SUPREME COURT OF NOVA SCOTIA

Citation: *Millbrook First Nation v Dawn Ellis- Abbott et al.,* 2023 NSSC 352

Date: 20230301
Docket: 507669
Registry: Halifax

Between:

Millbrook First Nation

Plaintiff

v.

Dawn Ellis-Abbott, in her personal capacity, Dawn Ellis-Abbott, Operating As "DME High Maintenance Hair & Esthetics", Matthew Abbott, Paul Blenkhorn, Donald Ellis, and Central Self Storage Limited, a limited company registered in Nova Scotia

Defendants

Judge:	The Honourable Justice Muise
Heard:	March 1, 2023, in Halifax, Nova Scotia
Counsel:	Kevin Latimer, KC and John T. Boyle and Shelley Martin for the Plaintiff *Respondents* Maintenance Hair & Esthetics (not appearing) Charles A. Thompson for Paul Blenkhorn (not appearing) Peter Rumscheidt for Donald Ellis (not appearing) Adam Harris for Central Self Storage Limited (not appearing)

By the Court:

DECISION ON SUMMARY JUDGMENT MOTION

INTRODUCTION

[1] Dawn Ellis-Abbott was employed by Millbrook First Nation ("Millbrook") as a Senior Finance Clerk. One of the commercial entities owned and operated by Millbrook is the Millbrook First Nation Aboriginal Fisheries ("Millbrook Fisheries"). Ms. Ellis-Abbott took over responsibility for providing accounting services to Millbrook Fisheries in 2003. She had a corporate credit card for Millbrook Fisheries business purposes only ("Fisheries Visa"). She used the Fisheries Visa to get cash advances for herself and to purchase personal items. She did not personally make any payments on the Fisheries Visa bills. She also wrote cheques to herself on the Millbrook Fisheries RBC Account (Fisheries Account), cashed them and deposited some in her own bank accounts. She had a personal bank account (the "Ellis Account") and a bank account for her beauty salon business, DME High Maintenance Hair & Esthetics (the "DME Account"). She further used Fisheries Account cheques to pay Nova Scotia Power invoices for her parents' residence and DME's business premises. She did not reimburse Millbrook for any of those amounts. This occurred over a six-year period (2013 to 2019).

[2] Millbrook commenced an action against her claiming, among other things, damages in the amount of $4,878,389 based on alleged breach of fiduciary duty, conversion and unjust enrichment.

[3] Ms. Ellis-Abbott filed a statement of defence. I will refer to the relevant portions of that statement of defence later.

[4] Millbrook brought the within motion for partial summary judgment on the evidence against Dawn Ellis-Abbott, in her personal capacity and in her capacity operating as DME High Maintenance Hair & Esthetics ("DME").

[5] Millbrook filed a very comprehensive brief and numerous affidavits including those of Paul Bradley, Michelle Gloade, Angela Bernard, and John Boyle. Mr. Bradley is a forensic accountant and his affidavit was comprised of 10

volumes. It also relied on the affidavits filed in its motion for a mareva injunction, which included those of Paul Bradley, Shelly Martin and Caitlin Regan.

[6] Ms. Ellis-Abbott and DME did not file anything on this motion and no one appeared on their behalf.

[7] On March 1, 2023, I rendered a bottom-line decision granting partial summary judgment against Ms. Ellis-Abbott and DME in the amount of $3,209,909.17, later corrected to $3,209,909.27, to take into account an omitted 10 cents, plus $5,000 in costs, with written reasons to follow. These are my reasons.

[8] In these reasons, when I refer to Ms. Ellis-Abbott, I am referring to her in her personal capacity or in her capacity operating as DME, or both, as applicable.

