KING'S BENCH FOR SASKATCHEWAN

2024 SKKB 10

Date: **2024 01 25**
Docket: QBG-RG-00590-2016
Judicial Centre: Regina

BETWEEN:

LORNE PIETT

PLAINTIFF

- and -

CANADA REVENUE AGENCY

DEFENDANT

Counsel:

E.F. Anthony Merchant, K.C.	for the plaintiff
Brooke Sittler and Anne Jinnouchi	for the defendant, Canada Revenue Agency

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FIAT RE COSTS
JANUARY 25, 2024

McCREARY J.A.
ex officio

I. OVERVIEW

[1] On August 27, 2021, I denied the certification application in the class action [*Piett Action*] for which Lorne Piett was the proposed representative plaintiff: *Piett v Global Learning Group Inc.*, 2021 SKQB 232, 2021 DTC 5115 [*Certification Decision*]. In the *Certification Decision*, I directed the following: "The defendants shall have their costs. Quantum of costs may be spoken to, at the request of any party" (at para. 153). The corresponding order, issued November 10, 2021 [*Certification Order*], stated as follows:

> 4. The Defendants shall have their costs of the applications and action from the Plaintiff.
>
> 5. The quantum of costs may be spoken to at the request of any party.

[2] The application now before me is brought by Canada Revenue Agency [CRA], one of the defendants in the *Piett Action*, seeking costs against both Mr. Piett and his counsel [respondents].

[3] For the reasons that follow, I award costs against Mr. Piett alone, on Column III of the Tariff of Costs, Schedule 1 "B" – General [Tariff].

II. Position of the Parties

[4] CRA seeks costs calculated on a solicitor and client basis, or costs otherwise enhanced beyond the Tariff amount, payable jointly and severally by the plaintiff and his counsel. In CRA's view, the conduct surrounding this litigation warrants significant rebuke. Principally, CRA points to the facts that led to my finding in the *Certification Decision* – that the background conduct of the *Piett Action* constituted an abuse of process – to support its position respecting costs. CRA also argues that Mr. Piett's claim, as against CRA, was clearly meritless and contained unnecessary allegations of bad faith.

[5] In response, Mr. Piett and his counsel take the position that the language of the *Certification Decision* and *Certification Order* precludes any order for costs on a solicitor and client basis, or for costs against plaintiff's counsel. They argue that I am now powerless to alter this, owing to the doctrine of *functus officio*. In the alternative, they contest CRA's characterization of this case and say that the facts do not justify costs on a solicitor and client basis or otherwise enhanced beyond Column I of the Tariff, and do not justify an award for costs against plaintiff's counsel.

[6] If I decline to award costs on a solicitor and client basis, then the parties agree on which Tariff items must be taxed, but do not agree about which column of the Tariff should be applied. The respondents conceded in oral submissions that the doctrine of *functus officio* does not apply in relation to selecting the appropriate column, a conclusion at which I would have arrived in any event.

III. Analysis

A. Preliminary Considerations

1. The Court Has Not Relied on the Affidavit of Mr. Shoeman

[7] In oral submissions, I heard from the parties concerning the affidavit of Mr. Shoeman, which the respondents filed in support of their response to CRA's costs application. I make no ruling on the issues raised concerning that evidence because I have arrived at my conclusion in relation to costs without any reliance on Mr. Shoeman's affidavit.

2. This Court Has Jurisdiction to Consider CRA's Application

[8] I begin with the preliminary issue of jurisdiction and the doctrine of *functus officio*, which is a common law principle: *E.D.G. (Re)*, 2019 SKQB 265 at para 20. To the extent the doctrine of *functus officio* would apply in relation to an award for costs, in Saskatchewan it has been encoded, with some qualification, in delegated legislation. *The King's Bench Rules* provide as follows:

> **Further directions after judgment**
>
> **10-11**(1) Subject to subrule (2), the Court may make a further or other order and give further or other remedy that the Court considers may be required if in an action:
>
> > (a) a judgment has been pronounced or an order has been made and the judgment or order has been formally drawn up and entered; and
> >
> > (b) it subsequently appears that further directions are necessary in order to insure to the party entitled to the benefit of the judgment or order the remedy to which he or she is entitled, whether costs or otherwise.
>
> (2) The Court may give further or other remedy only if it does not necessitate any variation of the judgment or order as to any matter decided by the original judgment or order.
>
> …
>
> **Time for dealing with costs**
>
> **11-2**(1) The Court may make a direction or order as to costs at any stage of the proceedings.

