

KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 29**

Date: **2025 02 21**
File No.: QBG-RG-01896-2019
Judicial Centre: Regina

BETWEEN:

CONEXUS CREDIT UNION 2006

PLAINTIFF

- and -

DERRICK ENGEN AND KIMBERLY ENGEN

DEFENDANTS

- and -

THE DRIVING FORCE INC., CANADIAN IMPERIAL BANK
OF COMMERCE, SPECIAL INVESTMENTS LTD.
(operating as COMMERCIAL TRUCK TERMINAL),
SASKATCHEWAN EMPLOYMENT STANDARDS DIVISION,
SASKATCHEWAN FINANCE – REVENUE DIVISION,
TR PETROLEUM MARTENSVILLE LTD.,
PRINCIPIIS CAPITAL LLC

DEFENDANTS

Counsel:

Rick Van Beselaere, K.C.

for the plaintiff

No one appearing

for defendants Derrick Engen and Kimberly Engen

No one appearing

for the other

defendants

JUDGMENT

ROBERTSON J.

February 21, 2025

Contents	Paras.
INTRODUCTION	1-2
BACKGROUND	3-7
ISSUES	8
ANALYSIS	9-103
Relevant Law	9-18
Failure to pay sale proceeds into Court	19-23
Evidence	24-84
<i>Sale price</i>	25
<i>Conexus evidence of costs incurred</i>	26-35
<i>Conclusion on claimed costs</i>	36-37
<i>Property taxes</i>	38-41
<i>Property maintenance costs</i>	42-45
<i>Selling Officer's Fees</i>	46-50
<i>Realtor fees</i>	51-52
<i>Legal fees</i>	53-79
<i>Conclusion on allowed costs</i>	80-84
Deficiency Judgment	85
<i>Conexus claim</i>	85-86
<i>Calculation of mortgage debt and costs eligible for personal judgment</i> 87-100	
<i>Calculation of deficiency judgment</i>	101-103

INTRODUCTION

[1] This decision addresses applications for assessment of costs following judicial sale and for award of deficiency judgment.

[2] The case is unusual in that the foreclosure proceedings were protracted, continuing over several years. The foreclosure action was defended. The applicant-mortgagee was successful in its contested application for summary judgment. This decision addresses the last stage of foreclosure proceedings, subject to appeal.

BACKGROUND

[3] The background to this application is set out in *Conexus Credit Union 2006 v Engen*, 2023 SKKB 134 [*Engen 2023*], in which I dismissed the defence to the Statement of Claim and granted summary judgment. Since that decision of June 26, 2023, the following events have occurred, as recorded on the Court file.

[4] On July 6, 2023, I granted an Order for Rectification to correct errors in the mortgage documents and an Order *Nisi* for Sale by Real Estate Listing with a minimum sale price of \$585,000.

[5] On January 25, 2024, Kilback J., as he then was, granted an Order Confirming Sale of the real property for \$655,000.

[6] On September 30, 2024, Conexus Credit Union 2006 [Conexus] filed Notice of Application for deficiency judgment and assessment of costs. That unopposed application was heard on November 6, 2024, with decision reserved and leave to file additional material in support of the application. Conexus' counsel filed additional material on November 8, 2024.

[7] On December 13, 2024, I issued a fiat asking counsel for Conexus to answer questions about the claim for costs and judgment. Conexus provided answers in a letter from counsel dated December 31, 2024.

ISSUES

[8] The issues arising from the application are:

1. What costs are claimed?
2. Whether the costs claimed are eligible for payment from the sale proceeds?
3. What award should be made for eligible costs?
4. What apportionment should be made between the purchase mortgage and the non-purchase mortgage?

and
5. Whether deficiency judgment should be granted and, if so, in what amount?

ANALYSIS

Relevant Law

[9] Recoverable costs are those costs allowed by statute or contract, keeping in mind that the statute prevails over any contractual term. (*Scotia Mortgage Corporation v Keep*, 2024 SKKB 133 at para 41, 62 RPR (6th) 313

[*Keep*]). Conexus relied upon clauses 4 and 6 of the mortgage agreement which read as follows:

4. If I am in default in repaying this loan, I agree to pay the Credit Union any missed payments, interest on any missed payments, reasonable charges respecting legal costs the Credit Union incurs in collecting or attempting to collect a payment, reasonable charges respecting costs including legal costs which the Credit Union incurs in realizing on any security interest or protecting the subject-matter of any security interest after default, and reasonable charges respecting costs the Credit Union incurs because my cheque or other payment is dishonoured.

...

6. I agree to pay all legal, appraisal, search, registration, insurance and other fees and charges payable in connection with the loan.

[10] *The Limitation of Civil Rights Act*, RSS 1978, c L-16 [*Act*], both authorizes and limits recovery of costs in a foreclosure action. Some costs are recoverable. Some are not.

[11] Section 2(1) of the *Act* prohibits personal judgment against the mortgagor (borrower) where the mortgage loan was for the purchase of the real property (land) against which the loan is secured. In that case, recovery is limited to an order for judicial sale or foreclosure of the land. The *Act* prevails over the mortgage agreement: ss. 16 and 40(1).

