KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 40**

Date: **2025 03 13**
Docket: QBG-RG-00789-2020
Judicial Centre: Regina

BETWEEN:

JACOB WASSERMANN, CAROL BRONS, and LYLE BRONS; THE GOVERNMENT OF SASKATCHEWAN AS REPRESENTED BY THE MINISTER OF HIGHWAYS AND INFRASTRUCTURE; AND HIS MAJESTY THE KING, AS REPRESENTED BY THE ATTORNEY GENERAL FOR SASKATCHEWAN; THE GOVERNMENT OF ALBERTA, AS REPRESENTED BY THE MINISTRY OF TRANSPORT; HIS MAJESTY THE KING, AS REPRESENTED BY THE ATTORNEY GENERAL FOR ALBERTA; HIS MAJESTY THE KING OF CANADA, AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA; JASKIRAT SINGH SIDHU; ADESH DEOL TRUCKING LTD.; SUKHMANDER SINGH; ANSWER TRAILER RENTALS & LEASING LTD.; CHARLIE'S CHARTERS LTD.; NFI GROUP INC. OPERATING AS MOTOR COACH INDUSTRIES; PREMIER HORTICULTURE LTEE./PREMIER HORTICULTURE LTD.; AND SASKATCHEWAN GOVERNMENT INSURANCE

RESPONDENTS/APPLICANTS

-and-

ADAM HEROLD BY HIS ADMINISTRATOR *AD LITEM* RUSSELL HEROLD, RUSSELL HEROLD, RAELENE HEROLD, JAXON JOSEPH BY HIS ADMINISTRATOR *AD LITEM* CHRIS JOSEPH, CHRIS JOSEPH, ANDREA JOSEPH, LOGAN HUNTER BY HIS ADMINISTRATOR *AD LITEM* SHAUNA NORDSTROM, SHAUNA NORDSTROM, PETER SNATERSE, JACOB LEICHT BY HIS ADMINISTRATOR *AD LITEM* KURT LEICHT, CELESTE LEICHT, MARK CROSS BY HIS ADMINISTRATOR *AD LITEM* BRAD CROSS, BRAD CROSS AND MARILYN CROSS

APPLICANTS/RESPONDENTS

Counsel:

Kevin Mellor and Sharon Fox	for the applicants/respondents
Sean Watson	for the respondents/applicants

FIAT MITCHELL J.
March 13, 2025

I. OVERVIEW

[1] This is an application brought by the applicant/respondent, Adam Herold by his Administrator *ad litem* Russell Herold, on behalf of the named applicants/respondents [Herold Estate Applicants], to recover legal costs following a successful appeal of my decision temporarily staying their lawsuit pending a decision whether to certify a related putative class action. The Herold Estate Applicants seek solicitor and client costs for that stay application.

[2] The related proposed class action has been commenced by Jacob Wassermann, and Carol and Lyle Brons, as the proposed representative plaintiffs. They seek certification of the class action against numerous defendants, most notably the Government of Saskatchewan among others arising out of the catastrophic Humboldt Broncos bus crash which occurred on April 6, 2018. For purposes of this application, I refer to all parties to that litigation as the "Wassermann Action Respondents".

[3] The Wassermann Action Respondents submit that an order for solicitor and client costs is not warranted in these circumstances. They accept that the Herold Estate Applicants are entitled to some form of costs award; however, they assert that the usual costs award should be made.

[4] This application raises four general issues:

1) Are solicitor and client costs warranted in these circumstances?

2) If not, what costs should the Herold Estate Applicants be awarded?

3) Should these costs be awarded against counsel for the Wassermann Action Respondents, personally?

4) Should the Wassermann Action Respondents be awarded costs for applications they successfully defended against in the stay application?

[5] This fiat explains why I have come to the following conclusions:

1) Solicitor and client costs are not warranted in these circumstances.

2) The Herold Estate Applicants are entitled to costs which I set at $7,500.

3) Counsel for the Wassermann Action Respondents is not personally liable for paying such costs.

4) The Wassermann Action Respondents are not awarded costs for applications successfully defended by them.