> (2) Any direction or order as to costs may be made after entry of judgment unless it is inconsistent with the express provisions of the entered judgment.

[9] Rule 10-11 was first enacted as Rule 353 in 1942 (*Rules of Court*, 1942 Revision, promulgated 7 May 1942 and effective 1 September 1942), and it became Rule 344 in 1961 (*Rules of Court*, 1961 Consolidation, promulgated 7 April 1961 and effective 1 July 1961). In *MacCosham Storage & Distributing Co. (Saskatchewan) Ltd. v C.B.R.T. & G.W.* (1958), 26 WWR 427 at para 4 (WL) (CA), the Saskatchewan Court of Appeal determined that what was then Rule 353 (now Rule 10-11) governed in a case just like the instant one, where costs had been ordered only in general terms, with no direction concerning the scale of costs. More recently, the point has been made clearer by the introduction of Rule 11-2, initially as Rule 546, effective January 1, 2003 ((2002) S Gaz I, 1423).

[10] Despite the respondents' reliance on the common law doctrine of *functus officio*, I conclude that I am not precluded from deciding whether to grant solicitor and client costs. Although I made an order for costs, the *Certification Order* expressly left for another day the issue of quantum, in the event the parties should fail to reach agreement. Put differently, I have not decided the appropriate methodology for determining quantum, including whether that methodology should be a calculation on a solicitor and client basis. I continue to have jurisdiction to consider that question. Not only is this conclusion not "inconsistent with the express provisions" of the *Certification Order* within the meaning of Rule 11-2, it necessarily flows from those provisions.

[11] I turn now to the question of my jurisdiction to consider whether costs may be ordered against plaintiff's counsel. The respondents urge that the words "costs … from the Plaintiff" in the *Certification Order* must be read to exclude the possibility that costs be awarded against any party other than Mr. Piett. Although I agree that the *Certification Order* does not expressly leave open costs against counsel in the manner it leaves open the determination of quantum, I am unable to agree with the respondents' submission.

[12] Separately from the rules concerning costs discussed above, *The King's Bench Rules* contemplate that an order for costs against a lawyer may be made on the Court's own

initiative or on the application of a party. In its materials in the instant application, CRA invokes Rule 11-24:

> **Costs against a lawyer**
>
> **11-24**(1) If the Court considers 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, the Court may do any one or more of the following:
>
> (a) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
>
> (b) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
>
> (c) make any other order it considers appropriate.
>
> (2) An order pursuant to subrule (1) may be made by the Court on its own initiative or on the application of any party to the proceeding.
>
> (3) No order pursuant to subrule (1) is to be made against a lawyer unless the lawyer has been given an opportunity to be heard.

[13] No motion or application pursuant to Rule 11-24 or otherwise of a similar nature has been before me in the *Piett Action*, much less decided in the *Certification Decision* or *Certification Order*. The doctrine of *functus officio* is not engaged in relation to the plea now made by CRA for costs against Mr. Piett's counsel personally.

3. The Finding of Abuse of Process in the *Certification Decision* is Not Dispositive of CRA's Costs Application

[14] As a final preliminary point, none of CRA's arguments in relation to the present costs application may be disposed of based on my earlier finding that the *Piett Action* was an abuse of process (see *Certification Decision* at para 66).