[12] Rule 10-47(2) of *The King's Bench Rules* requires that all sale proceeds be paid into court unless a judge directs otherwise. (*Keep* at para 43; and *Scotia Mortgage Corporation v Yamniuk*, 2024 SKKB 48 at paras 17, 18 and 28 [*Yamniuk*]). Sale proceeds may not be disbursed before the assessment

of costs. (*Keep* at para 44; *Scotia Mortgage Corporation v Irvine*, 2023 SKKB 171 at paras 8 and 10 [*Irvine*]; *Toronto-Dominion Bank v Schell*, 2014 SKQB 344, at paras 15-18, 461 Sask R 257 [*Schell*]; *CIBC Mortgages Inc. v Roberts*, 2006 SKQB 44 [*Roberts*]) Application for assessment for costs should be made within three weeks of sale. (*Keep* at para 47)

[13] In *Keep*, I reviewed the principles and governing law and proper practice for assessment of costs following judicial sale. I repeatedly cite *Keep* in this decision in support of statements of law. I do so because *Keep* represents a distillation of case law and other authorities referenced in that decision.

[14] Assessment of costs must occur before or in conjunction with granting judgment. (*Keep* at paras 45 and 47; *The Toronto-Dominion Bank v Gibbs*, 2019 SKCA 57 at para 79, [2019] 12 WWR 71) This ensures that the sale proceeds are properly disbursed, including any surplus, and that any deficiency judgment can be calculated.

[15] The applicant has the onus to identify and justify all costs claimed. (*Keep* at para 48) Even where costs are eligible for payment, the Court must still consider whether the costs claimed are reasonable. (*Keep* at para 50; *Kokanee Mortgage M.I.C. Ltd. v Rozdilsky*, 2020 SKQB 52 at para 45 [*Rozdilsky*], and *Bank of Nova Scotia v Moore*, 2019 SKQB 122 at para 33) The application for assessment of costs should include materials supporting each claim for costs. Rule 11-18 requires affidavit evidence to support the claim. (*BTB Mortgage Investment Corporation v Harpham*, 2025 SKKB 16 at paras 15 - 18; *Keep* at para 49; *Royal Bank of Canada v Vilorio*, 2014 SKQB 424 at para 53, 464 Sask R 177)

[16] The application for assessment of costs should include a summary document which:

1. identifies and itemizes each eligible cost or fee claimed and the amount;
2. states the basis for each cost claimed, including reference to the mortgage term or statutory provision which allows recovery; and
3. explains and justifies the amounts claimed, with reference to individual circumstances of the case.

[17] A deficiency judgment can only be calculated after assessment of costs, since the judgment amount is the amount owing after the mortgage debt and court-approved (allowed) costs are deducted from the sale price.

[18] Where, as here, the judicial sale involved both a purchase mortgage and a non-purchase mortgage, the mortgagee is entitled to deficiency judgment on the non-purchase mortgage claim only. This requires the Court to apportion the allowed costs based on the amounts of the different mortgage debts. (*Keep* at para 43; *Irvine* at paras 8 and 10; *Royal Bank of Canada v Alexander*, 2019 SKQB 58 at para 11 [*Alexander*]; *Royal Bank of Canada v Partridge*, 2018 SKQB 216 at para 13 [*Partridge*]; *Schell* at paras 15-18; and *Roberts*)

Failure to pay sale proceeds into Court

[19] The proper process for distribution of sale proceeds was not followed in this case. As noted above, Rule 10-47(2) requires the selling officer to pay the sale proceeds into Court through the local registrar. In this case, the

sale proceeds were not paid into Court. Instead, the selling officer paid the net sale proceeds (after payment from the sale proceeds of some costs) to Conexus' lawyer.

[20] In the December 31, 2024 letter from its counsel at page 1, Conexus explained that the balance of sale proceeds, after payment of property taxes, realtor commissions and selling officer's fees, were paid to Conexus, pursuant to para. 5 of the Order Confirming Sale. The letter gave the following rationale for this deviation from Rule 10-47(2):

... It was known at that time that with the large amounts that had been paid for property tax arrears alone (not to mention the other protective disbursements) there would not be sufficient net sale proceeds to pay off principal, interest, property taxes and protective disbursement costs.

[Affidavit of Brenda Abrahamson, Exhibit D]

[21] This explanation does not excuse the omission. Paragraphs 5 and 6 of the Order Confirming Sale were additions to the standard terms of Form 10-47E: Order Confirming Sale. Nothing was done to bring this change to the attention of the presiding Justice. This Court has repeatedly warned counsel that any deviation from the forms must be clearly brought to the attention of the Justice who is asked to authorize the order. This should be done by describing the change in the written application along with an explanation, underlining any change in the draft order, and verbally telling the presiding Justice at the hearing of the application. (*Keep* at paras 28-29)

[22] There seems to be an increasing disregard for the requirement to pay judicial sale proceeds into Court. This practice of retaining the sale proceeds likely also contributes to the failure to comply with the requirement to

apply for assessment of costs within three weeks of sale. In this case, the interval between the Order Confirming Sale and application for assessment of costs was eight months. If people were waiting to be paid from the proceeds, the mortgagee would be motivated to act with proper dispatch. Further, the Court would then be in a position to ensure that all proceeds are properly paid out in a timely manner, thereby concluding the action and the Court's supervision of the foreclosure proceeding.

