

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

B E T W E E N:

**MARIO & ANNE LEVESQUE HOLDINGS
INC. and MARIO LEVESQUE**

Plaintiff,

-and-

**E.I. DUPONT CANADA COMPANY and
GRAND FALLS AGROMART LTD.,**

Defendants.

BEFORE: Justice Kathryn A. Gregory

HEARING HELD: Saint John, NB

DATE OF TRIAL: March 17-28, 2025

BRIEFS ON COSTS: March 17 and April 7, 2026

DATE OF DECISION: May 26, 2026

SUBJECT MATTER: Costs

COUNSEL:

Rodney J. Gillis, K.C., on behalf of the Plaintiffs

Thomas G. O'Neil, K.C. and Annalise Benoit, on behalf of the Defendant, DuPont

Blair C. Fraser, K.C. and Caitlin Mahoney, on behalf of the Defendant, Grand Falls Agromart

GREGORY J:

1. Following my decision, dated February 24, 2026, dismissing the entirety of the Plaintiffs' claims against the Defendants, I asked the parties to address how this Court should determine the amount of costs payable to the Defendants.
2. I determined, at that time, that given the problematic evidence on damages, I could not make a provisional assessment for the purposes of addressing costs.
3. Further, the Defendants wished to address the issue of costs post-trial given the rejected offer of settlement made to the Plaintiffs approximately two weeks prior to the start of the two-week trial, March 17-28, 2025.
4. All parties submitted briefs addressing the issue of costs payable pursuant to *Rule 59* following trial.
5. Turning to *Rule 59*, I note the following provisions:

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.

6. The Defendants both argue first that a cost award here should be in the form of an elevated lump sum, given the absence of a provisional assessment by the Court at trial, and to reflect the conduct of the Plaintiffs, prior to and at trial, and the rejected offer of settlement.
7. Alternatively, the Defendants seek a costs award based on the amount claimed by the Plaintiffs applying *Tariff A*, at *Scale 5*.
8. The Defendants rely on the decision of the New Brunswick Court of Appeal in *Doucet v Spielo*, 2011 NBCA 44. Morrison J, in *Chishti v. Northside Pharmacy*, 2021 NBQB 193, provides a helpful summary of the *Spielo* principles and the “loser pay” system, as follows:

The leading case in New Brunswick on the question of costs is [*Doucet v. Spielo Manufacturing Inc.* 2011 NBCA 44](#) in which Justice Robertson conducts an in-depth analysis of the role and assessment of cost awards. Some of the pertinent key principles outlined in [*Spielo*](#) are:

- 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 predictably 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).
9. Chief Justice Dewart, in *Smith v. Osiyo LLC*, 2025 NBKB 105, referenced a decision of Glennie J in *Black v. Norris*, 2012 NBQB 387, at paras. 3-6, dealing with when to award solicitor-client costs. In doing so, Glennie J referenced some basic principles following from the *Spielo* decision, as follows:

[3] The authority of this Court to award costs is governed by [Rule 59 of the Rules of Court](#). [Rule 59.01\(1\)](#) provides that the costs of a proceeding are in the discretion of the Court and the Court may determine by whom and to what extent costs shall be paid. **Generally, costs are awarded to the successful party to provide a level of indemnification for the legal fees incurred in prosecuting or defending a proceeding: [Doucet v. Spielo Manufacturing Inc.](#), 2011 NBQA 44 (CanLII) at para. 117. There are three available options: solicitor-client costs; costs based on the Tariff and lump sum costs awards.**

[4] [Rule 59.01\(2\)](#) confirms this Court's jurisdiction to order costs to be assessed on a solicitor and client basis or to fix the costs of a proceeding without reference to a tariff (i.e., a lump sum award). **As stated by Justice Robertson in [Spielo](#), the authority to depart from the limits of the Tariff is an accepted feature of our jurisprudence and trial judges retain this discretion in order to respond to the exigencies of the case.**

[5] Rule 59.02 sets out twelve factors that a Court may consider when awarding costs of a proceeding...

