2025 NBKB 184

COURT FILE NO: FC-344-2023

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

JULMAC CONTRACTING LTD.,

Plaintiff/Respondent Party,

- and –

PROVINCE OF NEW BRUNSWICK

Defendant/Moving Party

DECISION ON MOTION FOR SECURITY FOR COSTS

Date of Hearing: July 31, 2025

Date of Decision: August 12, 2025

Before: Justice Richard G. Petrie

Representation of Parties at Hearing:

Shalom Cumbo-Steinmetz and Alison Lew,
Counsel for the Plaintiff / Responding Party, Julmac Contracting Ltd.

Frederick C. McElman, K.C., and Lara Greenough
Counsel for the Defendant / Moving Party, the Province of New Brunswick

Petrie, J.

I. INTRODUCTION

[1.] This is a motion for security for costs bought by the Defendant, the Province of New Brunswick (the "Province"), against Julmac Contracting Ltd. ("Julmac"), pursuant to Rule 58 of the *Rules of Court*. By way of their motion, the Province also seeks an order staying the action until any required security for costs has been furnished.

[2.] On or about December 27, 2023, Julmac filed its Notice of Action with Statement of Claim Attached against the Province. Julmac's action is premised on an alleged breach of fair and honest contractual treatment by the Province. At the time it was commenced, the parties were engaged in four different construction/rehabilitation contracts involving three bridges.

[3.] In the Statement of Claim, Julmac's claims estimated damages of $27M (and "continuing to rise") along with other associated relief. By way of its Amended Statement of Claim filed September 11, 2024, Julmac claims $29.4M.

[4.] At paragraph 1 of the Statement of Claim, Julmac pleads "this is a dispute of unfair treatment by the Province of New Brunswick of an *out of Province construction contractor, Julmac Contracting Ltd.*" (*emphasis added*)

[5.] Further, at paragraph 12 of the Statement of Claim, Julmac describes itself as "a construction company specializing in civil bridge construction and repair. *JCL is incorporated in Alberta and registered as an extra-provincial corporation in New Brunswick. It operates from offices located in Ontario*". (*emphasis added*)

[6.] The Province filed its Statement of Defence on October 3, 2024. The Plaintiff filed a Reply on October 15, 2024. The pleadings are closed.

[7.] To date and currently, these parties have been engaged in various litigation on issues associated to the present action including Julmac's request for injunctive relief as well as a significant *Right to Information and Protection of Privacy Act* (*RTIPPA*) request.

II. FACTS

Summary of the Province's Evidence

[8.] The Province filed various affidavits in support of its motion:

1. Affidavit of Cass Phillips affirmed to on December 16th, 2024;
2. Affidavit of Donald Patterson affirmed to on February 6th, 2025;
3. Affidavit of Donald Patterson affirmed to on June 5th, 2025;
4. Affidavit of Karen Anne Craig-McAdam sworn to on January 13th , 2025;
5. Affidavit of Sarah Trask affirmed to on January 20th, 2025; and
6. Affidavit of Melissa O'Neill affirmed on June 20th, 2025.

[9.] The Province's evidence includes its efforts to confirm indicia of Julmac's presence or lack thereof in the Province of New Brunswick along with identifying any of its assets.

[10.] Julmac is an extra-provincial corporation registered in New Brunswick, with a Registered Office located at 421 7th Avenue SW, Suite 1700, Calgary, Alberta T2P 4K9.

[11.] Derek Martin is listed as the sole director for Julmac with an address of 25 Turtle Lake Drive, Acton, Ontario, L7J 2W7. Julmac's corporate website lists the same Turtle Lake address. The website does not list any New Brunswick phone number or address.

[12.] There is a third address uncovered for Julmac. Julmac is listed on a Certificate of Substantial Performance document in relation to one of the bridge projects in New Brunswick as 75 Cascade St., Hamilton, ON, L8E 3B7.

[13.] After completing various property registry searches within the Province, the Province was unable to identify any real or personal property owned by Julmac in New Brunswick.

[14.] After Julmac's work was "removed" under the contracts and from its remaining projects with the Province, Julmac took no immediate steps to remove any equipment or assets remaining on the project sites. Subsequently, Derek Martin advised Donald Patterson, Contract Manager for the Province that "his other company", Landform

Holdings Inc. (LHI), would attend the sites to remove all the assets and equipment. Mr. Martin advised that "all assets onsite belong to LHI".

[15.] Donald Patterson asserts that throughout the periods of the contracts, his numerous and regular email communications with representatives of Julmac had them using only email addresses with Landform Canada or Landform Civil domains.