[23] This Court has warned that sanctions may be imposed for such irregular procedure. (For example, see: *Scotia Mortgage Corporation v Schneikart*, 2025 SKKB 6 at para 26 [*Schneikart*]; *Keep* at paras 29 and 50 – 54; and *Yamniuk* at para 28.) I echo that concern and warning.

Evidence

[24] This assessment of costs was made more difficult by the failure of Conexus to provide a simple summary of the mortgage debt and claimed costs. The problem was less lack of evidence than its organization and summary in support of the applications. I will review the evidence below and then state my own summary, which was shared with Conexus through my fiat of December 13, 2025. In future, I encourage counsel to provide such a summary, with reference to supporting evidence, as part of any application for assessment of costs and deficiency judgment.

Sale price

[25] The Order Confirming Sale was made on January 25, 2024 and the selling officer completed the sale on February 15, 2024. The sale price was

\$655,000. (Affidavit of Natalie Knudsen sworn December 21, 2023 at para. 3 and Exhibit “A” letter from selling officer).

Conexus evidence of costs incurred

[26] Conexus, in its brief of law at paras. 49 – 52, correctly states the process for assessment of costs:

1. Legal Principles

49. The Court in *Keep* has noted principles applicable to claims for costs. Namely, that these fees should be:

- (a) Identified and itemized, with material supporting each claim;
- (b) Grounded in reference to the mortgage term or statutory provision which allows recovery; and
- (c) Explained and justified, with reference to individual circumstances of the case. [citation omitted]

50. This Court has noted that property management fees and utility charges are recoverable where the mortgagee stepped in to maintain an abandoned property. Property tax arrear payments are also properly claimable by the mortgagee, as well as costs to insure the property. However, the mortgage agreement must authorize collection of such costs. [citation omitted]

2. Application to the Deficiency Costs

51. Pursuant to the Court’s guidance in *Keep*, Conexus has filed two (2) affidavits of Natalie Knudsen, sworn December 21, 2023 and May 14th, 2024 which particularize the amounts owing on the Conexus Mortgage after judicial sale.

52. In addition, there were other costs incurred by Conexus in relation to the Property, in the amount of:

- (a) The property tax arrears paid by Conexus;
- (b) Insurance premiums;
- (c) Property manager's fees;
- (d) Boiler repair fees; and
- (e) Utilities.

...

53. Pursuant to s. 4 of the Conexus Mortgage (reproduced above at para 19), these costs are all properly claimable. More than that, these costs were reasonable and necessary. The Mortgagors had not paid the property taxes, utilities, or insurance and, as such, Conexus has to pay these costs to maintain the property. [citation omitted]

[27] The Affidavit of Natalie Knudsen sworn May 14, 2024 [May 14, 2024 Affidavit] was filed in support of the application for assessment of costs and judgment. That affidavit attached as Exhibit "A" a letter from the selling officer with a "Final Statement of Adjustments". That statement records the sale price was \$655,000. That amount was adjusted and reduced to account for a property tax adjustment and costs incurred in the sale, which were presumably paid from the sale proceeds. The amount remaining of \$607,555.53 was described as "net sale proceeds". The calculation of these amounts is summarized below:

\$655,000.00	Sale price
- \$ 1,087.36	Property tax adjustment (for 2024 property taxes)
<u>≡ \$653,912.64</u>	Total sale proceeds received by selling officer
- \$13,755.00	Commission paid to buyer's realtor
- \$15,327.00	Commission paid to seller's realtor

- \$ 9,096.80	Paid to RM for 2023 property taxes
- \$ 6,713.25	Selling officer's fees for sale process
- <u>\$ 1,465.06</u>	Selling officer's fees for title conveyance
<u>\$607,555.53</u>	Net sale proceeds (paid to Conexus lawyer)

[28] The May 14, 2024 Affidavit at para. 4 described costs deducted from the sale price:

4. Pursuant to paragraph 6 of the Order Confirming Sale, the summary of the receipts by the Selling Officer from the sale and the payments made are as follows:

Receipts

Cash to close	\$623,162.64
Refund of initial deposit after payment of Buyer's Brokerage commission and taxes (\$13,755.00 incl. GST)	<u>\$ 16,995.00</u>
Total available Net Proceeds	\$640,157.64

Payments from Net Proceeds of Sale

Selling officer's fees for completion of transfer	\$ 1,465.06
Selling Officer's fees	\$ 6,713.25
Commissions paid to Seller's Brokerage (\$13,100 + PST + GST)	\$ 15,327.00
Payment of 2023 property taxes and penalties	\$ 9,096.80
Remaining sale proceeds paid to Conexus	<u>\$607,555.53</u>
Total disbursements	\$640,157.64

[29] The May 14, 2024 Affidavit went on at paras. 6 and 7 to state other costs incurred since December 19, 2023:

6. I refer to paragraph 8 of my Affidavit sworn December 21, 2023 in this matter. As of December 19, 2023, the total amount owing was \$708,553.50. This included

significant amounts paid for property taxes and insurance, as well as payments made to a property manager and for repairs on the premises and for payment of utilities to December 19.