[15] I made the determination of abuse of process in the *Certification Decision* for two reasons. First, within the meaning of abuse of process endorsed in *Boehringer Ingelheim (Canada) Ltd. v Englund*, 2007 SKCA 62 at para 41, 284 DLR (4th) 94, I found that the proposed representative plaintiffs and Mr. Mitchell, a third party, had pursued the class action for an ulterior or improper purpose (see *Certification Decision* at paras 50–63). That purpose was self-

enrichment, pursued through a fee arrangement not disclosed to class members and for which prior court approval was not sought (see *Certification Decision* at para 51).

[16] Second, I concluded that the activities of Mr. Mitchell were akin to maintenance of the action, within the meaning of *Young v Young*, [1993] 4 SCR 3 [*Young*], constituting an abuse of process at common law generally (see *Certification Decision* at para 64). This drew from the tort of maintenance, defined as a non-party's officious or improper intervention in litigation, also described as the wilful and improper stirring up of litigation and strife: *Young* at 136–37.

[17] Those legal standards are met by conduct of a different nature and, in general, of less gravity, than what is required to meet the legal standards for costs on a solicitor and client basis, against counsel personally, or otherwise enhanced relative to the Tariff. Under the headings below, I consider each of those legal standards.

B. No Costs Awarded on an Enhanced Basis

[18] CRA argues that the respondents engaged in conduct which justifies an award of enhanced costs by bringing "a claim they ought to have known did not exist in law, for the purpose of enriching themselves at the expense of other [Global Learning Group Inc.] participants". Taken at its highest, CRA's argument asks me to consider the lack of merit of the *Piett Action* in combination with the respondents' ulterior motive of self-enrichment. Even on that basis, for the reasons that follow, I do not agree that enhanced costs are warranted.

1. Solicitor and Client Costs Not Warranted

[19] Writing for the Saskatchewan Court of Appeal, Jackson J.A. discussed in detail the authorities according to which costs may be awarded on a solicitor and client basis, setting out the following principles in *Siemens v Bawolin*, 2002 SKCA 84 at para 118, [2002] 11 WWR 246 [*Siemens*]:

> 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.

These principles have been repeatedly affirmed by the Court of Appeal: see, for example, *Olson v Skarsgard Estate*, 2018 SKCA 64 at paras 39–40, 426 DLR (4th) 151.

[20] In considering whether solicitor and client costs are warranted, I have found it helpful to divide the question in the same manner as the *Siemens* principles, considering conduct in the litigation itself separately from conduct giving rise to the litigation.

a. Pre-Litigation Conduct

[21] Most of the impugned conduct upon which CRA grounds its argument did not arise in the litigation itself, but in pre-litigation conduct. Thus, CRA necessarily argues that this case warrants departing from the general rule articulated in the third principle of *Siemens*. I do not accept this submission.

[22] CRA cites several decisions relating to pre-litigation conduct. First, in *Red Pheasant First Nation v Whitford*, 2023 FCA 29 [*Red Pheasant First Nation*], the Federal Court had ordered enhanced costs, but had not gone so far as to award solicitor and client costs (see para. 56). The Federal Court of Appeal ruled that it was open to the trial court to consider pre-litigation conduct in determining the elevated lump sum award, on the basis that the first step of litigation would not have been necessary but for that conduct and on the basis that the conduct was of a sufficiently culpable nature (see paras. 48 and 54). The parties ordered to pay enhanced costs had engaged in electoral fraud through vote buying, conduct which the lower court described as “an insidious practice”, “particularly grave”, and “egregious” (at para. 55).

[23] Second, CRA relies on *Siemens* itself, which was aptly summarized by Wright J. in *Snider v Karpinski*, 2009 SKQB 394, 342 Sask R 235:

> [173] It is important to consider some of the facts in *Siemens*, *supra*. There it was found that the defendant deceived the plaintiffs and misappropriated property in breach of his fiduciary duty. The plaintiffs were put to enormous cost, both before and during the trial, due to the

> conduct of the defendant. Smith J. (as she then was) found that the plaintiffs should be fully indemnified for the costs incurred solely as the result of the defendant's dishonest and reprehensible behaviour in breach of his duty. These circumstances made it one of those exceptional cases where solicitor-client costs were warranted. …

[24] Third, CRA cites *Atchison v Manufacturers Life Insurance Company*, 2002 ABQB 1121, [2003] 4 WWR 123 [*Atchison*], where the insurer had withheld information from the claimant wife of the deceased about an application for excess insurance which had been made by the deceased, after the claimant sought that insurance policy information, and where that information was necessary for the claimant to ultimately have the excess insurance claim paid out (see paras. 61–65). Justice Bielby (as she then was) described this as "reprehensible" conduct (at para. 67) and determined that the litigation would have been unnecessary but for the insurer's conduct (see para. 98).