[16.] A number of liens have been filed with respect to the three bridge projects, and in relation to the holdbacks retained by the Province through its Department of Transportation and Infrastructure ("DTI") on the contracts:

a. November 7, 2024 a lien in the amount of $566,440.00 by Skyway Canada Limited for several projects.
b. January 14, 2025, a lien in the amount of $2,749,063.20 by Strescon Limited;
c. March 19, 2025, a lien in the amount of $151,612.57 by Ship to Shore Diving & Engineering Ltd.;
d. April 8, 2025. A lien in the amount of $375,738.24 by MQM Quality Manufacturing Ltd.; and
e. April 25, 2025, a lien in the amount of $246,195.36 by Ireland Bros Ltd.

[17.] In each of these lien claims, the office addresses for Julmac are listed as either:

a. 421 7th Avenue SW, Suite 1700, Calgary, Alberta T2P 4K9; and/or
b. 25 Turtle Lake Drive, Acton, Ontario, L7J 2W7.

[18.] A number of actions, totaling millions of dollars of claims, have been filed by Julmac subcontractors against Julmac with respect to the bridge contracts in New Brunswick.

[19.] The Province maintains the underlying litigation to be very complex, lengthy, and with significant volumes of documents. It will be undoubtedly costly.

[20.] The Province maintains it will require numerous weeks of discovery and many weeks for trial. It has provided some preliminary estimates of expected legal costs and disbursements in regards to the litigation. The Province anticipates significant legal costs to be incurred directly associated with defending the action.

Summary of Julmac's Evidence

[21.] In response, Julmac filed an affidavit by Derek Martin, President of Julmac, sworn June 19, 2025 and an affidavit of Kristen Whelan, sworn June 23, 2025.

[22.] The thrust of Julmac's evidence and argument is that Julmac "had significant assets in New Brunswick for the past four years". It also maintains that the Province has purposely taken steps to remove those assets "out of Julmac's hands" (see Derek Martin's affidavit, at para. 5).

[23.] Mr. Martin's affidavit asserts Julmac to continue to have "current assets" including "storage yards", with various heavy equipment and construction materials. He maintains the value of these to exceed $3.5M.

[24.] Julmac also refers to significant amounts of contract receivables and entitlements, albeit most are tied to the impugned contracts that form the subject of this litigation.

[25.] Mr. Martin points to the fact that he has purchased a house in New Brunswick at which location he purportedly stores company equipment worth hundreds of thousands of dollars. His affidavit identifies himself as a resident of Halton, Ontario.

[26.] Mr. Martin, states that Julmac will pay any costs awarded in this matter and has twice done so in proceedings involving the parties to date.

[27.] Julmac also highlights the various performance bonds Julmac has in place. Julmac maintains that the two liens filed in relation to the Centennial Bridge project are not a sign of insolvency and they strenuously take issue with the merits of those liens.

[28.] Mr. Martin underscores Julmac's current solvency and points to ongoing projects it has obtained or bid for, including one recently with secured bonding related to the Fredericton Police Station and other (potential) projects.

[29.] Mr. Martin also acknowledges there to be significant documentary disclosure and significant ongoing litigation between these parties (and with other claimants in New Brunswick).

[30.] At paragraph 59, Mr. Martin states:

> 59. JCL is solvent. In the last two months, JCL has bid on 12 projects worth approximately $62,415,262M. JCL's multimillion dollar bonding capacity

reflects its solvent position. Attached as Exhibits NNN and 000 are the tender results.

[31.] Ms. Whelan confirms Julmac to have filed Notices of Intent to Defend and/or Statements of Defence to any of the Actions for which Julmac has yet been served in New Brunswick.

Argument

[32.] Mr. McElman, for the Province, argues that Julmac, as an "out of Province" litigant with no real property and insufficient personal property in New Brunswick to satisfy a costs award, should be required to furnish security for costs. They maintain such an award would be in the interests of justice to protect itself from possibly having to bear the costs of a successful defence without the "security" typically found by way of resident litigants. The Province maintains the current litigation to be complex and costly. Mr. McElman urges the Court to order a significant costs award and points to a number of what he asserts as "similar construction type" claims in New Brunswick as useful precedents.

[33.] Mr. Cumbo-Steinmetz, for Julmac, maintains the Province's current motion is a litigation tactic and an attempt by the Province to "weaponize" the courts processes in

a manner so as to avoid the merits of the litigation itself. He says this motion is one of form over substance.

[34.] Julmac argues it has more than sufficient personal property such as equipment and materials, plus accounts receivables available to it to satisfy any future costs award. Mr. Cumbo-Steinmetz during oral argument further clarified that the assets available to Julmac, whether directly or through an affiliated company, Landform Civil, support an ongoing and substantial presence of Julmac in New Brunswick. Julmac suggests that it has sufficient active presence within the Province to make Rule 58 inappropriate.

[35.] In addition, Julmac asks the Court not to exercise its equitable discretion to make the requested order as the Province could have protected itself through its contracts with Julmac, but did not. They argue the Province was never concerned about Julmac's residency or solvency and that the Province is not a vulnerable party and in need of cost protection.