LAW AND ANALYSIS

TEST FOR SUMMARY JUDGMENT ON THE EVIDENCE

[9] Civil Procedure Rule ("CPR") 13.04 states, among other things:

> **13.04 (1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> > (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> **(2)** When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
> **(3)** The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
> **(4)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
> **(5)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
> **(6)** A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

> a) determine a question of law, if there is no genuine issue of material fact for trial;
> b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[10] The Court in ***Shannex Inc. v. Dora Construction Ltd.***, 2016 NSCA 89, at paragraphs 32 to 42, provided the principles and questions applicable to a motion for summary judgment on the evidence under the Rule. It outlined five sequential questions raised by Rule 13.04. For the purposes of this motion, I need only refer to the first three. In relation to those three questions, the court stated, among other things, the following:

> • **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. …
>
> A "material fact" is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: … .
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]
>
> ….
>
> **• Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**
>
> If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). …
>
> • **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**
>
> ….
>
> It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

[11] At paragraph 36, the court stated:

> **"Best foot forward":** Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.

[12] I will now turn to the application of CPR 13.04 and the jurisprudence interpreting it to the case at hand. The first question to address is whether there is a genuine issue of material fact, either pure or mixed with a question of law.

FIRST QUESTION: IS THERE A "GENUINE ISSUE OF MATERIAL FACT, EITHER PURE OR MIXED WITH A QUESTION OF LAW"?

[13] As noted in CPR 13.04(4), the pleadings indicate what the issues are, which, in turn, informs what facts are material. Whether there is a genuine issue of material fact depends upon the evidence presented.

Material Facts

[14] I will outline the elements required to establish the three causes of action advanced.

[15] To prove conversion, Millbrook must show:

- Wrongful acts by Ms. Ellis-Abbott involving goods belonging to Millbrook;
- The acts consisted of taking, handling, disposing or using of the goods; and,
- The acts were intended to, or had the effect of, interfering with, or being inconsistent with, Millbrook's right or title to the goods.

[16] Authorities supporting these elements include ***Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce***, [1996] 3 S.C.R. 727, paragraph 31 and

32, and Gerald H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Carswell, Toronto:2010), page 117.

[17] To prove breach of fiduciary duty, Millbrook must show Ms. Ellis-Abbott

- was in a fiduciary relationship in relation to it;
- owed a fiduciary duty to it; and,
- breached that duty.

[18] An employee who handles their employer's money will owe their employer a fiduciary duty to handle that money in a way which benefits the employer, not the employee: ***581257 Alberta Ltd. v. Aujla***, 2013 ABCA 16

[19] In ***West Bros. Frame & Chair Ltd. v. Yazbek***, 2019 BCSC 1844, the employee: managed and recorded accounts payable and payroll; was responsible for CRA remissions; and co-signed cheques for accounts payable and salaries, including some blank cheques pre-signed by the owner of the employer corporation. She was found to be in a fiduciary relationship in relation to her employer. The Court found she breached the fiduciary duty she owed to the employer by making unauthorized transfers to accounts she controlled.

[20] There is some lack of clarity regarding whether the existence of a fiduciary relationship with a corresponding fiduciary duty is a question of fact or law. Either way, it at least includes applying the applicable legal principles to the facts.

[21] In ***Hodgkinson v. Simms***, [1994] 3 S.C.R. 377, at page 381, the Court stated:

> Where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor.

[22] In ***Lac Minerals v. International Corona Resources***, [1989] 3 S.C.R. 574, at page 605, Justice Sopinka (dissenting in part) stated that the existence of a fiduciary duty is "essentially a question of law". However, at page 648, Justice LaForest stated:

> [T]he existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship.

[23] The Court in ***Perez v. Galambos***, 2009 SCC 48, at paragraph 48, stated that determination of a fiduciary obligation is "primarily a question of fact". Then, at paragraph 82 it found that the Court of Appeal had erred "on a point of law as to what was required for a fiduciary relationship".

[24] To the extent that Ms. Ellis-Abbott's denial of a fiduciary relationship and corresponding obligation involves a question of law, I will address that question in determining whether the challenged pleading has a real chance of success.

[25] To prove unjust enrichment, Millbrook must show:

- Ms. Ellis-Abbott was enriched;
- Millbrook suffered a corresponding deprivation; and,
- There was no juristic reason for the deprivation

[26] Those elements were discussed by the Supreme court of Canada, in ***Kerr v. Baranow***, 2011 SCC 10.