7. In addition to those amounts, since December 19, Conexus paid certain other amounts to preserve the property. They were:

Sask Energy	\$1,609.94
Sask Power – This was a net credit from Sask Power	(\$171.98)
Qu’Appelle Valley Water Utility Agency	\$ 444.16
Cumis (insurance on the property)	\$4,848.44
BJ’s Property Management Fees	<u>\$ 567.00</u>
TOTAL	\$7,295.56

[30] The Affidavit of Natalie Knudsen sworn December 21, 2023 was filed in support of Conexus’ application for Order Confirming Sale. That Affidavit at para. 8 stated that the mortgage balance as of December 19, 2023 was \$708,533.50. That amount included costs added to the mortgage balance. The following breakdown of that total amount was provided:

8. The total amounts owing and costs incurred in respect of the preservation, repairs and clean up of the Mortgaged Property, other than legal costs incurred by Conexus as at December 19, 2023 are as follows:

Arrears of Principal:	\$504,819.09
Arrears of Interest:	\$81,570.85
Property taxed [<i>sic</i>] paid by Conexus:	\$88,415.93
Insurance Premiums paid by Conexus:	\$22,862.08
Amounts paid to property manager:	\$8,894.63
Amounts paid to repair and start up boiler:	\$377.78
Utilities (SK Energy & SK Power):	<u>\$1,593.14</u>
TOTAL OWING:	\$708,533.50

[31] The May 14, 2024 Affidavit at para. 10 also claimed legal fees incurred by Conexus of \$88,033.19. These fees were supported by billing summaries attached as Exhibit “B”.

[32] The May 14, 2024 Affidavit at para. 8 stated the balance owing after payment of the net sale proceeds was \$107,627.

Principal owing	\$22,295.20
Interest owing	\$85,332.79
TOTAL	\$107,627.99

[33] From these two affidavits, I calculated the mortgage balance owing as of December 19, 2023 at \$586,389.94 (\$504,819.09 principal + \$81,570.85 interest).

[34] It would have been helpful if the Conexus brief had stated the amount of each cost incurred as I have done below. At the hearing on November 6, 2024, I asked Conexus’ counsel to file a summary sheet breaking out from the mortgage debt the charges and costs claimed. Instead, Conexus filed a letter attaching a document titled “Statement of Judicial Sale Funds Received and Disbursed”. This document confirmed some of the post-sale costs listed below (realtor commissions, 2023 property taxes and selling officer fees). From the evidence reviewed above, I summarized my understanding of the sale proceeds and costs claimed by Conexus in my fiat of December 13, 2024, asking that Conexus confirm or correct those figures. Conexus responded with its letter of December 31, 2024.

[35] Conexus’ counsel, in his letter of December 31, 2024, stated the mortgage balance as of January 25, 2024 (date of Order Confirming Sale) was \$590,995.70 (adding additional interest of \$4,605.76 for the period from

December 19, 2024 to January 25, 2025). I accept that as the mortgage balance owing at date of sale.

Conclusion on claimed costs

[36] The claimed charges and costs are as follows:

Property taxes paid by Conexus (\$88,415.93 + \$9,096.80 - \$1,087.36)	\$ 96,425.37
Insurance premiums (\$22,862.08 + \$4,848.44)	\$ 27,710.52
Utility charges (\$1,593.14 + \$1,609.94 - \$171.98)	\$ 3,031.10
Preservation costs (\$8,894.63 + \$377.78 + \$567.00)	\$ 9,839.41
Selling Officer's Fees	\$ 8,178.31
Conexus realtor fees	\$ 15,327.00
Buyer realtor fees	\$ 13,755.00
Conexus legal fees	<u>\$ 88,033.19</u>
Total charges and fees	\$262,299.90

[37] I will consider each category of cost claimed.

Property taxes

[38] As set out above, I calculate Conexus' claim for property taxes at \$96,425.37.

[39] Property taxes have priority over a mortgage debt. (*Thorpe v Kindersley (Town)*, 2021 SKQB 211 at paras 48-50, 19 MPLR (6th) 77) Section 11 of the *Act* allows the mortgagee (lender) to add to the mortgage balance the cost of property taxes paid for the mortgaged land:

Only land taxes chargeable to mortgagor

11 Notwithstanding anything contained in any mortgage of land whether heretofore or hereafter given or in any agreement renewing or extending the same, no taxes, rates or assessments, other than taxes, rates or assessments levied or charged against the land and paid by the mortgagee, shall be charged by the mortgagee to the mortgagor or added to the mortgage account; and an agreement, stipulation or covenant to the contrary is null, void and of no effect.