[25] Fourth, CRA cites *Hrycyna v Hood*, 2019 SKCA 30, [2019] 6 WWR 712 [*Hrycyna*], where the Saskatchewan Court of Appeal upheld an award of costs on a solicitor and client basis, having concluded that the impugned pre-litigation conduct was "egregious" (at para. 75). That conduct amounted to various attempts to exploit a vulnerable person in her twilight years, including by removing her from the home she had established with another family member in an apparent attempt to overtake an existing power of attorney executed by that vulnerable person (see paras. 73–75).

[26] These cases demonstrate two requirements that must be met before pre-litigation conduct may be considered in an inquiry concerning solicitor and client costs. The first is a causal connection between the conduct and the costs borne by the other party in litigation. The second is that the conduct must be reprehensible. This accords with what the Saskatchewan Court of Appeal explained in *Lynch v Hashemian*, 2006 SKCA 126 at para 32, [2007] 2 WWR 52: the objective of an award of costs on a solicitor and client basis, generally, is to condemn reprehensible conduct in the litigation, but the exception according to which pre-litigation conduct may be considered necessarily involves the principle of indemnification, not merely condemnation. Accordingly, in relation to pre-litigation conduct, it is not enough for CRA to demonstrate that the conduct is culpable in a general sense. It must also establish that the conduct caused CRA, itself, to unfairly bear costs for which indemnification is warranted.

[27] In the instant case, the respondents take the position that Mr. Piett and his counsel would not have been incentivized to pursue the *Piett Action* without the impugned funding arrangement, which provided funds upfront. In that sense, it might be said that the litigation would have been avoided but for the fact that the respondents undertook that funding arrangement. In my view, this is not sufficient to establish the requisite connection between the pre-litigation conduct and the litigation itself. No civil action goes forward unless the plaintiff is sufficiently incentivized to advance it. The causation inquiry cannot be so broad. Instead, the focus is on the consequences of only the aspects of the pre-litigation conduct which are impugned as reprehensible. In this regard, the instant case is distinguishable from *Red Pheasant First Nation*, *Atchison*, *Siemens*, and *Hrycyna* because none of the impropriety associated with the respondents' pre-litigation conduct gave rise to a core issue in the ensuing litigation. Rather, that impropriety only came to be relevant to the issue of abuse of process at the preliminary certification stage, a subject on which CRA did not make material submissions.

[28] A significant portion of CRA's argument is that various pre-litigation or extra-litigation activities of the respondents were contrary to the public interest or to the interests of class members. To this end, the parties made submissions in relation to the Supreme Court of Canada's decision in *Kerr v Danier Leather Inc.*, 2007 SCC 44, [2007] 3 SCR 331. I accept that there is no presumption against enhanced costs based on an assumption that all class proceedings favour the public interest. The relevant point in the instant application for solicitor and client costs, however, is that the impugned activities of the respondents did not unfairly prejudice CRA as a party in these proceedings. The burden to establish that is on CRA, and consequently the respondents bear no burden to defend their actions based on access to justice for class members, or otherwise based on the public interest.

[29] Even if I did find there to be the requisite causal connection between the pre-litigation conduct and the litigation itself, which I do not, I am not satisfied that the impugned conduct is reprehensible, which is to say that it is of a sufficiently culpable nature (see *Red Pheasant First Nation* at para 54). The respondents chose to pursue a funding model which I found had the effect of pulling out of alignment the respondents' incentives relative to the duty to the interests of class members. Although I found that the respondents were not properly forthcoming about the funding model with the court and with class members, I accept that the blameworthiness

associated with this is diminished because the law concerning pre-certification disclosure obligations was not settled in Saskatchewan prior to the *Certification Decision*.