II. BACKGROUND

[6] To better understand the context for this application, it is necessary to identify and distinguish the two legal actions involved. Each action flows from the catastrophic motor vehicle accident which took place on April 6, 2018, involving a chartered bus carrying players, members of the coaching staff and supporters of the Humboldt Broncos junior hockey team. Of the 29 people on that bus, 16 individuals were killed, and 13 were left with debilitating and, for some, permanent injuries.

[7] The first lawsuit chronologically was commenced by the Herold Estate Applicants in 2018. They are parents of four deceased players – Adam Herold, Jaxon

Joseph, Logan Hunter, and Jacob Leicht – and the assistant coach of the team, Mark Cross. These plaintiffs wish to pursue this litigation on their own.

[8] The second lawsuit was commenced in 2020. It is a very broadly based proposed class action commenced by the putative representative plaintiffs – Jacob Wassermann, Ms. Carol, and Mr. Lyle Brons. This putative class action is brought on behalf of a widely defined proposed class, and against many of the parties and individuals who are named respondents to this application. Currently, the Herold Estate Applicants are also putative class members in any future class action unless and until they opt out of it pursuant to s. 18 of *The Class Actions Act*, SS 2001, c C-12.01.

[9] On April 22, 2020, the Government of Saskatchewan [Saskatchewan], a defendant in both legal actions, applied to strike the Herold Estate Applicants' statement of claim. A hearing of this application was scheduled to proceed on November 4, 2020, before Layh J.

[10] On that date, Mr. John K. Rice K.C., lead counsel for the plaintiffs in the putative class action, appeared remotely before Layh J. He requested that he be permitted to participate in the hearing of Saskatchewan's strike application in the Herald Estate lawsuit. Counsel for both those plaintiffs and Saskatchewan strenuously objected to Mr. Rice's participation because his clients lacked standing in this lawsuit. Faced with their opposition, Layh J. adjourned the hearing of Saskatchewan's application until January 7, 2021, to permit counsel an opportunity to arrive at a mutually agreeable resolution of this dilemma.

[11] On January 7, 2021, counsel including Mr. Rice, advised Layh J. they were unable to resolve this dispute. Consequently, Layh J. advised Mr. Rice that he should commence an application to stay the Herold Estate action. He adjourned Saskatchewan's application a second time.

[12] On January 29, 2021, following Layh J.'s direction, Mr. Rice on behalf of the putative representative plaintiffs initiated an application for a temporary stay of the Herold Estate lawsuit until a certification decision is made in their companion class action. As the judge designated to adjudicate the certification application, this application came before me.

[13] In a fiat indexed as *Wassermann v Saskatchewan (Highways and Infrastructure)*, 2021 SKQB 204, 16 CCLI (6th) 63 [*Wassermann*], I stayed prosecution of the Herold Estate lawsuit temporarily pending the determination of the Wassermann's certification application.

[14] Subsequently, the Herold Estate plaintiffs appealed to the Saskatchewan Court of Appeal. As can happen in the litigation process, the Court of Appeal disagreed with my decision, and set it aside: *Herold v Wassermann*, 2022 SKCA 103, 473 DLR (4th) 281[*Herold*].

[15] In *Herold*, the Court speaking through Leurer J.A. (as he then was) allowed the appeal and lifted the temporary stay. The Court ruled that in *Wassermann*, I committed two errors of principle. The first error was a failure to account for the "Herold Plaintiffs presumptive extant right to prosecute their action": *Herold* at para 57. The second error was a failure "to identify what prejudice the [Wassermann] Plaintiffs would suffer if the Herold Action was allowed to proceed" and to "weigh that prejudice against the consequences to the Herold Plaintiffs if their action was stayed": *Herold* at para 57. I note, parenthetically, that this last issue was discussed at length by counsel for the Herold Estate Applicants at the costs hearing.

[16] The Court went on to consider whether, if the proper criteria are applied, the Herold Estate legal action should be stayed, even temporarily. It determined it should not. See: *Herold* at paras 89-90, 99.