[36.] In the alternative, Mr. Cumbo-Steinmetz argues the Province's estimate of costs and disbusements to be wildly exaggerated.

III. LAW

[37.] The Province's motion for security for costs is governed by Rule *58* of the *Rules of Court*. The most pertinent parts of Rule 58 on this motion include:

SECURITY FOR COSTS

58.01 Where Available

A plaintiff may be ordered to furnish security for costs where it appears that

a. he is ordinarily resident out of New Brunswick,

…

d. it is an association as defined in Rule 9.01 or is a corporation and there is reason to believe that it has not sufficient assets in New Brunswick to pay the costs of the defendant if ordered to do so, or

…

58.02 Time for Making Motion

A motion for security for costs may be made to the court at any time after the defendant has filed and served his Statement of Defence and before the action is set down for trial.

58.03 Furnishing of Security

In an order for security for costs, the court shall

(a) fix the amount and form of the security,
(b) fix the time within which the security is to be given, and
(c) direct how and by whom the security is to be held.

58.04 Form and Effect of Order

An Order for Security for Costs (Form 58A) shall stay all proceedings in the action from the date the order is served until the amount of security required has been furnished, unless provided otherwise.

…

58.06 Amount May be Varied

The amount of security for costs may be increased or decreased by the court at any time.

…

[38.] An order for security for costs as set out in Rule 58 is permissive, not mandatory nor automatic. In *Williamson v. Gillis***,** 2011 NBCA 53, our Court of Appeal held that even

when all criteria set out in the rule are present, a judge remains vested with the discretion to decide whether or not to order a plaintiff to provide security for costs (see paragraphs 4 and 5) (Also see *Frothingham v. RegionalAuthorityB,* 2012 NBQB 155, at paragraph 5).

[39.] In *Frothingham*, Glennie, J., emphasizes the discretionary nature of the remedy and its purpose. At paragraph 21 of his decision, Justice Glennie refers to Justice Godin's decision in *Isabelle v. Campbellton Regional Hospital* (1987), 80 N.B.R. (2d) 181, more particularly paragraph 5 of that decision, where Justice Godin writes

> "5 Rule 58 is a discretionary remedy that may be granted in an appropriate case. The objective of the rule is to ensure equality between litigants. **Where a plaintiff does not reside in the province and does not possess assets within the province sufficient to satisfy costs, that party is not at risk on an equal footing with a resident party. In order to re-establish a measure of equality between such parties the court may order that security for costs be paid into court.** Rule 58 does not violate Section 15(1) of the Charter." (emphasis added)
>
> (See also *Canadian National Growers v Irishview Estates Ltd.*, 2019 NBQB 86)

[40.] In *Dugas, Re* [2003], N.B.J. no 230, our Court of Appeal, although dealing with a request for security for costs on appeal, articulated that security for costs should only issue when it is required in the interests of justice (see paragraph 9).

[41.] As stated by Justice Stephenson in *1059217 Ontario Inc. et al. v. General Motors Ventures LLC et al.*, 2023 NBKB 146, at para. 6 and 14:

> (6) However, it is clear from the jurisprudence that security for costs is a purely discretionary remedy to be granted by the Court in appropriate cases. The objective of the Court must be to achieve equality between the litigants such that a plaintiff is not deprived of its ability to pursue its claim while at the same time affording the defendant an appropriate ability to recover costs in the event the plaintiff is unsuccessful.

> See: *Isabelle v. Campbelton Regional Hospital*, (1987) 1987 CanLII 5356 (NB KB), 80 NBR (2nd) 181, *Canadian National Growers Inc. v. Irishview Estates*, 2019 NBQB 86 and *Williamson et al v. Gillis et al*, 2011 NBCA 53
>
> …
>
> (14) In my view the analysis and commentary from the *Comstock*, *Windsor Energy* and *Prism Transport* decisions reflects the importance of an exercise of the Court's discretion that balances the interests of the litigants, taking into account the circumstances of the case under consideration, to best achieve the objective of equality discussed in paragraph 6.

[42.] Where, for example, impecuniosity would effectively deprive a "worthy" plaintiff of his ability to prosecute the action, an order for security for costs is properly denied *(Buraglia v. New Brunswick Research and Productivity Council(1995), 161* N.B.R. *(2d) 197).*

[43.] I view the court's obligation to be an holistic one that considers all of the circumstances in order to determine whether an order for costs is just and should be granted.

[44.] In *Buraglia et al. v New Brunswick Research and Productivity Council et al.*, the Court stated:

> The purpose of rule 58.01(d) is to prevent a defendant from being deprived of costs when it successfully resists a claim made by a corporation.

[45.] Julmac does not allege impecuniosity and do not seriously claim that they will be non-suited if a reasonable order for security for costs is issued.

[46.] In *Sandfire Capital v Keough*, 2017 NBQB 123, Justice Rideout observed that a Defendant need only show that one of the Rule 58.01 criteria applies in order for security for costs to be available.