[30] In the *Certification Decision* at paragraph 61, I concluded that judicial oversight concerning funding arrangements must be in place from the conception of a class action, including before it is certified. I adopted the reasoning of Belobaba J. in an Ontario Superior Court decision, *McCallum-Boxe v Sony*, 2015 ONSC 6896 (*Certification Decision* at para 60). The respondents draw my attention to another decision, which I accept supports the contrary conclusion. In *Baxter v Lloydminster (City)*, 2010 SKQB 452, 367 Sask R 107 [*Baxter*], Laing C.J. (as he then was) concluded that *The Class Actions Act*, SS 2001, c C-12.01, did not require court approval for a proposed settlement if the class had not yet been certified, based on the Act's definition of "class action" as having been certified. *Baxter* went on to be considered in *McLean v Canada (Attorney General)*, 2021 MBCA 15, 457 DLR (4th) 673 [*McLean*], which was decided after the certification hearing in the *Piett Action*. In *McLean*, the Manitoba Court of Appeal determined that court approval for a discontinuance of the proceeding was not required, because the class had not yet been certified (see paras. 79–81), based largely on the Manitoba Act's definition of "class proceeding" as having been certified (see para. 62) and notwithstanding that the purpose of certain parts of the Act is to protect class members (see para. 71).

[31] In the *Certification Decision*, I ultimately found that the respondents' funding model amounted to an abuse of process, and I denied certification on that basis, among others. All of this plainly comes up short, however, of the degree of culpability exemplified in the case law for solicitor and client costs, such as egregious election fraud, as in *Red Pheasant First Nation*; intentionally withholding insurance policy information from a claimant, as in *Atchison*; egregious attempts to exploit a vulnerable person, as in *Hrycyna*; or misappropriating funds in breach of a fiduciary duty, as in *Siemens*.

b. Conduct of the Litigation Itself

[32] Aside from the respondents' funding scheme, CRA argues that certain conduct directly related to the litigation is reprehensible. In particular, CRA argues that the respondents put forward a claim which was totally without merit as against CRA, because a legal issue essential to the claim had already been disposed of by the Federal Court of Appeal. There is also

Mr. Mitchell's involvement, which I found to be akin to maintenance. I conclude that this conduct does not meet the threshold of being reprehensible, in line with what McLachlin J. (as she then was) explained in *Young* at 134, as quoted in *Siemens* at para 116: "the fact that an application has little merit is no basis for awarding solicitor-client costs; nor is the fact that part of the cost of the litigation may have been paid for by others".

[33] I agree with the respondents that a legal action's lack of merit is not a strictly binary concept, but a matter of degree. CRA's position must be read as characterizing the *Piett Action*, as against CRA, as not only having fallen short of advancing past the certification stage, but as having been devoid of merit to such a degree that elevated costs are justified. CRA advances this position essentially based on two arguments.

[34] First, CRA points to the conflicts of interest that led me to disqualify the proposed representative plaintiffs. I do not accept this first argument. The disqualification of a representative plaintiff in a certification application is not in all cases sufficient even to finally dispose of the class action. As the respondents point out, this Court has allowed a class action to ultimately be certified despite that an earlier proposed representative plaintiff was rejected: *Frey v BCE Inc.*, 2006 SKQB 328 at paras 97–98, [2006] 12 WWR 545 (declining to certify, but granting leave to amend the plaintiffs' application, including to address the lack of a suitable representative plaintiff); and *Frey v Bell Mobility Inc.*, 2007 SKQB 328 at paras 8 and 22, 312 Sask R 4 (certifying the same class action with a new representative plaintiff). In any event, CRA did not make material submissions on this issue for the certification hearing in the *Piett Action*.