[17] In the final paragraph of *Herold* – paragraph 101 – the Court made a costs award. As this paragraph is relevant to the issue of costs, I reproduce it in full below:

> [101] **The Herold Plaintiffs are entitled to their costs against the Brons [Wassermann] Plaintiffs in the Court of King's Bench and in this Court, including those costs associated with their application for leave to appeal, to be taxed in the usual way.** I would order no costs in relation to the Brons Plaintiffs' application to adduce fresh evidence, as it was primarily directed towards informing this Court as to developments in the Court of King's Bench after the rendering of the *Chambers Decision* [*Wassermann v Saskatchewan (Highways and Infrastructure)*, 2021 SKQB 204, 16 CCLI (6th) 63]. To be clear, since there is no ongoing *lis* between the Herold Plaintiffs and the Brons [Wassermann] Plaintiffs, the costs I have ordered are payable forthwith.
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> [Emphasis added]

[18] The Herold Estate Applicants have now brought an application for their costs in this Court.

III. ANALYSIS

A. Relevant Materials

[19] The Herold Estate Applicants filed the following materials on this application:

(a) Brief of Law on Behalf of the Herold Plaintiffs;

(b) Affidavit of Russell Herold sworn March 6, 2023 [Herold Affidavit];

(c) Affidavit of Shauna Nordstrom sworn March 6, 2023;

(d) Affidavit of Celeste Leray-Leicht sworn March 6, 2013 (*sic*); and

(e) Affidavit of Peter Snaterse sworn March 7, 2023.

[20] I do not intend in this fiat to rehearse the information averred to in these affidavits. I will, however, refer to some of it when relevant to the analysis which follows.

[21] Wassermann Action Respondents filed the follow material:

(a) Brief of Law on Behalf of the Plaintiffs, Jacob Wassermann, Carol Brons and Lyle Brons.

B. Are Solicitor and Client Costs Warranted?

[22] The Herold Estate Applicants assert they should be awarded solicitor and client costs on the stay application brought by the Wassermann Action Respondents which succeeded at first instance but was over-turned on appeal. They seek costs on this scale in the amount of $44,236.75. This amount is comprised of $27,257.50 solicitor and client costs for the stay application, itself. The amount of $16,979.25 solicitor and client costs is for preparation for the larger application to strike the Herold Estate Applicants' Statement of Claim. At the hearing itself, counsel advised that they had discounted their costs request by approximately 50%.

1. Law

[23] In Saskatchewan, solicitor and client costs are exclusively reserved for exceptional circumstances and are rarely awarded. See, especially: *Siemens v Bawolin*, 2002 SKCA 84 at para 118, [2002] 11 WWR 246 [*Siemens*]; *Lynch v Hashemian*, 2006 SKCA 126 at paras 31-32, [2007] 2 WWR 52; *Strand v Gilewich*, 2007 SKCA 34 at para 14, 293 Sask R 48; *Phillips Legal Professional Corporation v Vo*, 2017 SKCA 58 at para 150, [2017] 12 WWR 779, and *6517633 Canada Ltd. v Gibson Creek Farms Ltd.*, 2023 SKCA 19 at para 46 [*Gibson Creek Farms*].

[24] Solicitor and client costs are designed to chastise the offending party for reprehensible, scandalous, outrageous or otherwise egregious conduct in the litigation process. See, especially: *Young v Young*, [1993] 4 SCR 3 at 134 [*Young*]; *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9 at para 26, [2004] 1 SCR 303; and *Eckdhal v Long*, 2012 SKQB 89 at para 64, 347 DLR (4th) 556 per Ryan-Froslie J. (as she then was).

[25] *Siemens* is the touchstone authority in Saskatchewan on the question of when it may be appropriate for a court to depart from the general rule of party and party costs and award costs on a solicitor and client basis. After reviewing leading cases on costs, Jackson J.A. for the Court at para. 118 distilled the following principles from those authorities:

> [118] …
>
> 1. solicitor and client costs are awarded in rare and exceptional cases only;
>
> 2. solicitor and client costs are awarded in cases where the conduct of the party against whom they are sought is described variously as scandalous, outrageous or reprehensible;
>
> 3. solicitor and client costs are not generally awarded as a reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone;
>
> 4. notwithstanding point 3, solicitor and client costs may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred.

See also: *Gibson Creek Farms* at para 46.