Residency

[47.] It is at least interesting to note that the very underlying premise of Julmac's lawsuit is that the Province is treating Julmac differently and unfairly in its administration of its contracts because it is an "out-of-province" contractor.

[48.] The Record before me establishes the Province to have *prima facie* shown that Julmac appears to not be "ordinarily resident" in New Brunswick. While Julmac may have had significant operations in New Brunswick during the period of the various bridge contracts, this is no longer the current circumstances. Furthermore, unlike in *Henderson Lumber Co. Ltd. v. East Coast Lumber Ltd.*, 1985 CanLII 4111 (NB KB), Julmac's presence in New Brunswick does not include: an ongoing substantial presence; an operating office, let alone a New Brunswick telephone number or mailing address; nor is it an owner of real property located in the province.

[49.] To put it differently, the Province has *prima facie* established Julmac to be a non-resident corporation and that it currently lacks a substantial operating presence in the Province. At the same time, Julmac has not satisfied me of a substantial enough current presence in order to overcome the mischief that the security for costs rule seeks to avoid, which is to overcome the impediment a successful party may face in obtaining an enforceable costs award at the end of litigation as it could from a resident party.

[50.] In the *Mega Cranes Ltd. v. Statesman Group of Companies Ltd.*, 2011 ABQB 249, at paragraph 13, the court quotes Freeman J.A. of the Nova Scotia Court of Appeal in *Nova Scotia Power Inc. v. AMCI Export Corporation*, 2005 NSCA 152, in part:

> …
>
> When such indicia of residence are lacking, attachment orders are a means of equalizing enforcement between resident and non-resident corporations. Whether the indicia of residence are sufficient for purposes of Rule 49.0 1(1)(a) is a matter of fact to be determined on the evidence.
>
> Evidence of such indicia would include registration as a mandatory requirement; it would include the presence of assets and the form they took, whether they were investments, stock-in-trade or mere goods in transit to a purchaser; it would include the manner of doing business; domicile and the location of the head office and other seats of decision making; maintenance and purpose of branch offices, factories or warehouses; the presence and status of employees, and any other relevant consideration.

[51.] As a result, the Province has satisfied Rule 58.01(a).

Sufficiency of Assets

[52.] While it is perhaps not as clear that Julmac, as a corporation, currently has insufficient assets in New Brunswick (Rule 58.01(d)); given my above finding, that is not a strict requirement the defendant must meet for their motion to succeed in this matter. In any event, I am more than satisfied that the Province has met the requisite standard of "reasons to believe there to be insufficient assets in New Brunswick to pay costs if ordered to do so" under Rule 58.01(d).

[53.] Julmac has not established itself to own or have unencumbered title to property, real or personal, in the Province sufficient to satisfy any potential award of costs. Legal fees will undoubtedly be significant in this matter. To the Province's point, Julmac has not shown itself to own "realizable" or recoverable assets in the Province. In addition, for instance, they have not produced any financial statements or balance sheets as referred to by Justice Grant in *Comstock Canada Ltd. v. Potash Corporation of Saskatchewan*, 2011 NBQB 127 (*Comstock* (#1)).

[54.] In an Ontario decision, *Chemical Vapour Metal Refinishing v. Terekhov*, 2016 ONSC 7080, the Court outlined various principles relating to the evidentiary establishment of sufficient assets by Julmac, in a security for costs motion, many of which are helpful and I wish to repeat:

> [21] **As establishing the sufficiency of their assets falls under the second stage of the inquiry, the onus is on a plaintiff to establish that they (or each of them when the order is sought from a group of plaintiffs as is the case here) are able to meet that test.** There is, again, a sound policy reason for approaching the matter in this way – who but the plaintiff is in a position to address their own financial situation?
>
> [22] **When dealing with this subparagraph, it is not enough for plaintiff to simply point to their possessions and declare that there is surely enough there to satisfy a cost order.** First, an independent evaluation must be performed with respect to each asset put forward. The court must consider how much each asset can reasonably be expected to fetch and assess if this would be adequate to meet a security order that is reasonable in the context.
>
> [23] **The court must also have evidence at to the status of each asset: owning a house on paper means little unless a party actually has equity in that house. Similarly, the court has to be assured that the**

plaintiff has sufficient equity in the assets relied on in response to a motion for security for costs to meet a cost order.

