the successful litigant with substantial indemnification.

At paragraph 119:

The jurisprudence of this Province does not support the proposition that a costs award in New Brunswick is or was originally intended to provide the successful party with substantial indemnification.

At paragraph 145:

I agree with the judge in *Westinghouse* that it would be inconsistent with the jurisprudence of this Province to accept the proposition that costs are intended to provide substantial indemnification to the successful party.

And at paragraphs 153 and 154:

While there is nothing in the post-1982 jurisprudence to support the belief that awards of costs in New Brunswick were intended to provide substantial compensation, there is one relatively recent decision rendered in this Province in which the costs award approached 80% of the successful party's legal bill. The respondents, *Spielo* and Mr. Manship, were quick to draw this case to our attention. In *Beaverbrook Foundation v. Beaverbrook Art Gallery* (2007), 325 N.B.R. (2d) 72 (Arb.), the Hon. Peter Cory sat on a private arbitration in which the parties were disputing ownership of paintings valued at \$100 million. The Art Gallery was successful. With respect to costs, Arbitrator Cory rejected the claim for solicitor-client costs (\$6.2 million) and went on to accept that the New Brunswick Tariff should be applied. The amount involved was fixed at \$100 million, the value of the disputed paintings. Scale 5 was selected and the percentage rate to be applied to the excess amount was fixed at 5% without comment. Scale 5 was selected because of the factual complexity of the case. However, before reaching a final decision on the costs issue, Arbitrator Cory

considered numerous competing considerations advanced by the respective parties for increasing or lowering the costs award. All things considered, he based his costs award on Scale 5 and 5% on the excess. This resulted in a costs award of \$4.9 million with respect to an arbitration that lasted 32 days. The award represented 80% of the successful party's bill.

I do not view the Beaverbrook Art Gallery case as supporting the proposition that New Brunswick's Tariff was or is intended to provide the successful party with substantial indemnification. Indeed, the respondents, Spielo and Mr. Manship, did not cite that case for that proposition. They simply want costs to be fixed in accordance with the Tariff, subject to an adjustment for the rejected offer to settle. In short, the Art Gallery was substantially indemnified, not because of a principle of law, but because of the mechanical application of the Tariff in circumstances where the accepted value of the paintings in question was \$100 million. While I agree with that submission, I cannot help but note the magnitude of the costs award in the Beaverbrook Art Gallery case and ask whether there comes a point where the monetary amount involved is so large as to make the Tariff totally unresponsive to the question of proper indemnification. For purposes of deciding this case, I need only state that the principle of substantial indemnification has never taken hold in New Brunswick. But this is not to suggest that such an award is not possible through the proper exercise of judicial discretion and the application of the Tariff. As stated several times, Rule 59.01 has been drafted in the broadest of terms to preserve the discretion of trial judges when it comes to the task of fixing costs, so long as that discretion is exercised in a principled manner.

37. Rule 22.06 provides for cost sanctions on unsuccessful summary judgment motions. It reads:

**22.06Costs Sanctions for Improper Use of Rule**

*If Motion Fails*

(1)On a motion for summary judgment, if the moving party obtains no relief and the action as originally constituted is allowed to proceed to trial without the imposition of terms or conditions, the court shall fix the costs of the opposite party and order the moving party to pay them without delay unless the court is satisfied that the motion, although unsuccessful, was nevertheless justified.

*If Affidavit Filed in Bad Faith*

(2)If it appears to the court that an affidavit filed on a motion under this rule was filed in bad faith or solely for the purpose of delay, the court may fix the costs of the opposite party and order the party filing the affidavit to pay those costs without delay.

38. The Rule does not provide that a party is entitled to substantial indemnity costs, even where an affidavit is filed in bad faith—which is not alleged in this case. Rule 22.06 simply requires that costs be paid without delay, in contrast to Rule 59.03, which addresses costs on contested motions, and allows for judicial discretion to order that costs be paid forthwith or in the cause.
39. The jurisprudence further supports the conclusion that substantial indemnity is not the norm for interlocutory or abandoned motions.
40. In *Darrell Tidd et al. v. PNB et al.*, 2022 NBQB 24, Chief Justice DeWare considered an appropriate award of costs following a certification motion of a class action. The Plaintiffs, who were successful on the motion, sought costs in the amount of \$100,000 plus \$41,500 in disbursements. The Defendants suggested the appropriate award for costs was \$15,000 inclusive of disbursements.
41. The motion in *Tidd* was conducted over three days in 2021. The Plaintiffs adduced evidence that legal counsel had recorded 631.5 hours of work which translated to \$320,401.50 in legal fees and \$41,511.25 in disbursements. As in the present case, the Plaintiffs relied on *Spielo* to support the proposition that significant costs may be awarded in New Brunswick.
42. Chief Justice DeWare considered jurisprudence from both New Brunswick and Nova Scotia regarding the appropriate costs award for certification motions. While a motion for summary judgment is different from a certification motion, her comments and the caution expressed by then Justice Wood of the Nova Scotia Superior Court regarding a cost award following an interim motion are instructive.