[26] An order of solicitor and client costs is exceptional, and "must not be awarded casually". Consequently, a judge must provide adequate "reasons as to why they are being awarded and an identification of the conduct which is said to warrant

them". See: *Hope v Pylypow*, 2015 SKCA 26 at para 48, [2015] 6 WWR 551; and *Gibson Creek Farms*, at para 44.

[27] The law is similar in other provinces, see, for example: *Pillar Resource Services Inc. v PrimeWest Energy Inc.*, 2017 ABCA 19 at para 8, 96 CPC (7th) 1, per Beilby J.A., and at paras 60-73 per Wakeling J.A.; *Sidorsky v CFCN Communications Limited*, 1997 ABCA 280 at para 28, [1998] 2 WWR 89 [*Sidorsky*]; *West Van Holdings Ltd. v Economical Mutual Insurance Company*, 2019 BCCA 110 at paras 68-73, [2019] 10 WWR 53 [*West Van Holdings*]; *Hunt v TD Securities Inc.* (2003), 229 DLR (4th) 609 at paras 123-133 (Ont CA); and *Liu v Atlantic Composites Ltd.*, 2014 NSCA 58 at paras 75-76, 345 NSR (2d) 235.

[28] As well, Rule 11-20 of *The King's Bench Rules* contemplates a court ordering solicitor and client costs; however, it provides that if such an order is made "the judge awarding those costs shall assess them". As explained in the commentary to this Rule, it seeks to avoid difficulties for assessment officers by requiring the judge to fix solicitor and client costs.

2. Discussion

[29] Counsel for the Herold Estate Applicants argue that solicitor and client costs are warranted because the actions of counsel for the Wassermann Action Respondents culminating in this application qualify as reprehensible, scandalous, and outrageous, as identified in the jurisprudence.

[30] In their Brief of Law at pages 15 and 16, counsel itemizes (11) factors they claim demonstrate this alleged misconduct. I will not reproduce those factors here. Suffice it to say, they can be grouped into four general areas. These areas are:

i. Withholding evidence to show what prejudice would accrue to the proposed class action plaintiffs if the Herold Estate action was permitted to proceeded contemporaneously with it;

ii. Interjecting themselves into pre-trial proceedings in the Herold Estate action;

iii. Causing unnecessary delay in the prosecution of the Herold Estate action by commencing the ultimately unsuccessful stay application; and

iv. Knowingly disregarding the harm which would be visited upon the plaintiffs in the Herold Estate action, if it was temporarily stayed.

[31] The request for an order of solicitor and client costs is unusual in the circumstances of this matter. The Wassermann Action Respondents succeeded at first instance in having the Herold Estate action stayed temporarily, only to have it set aside by the Court of Appeal. See: *Herold*. On its face, these circumstances would not appear to attract an award of solicitor and client costs.

[32] As noted, counsel for the Herold Estate Applicants contend these circumstances are exceptional and warrant such a heightened award of costs. Principally, they assert that counsel for the Wassermann Action Respondents "misled" this Court by failing to point to any prejudice which might accrue to their clients if the Herold Estate action was permitted to continue parallel to it. The failure to show such prejudice, the Court of Appeal determined, resulted in this Court "failing to identify that the Herold Plaintiffs have an extant right to prosecute their action": *Herold* at para 41.

[33] Parenthetically, while I accept this direction of the Court of Appeal, I note that prejudice suffered by all parties was acknowledged and addressed at length in *Wassermann* at paras 89-93. There, particularly at paras. 90-92, this Court stated:

> [90] In the Second Russell Herold Affidavit, for example, Mr. Herold poignantly describes at length the devastating impact the loss of his son, Adam, has had on him and other members of the Herold Family: Second Russell Herold Affidavit at paras. 2-13. At para. 7, Mr. Herold avers that he suffers from "severe depression, loneliness, worry, anxiety and from anger resulting from the death of my son". The intensity of these feelings will only be exacerbated, he avers, if "my lawsuit is delayed": Second Russell Herold Affidavit at para. 14.
>
> [91] Counsel for the Respondents submitted that this affidavit evidence is uncontroverted, and, in addition, no evidence has been presented by any of the Applicants that they, too, are subject to such deep-seated emotions and feelings.
>
> [92] **Far be it for me to gainsay these statements of the Respondents. However, with all due respect to counsel, I cannot accept that the Applicants and other putative class members do not also experience emotions of this kind. The fact that none of the named Applicants or other putative class members filed affidavits attesting to the impact of this catastrophic event on their lives and those of their families is of little moment. I believe I can take judicial notice of the fact that there is more than enough grief, anguish, heartache, and devastation to go around.**
>
> [Emphasis added]

[34] That said, I do not accept that counsel led this Court into error by not specifically addressing the issue of prejudice to the Herold Estate Applicants for which their clients should now be penalized by an order of solicitor and client costs.