[40] This statutory exception for property taxes recognizes both the priority of property taxes and the real possibility that the land, which is security for the mortgage debt, might otherwise be transferred to the municipality for tax arrears under *The Tax Enforcement Act*, RSS 1978, c T-2. If that occurred, then the mortgage would be discharged from the land and the mortgagee would lose its security, pursuant to ss. 26.1(8) and 27 of *The Tax Enforcement Act*. It may be noted that ss. 19(5) of *The Tax Enforcement Act* allows a mortgagee to forestall tax enforcement proceedings by redeeming the land. In that case, the mortgagee may similarly add the redemption payment to the sum secured by the mortgage.

[41] I am satisfied that the property tax payments claimed by Conexus are eligible costs and are recoverable.

Property maintenance costs

[42] Conexus claimed property maintenance costs of \$40,581.03, comprised of insurance premiums of \$27,710.52, utility charges of \$3,031.10 and preservation costs of \$9,839.41.

[43] Conexus said the costs to preserve the property were necessarily incurred because the owners failed to pay property insurance and utility charges and because the owners vacated the property. As stated in *Keep* at para 59, “The court has allowed addition of property management fees and utility charges where the mortgagee stepped in to maintain an abandoned property and the mortgage agreement authorized collection of such costs [citations omitted].” Such costs are subject to assessment of costs to ensure the costs claimed are both eligible and reasonable.

[44] Section 13 of the *Act* allows the mortgagee to attach moneys payable under a property insurance claim for damage or destruction of the mortgaged property. This recognizes that such loss to the property reduces the security. It makes sense to allow the mortgagee to keep property insurance in place and to maintain utility service to avoid harm to buildings which would diminish the property value. This benefits anyone with an interest in the property, including both mortgagor and mortgagee.

[45] I am satisfied that the costs claimed were necessary and are appropriate.

Selling Officer’s Fees

[46] Conexus claimed selling officer’s fees of \$8,178.31.

[47] While this amount is much higher than normal, I accept the explanation from Conexus’ counsel that the costs were reasonably incurred. The higher than normal cost was caused in part by the obstructive tactics of the mortgagors and other complications in the sale process. Conexus filed an affidavit from the selling officer, Randall Sandbeck, K.C., sworn January 8, 2024 in which the selling officer detailed his work.

[48] The selling officer fees include \$1,465.06 as legal fees for closing the sale. The cost of legal fees should be claimed under legal fees. In doing so, I also note that this Court has repeatedly held that legal fees incurred for closing the sale are not to be separated and billed or deducted from the standard award of legal fees. (*Schneikart*; *Keep* at paras 63-64; and *Yamniuk* at paras 31 and 35).

[49] I reduce the cost of the selling officer’s fees by \$1,465.06, so that the amount approved for payment is \$6,713.25. The \$1,465.06 for legal fees in closing the sale will be considered under “Legal fees” below.

[50] In approving this amount, I emphasize that this was not a typical foreclosure file. The Court may in future decide to establish a standard amount for selling officer fees, similar to the standard award for legal fees.

Realtor fees

[51] Conexus claimed costs of \$29,082 for realtor fees, comprised of \$15,327 for the vendor’s realtor and \$13,755 for the buyer’s realtor. This was a higher value rural acreage with residence. The total realtor commission is 4.4% of the sale price.

[52] I accept the realtor fees as representing market fees for the industry. This claim is allowed in full.

Legal fees

[53] Conexus, in its letter from counsel dated November 8, 2024, asked for an award of \$85,833.19, representing the actual cost of legal fees and disbursements charged for the action. Conexus asks for an additional \$2,200 for the cost of this application, so a total claim of \$88,033.19. Conexus conceded this amount is far above the standard award for legal fees, but argued this action was much more complex than the typical undefended foreclosure action for which the standard amount is intended.

[54] Conexus claimed legal fees of \$88,033.19. I add \$1,465.06 to this amount for the legal fees charged by the selling officer. The total legal fees (and disbursements) to be considered then is \$89,498.25.

[55] In considering this claim, I acknowledge at the outset that the amount of legal fees claimed are far more than claimed in any previous Saskatchewan foreclosure decision on assessment of costs of which I am aware. Nor was any similar award brought to my attention. So particular scrutiny of this claim is warranted.

[56] The current standard award of legal fees on assessment of costs is \$5,500. (*Home Trust Company v Haughian*, 2025 SKKB 8) However, the Court has discretion to award more or less, as circumstances warrant.

[57] In *Homequity Bank v Lindemann*, 2022 SKQB 149 at paras 43-44, I reduced the claimed costs of \$11,756.88 for legal fees to \$3,000, below the then standard award of \$5,000.

[58] In *Westfield Twins Condominium Corporation v Reginald Mark Wilchuck, B2B Bank*, 2021 SKQB 23 at paras 58-59, I recognized the Court’s authority to deviate from the standard costs award for legal fees, awarding costs of \$19,000 (but not the \$29,457.19 claimed nor the then standard award of \$4,500).