[27] The Affidavits filed by the Plaintiff cover the points required to establish the elements of these causes of action.

[28] Ms. Ellis-Abbott did not provide any evidence to dispute them.

[29] The affidavit evidence filed by the Plaintiff negate the material facts which Ms. Ellis-Abbott's pleadings dispute, as noted in the following three paragraphs.

[30] She pled, as a conclusory statement, that she did not act in a fiduciary capacity in her role with Millbroook. However, she did not dispute the factual circumstances underlying a finding that she did act in a fiduciary capacity. The evidence clearly establishes that, in the position of Senior Finance Clerk at Millbrook, she had access to and used the Fisheries Account and Fisheries Visa.

[31] She also pled the following:

- She was only one of multiple Senior Finance Clerks within Millbrook's accounting team, all of which had equal access to Millbrook's bank account.

- All members of Millbrook's accounting team had access to its online banking credentials, credit card, and bank PIN number.
- Some payments and cash advances claimed in this action were charged to Millbrook's credit card by other members of the accounting team and various members of the Millbrook Band.
- Some of the funds were used for legitimate Millbrook purposes. It was common for Millbrook's credit card to be used to pay expenses for community events. Payments and cash advances on Millbrook's credit card were used to provide donations and fund care packages for financially distressed Band Members. Under instruction from her superiors, she would withdraw cash and deposit it into her personal account to pay for Band-related expenses. These practices were known to Millbrook's accountants and auditors.

[32] However, these pleadings are unsupported, rendered immaterial or refuted based on the following points and evidence:

- She presents bald assertions with no supporting evidence.
- No legitimate Millbrook Fisheries expenses required her to write cheques to herself, deposit them in her personal account, withdraw cash and pay individuals in cash.
- She had access to the Fisheries Account cheques and was responsible for ensuring they were only used for legitimate Millbrook purposes.
- She was not authorized to issue cheques to herself for her own personal use.
- She deposited $811,807.72 worth of cheques written to herself in her account or DME's account.
- She did not identify anyone she paid in cash and no records have been found to support such legitimate transactions, despite an extensive search having been conducted, and despite her being responsible for properly recording any payments.
- None of the Millbrook Fisheries expenses needed to be paid in cash during the relevant time.

- On many occasions, she deposited, into her own account, amounts that were the same as, or similar to, the cash advances she took, the same day as, or shortly after, she took them.
- She made many cash purchases for personal items, such as jewelry.
- She paid over $133,000 for automobiles from an unknown source.
- It would not make sense that she would deposit cheques in her own accounts to make cash payments, instead of making them with cash withdrawn directly from the Fisheries Account. She did not explain why it would need to be done that way.
- The person previously responsible for providing accounting services to Millbrook Fisheries never issued a cheque to herself to get cash to pay vendors, and never took cash advances on the Visa to pay vendors.
- The coding Ms. Ellis-Abbott used on many of the cheques designated expenses that were not paid in cash.
- The standard practice was to pay Millbrook Fisheries expenses by cheque or direct deposit. In some rare instances, a vendor required payment by Visa, such as with monthly fees related to radios and black boxes on fishing vessels. However, those Visa payments had to be balanced each month and required submission of a requisition form and associated receipts.
- In the rare instances where cheques were issued to individuals within Millbrook Fisheries, a corresponding requisition form was required before the cheques could be issued.
- A majority of the cheques in question ended in round numbers, such as “50” or “00”, which is inconsistent with legitimate Millbrook Fisheries business expenses.
- She did not identify anyone who took cash advances on the Fisheries Visa.
- She was the only cardholder for the Fisheries Visa which was used in 1,519 transactions to advance cash totalling $1,268,343.10. Also, all vendor purchases were made by her. There is no indication of cash advances to anyone else. Therefore, the most reasonable inference is that she had sole use of the credit card.