[35] I acknowledge that the granting of the temporary stay and its subsequent quashing on appeal delayed the plaintiffs in the Herold Estate action in prosecuting it; however, this delay was a function of the litigation process itself and not manufactured by counsel for the Wassermann Action Respondents. In no way can this case be

characterized as circumstances where counsel "did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings", to quote *Sidorsky* at para 28(3).

[36] Rather, I accept that counsel for the Wassermann Action Respondents acted throughout in the best interests of their clients. Their zealous advocacy was assuredly not appreciated by counsel for the Herold Estate Applicants or their clients. Yet, I cannot conclude counsel for the Wassermann Action Respondents' conduct was unprofessional or obstructionist of the kind which the jurisprudence identifies as necessary to warrant an enhanced costs sanction.

[37] Accordingly, for these reasons, I reject the Herold Estate Applicants request for solicitor and client costs.

C. What Costs Should Be Awarded to the Herold Estate Applicants?

[38] The Wassermann Action Respondents acknowledge that the Herold Estate Applicants are entitled to an award of costs but dispute what the amount of this award should be.

1. Law

[39] Costs fulfill an important function in civil litigation. Cost rules have a purpose beyond simply indemnifying the successful party in the litigation. They should enable parties when calculating the risks of proceeding with a particular action or defence to forecast with some degree of precision what penalty they may incur if unsuccessful. See, for example: *Catalyst Paper Corporation v Companhia de Navegação Norsul*, 2009 BCCA 16 at para 13, 307 DLR (4th) 285. It is for this reason that costs should be predictable and consistent across similar cases. See: *West Van Holdings* at para 64.

[40] As explained by LeBel J. in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 21, [2003] 3 SCR 371:

> 21 … the traditional purpose of an award of costs [is] to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). …

[41] This purpose animates Rule 11-1 of *The King's Bench Rules*.

[42] Generally, a successful litigant is entitled to their costs. Party and party costs are the default in most cases. Awards of this kind provide only partial indemnity to that party and are to be assessed in accordance with Rule 11-1 and the Tariff.

[43] Rule 11-1(4) specifically identifies various factors to be considered when a court exercises its discretion to award costs in a particular matter.

[44] In *1348623 Alberta Ltd. v Choubal*, 2016 SKQB 200, 94 CPC (7th) 210 [*Choubal*], Danyliuk J. considered Rule 11-4 as well as complementary jurisprudence from other provinces, and at para. 31, distilled principles relevant to the exercise of judicial discretion when awarding costs as follows:

1) Complexity of the case;
2) Importance of the case;
3) The duration and conduct of the proceedings;
4) The urgency of the matter;
5) The amount at issue;
6) Whether experts were involved;
7) Party and expectations;
8) Access to justice;

9) Discretion and reasonableness; and

10) Any other relevant matter.

[45] It is not necessary for an applicant to demonstrate the applicability of each factor to his or her case. The over-whelming relevance of certain factors may be enough to displace, if not obviate, the applicability of other factors. Rather, it is the facts and circumstances of the case being assessed which will determine if a higher column in the Tariff or an enhanced costs order is appropriate. See: *Northland Material Handling Inc. v Parkland (County)*, 2012 ABQB 586 at para 26, 77 Alta LR (5th) 150, quoted in *Chaboul* at para 28.

2. Discussion

[46] The Wassermann Action Respondents submit because the Court of Appeal directed in *Herold* at para 101 that the Herold Estate Applicants are entitled to their "costs to be taxed in the ordinary way", this means party and party costs assessed in accordance with Column 1 of the Tariff.