[59] In *Rozdilsky* at para 45, Danyliuk J. recognized both the right of a mortgagee to seek solicitor-client costs and the authority of the Court to limit those costs. The Court awarded legal fees of \$7,547, rather than the then standard award of \$4,500.

[60] In *Royal Bank of Canada v Toews*, 2007 SKQB 142 at para 17, 296 Sask R 129 [*Toews*], Ryan-Froslic J., as she then was, awarded legal fees of \$19,560. (The bank had claimed legal fees of \$54,121.32.) In doing so, she set out a non-exhaustive list of factors for the Court to consider in deciding whether to deviate from the standard award for legal fees.

17) In establishing whether costs are “reasonable and necessarily incurred”, the case law instructs the Court to consider a variety of factors including, but not limited to the following:

- (i) the nature of the case;
- (ii) the complexity of the matter;
- (iii) the skill and ability of the counsel involved;
- (iv) the conduct of the parties;

- (v) the necessity of the services rendered;
- (vi) the standard costs for such services (if any);
- (vii) the amount involved; and
- (viii) the ultimate result.

[61] In *Royal Bank of Canada v Murdoch Professional Golf Services Inc.*, 2003 SKQB 492 at para 5, 242 Sask R 319, Barclay J. reduced the legal fees claimed from \$11,166 to \$5,000, while acknowledging that the then standard award was \$3,000.

[62] I will review Conexus' claim for legal costs against the factors set out in *Toews*.

(i) *the nature of the case*

[63] This was a foreclosure action. The action was defended. The defendants were uncooperative and raised objections, which delayed proceedings.

(ii) *the complexity of the matter*

[64] This was a complex file that proceeded over several years. The mortgage agreement was made in 2013 with an amended agreement for a re-advance in 2016. Default first occurred in 2018 with the last payment made on February 23, 2019.

[65] Leave to commence action was granted June 16, 2020. The Statement of Claim was issued June 18, 2020. The Statement of Defence was issued July 16, 2020. A Consent Order for summary judgment hearing was granted on November 26, 2020. The defendants sought discovery of documents.

(Conexus’ lawyer noted that it received multiple requests for documents and provided extensive discovery). Questioning occurred in 2021. On December 31, 2022, the Court directed scheduling of the summary judgment hearing. Application for summary judgment was heard on April 21, 2023 with judgment granted in favour of Conexus on June 26, 2023.

[66] The Court file is now in four volumes held in two accordion files. The flyleaf on the file records 24 endorsements from July 18, 2019 to November 6, 2024. There are also four fiat decisions from reserved applications.

[67] Conexus, in its brief of law at para. 35, provided a helpful summary of the legal fees charged at each step of the proceeding. Given the complexity of the case, I am satisfied that the time and cost involved were reasonable and necessary. In making that finding, I have regard to my personal knowledge from receiving or hearing some of the applications, including the summary judgment application.

STEP	DATE	TIME	COST (including taxes and disbursements)
Statement of Claim	June 16-22, 2020	3.9 hours	\$1,825.95
Review of Statement of Defence and preparation for mediation	July 17-September 11, 2020	8.4 hours	\$5,264.65
Notice of Application seeking summary judgment, affidavit and consent order	September 21-December 3, 2020	14.9 hours	\$5,544.60

Affidavit of Documents, questioning and replies to undertakings	January 6 – March 11, 2021	37 hours	\$15,176.39
Additional affidavits for summary judgment, review of mortgagors’ affidavits, briefs of law, chambers appearances for scheduling and argument	March 18, 2021 – June 26, 2023	92.4 hours	\$45,991.83
Order <i>Nisi</i> for Sale application, arranging for selling officer and order confirming sale application	June 27, 2023 – January 25, 2024	14.6 hours	\$11,191.47
TOTAL	3 ½ years	171.2 hours	\$84,994.89

[68] Conexus made the point in argument that an opposed summary judgment application can be as costly as a trial. I accept that point to some extent. While the summary judgment procedure is intended to reduce delay and cost, that is achieved when the parties cooperate in good faith to reach a resolution through a Court decision. When one or both parties do not cooperate, that goal may not be achieved.

(iii) *the skill and ability of the counsel involved*

[69] Three lawyers worked on the file for Conexus, including an articling student/new lawyer, a lawyer with under ten years’ experience and a senior lawyer with extensive experience in foreclosures. Their hourly billing rates reflected their experience. This range of experience allowed a division of

labour which avoided over-billing. I am satisfied there was no unnecessary duplication of effort.

[70] The selling officer, who also charged legal fees for the sale closing, is a senior counsel with extensive experience in real estate law and practice. His experience was undoubtedly of value in this challenging sale. While the selling officer is an agent of the Court, not the mortgagee, I am satisfied that the selling officer, Mr. Sandbeck, K.C., and Conexus counsel, Mr. Van Besaleare, K.C., worked cooperatively and avoided unnecessary costs.