[6] A complete court costs award analysis along with concise directions have now been clearly established in *Spielo* where Justice Robertson,

writing for a unanimous Court, began his review with the statement that the purpose of costs is to provide the successful party with partial indemnification with respect to lawyers' fees incurred in either pursuing or defending an action or proceeding. He emphasizes throughout his exhaustive examination that **awards of costs in New Brunswick have never been intended to provide "substantial compensation." The bottom line from Spielo is that Trial Judges in New Brunswick must attempt to provide the successful party with "meaningful compensation."** Justice Robertson also emphasizes that it is far better for Trial Judges to adhere to the Tariff established in [Rule 59](#) than to make lump sum awards of costs based on unarticulated criteria. He emphasizes that a lump sum award is inherently problematic unless there is a rational basis for fixing such lump sum.

[Emphasis in *Smith*, at para. 33]

10. Effectively, the “amount claimed” by the Plaintiffs was \$965,000; almost a million dollars. This was broken down to \$545,600 for damages, plus prejudgment interest from the time the claim commenced in 2013, 12 years prior to the trial, in the amount of \$420,000.
11. The Defendants both argue that the Court should consider a lump sum here, taking into consideration their significant legal fees, as noted in their briefs, the lack of a provisional damage assessment, the behaviour of the Plaintiffs during the litigation and the rejected offer of settlement.
12. Further, the Defendants argue this was a product liability case similar to that before Justice Stephenson in *McLaughlin Brothers v. Dow*, 2023 NBKB 138, wherein he observed that “...a product liability case is by its very nature complex” (at para. 147).
13. The Defendant, DuPont, indicates in its brief on costs that it has expended \$436,200 in legal fees and approximately \$40,000 in disbursements to defend this case.
14. The Defendant, Agromart, indicates in its brief on costs that it has expended \$379,219 in legal fees and \$21,726 in disbursements.
15. According to the Defendants, a lump sum would meet the principle of “partial indemnification”, without crossing over to “substantial indemnification” which our Court of Appeal has determined is not appropriate in New Brunswick.
16. As noted above in *Black*: “There are three available options: solicitor-client costs; costs based on the Tariff and lump sum costs awards.”

17. I do not find solicitor-client costs to be warranted here, nor do the Defendants so suggest. This is despite the problematic behaviours during the litigation and the trial by the Plaintiffs, as noted by the Defendants and by me in my decision on the merits of the claim.
18. Nonetheless, the Defendants, as noted, do argue that an elevated lump sum amount is appropriate. Their alternative argument is to rely on the *Tariff*.
19. The Plaintiffs argue that a cost award should be based on *Tariff A*, at *Scale 3*, using a reduced “amount claimed” that excludes the sizable prejudgment interest component of the amount claimed.
20. Having considered the arguments of counsel and the principles regarding costs, I find that the most appropriate method of determining costs here is by way of the *Tariff* set out in *Rule 59*, and not a lump sum award.
21. Despite the many issues around the 1982 *Tariff A Schedule*, namely a needed overhaul to reflect current pricing and modern litigation costs, it remains a helpful tool for parties during litigation, as it promotes some certainty and predictability, as noted at paras. 119-121 in *Spielo*:

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. Those who have practiced law in the Province for the last thirty years can speak for themselves. One has to ask whether our 1982 Tariff bears any relationship to the realities of litigation costs today. To the extent the 1982 Tariff sets out party-and-party costs payable in actions involving \$1,000 to \$100,000, based on one of five scales, the Tariff is arguably reflective of a legal era long past and, therefore, is unresponsive to a party's plea for fair and meaningful reimbursement for costs in successfully pursuing or defending an action. The Tariff's other obvious shortfall is the lack of a logical relationship between the amount being claimed and the amount reasonably needed to pursue or defend a law suit. Such a relationship may have existed in 1982, but too much time has passed. This observation is reinforced once it is recognized that the Tariff contains a notation that costs on appeal shall be 40% of the costs awarded at trial. Understandably, the word "shall" is read in this Court as being directory, not mandatory. But the inclusion of a 40% award in the Court of Appeal reinforces the notion that the drafters of the Rule did not envisage multi-million dollar commercial claims being regularly advanced in the courts. After all, who in 1982 would have predicted that in 2010, actions in the "Small Claims Court" would have a limit of

\$30,000?