[47] Alternatively, the Wassermann Action Respondents submit that when the factors set out in sub-Rule 11-1(4), as well as those identified in *Choubal*, are used to determine the appropriate amount of costs in this matter, the result is the same. Costs are to be based on Column 1 of the Tariff.

[48] It was not clear from the Herold Estate Applicants' submissions what would be an appropriate award of costs in the event their request for costs on a solicitor and client basis is rejected. My review of the materials leads me to conclude that their counsel is seeking an enhanced costs order in the amount of $10,000. They further ask that this award be borne by Mr. Rice, the lead counsel of the Wassermann Action Respondents.

[49] I have considered the submissions of counsel – both oral and written – and do not agree with either position advanced by them. Rather, for the following reasons, I award enhanced costs in the amount of $7,500.

[50] I am persuaded that considering all the aspects of this matter, its tragic genesis, and the heightened significance it holds for all parties, the Herold Estate Applicants have met their burden to demonstrate that a costs award higher than Column 1 is appropriate. See: *Choubal* at para 24.

[51] First, this was an application seeking to stay temporarily the Herold Estate Applicants' lawsuit while a complementary and contemporaneous putative class action moved towards certification. This is an uncommon situation as evidenced by the limited jurisprudence pertaining to this type of case. See, especially: *Wassermann* at paras 50-54.

[52] Second, as noted this was an unusual application and important not only to the participating parties but also, more generally, to the evolution of the jurisprudence in this area of the law.

[53] Third, while this case might not be described as overly complicated, it did engage counsel and the court in uncommon legal issues in the context of a unique and shockingly tragic factual matrix. It challenged counsel to address difficult legal issues, and the court to adjudicate those issues mindful of the effect of its decision on all parties, despite the contrary view of the Court of Appeal.

[54] Fourth, I acknowledge that considerable effort was put into preparation for the stay application by all counsel. Voluminous materials were filed as well as extensive written briefs prepared. I accept that in view of these circumstances, it is appropriate to account for more than one counsel when assessing costs payable to the Herold Estate Applicants.

[55] Fifth, and finally, I choose to exercise my discretion under Rule 11-1(3)(b) of *The King's Bench Rules*, and "award a lump sum" of costs in these circumstances. After careful consideration and weighing all relevant factors identified in Rule 11-1 and the appropriate case law, I conclude a costs award fixed at $7,500 is appropriate in these circumstances.

D. Should These Costs Be Awarded Against Counsel Personally?

[56] The Herold Estate Applicants assert categorically that Mr. Rice as lead counsel for the Wassermann Action Respondents, should be ordered to pay any costs awarded to them personally. They contend that personal liability is warranted by virtue of what they allege was Mr. Rice's "serious dereliction of duty to the court and the Herold Plaintiffs".

[57] The Wassermann Action Respondents demur. They respond that what transpired was not improper because it was in keeping with the litigation process. The Herold Estate Applicants disagreed with, and disputed, the approach taken by opposing counsel. Ultimately, they were successful in having the temporary stay lifted by the Court of Appeal. Yet, this reality does not mean the stay application proceedings can be characterized as scandalous, reprehensible or outrageous, in any way.

1. Law

[58] Rule 11-24 of *The King's Bench Rules* governs costs against a lawyer which is described as a sanction by the heading given to Division 3 of Part 11. Rule 11-24(1)(b) authorizes a court to order a lawyer personally liable to pay costs "that his or her client has been ordered to pay to another party". Orders of this kind are warranted only if a court is satisfied that "a lawyer for a party has caused costs to be incurred improperly or without reasonable cause or has caused costs to be wasted through delay, neglect or some other fault": Rule 11-24(1).

[59] Like solicitor and client costs, situations where a lawyer is found personally liable to pay a costs award ordered against his or her client should be exceptional and rare.

[60] The leading authority on when such an order is appropriate appears to be *Young*. Justice McLachlin (as she then was) wrote for the majority on the costs issues raised on appeal. Respecting orders of costs against a lawyer personally, she opined at page 135-136:

> … The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court … Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.
>
> [Emphasis in original]

[61] The Court of Appeal recently endorsed this analysis in *Patel v Saskatchewan Health Authority*, 2021 SKCA 115 at para 166 [*Patel*].