- She did not identify anyone who authorized her to make cash advances on the Fisheries Visa. She was not authorized to do so.
- She did not plead any reason why the cash advances were required and there were other sources of funds that did not attract the high interest rates of Visa cash advances.
- She was responsible for ensuring any purchases were properly documented.
- Millbrook has not identified any goods or services it received from the vendor charges on the Fisheries Visa which are part of its claim against her.
- She was not authorized to charge personal expenses, including DME expenses, to the Fisheries Visa.
- The Vendor records show that the Fisheries Visa vendor purchases claimed were personal. They were not authorized by Millbrook. They do not relate to Millbrook Fisheries, nor to provision of care packages. Such general expenditures would be paid from a separate Millbrook bank account, not with Millbrook Fisheries funds.
- Neither the person previously responsible for providing accounting services to Millbrook Fisheries, nor the Administrative Assistant for Millbrook Fisheries, ever saw any goods or services purchased from the vendors that Ms. Elliott-Abbott purchased items from using the Fisheries Visa, except Kelsy's Plumbing, Harris Home Hardware, Air Canada and Maritime Travel.

[33] The evidence for the Plaintiffs also establishes the following:

- 233 cheques totalling $1,070, 860 from the Fisheries Account were issued to Ms. Ellis-Abbott. Cheques totalling $811, 807.72, ie. the only amount claimed in this motion, were traced as having been deposited into the Ellis Account or the DME Account.
- She used cheques drawn on Millbrook Fisheries' RBC Account to pay a total of $24,334.50 on two Nova Scotia Power accounts held by her. One was at the residence of her parents. The other was at the business location of her hair salon, DME. She was not authorized to use that account for those purposes.

- She took a total of $1,268,343.10 in cash advances on the Fisheries Visa. She was not authorized to do so and there was no legitimate business reason for her to do so. She did not repay any of the Visa cash advances. They were all repaid using Millbrook Fisheries funds.
- She charged at least $1,763, 647 in purchases from various vendors to the Fisheries Visa. The vendors who provided records of such transactions, in response to requests and production orders, included Air Canada, Amazon, Apple, Charlottetown Vet Clinic, Charm Diamond Centre, Costco, Fundy Vet, Harris Home Hardware, Nova Animal Hospital, Kelsy's Plumbing, Maritime Beauty, Maritime Travel, PayPal, Rogers, Standardbred Canada, Truro Raceway, Walmart, Wayfair, Westjet and Zack's Auto Sales. In these vendor records, a total of $1,105,423.95 has been matched to personal purchases (unconnected with legitimate Millbrook purchases and not authorized by Millbrook) made using the Fisheries Visa, as being purchases made by Ms. Ellis-Abott.
- That is largely evidenced by her name on the account as the purchaser, or the shipping/delivery location, or both. In relation to travel-related purchases, the travellers are herself and her friends or family. Such travel was not for Millbrook business purposes and not authorized by it.
- Examples of how clearly personal many of the purchases were include those which follow. There were purchases of beauty products, jewelry and entertainment materials such as shows, movies and music. The veterinarian service and product purchases were for animals, including horses, which Millbrook does not have, but Ms. Ellis-Abbott does. The Standardbred Canada and Truro Raceway purchases were for standardbred horses belonging or having belonged to her. Millbrook does not have any.

[34] The circumstances revealed in the facts presented can be summarized as being that Ms. Ellis-Abbott, while employed by Millbrook as a Senior Finance Clerk, wrote herself cheques and paid power bills using Fisheries Account cheques, and took cash advances and made purchases with the Fisheries Visa, for personal purposes, which were not authorized by Millbrook, nor for any legitimate Millbrook purpose.

[35] These circumstances address the elements of the causes of action advanced as follows.

[36] In relation to the tort of conversion, they show her handling and use of Millbrook Fisheries funds and credit were wrongful acts which interfered and were inconsistent with Millbrook's right to, or ownership of, the credit and funds.

[37] In relation to the unjust enrichment claim, they show that, as a result of those same unlawful and unauthorized acts, Ms. Ellis-Abbott was enriched, Millbrook suffered a deprivation, and there was no juristic reason for the deprivation.

[38] In relation to the breach of fiduciary duty claim, there is no dispute regarding the facts that are material to a determination as to whether Ms. Ellis-Abbott was in a fiduciary relationship with, and owed a fiduciary duty to, Millbrook. I will return to those questions later. However, if she did owe Millbrook a fiduciary duty, the unlawful and unauthorized acts she committed breached that duty.