[24] Further, even if an asset is owned free and clear, the court has to be confident that there are no other creditors about with a higher priority, or a better claim, against those same assets. Parties engaged in litigation often find themselves embroiled in court proceedings with more than one party or creditor. **If a moving party is denied security on the basis of sufficiency of assets, the court must be certain that those assets will still be there at the end of the day so there can be execution to satisfy a cost award.**

[25] **Finally, the assets must be readily exigible and marketable, so that they can be easily transformed to cash to generate the funds needed to meet a cost order.** As stated in Bluefoot Ventures Inc. v. Ticketmaster, 2008 CarswellOnt 8788, **a party should be able to recover costs ordered in their favour without having to resort to extraordinary measures to do so.**

[26] While the case law addressing the level of evidence needed most often speaks in the context of establishing impecuniosity, similar principles apply here. **The court expects the plaintiff to make financial disclosure with full particularity, as they have the ability to speak to their financial status while the moving party would not.**

[27] As was stated in Uribe v. Sanchez [2006] OJ No. 2370, **the financial evidence of the plaintiff must be set out with robust particularity, leaving no unanswered questions.** Thus, the evidence about assets should be backed up by production of all appropriate supporting documents, and a reliable listing of assets and liabilities, income and expenses. A list of assets on its own is evidence in a vacuum. It provides an incomplete snapshot of a party's actual financial situation and is of no real assistance in response to a motion of this kind.

…

[32] It therefore appears that the Rule does not mean *any* asset when it speaks of assets. **The assets relied on to resist having to post security must be those that can meet both the letter and spirit of the Rule. If they cannot be readily used to pay off a cost order, the purpose of the Rule is defeated.**

(**Emphasis Added**)

[55.] In one New Brunswick decision, which both parties maintain (albeit for different reasons) has much similarity to the present motion, Justice Grant in *Comstock* (#1) noted an absence of supporting evidence and expressed concern over the Plaintiff's failure to sufficiently "prove" its assets in Province. At paragraph 18 he states:

> …there is no evidence before the Court as to what assets it [the Plaintiff] has, wherever located, to satisfy any costs order.

[56.] In my view, the Affidavit of Derek Martin is not sufficient nor effective in ameliorating these evidentiary concerns. Mr. Martin chose not to address his own emailed statements to Mr. Patterson that assets on site belonged to Landform and not Julmac. Similar to Justice Grant, in *Comstock,* I hold the view that the affidavit evidence of Julmac amounts to rather bald assertions of assets with value, and without sufficient explanation or evaluations to be reasonably reliable. (See also *Windsor Energy et al. v. Northrup et al.*, 2015 NBQB 5, at para. 8). Julmac has not provided any substantiation of ownership of assets such as bills of sale, registrations, or other such title documents. This may be the case because, in fact, Landform Civil owns those assets. While there was some suggestion in argument by Mr. Cumbo-Steinmetz that Landform would commit the assets to be "available" this was not pursued, and the court is not prepared to or able to address it further.

[57.] I am also not prepared to give much, if any, "weight" to the various alleged (and disputed) accounts receivables/contractual entitlements which are embroiled in the ongoing litigation (see *1049086 Ontario Ltd. v. Torbear Contracting Inc.*, 2005 Carswell Ont 7322 (SC)). While Julmac has provided a notice to the Province of it's intention to sue for breach of each contract, this has not yet occurred. Those alleged

claims for contractual entitlements remain at this stage merely anticipated and, at best, speculative.

[58.] As required by Rule 58.02, the Province's motion has been filed after the pleadings closed and before the matter has been entered for trial.

[59.] Given my above determination that the requirements of Rule 58.01 (a) and (d) have been met in this case, the overriding issue remains whether or not fairness requires that I exercise my discretion to make the requested order. In other words: is the defendant "at risk with respect to the costs of a successful defence"?

[60.] I am of the view that in all of circumstances, a reasonable order for security of costs is both fair, appropriate and necessary.

[61.] There is no evidence before me that requiring Julmac to furnish security for costs, would constitute a bar to their pursuit of its claims against the Province. There is also no evidence that Julmac would be unable to provide reasonable security for costs at this time.

[62.] I am, at this stage, satisfied that the motion has been brought in a timely manner and it is not simply a tactic to prevent the merits from being heard. Both parties are engaged in and have shown themselves as willing participants in complex and varied litigation to pursue and defend their interests.

[63.] While it is far too early to adjudicate, or even opine, on the merits of either the action nor the defence, it is sufficient to conclude that they are not devoid of merit or are frivolous.

[64.] Julmac has attempted to draw a number of parallels in this case with the rationale set out in cases such as *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827 ("*Chevron*"), and two costs decisions of Justice Grant: *Comstock* (#1), and the (unreported) security for costs decision in *HB Construction Company v. Potash Corp. of Saskatchwan* et al. dated October 4, 2016 (SJC -404-2010)), (*Comstock (*#2)). By this, Mr. Cumbo-Steinmetz strenuously argues that this Court must be disciplined to not simply apply the Rule's criteria "mechanically". He urges the Court to first apply the criteria of Rule 58 and then, even if that criteria is satisfied, which he maintains it is not in the present matter, proceed to a consideration of the justness of the order, i.e. the equities of the situation.