[35] I also do not accept CRA's second argument associated with lack of merit, which is based on my conclusion that the *Piett Action* advanced no reasonable cause of action against CRA. That followed from my conclusion that there is no private law duty of care owed by CRA. In that regard, as CRA points out, I reached the same result as in *Canada v Scheuer*, 2016 FCA 7, 480 NR 263 [*Scheuer*], a class action in which Mr. Piett was a plaintiff and was represented by the same counsel as in the *Piett Action*, and which was based on substantially the same claim in negligence against CRA as that advanced in the *Piett Action*. None of this implies, however, that the *Piett Action* would inevitably be found to disclose no reasonable cause of action against CRA,

or that the respondents should have expected that result. The respondents' personal knowledge of the *Scheuer* action is of no relevance.

[36] CRA relies on *Abbott Laboratories, Ltd. v Spicer*, 2023 SKCA 55, 482 DLR (4th) 624, to support this argument. However, *Abbott Laboratories* relates to striking a class action as an abuse of process, not to costs awards. As I have already discussed, those two subjects are quite distinct.

[37] Instead, CRA's second argument concerning merit is disposed of as follows. As of the hearing of the certification application in the *Piett Action*, there was no binding authority on the duty of care issue in Saskatchewan and, in particular, I was not bound to follow the result from *Scheuer*. Although I arrived at the same conclusion, that conclusion was not foregone. Indeed, my analysis concerning duty of care differed considerably to that in *Scheuer*, a fact not necessary to dispose of CRA's argument for elevated costs, but illustrative of the point. Whereas the Federal Court of Appeal in *Scheuer* assumed without deciding that the first step of the *Cooper-Anns* analysis was satisfied, thus considering a *prima facie* duty of care to have been established (*Scheuer* at para 41), I engaged that question and decided that the first step was not satisfied (*Certification Decision* at para 130; see also *Anns v Merton London Borough Council*, [1978] AC 728 at 751–752; and *Cooper v Hobart*, 2001 SCC 79 at paras 30–31, [2001] 3 SCR 537). Then, whereas the Federal Court of Appeal went on to decide that the second step of *Cooper-Anns* disposed of the matter, based on an overriding policy reason militating against creating the new duty of care as proposed (*Scheuer* at para 44), in light of my conclusion on the first step, I did not proceed substantively to the second step.

[38] The case at bar is also distinguishable from *Phillips Legal Professional Corporation v Cowessess First Nation No. 73*, 2020 SKCA 16, upon which CRA relies. There, solicitor and client costs were awarded in the appeal on the basis of a party's "alarming disregard for the *Rules*" and "prolix, rambling and unfocused" written materials which advanced several spurious arguments, all of which introduced "futile complexity" to the proceedings, which the Court characterized as "outrageous" (at paras. 116–19). The solicitor and client costs awarded in the court below were also upheld on appeal, based on similar conduct (see paras. 113–14).

[39] Finally, CRA argues that the respondents made allegations in their statement of claim reproaching CRA of bad faith, which it contends were unwarranted. CRA cites *Jones v Stooshinoff (Nicholas J. Stooshinoff Law Professional) Corporation*, 2021 SKQB 120, where a statement of claim involved collateral attacks on matters already decided and put into issue the integrity of the defendant by alleging theft and fraud, while advancing no credible evidence to support those allegations (see paras. 24 and 27). Similarly, in *Henley v Henley*, 2021 NLCA 46 at paras 39–40 and 45, 7 CANLR 27, solicitor and client costs were awarded against a party who, in open court, made inflammatory but unfounded allegations of criminal conduct against the appellants.

[40] I do not accept that the impugned portions of the statement of claim in the *Piett Action* are so improper as to warrant rebuke in the form of elevated costs. They do not put into question the reputation of CRA to the same degree as an allegation of fraud or criminal activity. At worst, as I found in the *Certification Decision*, the respondents' allegations of bad faith had not been properly pleaded as an independent cause of action (see para. 131).