Conclusion on First Question

[39] For these reasons, I conclude that a trial is not required to determine any of these material facts.

[40] Consequently, there is no genuine issue of material fact and the answer to the first question is "no". That brings us to the second question.

SECOND QUESTION: DOES THE CHALLENGED PLEADING REQUIRE THE DETERMINATION OF A QUESTION OF LAW, EITHER PURE, OR MIXED WITH A QUESTION OF FACT?

[41] The Statement of Defence "arguably" calls for determination of one question of law. That question is whether Ms. Ellis-Abbott acted in a fiduciary capacity in her role with Millbrook.

[42] I say "arguably" because it is not necessary for Millbrook to establish breach of fiduciary duty to justify the relief requested on this motion. The same relief emanates from conversion and unjust enrichment.

[43] Breach of fiduciary duty is, however, relevant to aggravated and punitive damages which Millbrook reserves the right to pursue.

[44] So, the answer to the second question is “yes”, the challenged pleading does require the determination of a question of law.

[45] So, in relation to the unjust enrichment claim, I can go on to the third question.

[46] The remaining points raised in the Statement of Defence relate to questions of fact and, for reasons already outlined, there is no genuine issue of material fact.

[47] Therefore, in relation to the remaining claims, the answer to the second question is also “no” and summary judgment must issue.

THIRD QUESTION: “DOES THE CHALLENGED PLEADING HAVE A REAL CHANCE OF SUCCESS?”

[48] On the evidence before me, Ms. Elliott-Abbott’s defence that she was not acting in a fiduciary capacity in her role with Millbrook does not have a real chance of success. I come to this conclusion for the reasons which follow.

[49] Like the employee in ***581257 Alberta Ltd. v. Aujla***, *supra*, she handled Millbrook’s funds, mostly unsupervised.

[50] Like the employee in ***West Bros. Frame & Chair Ltd. v. Yazbek***, *supra*, her duties included, among other things, handling payroll and accounts (payable and receivable). The employee in ***West Bros.*** had to have another signature on the cheques she signed. Ms. Elliott did not. Plus, Ms. Elliott-Abbott also handled electronic fund transfers, had a Millbrook Fisheries credit card in her name, and prepared records for audits . Consequently, Millbrook was even more vulnerable to misappropriation of funds by Ms. Ellis-Abbott than the employer in ***West Bros.*** was to misappropriation of funds by the bookkeeper in that case.

[51] The employees in both those cases were found to be in fiduciary relationships vis-à-vis their employer and to owe a corresponding duty to handle its funds for its benefit, not theirs.

[52] ***Perez v. Galambos***, *supra*, at paragraph 66, stated that, for an “*ad hoc*” fiduciary duty to arise, the fiduciary must at least impliedly undertake that they “will act in the best interests of the other party”. In describing the alleged fiduciary duty in question as “*ad hoc*” the Court meant “that apart from the categories of relationships to which fiduciary obligations are innate, such obligations may arise as a matter of fact out of the specific circumstances of a particular relationship”.

[53] An employee tasked with handling their employer's funds, particularly when they can do so without a co-signature or supervision, as in the case at hand, at least impliedly undertakes to do so in the employer's best interests.

[54] ***Perez v. Galambos***, at paragraphs 83 and 84, also stated:

> It is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests. …
>
> The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. …

[55] In the case at hand, Millbrook relinquished, to Ms. Ellis-Abbott, the power to unilaterally control and direct its funds through cheques, electronic transfers and use of the credit card in her name. That gave her a discretionary power to affect Millbrook's practical interests relating to its funds, making it vulnerable to her misappropriating those funds.

[56] Thus, the circumstances of the case at hand satisfy the requirements of an *ad hoc* fiduciary duty set out in ***Perez v. Galambos***.

[57] Ms. Ellis-Abbott taking and using Millbrook's funds for her personal interests was clearly a breach of her fiduciary duty to handle those funds in the best interests of Millbrook only.