(iv) *the conduct of the parties*

[71] Conexus acted promptly and properly in the conduct of the action. The Engens contributed to delay, requiring an order for substitutional service for the leave application and raising defences found to be without merit. They also failed to cooperate in the judicial sale, resulting in additional delay and costs. Parties who abuse the process should expect to suffer consequences.

(v) *the necessity of the services rendered*

[72] The complexity of the file required a lawyer of Mr. Van Beselaere's skill and experience.

[73] The defendants filed a Statement of Defence. There was full discovery, including exchange of documents, requests for further documents, questioning, undertakings and replies to undertakings.

[74] This action was resolved by summary judgment. The application for summary judgment was opposed and argued. The Engens denied that they were bound by the mortgage agreement. If they were bound, then they argued

the mortgage agreement was unconscionable. The primary issues on the summary judgment were: 1. whether the Engens were liable under their assumption of mortgage; 2. whether the mortgage agreement was unconscionable; and 3. whether the doctrine of rectification could and should be applied to correct errors in the mortgage agreement.

(vi) *the standard costs for such services (if any)*

[75] The standard award of legal fees for a typical foreclosure action is now \$5,500. This was not a typical foreclosure action. Most foreclosure proceedings are undefended. The facts are usually known and the issues relatively simple to decide.

[76] The standard costs amount is not appropriate for this action. This is one of those exceptional cases which justify substantial indemnity for legal fees.

[77] While I am prepared to award increased costs, the claim for legal fees should be reduced for the application for rectification. The application for rectification was required to correct Conexus' errors in preparing mortgage documents. While Conexus was successful on its application for rectification, the Engens were entitled to oppose that application. Mortgagors should not be penalized for exercising their legitimate rights in opposing foreclosure. Conexus should not receive any costs for that part of the summary judgment application.

(vii) *the amount involved*

[78] The total mortgage balance as of January 25, 2024 (date of Order Confirming Sale) was \$590,995.70. (The amount stated in *Engen 2023* at para

13 as owing under the mortgage as of April 18, 2023 was \$670,812.23, however, this amount would have included costs added to the mortgage balance.) The amount of debt was significant for the mortgagors. It is, however, less than many of the claims dealt with by this Court.

(viii) the ultimate result

[79] Conexus was completely successful on its application for summary judgment and in later proceedings for judicial sale.

Conclusion on allowed costs

[80] I am satisfied that Conexus is entitled to a substantial indemnity for legal fees incurred in pursuing its action to a successful conclusion.

[81] The legal fees should be reduced to recognize that part of the summary judgment application pertained to Conexus' application for rectification of mistakes it made in the mortgage documents. Those mistakes provided a defence to the mortgagors.

[82] Conexus sought legal fees of \$89,498.25. I award costs of \$60,000 to Conexus for its legal fees and disbursements. This is an exceptional award based upon exceptional circumstances.

[83] The following summarizes the allowed costs:

CATEGORY	CLAIM	ALLOWED
Property taxes	\$96,425.37	in full
Property insurance	\$27,710.52	in full
Utility charges	\$3,031.10	in full

Preservation costs	\$9,839.41	in full
Selling Officer fees	\$8,178.31	\$6,713.25
Realtor fees	\$29,082	in full
Legal fees	\$88,033.19	\$60,000
TOTAL	\$262,299.90	\$232,801.65

[84] The next issue is how to calculate the deficiency judgment.

Deficiency Judgment

Conexus claim

[85] Conexus sought a deficiency judgment in the amount of \$195,661.18. The \$195,661.18 was comprised of: \$107,627.99 as the mortgage balance still owing after deducting the sale proceeds from the mortgage debt; and \$88,033.19 for Conexus’ legal fees. (Conexus brief of law at para. 1)

[86] The calculation of this claim ignores the other costs, presumably because they have been paid. That does not remove them from assessment of costs and calculation of deficiency judgment. All costs must be considered.

Calculation of mortgage debt and costs eligible for personal judgment

[87] Section 2 of the *Act* bars recovery of a personal judgment against the mortgagor where the mortgage loan is for the purchase of the property, often referred to as a “purchase mortgage”. In that case, the lender’s remedy is limited to foreclosure or judicial sale of the property.

[88] The 2013 mortgage loan was for the purchase of the property. (*Engen 2023* at paras 28-29) The fact that the Engens assumed the existing mortgage in an approved swap of properties did not change the essential nature of that mortgage loan. (*Bank of Montreal v Hrynewich Holdings Ltd.* (1989), 79 Sask R 134 (CA))

[89] There was a “re-advance” loan of \$79,000 in 2016, which was a non-purchase mortgage. That portion of the debt could be subject to a deficiency judgment. (*Keep* at para 42) If so, then costs should also be apportioned based upon the respective amounts of the purchase mortgage and the non-purchase mortgage.

[90] Conexus, in its letter of December 31, 2024, acknowledged that it had not considered the application of s. 2 of the *Act*, which bars a personal judgment for a money purchase mortgage. It provided its calculation of the portion of the non-purchase money mortgage debt as 13.93%.