14 In *Taylor v. Wright medical technology Canada Limited* 2014 NSSC 349, the successful Plaintiffs on a certification motion following a one-day hearing sought a cost award of \$40,000 together with disbursements

in excess of \$50,000. Justice Wood, as he then was, of the Nova Scotia Supreme Court awarded costs of \$9,000 plus disbursements. In his reasons, Justice Wood disagreed with the Plaintiff's suggestion that the substantial indemnity principle applied to an interim cost award.

15 In explaining his relatively modest cost award, Justice Wood commented in Taylor at paragraphs 5, 6, 7, 9, 10, and 11:

[5] The Plaintiff says the Court should exercise its discretion and award a lump sum rather than apply the Tariff calculations found in Civil Procedure Rule 77. His rationale is that costs should represent a substantial contribution to a party's actual legal expenses, and in this case, those amount to \$150,000.00.

[6] I have two difficulties with the Plaintiff's position. The first is that there was no evidence of the actual legal expenses of the Plaintiff. Neither of the affidavits filed indicate the fee agreement between Plaintiff's counsel and the Plaintiff, the hours spent or the applicable hourly rates. Without this information the Court has no basis on which to assess the Plaintiff's actual expenses or their reasonableness. The reply brief includes a statement that the Plaintiff has incurred costs in the approximate amount of \$150,000.00 to "secure the ability to launch his class proceeding". This statement is not evidence and is of no assistance to the Court in assessing costs.

[7] The other difficulty I have with the Plaintiff's submission is the assumption that the substantial indemnity principle applies to interim cost awards. Amounts awarded for chambers motions are almost never determined by a comparison with the party's actual expenses. The Tariff amount for costs of a half day motion is \$750.00 to \$1,000.00 which could hardly be considered a substantial contribution to a party's actual expenses in most cases.

[9] **The substantial indemnity principle has more relevance once the ultimate outcome of the proceeding has been determined. Awarding costs on this basis for interim motions could result in very substantial cost orders being made prior to the final hearing. This could impact on the hearing judge's ability to provide substantial cost indemnity to the litigant who is ultimately successful on the merits.**

[10] **Certification hearings are different than other interim motions. They frequently involve expert evidence and can be very complex. In some cases the hearing will extend over many days. The successful party should be entitled to costs and sometimes these will be significant. A lump sum amount will frequently be appropriate.** For example, in Morrison Estate v.

Nova Scotia (Attorney General), 2012 NSSC 386 the Court awarded lump sum costs of \$40,000.00 on a successful certification motion. The Plaintiff said that the hearing spanned six days over a period of two years and the value of their docketed time was \$478,000.00 with over half of that time devoted to certification. In *MacQueen v. Sydney Steel Corp.*, 2012 NSSC 461 the Court awarded lump sum costs on the certification motion of \$400,000.00. That motion involved 13 days of discovery examinations prior to the hearing and 19 court days.

[11] In this proceeding the certification hearing lasted one day. In addition Dr. Zukor was cross-examined out of court and his examination was completed in a half day. The Tariff C calculation would fix costs at a maximum of \$3000.00. Given the complexity of the issues and the length of the hearing I am satisfied that a lump sum award of \$9,000.00 is appropriate. This is three times the amount which would be calculated under the Tariff.

[Emphasis Mine]

[19] While sharing Justice Grant's concerns in *Hayes* on the importance of a meaningful costs award in these circumstances, I am also mindful of the caution expressed by Justice Wood in *Taylor*. It is important to recognize that this is a cost award following an interim motion for certification. While the Plaintiffs were largely successful in obtaining their certification order, a trial on the merits has yet to take place. The Plaintiffs shall have the burden of establishing liability against the Defendants on the merits. It is important that the Court not lose sight of the fact that the trial on the merits will also involve an assessment of costs against the unsuccessful parties - who the unsuccessful parties may ultimately be is not clear at this stage of the proceedings.

43. An abandoned summary judgment motion is interlocutory. Had the summary judgment motion been successful, we would be in a very different position, where the motion judge may properly give consideration to the significant expense expended by the successful party and whether a very substantial cost award would be appropriate. In this matter, the proceeding continues and the Plaintiff, if ultimately successful will have the opportunity to argue substantial indemnification in the cause.
44. At this juncture, with the ultimate determination still outstanding and no case law to support the Plaintiff's request for a sizeable cost award following a successful or abandoned summary judgment motion, I am not prepared to make such an award.

45. Having considered the applicable Rules of Court, the jurisprudence cited, and the evidence presented, I find that the Plaintiff is entitled to costs arising from the Defendant's abandoned motion for summary judgment. However, in light of the interlocutory nature of the motion, and the absence of authority supporting substantial indemnity costs in such circumstances, I am not prepared to award costs on a substantial indemnity basis in these circumstances. Accordingly, I assess costs in the amount of \$10,000.

46. As no disbursements were sought, none were awarded.

### **CONCLUSION**

47. Accordingly, a Certificate of Assessment in the amount of \$10,000.00 will issue.

Dated at Fredericton, New Brunswick, this 22<sup>nd</sup> day of September, 2025.

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Rachelle Standing,  
Ex-Officio Clerk of the Court of King's Bench,  
Judicial District of Miramichi  
Being a Deputy Registrar