[65.] Mr. Cumbo-Steinmetz's arguments draw heavily on the *Comstock* (#1) and (#2) costs decisions. Mr. Cumbo-Steinmetz urges the Court to interpret the words of Justice Grant in both cases to reflect that, as here, where two sophisticated litigants are in a contractual relationship and the Province could have essentially protected itself on the risk of the costs of litigation by the contract but did not, then the equities do not favour the Province in its request for such an order.

[66.] Mr. McElman suggests that Julmac is simply "cherry-picking" or selectively using certain words of Justice Grant out of context. Further, Mr. McElman asserts Julmac to

be “muddying the waters” deliberately so that “the truth would drown in a sea of irrelevance”.

[67.] Mr. Cumbo-Steinmetz relies not only upon the two “*Comstock*” costs decisions but he also points to *Chevron*, and to the Nova Scotia decision in *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316.

[68.] I confess to having had to carefully review the two *Comstock* costs decisions repeatedly in order to fully grasp what occurred there. While it seems trite to say, but “context is everything”. Circumstances matter. All of these cases relied upon by Julmac are, if necessary, distinguishable in my view.

[69.] First, in both *Comstock* costs decisions, it is clear that the Court was dealing with a breach of contract and construction *performance* type dispute. In addition, in *Comstock*, the owner had counterclaimed for non-performance of the contract by the Plaintiff, seeking damages for the costs of completing the contract.

[70.] Justice Grant found the equities to favour the plaintiff as against the owner of the project as, at least in part, be found the owner could have taken steps under the contract to require fulfillment of the performance and labour/material payment bonds provided under the contract, if the owner was truly concerned about the creditworthiness of the plaintiff. The owner knew the plaintiff in that case, was an out-of-province contractor. Justice Grant, in essence, found that the owner had accepted or acquiesced in the creditworthiness of the plaintiff and that it would be unfair, at that point, to require the

posting of security. Further, the available bonds under the contract were directly relevant to the thrust of the litigation in *Comstock* as it was premised on the performance and execution of work under the contract unlike in the present litigation between the parties at bar.

[71.] In *Comstock* (#2), Justice Grant expressly noted the subsequent party replacement for the Plaintiff (due to insolvency) was not one like Comstock for which the owner had "agreed" to their creditworthiness. He ordered security for costs at that point in favour of the substituted plaintiff.

[72.] Before me, the Province, who I accept was fully aware that Julmac was an out-of-province contractor, did require Julmac to post (as they did) both performance and labour/material bonds. In that way, Julmac's creditworthiness for purposes of contractual performance was addressed under the contract.

[73.] *Chevron* was an extraordinary case. In *Chevron*, the Ontario Court of Appeal vacated an earlier security for costs order, finding the equities no longer justified it. The case involved public interest litigation over 25 years. The Court was able to determine in that instance that the security for costs motion was purely a tactic by the Defendant to end the litigation.

[74.] The *Ellph.com Solutions Inc.* case was a non-conventional security for costs matter. The Nova Scotia Court emphasized the defendant, Aliant, to have negotiated a contract with the much smaller corporate plaintiff for corporate liability only and one which

Aliant did not seek personal guarantees from the Plaintiff's individual shareholders. Further, Ellph.com was insolvent. The Court denied the defendant's security for costs motion in that matter finding the defendant did not take available steps to protect itself under the contract. Again, the requested motion for security for costs was for *personal* security from the corporation's individual shareholders.

[75.] In any event, and despite Mr. Cumbo-Steinmetz valiant efforts, I simply do not accept that the mere fact of a contractual relationship between these two litigants will necessarily be determinative as to the equities between them and be determinative of the outcome on a security for costs motion in New Brunswick.

[76.] I do not believe that Justice Grant was suggesting the owner in *Comstock* (#1) should have or could have obtained "litigation costs security". He makes no such reference to that concept. Furthermore, in my view, that would not be a reasonable interpretation of the cases in New Brunswick involving Rule 58.

[77.] To be clear, it would be unreasonable to require the Province to have been mandated to negotiate for some potential litigation costs protection in the contracts with Julmac. Such a mandate would mean the contracting out of the applicability of Rule 58. That is not a reasonable interpretation. I agree with Mr. McElman that performance and labour bonds in the construction context do not naturally extend to security for litigation costs. I also note that the dispute mechanism under the parties contract effectively required mandatory resolution through the New Brunswick courts. As such, Rule 58

would have been contemplated as available to (either) party in the event they were to commence litigation against the other.

[78.] Considering all of the evidence and in balancing the competing interests fairly and justly, it is appropriate, and in the interests of justice, for Julmac to post security for costs in favour the Province. Without such an order, the Province is unfairly at risk of incurring all of the costs of a successful defence.

Setting of Security

[79.] The amount of security being requested by the Province is, "a minimum of $2,400,985.44 in the form of cash, certified cheque, or letter of credit", which is said to represent two-thirds of the Province's estimated costs and disbursements at the end of trial at Scale 5 of Tariff A.