[62] Thus, before a judge should order a lawyer personally responsible for legal costs incurred by the opposing party, there must be evidence that their conduct amounted to a "serious dereliction of duty or behaviour". See: *Stephens v Canadian Imperial Bank of Commerce*, 2021 SKCA 155 at para 50 [*Stephens*], quoting *Waters v DaimlerChrysler Services Canada Inc.*, 2011 SKCA 53 at para 10, [2011] 8 WWR 241.

See also: *Patel* at para 167. This evidence must be clear and permit a judge to find "as a fact, that there had been highly improper conduct" on the part of the lawyer against whom such a costs order is sought. See: *Stephens* at para 51. Discourteous and disrespectful behaviour to opposing counsel is not sufficient. See: *Patel* at para 167; and *Sun Country Regional Health Authority v Mamchur*, 2023 SKKB 17 at para 178.

2. Discussion

[63] Counsel for the Herold Estate Applicants filed four affidavits in support of their application. Identified in paragraph 19 above, these affidavits are sworn by the parents of individual players who were killed in the accident.

[64] I do not intend to review the averments set out in these affidavits in detail. Suffice it to say the affiants expressed their personal anger towards Mr. Rice for choosing the litigation strategy he did on behalf of his clients. They allege he did so with no regard to their wishes or the emotional toll his clients' application to stay temporarily their separate action caused them. The tenor of these affidavits reveals that this generated considerable (and possibly undue) rancour amongst the Herold Estate Applicants. I leave it to others to determine for themselves if it is well-placed.

[65] I acknowledge that Mr. Rice prosecuted his clients' action zealously, and in what he believed – and still does – to be in the best interests of his clients. However, despite the Herold Estate Applicants obvious anger and frustration with how Mr. Rice and his litigation team conducted themselves in this litigation, I cannot find that it, in any way, came close to the level of "serious dereliction of duty or behaviour" – the standard demanded by the authorities to warrant an order directing a lawyer personally to pay a costs award imposed on his or her client.

[66] Accordingly, I dismiss this aspect of the application.

E. Should The Wassermann Action Respondents Be Awarded Costs?

[67] Finally, the Wassermann Action Respondents seek costs for successfully defending against two applications brought by the Herold Estate Applicants concurrently with the application they brought to stay temporarily the Herold Estate action.

[68] The first application sought to strike certain affidavits filed by the Wassermann Action Respondents on that application. Ultimately, this application was largely dismissed at first instance. See: *Wasserman v Saskatchewan (Highways and Infrastructure)* (31 March 2021) Regina, QBG-RG-00789-2020 (Sask QB), leave to appeal granted 2021 SKCA 142. The appeal from this ruling does not appear to have been addressed in *Herold* however.

[69] The second application sought to have Mr. Rice removed as counsel for the Wassermann Action Respondents for alleged violations of *The Code of Professional Conduct* because he had filed an affidavit sworn by a legal assistant. This application was abandoned at the hearing when counsel advised they wished an adjournment to respond to this application, as described in the Herold Affidavit at para. 41.

[70] Costs are discretionary. Exercising my discretion in accordance with the caselaw and Rule 11-1, I decline the Wassermann Action Respondents' request for the following reasons.

[71] First, while I acknowledge their arguments for an award of costs have merit, those applications on which they were successful were truly peripheral to the main application for a stay. Ultimately, the Herold Estate Applicants succeeded in having the temporary stay set aside. In view of the totality of the circumstances, I am persuaded that a small award of costs is not warranted.

[72] Second, as I have alluded to, there appears to exist considerable animus among the parties, not to mention their counsel, towards the others. I believe an order for costs against the Herold Estate Applicants – even a small one – would only exacerbate this unfortunate situation and be viewed as "tit for tat".

[73] Accordingly, I decline to award costs to the Wassermann Action Respondents.

F. Costs for this Application

[74] As success has been divided, I will not award costs for this application.

IV. ORDERS

[75] In conclusion, I make the following orders:

a) That the request for solicitor and client costs is denied;

b) That the Herold Estate Applicants are entitled to costs which I fix at $7,500;

c) That Mr. Rice is not liable to pay those costs personally;

d) That the Wassermann Action Respondents' request for costs is denied; and

e) That no costs are awarded for this application.

J.
G.G. MITCHELL