2. No Costs Awarded Against Plaintiff's Counsel Personally

[41] The Supreme Court recently discussed a court's power to award costs against a lawyer personally. The purpose of this power is to supervise the conduct of lawyers in court which frustrates or interferes with the administration of justice: *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 at para 18, [2017] 1 SCR 478 [*Jodoin*]. The threshold for awarding costs against a lawyer personally "is a high one", is "rarely exercised", and requires "serious misconduct" on the part of the lawyer (at para. 25).

[42] I accept, as urged by the respondents, that a court must exercise caution in light of the duties of every lawyer, in particular the duty to keep confidential a client's instructions and the duty to fearlessly pursue even unpopular claims on behalf of a client (see *Jodoin* at para 25). As I explain below, however, given my conclusion concerning the gravity of the impugned conduct of Mr. Piett's counsel, I ultimately do not rely on this principle.

[43] In Saskatchewan, the power to award costs against a lawyer is encoded in Rule 11-24, which I reproduce here again for convenience:

> **Costs against a lawyer**
>
> **11-24**(1) If the Court considers 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, the Court may do any one or more of the following:
>
> (a) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
>
> (b) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
>
> (c) make any other order it considers appropriate.
>
> (2) An order pursuant to subrule (1) may be made by the Court on its own initiative or on the application of any party to the proceeding.
>
> (3) No order pursuant to subrule (1) is to be made against a lawyer unless the lawyer has been given an opportunity to be heard.

[44] As this Court has held, Rule 11-24 provides for a broader power to award costs against a lawyer than does the inherent jurisdiction discussed in *Jodoin*: *Murch v Dan Leonard Auto Sales Ltd.*, 2013 SKQB 314 at para 29, 429 Sask R 16 [*Murch*]. Rule 11-24 contemplates costs against a lawyer who has "caused costs to be wasted through delay, neglect or some other fault", and in this regard, it closely resembles the concordant rule in British Columbia (see *Murch* at para 28). Even so, as CRA acknowledges, a costs award against a lawyer personally must be made only sparingly and with restraint, only where the lawyer's conduct amounts to a "serious dereliction of duty or behaviour" and is not merely negligence or an error of judgment (*Stephens v Canadian Imperial Bank of Commerce*, 2021 SKCA 155 at para 50 [*Stephens*]; and *McNabb v Cyr*, 2018 SKCA 51 at para 68 [*McNabb*]. See also *Walsh v Muirhead*, 2020 BCCA 225 at para 34, 450 DLR (4th) 652).

[45] I conclude the threshold is not met in this case, and accordingly I make no award for costs as against Mr. Piett's counsel.

[46] As the authorities above demonstrate, for an award against a lawyer personally to be justified, it is the lawyer who must be shown to have engaged in the poor conduct. To that end, CRA argues that Mr. Piett's counsel was a beneficiary of the funding scheme associated with the

Piett Action, as well as a "guiding force" behind it, in the manner discussed in *Stephens* at para 51, citing *Orleski and Kruger v Reid* (1985), 38 Sask R 38 at paras 44–45 (QB) [*Orleski*]. Mr. Piett's counsel contests that characterization in light of the evidence on the record. I need not and do not resolve these issues. Even if it were assumed that counsel benefited from and approved, guided or was otherwise personally involved in the conduct complained of, I find that the threshold of "serious misconduct" is not met.

[47] As I explained above, the respondents, without court approval, adopted a funding model which I found gave rise to an abuse of process because it produced incentives not appropriately aligned with the respondents' duties to the interests of class members. The degree of impropriety of this conduct may be plainly distinguished as less serious than what was at issue, for instance, in *McNabb*. In that case, counsel persistently alleged that another individual had acted fraudulently, ultimately necessitating instruction from the Court to discontinue use of that language (see para. 66). The was no evidence to support the allegation of fraud (see para. 61). The Saskatchewan Court of Appeal described that conduct as "close to the line", but not sufficient to justify a costs award against counsel personally (at para. 69). The opposite result was reached in *Orleski* at paragraphs 38–47, which similarly turned on an unfounded allegation of fraud advanced by counsel through gross negligence. *Orleski* is distinguishable from the instant case. In *Orleski*, counsel had apparently drafted an affidavit which included an unfounded allegation of fraud in what was, at best, gross negligence on the part of counsel, and it would have been unfair to award costs against the party rather than counsel, since counsel was the guiding force behind the litigation and it was counsel who was shown to have ought to know the allegation of fraud was totally unfounded.