[80.] To repeat, this amount includes both party and party costs based on Scale 5 of Tariff "A" under Rule 59 and disbursements which the Province estimates it will incur to the end of trial . These amounts are then multiplied by two-thirds in accordance with the formula set out in *Maryon v. NBTel Ltd.* (1977) 1976 CanLII 1679 (NB CA), affirming 1977 16 N.B.R. 2nd 56 (N.B.Q.B.).]

[81.] Julmac argues the Province's estimate of costs and disbursements to be excessive, indeed exaggerated. They maintain the use of either tariff would amount to an unwarranted windfall for the Province (*Windsor Energy*, para. 16). They also point to

the unreasonable estimate for experts reports and document management costs. Mr. Cumbo-Steinmetz emphasizes the early nature of the litigation.

[82.] Mr. McElman counters the *Windsor Energy* case to be one in which the tariff approach to costs would have been unreasonable given the wildly varying and uncertain damages claimed by the Plaintiff of from $5M to $105M.

[83.] It is important to emphasize that this is a security for costs award and not an award of costs following trial. Security for costs is by necessity forward looking and with some degree of speculation. Also, security for costs need not have the goal of providing full cost indemnification and nor should it represent a windfall to the Defendant.

[84.] The New Brunswick Court of Appeal, in *Maryon v The New Brunswick Telephone Company Limited*, accepted a guideline which indicates that security for costs should *normally* be awarded in an amount equal to two-thirds of the estimated party-and-party costs of the action.

[85.] In *Comstock* (#1), Justice Grant also referenced the "guideline practice" of setting security of costs at two-thirds of the total estimated bill of costs (see also paragraph 10 of *1059217 Ontario Inc.*)

[86.] In *Windsor Energy***,** Justice Morrison identified three options for selecting a basis upon which to fix security for costs as follows:

1. Apply the Tariff on an amount involved equal to that claimed in the Plaintiff's Statement of Claim;

2. Apply the Tariff using a lesser amount than that claimed; or

3. Base the security order on an estimated lump sum costs award.

[87.] Following discussion of Options 1 and *2*, Justice Morrison determined:

> Option 3 also poses some challenges. Lump sum awards crafted in darkness are no longer permissible *(Spielo*, supra, at para. 160). Further, judges who elect not to apply the Tariff in cases involving quantifiable claims must be able justify the deviation *(Spielo*, supra at para. 147). Despite these cautions, I believe Option 3 is the most appropriate for several reasons. First, this is not a costs award but for an order for security for costs. By definition it is speculative to some degree. Second, it is open to either party to apply for an increase or decrease in the security once the complexity (or lack thereof) of this litigation becomes apparent. Third, the defendants have provided a preliminary estimate of the trial and discovery time anticipated thus there is some rational basis for estimating the costs on the lump sum approach. Finally, in my view applying Option 1 will result in an excessive security order and Option 2 cannot be justified on principled basis.

[88.] The claim by Julmac is, at this stage, certain and for just in excess of $29M.

[89.] The Province has provided an estimate of required discovery and trial dates. To some degree, at this stage, it is admittedly rather speculative but it purports to be drawn upon other past construction-type litigation in New Brunswick. While Julmac questions the estimate, it has not itself provided evidence of the anticipated time required. I am satisfied it to be reasonable to assume a significant number of days of discovery and trial will be necessary. The nature of this action will seemingly necessitate significant evidence including the comparative treatment of other bridge contractors by the Province on all such contracts over an extended period of time. The stakes are high and both parties are not shy in pursuing their interests.

[90.] In *Comstock* (#1) at paragraph 5, Justice Grant, observed "the amount claimed by Comstock in this action is $58M; documentary discovery will likely involve more than a hundred thousand documents, oral discovery will be at least four weeks and the trial will take a similar amount of time". Justice Grant selected Scale 3 of Tariff "A" to *Rule* 59. He ultimately ordered the posting of security for costs in favor of AMEC Limited in the amount of $1,400,000 (two-thirds of the Tariff amount of $2,100,000).

[91.] The "two-thirds rule" is often applied to the total amount of costs and disbursements at Scale 3 of Tariff A under Rule 59. (see *Prism Transport Ltd. v. Upm-Kymmene Miramichi Inc.*, 2006 NBQB 344)

[92.] The Province requests Scale 5 costs and cite *Mackin v New Brunswick (Minister of Finance)*, 1998 CanLII 9800, where it was noted that the issues raised in that proceeding were more complex than the "usual case" and where preparation for trial and the presentation of the case required a considerable amount of work. The Province also seeks support to its requests by drawing parallels to the decision of Justice Hackett in *HB Construction v. Potash Corporation et al.*, 2022 NBQB 59, who ordered costs on Scale 4 in arguably similar circumstances albeit *after* trial.