Despite obvious shortcomings, the Tariff possesses an advantage that simply does not exist if the trial judge elects to make a lump sum costs award. The Tariff promotes certainty and predictability in the law by providing lawyers and clients with the ability to anticipate or calculate the potential magnitude of a costs award. This is true irrespective of whether there is a relationship between the amount involved and the costs prescribed under the Tariff. Let me explain. The modern jurisprudence will speak of the need to craft a costs award which is "fair and reasonable". I assume this means that the award must be fair from the perspective of both parties in accordance with their reasonable expectations. Those reasonable expectations are informed by the Tariff. **Both lawyers and litigants are provided with beacons surrounding the size of a potential costs award and to a certain degree are insulated from the possibility of an award which departs substantially from the expectations as outlined in the Tariff.** After all, what lawyer or litigant wants a costs award predicated on the vague standard of "fair and reasonable"?

Another practical advantage of the Tariff is that it forces the parties to evaluate the merits of each claim and to estimate fairly the amount of damages likely to be recovered. If the claim is not grounded in law, or the damages being claimed are inflated or assessed on wrong principles, the client runs the risk of having that figure being used to calculate the "amount involved". Lawyers are also aware that awards of costs are frequently viewed as an appropriate deterrent to advancing questionable claims and a means for dealing with misguided conduct (missteps on the part of the lawyer). If the case is made more complex than necessary, the costs award will reflect that reality. **The general goal is not to punish but to compensate the innocent party for the added expense.** [Emphasis added]

22. I am aware, as are the Defendants, that there are revisions coming to *Rule 59* to better reflect what costs should be in 2026. However, those revisions are not in place yet, and where I have determined that the *Tariff* applies to this litigation based on party expectations when they commenced litigation, I find that it would be unfair not to accept the *Tariffs* as they are currently.
23. This being said, I do agree with the Defendants that *Scale 5* is warranted in this case, given the complexity of the allegations against the Defendants and the need to mount a "full court press" response despite the absence of evidence from the Plaintiffs in support of their claim.

24. Further, there was unwarranted conduct by the Plaintiffs with the late disclosure of “field tests”, the shifting theory of liability, an uncontradicted claim that the Plaintiffs caused delay in the litigation process and the rejected settlement offer.
25. The delay alleged by the Defendants is a bit of a two-edged sword, however, because, as the Plaintiffs point out, in a prior decision on an unrelated matter, I reduced the pre-judgment interest amount in a case that took 10 years to get to trial. I would have done the same in this case had the Plaintiffs been successful.
26. Thus, I will reduce amount of pre-judgment interest claimed by 50%, making the damages \$545,600 and the interest \$210,000, for a total “amount involved” of \$755,600.00.
27. As both Defendants were required to retain their own counsel, I will award *each* Defendant costs, according to *Tariff A, Scale 5*, in the amount of \$43,105.00 plus HST and reasonable disbursements.
28. The Defendant, Agromart, has listed their disbursements in their brief on costs and I see nothing unreasonable in that list. I presume the Defendant, DuPont, has a list of similar reasonable disbursements, which they state totals \$39,858.55.
29. While this award of costs and disbursements is no doubt a significant amount from the Plaintiffs’ perspective, it represents but a minor indemnification of the costs expended by the Defendants, who between them have expended close to a million dollars on this litigation.
30. I nonetheless find that this cost award strikes the balance sought by the *Rule* on costs in New Brunswick.

Kathryn A. Gregory
Judge of the Court of King’s Bench
of New Brunswick