[91] This calculation was based upon figures from the Application to Amend a Term Loan, Mortgage or Cyclical Credit Agreement dated October 27, 2016 and Amendment Agreement – Mortgage signed November 24, 2016, which had been filed as evidence for the summary judgment application as Conexus’ Affidavit of Documents, Tab P-9. Those documents stated the principal owing on the money purchase mortgage as \$483,467.82 and the re-advance (non-purchase) mortgage as \$78,237.31, for a total mortgage debt of \$560,705.13. The pro-rated calculation then was \$78,237.31 divided by \$560,705.13 = 13.93%.

[92] This calculation accords with the direction given by the Court of Appeal in *Walker v Bank of Montreal*, 2017 SKCA 42 at para 35, 415 DLR (4th) 277. I accept this calculation of the percentage of the total mortgage debt for which personal judgment could be obtained.

[93] The next question is whether the allowed costs should be awarded in full or reduced by the *pro rata* share of 13.93% representing the non-purchase mortgage?

[94] Conexus argued that costs are in the discretion of the Court and should not be reduced because of the two different mortgages. While I agree that the Court retains discretion over award of costs, I conclude that costs should be treated in the same manner as the mortgage debt.

[95] The question of the application of s. 2 of the *Act* to costs was directly addressed and answered conclusively by Rothery J., as she then was, in both *Alexander* at para 11 and *Partridge* at para 13.

[96] In *Partridge*, Rothery J. wrote:

[12] Counsel for RBC submits that the total of the assessed solicitor-client costs, the total condominium fees and the total property management charges ought to be added to the deficiency judgment, along with the prorated principal and interest due. Counsel argues that it was required to incur the extra legal costs to proceed by judicial sale in order to pursue recovery of the deficiency against Partridge. RBC should not have the solicitor-client costs prorated in accordance with the non-purchase money portion of the mortgage.

[13] The Saskatchewan Court of Appeal in *Walker* was not required to address the prorating of solicitor-client costs because the parties had consented to having the matter remitted to the Queen's Bench judge. However, *Walker* is instructive in

explaining the policy objective of s. 2 of the *LCRA*. The protection of s. 2 of the *LCRA* continues to apply to only that portion of the mortgage loan that was given to secure the purchase price of the land. It logically follows that the protection of s. 2 of the *LCRA* pertains to all costs which are part of the outstanding mortgage amount. In this case, the *pro rata* calculation of the non-purchase money mortgage is 8% of the total outstanding mortgage amount. RBC is entitled to judgment against Partridge for 8% of the solicitor-client costs, condominium fees and property management charges.

[97] In *Alexander*, Rothery J. wrote:

[11] Thus, while s. 11 of the *LCRA* permits the mortgagee to add property taxes to the mortgage account, the protection of s. 2 of the *LCRA* continues to apply to only that part of the mortgage loan that was given to secure the purchase price of the land. That protection extends to all permissible costs added to the mortgage, which include the payment of property taxes by the mortgagee.

[12] In this case, the *pro rata* calculation of non-purchase money mortgage is 17 percent of the entire mortgage granted to the Alexanders. Only 17 percent of the property tax arrears paid by RBC may be added to the deficiency judgment.

[98] *Partridge* and *Alexander* decisions have been cited with approval in subsequent decisions of this Court. While I would be expected to follow those decisions under the principle of comity, I agree with the reasoning and conclusion of those decisions.

[99] Where the mortgage debt includes both a purchase mortgage and non-purchase mortgage debt, the proper approach is to pay the mortgage debt and allowed costs from the sale proceeds. If any surplus remains, then, subject to claim of other creditors, that surplus is paid to the mortgagor. If a deficiency remains, then that amount must be reduced by the *pro rata* share attributable to the purchase mortgage. That reduced amount is the deficiency judgment.

[100] This approach is consistent with the protection afforded by s. 2 of the *Act* against deficiency judgments for purchase money mortgages. This legislative protection would be thwarted if deficiency judgments were made for cost awards after judicial sale on a money purchase mortgage. It could also create a perverse incentive to pursue the remedy of judicial sale rather than foreclosure. The remedy of foreclosure is both faster than judicial sale and avoids certain costs. In this case, for example, the full cost of the realtor commissions and selling officer fees allowed by the Court exceed the deficiency judgment awarded.

Calculation of deficiency judgment

[101] The total mortgage balance as of January 25, 2024 (date of Order Confirming Sale) was \$590,995.70. The total allowed costs are \$232,801.65. The total of those sums is \$823,797.35. The sale price was \$655,000. The calculation of the deficiency judgment is $\$823,797.35 - \$655,000 = \$168,797.35$ x 13.93% = \$23,513.47.

[102] The summary calculation of the deficiency judgment is as follows:

	\$590,995.70 (mortgage balance at sale)
+	\$232,801.65 (allowed costs)
=	\$823,797.35 (total owing)
-	\$655,000 (sale proceeds)
=	\$168,797.35 (total deficiency)

X 13.93% (pro rata share of non-purchase mortgage)

= \$23,513.47 (deficiency judgment)

[103] Conexus shall have judgment for \$23,513.47.

J.
D.N. ROBERTSON