[93.] The Province, more particularly, sets out it's security for costs request at para. 67-69 of their brief:

> 67. The Province will incur significant disbursements to the completion of trial, for example:
>
> > (a) the cost of reviewing the minimum 957,000 pages of documents is estimated to be at least within a range of

> $180,000.00 - $260,000.00 (plus HST) but could be as much as $600,000.00 to $900,000.00 (plus HST).100 The exact cost will depend on determination of the type of E-Discovery Services engaged. The Province's estimated disbursement costs for the E-Discovery Services required to review the minimum 957,000 pages of documents is $250,000.00; and
>
> (b) Based on an estimate of 28 days of discovery and 45 days of trial and based on currently available information and pricing, the Provinces anticipated total disbursements are estimated at approximately $1,908,459.50.

68. The Province's estimated costs and disbursements to the end of trial, pursuant to Rule 59, Tariff A, Scales 3 and 5, are as follows:

Scale 5	**Scale 3**
$3,605,083.25	**$2,945,790.75**

69. Therefore, the appropriate amount for an order for security for costs is a minimum of $2,400,985.44 in the form of cash, certified cheque, or letter of credit, representing two-thirds of the Province's estimated costs and disbursements at the end of trial at Scale 5.

[94.] At Scale 3, two-thirds represents $1,961,896.64.

[95.] The amount of Julmac's claim is very significant and there are *some* parallels between this action and other large construction litigation in New Brunswick. For instance, in *HB Construction v. Potash Corp et al.*, the lawsuit required 41 days of discovery and 54 days of trial. In *Comstock*, the litigation was estimated for 20-40 days of discovery and would involve tens, if not hundreds of thousands of documents. I also note the Province's estimate is just that, and any security for costs award may be varied as the litigation progresses.

[96.] The Province's estimate of costs and disbursements lists three (3) expert reports at a cost of $400,000.00 each. There is an absence of explanation for these amounts (see

Comstock (#1), para. 28). While I have little doubt that the Province will be required to retain experts in pursuit of its defence, I would have expected the Province to have better explained it's estimate.

[97.] In the circumstances, Julmac had alternatively suggested utilizing a lower figure which they asserted to be $75,000.00 per report, to be more reasonable (see para. 88 of Brief). At the hearing, Mr. Cumbo-Steinmetz "corrected" the number to be $25,000.00 per report for a total of $75,000.00 as in *Windsor Energy*. *Windsor Energy* was a 2015 decision. In all of the circumstances, I will reasonably select the figure of $75,000.00 per report and for up to three experts totalling $225,000.00. As a result, the Province's Schedule B to their Brief estimated total disbursements will be *reduced* by (3 x $325,000.00) = $975,000.00 plus HST of $1,121,250.00 *reduction*.

[98.] In terms of the document discovery management costs, I tentatively accept the estimate of a significant number of documents; most likely in the hundreds of thousands. However, given the current early stage, I prefer to select the lowest figure of the E-discovery estimate (the Record, page. 171) of $180,000.00 plus HST, totalling $207,000.00 rounded to $210,000.00. As a result, the Province's Schedule B estimate will also be *reduced* from $250,000.00 to $210,000.00 totalling a reduction of $40,000.00 plus HST of $46,000.00 *reduction*.

[99.] I fully accept that this litigation will be complex and will be document heavy. I also recognize that we are at the beginning of this litigation and thus I am naturally forced to speculate to some degree. I have made no finding of inappropriate conduct by either party in relation to this litigation.

[100.] Similar to Justice Grant, in *Comstock* (#1), I hold the view that Tariff A Scale 3 adequately addresses the "risks" to the Province of unpaid costs on a successful defence with due fairness to Julmac from being "knee-capped" in pursuit of its claim. The Province has not persuaded me to apply Scale 5.

[101.] While I, again, recognize the uncertainties, I am also comforted by Justice Morrison's observation in *Windsor Energy* that under Rule 58.06, it remains open to any party applying for an increase or decrease in the security amount if appropriate in the future.

[102.] The parties do not disagree on an appropriate form of security to be by way of a letter of credit.

[103.] In summary, then, the Province's motion is granted with costs of $2,500.00 plus reasonable disbursements. This award includes my consideration of the first adjournment.

[104.] The total estimated legal costs at Tariff A Scale 3 are $1,037,331.25. The total estimated disbursements, as adjusted above, are $741,209.50. In total, the amount of costs and disbursements is **$1,778,540.75**, **at two-thirds** (x 0.666) equals **$1,184,508.14** rounded to **$1,200,000.00**.

[105.] Julmac is ordered to post security for the Province's costs as follows:

a. **$1,200,000.00** by way of a letter of credit to be filed with the Clerk of the Court within thirty (30) days of this decision;

b. if Julmac fails to file the security within the time set out in this order, all proceedings in this action against Province of New Brunswick will be stayed until further order of the Court (Rule 58.04).

DATED at Fredericton, New Brunswick on the 12th day of August, 2025.

_____
Richard G. Petrie
J.C.K.B.