[58] For these reasons, the answer to the third question, regarding whether the challenged pleading has a real chance of success, is "no".

CONCLUSION ON SUMMARY JUDGMENT MOTION

[59] Given the answers to the first three questions, I must, and do, dismiss the Statement of Defence and grant partial summary judgment to the Plaintiff in the amount of $3,209,909.27.

PREJUDGMENT INTEREST

[60] I also received post-motion written submissions on prejudgment interest and will include my decision on that issue and the reasons for it.

[61] CPR 70.07 provides a presumptive prejudgment interest rate for a "liquidated claim" of "five percent a year calculated simply".

[62] The amounts claimed in this summary judgment motion could readily be determined with exactness using simple arithmetic. Therefore, they fit within the definition of "liquidated claim" for the purposes of CPR 70.07: ***Awan v. Cumberland Health Authority***, 2009 NSSC 295, para 15.

[63] No party has submitted, nor satisfied me, that the rate or calculation should be other than five percent per annum calculated simply.

[64] Therefore, it is fit and proper to use that prejudgment interest rate and calculation method.

[65] That rate and calculation method were applied to each individual wrongful transaction, using the number of days between the date of the transaction and March 1, 2023. The result is that, in total, the prejudgment interest accrued on the transactions in relation to which summary judgment was granted is $849,584.13.

CONCLUSION

[66] Based on the foregoing, I grant partial summary judgment to Millbrook against Ms. Ellis-Abbott and DME in the amount of $3,209,909.27, plus prejudgment interest of $849,584.13.

[67] After March 1, 2023, the judgment amount will attract interest at the rate of 5% per annum provided for in s. 5 of the Nova Scotia *Interest on Judgments Act*.

[68] Millbrook reserves the right to seek other damages and relief against Ms. Ellis-Abbott and DME referred to in the Statement of Claim, in particular aggravated and punitive damages.

COSTS

[69] My reasons for awarding $5,000 in costs are as follows.

[70] The motion took more than one hour but less than one-half day. Therefore, the basic range of costs under Tariff C is $750 to $1,000.

[71] However, the motion was determinative of a large portion of the Plaintiff's claim against Ms. Ellis-Abott, including in her capacity operating DME. That would make it possible to apply a multiplier of up to four times the basic Tariff costs, bringing the maximum Tariff C costs to $4,000.

[72] However, that maximum amount would not be sufficient to do justice between the parties for the reasons which follow.

[73] The motion was initially scheduled to take two days, likely because there are almost two banker's boxes of affidavit evidence and it would have been tedious and time-consuming to examine witnesses on the plethora of transactions evidenced in the voluminous documentation.

[74] The Plaintiff clearly invested a lot of time and effort in preparing for the hearing, including the preparation and filing of pre-motion materials, as if it was going to be contested.

[75] It is possible that the thoroughness of the preparation resulted in the motion not being contested. However, that was only communicated to the Plaintiff late in the day preceding the hearing. By then, it had already expended obviously extensive legal resources.

[76] If Ms. Ellis-Abbott had not filed a Statement of Defence, and the Plaintiff had obtained default judgment, under Tariff D, it would have been entitled to about $3,700 in costs with only a small fraction of the work that it had to perform in this motion.

[77] Clearly, Ms. Ellis-Abbott failed to admit a lot that should, in the context of this action, have been admitted. Pursuant to CPR 77.07, it can be appropriate to add an amount to Tariff C costs for that reason. However, I recognize that the existence of a collateral criminal proceeding may have impeded making such admissions.

[78] Pursuant to CPR 77.08, I may award lump sum costs instead of Tariff Costs.

[79] Ultimately, CPR 77.02 gives me discretion to make the costs order that I am "satisfied will do justice between the parties".

[80] For the reasons noted, the Tariff Costs will not do justice between the parties.

[81] The $5,000 requested is a fair and reasonable amount which will do justice between the parties in the circumstances.

[82] Therefore, I order Ms. Ellis-Abott to pay lump sum costs of $5,000.

ORDER

[83] I have already initialed an order for the judgment amount, prejudgment interest and costs, and it has been issued.

Muise, J.