3. Conclusion: Costs Ordered According to Column III

[48] Accordingly, I order costs on Column III of the Tariff. I select Column III based solely on the complexity of the certification application and not on the basis of the conduct of either of the respondents. At the hearing of the instant application, the parties agreed on the items to be taxed. Thus, costs shall be payable by Mr. Piett to CRA in the amount of $4,738.22, being the sum of the following items:

Item No. 14	Case management conferences	$2,000.00
Item No. 26b	Contested certification application	$2,000.00

Item No. 40	Preparation of Bill of Costs	$400.00
Disbursement	Photocopying	$196.00
Disbursement	Courier	$104.22
Disbursement	Court fax fee	$28.00
Disbursement	Court filing fee	$10.00

[49] For clarity, by fixing costs in this manner, I reject CRA's argument, made in the alternative to its plea for solicitor and client costs, that costs should be elevated beyond the Tariff amount based on Rule 11-1. I accept that the Court's ability to enhance costs in this manner is more readily engaged than its authority to award costs on a solicitor and client basis: *Tofin v Galbraith*, 2019 SKCA 35 at para 77, [2019] 9 WWR 1 [*Tofin*]. However, as is demonstrated by *Tofin* and the cases reviewed by Jackson J.A. therein (at paras. 70–71), an enhancement of costs beyond the Tariff is not the usual course, and the degree by which costs are enhanced is carefully measured in proportion to the facts of each case. The cases are also grounded in the principle of indemnification, so that there must be a causal connection between the improper conduct and unnecessary effort or expense on the part of the party seeking enhanced costs. As I explained above, CRA has not established such a causal connection in relation to the impugned pre-litigation conduct, and although I found in law that CRA owes no duty of care to class members as pleaded in the *Piett Action*, that argument was not meritless to the point of impropriety.

[50] In *Tofin*, the Tariff would likely have resulted in costs between $2,200 and $2,600 (see para. 68), and costs in the amount of $5,000 were sought instead (see para. 67). The unsuccessful applicant had made applications which added considerable complexity and length to the proceedings but were devoid of merit (see paras. 72–77). Costs were set at $4,000 (see para. 78). Other Saskatchewan cases discussed in *Tofin* involved enhanced costs justified by a party's unwillingness to abide by court orders (*Schulz v Schulz*, 2015 SKQB 399); relitigating matters already decided (*Radu v Radu*, 2017 SKQB 68); failing to "present the full and complete factual picture to the court, either on the *ex parte* application, or in response to the information provided by the respondents" (*Farrell Holdings Inc. v Nussbaumer Holding Ltd.*, 2017 SKQB 125 at para 86); and bringing "a number of meritless claims" and pursuing "avenues of appeal on questionable, or even arguably frivolous bases", thereby adding to the complexity of the proceedings (*Kaiser v Baildon (Rural Municipality)*, 2018 SKQB 292 at para 109, 82 MPLR (5th) 75).

[51] The respondents also drew my attention to *Kyrylchuk v Kyrylchuk Estate*, 2020 SKCA 62, 58 ETR (4th) 201, where solicitor and client costs were sought against a party which the Saskatchewan Court of Appeal accepted had "doggedly pursued a claim that was of questionable merit" (at para. 38), but the Court of Appeal awarded costs in the usual way, on a party and party basis (see para. 39).

[52] In all the circumstances, I am satisfied that Column III of the Tariff is appropriate.

[53] I therefore order that Mr. Piett shall pay costs to CRA on Column III of the Tariff, as set out at paragraph 48 of this application. No costs are ordered in respect of this application.

J.A.
M.R. McCREARY
ex officio