

# KING’S BENCH FOR SASKATCHEWAN

Citation: 2024 SKKB 141

Date: 2024 08 01  
Docket: KBG-SA-01212-2023  
Judicial Centre: Saskatoon

---

BETWEEN:

INNOVATION FEDERAL CREDIT UNION

APPLICANT

- and -

PAMELA JEAN MARIE TOEWS and MICHEL DONALD  
LIONEL ALEXZANDER MONTPETIT

RESPONDENTS

**Counsel:**

Avery Layh  
No one appearing

for applicant  
for respondents

---

FIAT  
August 1, 2024

ROBERTSON J.

---

## Contents

<b>INTRODUCTION</b> .....	1
<b>BACKGROUND</b> .....	2-17
<b>ISSUE</b> .....	18
<b>RELEVANT LEGISLATION</b> .....	19-23
<i>The Land Contracts (Actions) Act, 2018</i> .....	20-22
<i>The King’s Bench Act</i> .....	23
<b>ANALYSIS</b> .....	24-40
<b>Material default required for leave</b> .....	24
<b>Right to remedy default</b> .....	25-35
<b>Pre-leave costs</b> .....	36-37
<b>Eight-month limit to adjournment of leave applications.</b> .....	38-39
<b>Application for leave dismissed</b> .....	40

## **INTRODUCTION**

[1] This decision addresses an application for leave to commence a foreclosure action. Leave is denied and the application dismissed because the respondent homeowners had remedied the breach of the mortgage agreement by paying the arrears. This decision takes the opportunity to review the law governing rectification of mortgage default in the context of a leave application.

## **BACKGROUND**

[2] On June 24, 2021, the applicant, Innovation Federal Credit Union, [Credit Union] and the respondents, Michel Donald Lionel Alexzander Montpetit and Pamela Jean Marie Toews, [Homeowners] entered into a mortgage agreement [Mortgage]. Under the terms of the Mortgage, the Credit Union loaned the principal sum of \$193,600 to the Homeowners. The Mortgage loan has a fixed rate of 3.55% with a due date of June 10, 2026. The Homeowners were and are obliged to make monthly payments of \$971.71 beginning July 10, 2021.

[3] The Mortgage loan was used to purchase real property described legally as Lot 20, Block 5, Plan No C4769, Extension 0 and Lot 25, Block 5, Plan No 101580689, Extension 34 with a civic address of 317 Carson Street, Dundurn, Saskatchewan [Property]. On June 29, 2021, the Homeowners obtained title to the Property.

[4] On October 13, 2023, the Credit Union filed notice of application for leave to commence action in Form A of *The Land Contracts (Actions) Regulations*, RRS c L-3.001 Reg 1 and Form 10-39B of *The King's Bench Rules* with a hearing date of December 12, 2023. The Affidavit Regarding State of Respondent's Account Under the Mortgage filed in support of the Mortgage stated there were total Mortgage arrears

of \$4,858.55 as of September 12, 2023, as well as property tax arrears owing to the municipality. Both would be breaches of the Mortgage constituting default.

[5] On December 7, 2023, the application was adjourned by consent to January 11, 2024.

[6] On January 8, 2024, the Credit Union filed a Supplementary Affidavit Regarding State of Respondent's Account Under the Mortgage which stated that the total Mortgage arrears as of January 5, 2024 was \$3,773.39 and that property taxes had been paid in full to the municipality by the Homeowners and the municipal tax lien discharged.

[7] On January 11, 2024, Ms. Layh appeared for the Credit Union by phone and the Homeowners appeared in person. Morrall J. adjourned the application to February 8, 2024. The endorsement on the court file reads as follows:

In this matter, I note that Ms. Toews and Mr. Montpetit have been making significant efforts with respect to repaying arrears and have made some payments, however, we have not yet received the January payment. Ms. Toews did appear in court January 11, 2024 and indicated some of the significant reasons why that was not done which I find to be valid in these circumstances with the tacit consent of the Credit Union who, although realizing the amount of the arrears isn't much, but noting that obviously this matter has gone on for a bit of time, is prepared to adjourn it to February 8, 2024 and at that point Ms. Toews has indicated that there should be at least two payments made towards the arrears. She indicates that the arrears will not likely be fully paid by that point, but they anticipate perhaps by April that that could occur. In these circumstances, I find that it is appropriate to adjourn to February 8, 2024.

[8] On February 2, 2024, the Credit Union filed a Supplementary Affidavit Regarding State of Respondent's Account Under the Mortgage which stated that the total Mortgage arrears as of February 2, 2024 was \$4,745.10

[9] On February 8, 2024, Ms. Layh appeared for the Credit Union by phone and the Homeowner, Mr. Montpetit, appeared by phone, Rothery J. adjourned the application to April 4, 2024. The endorsement reads as follows:

With the explanation of Mr. Montpetit that he should have all payments current by the end of March 2024, the application for leave to commence action is adjourned to Thursday, April 4, 2024 at 10:00 a.m.

[10] On April 1, 2024, the Credit Union filed a Supplementary Affidavit Regarding State of Respondent's Account Under the Mortgage which stated that the total Mortgage arrears as of March 26, 2024 was \$1,766.81.

[11] On April 4, 2024, Ms. Layh appeared by telephone and the Homeowner, Mr. Montpetit, appeared in person. The application was adjourned to May 16, 2024. There was no other endorsement on the court file.

[12] On April 22, 2024, the Credit Union's lawyer wrote the Local Registrar of the court stating that the Homeowners had "brought their mortgage current" and asked that its application be adjourned by consent to June 13, 2024. The letter read as follows:

Further to the Chambers Application adjourned to May 16, 2024, our client advises that Michel Montpetit and Pamela Toews have brought their mortgage current. Although the mortgage is presently current, we wish to adjourn this matter, by consent, to June 13, 2024, to ensure payments continue to be made to keep the mortgage current. Kindly advise if the Presiding Judge will agree to this matter being adjourned to June 13, 2024.

We look forward to hearing from you.

[13] On April 23, 2024, the application was adjourned to June 13, 2024.

[14] On June 7, 2024, the Credit Union filed a Supplementary Affidavit Regarding State of Respondent's Account Under the Mortgage which stated that the total Mortgage arrears as of June 6, 2024 was \$971.71.

[15] On June 12, 2024, the application was adjourned by consent to July 23, 2024.

[16] On July 18, 2024, the Credit Union filed A Supplementary Affidavit Regarding State of Respondent’s Account Under the Mortgage which stated that the total Mortgage arrears as of July 18 was \$971.71.

[17] On July 23, 2024, Ms. Layh appeared by the telephone for the Credit Union. No one appeared for the Homeowners. Ms. Layh said that the Homeowners had recently made payment and the Mortgage account was again current. She proposed adjourning *sine die* to allow “monitoring through the court”. Decision was reserved.

## **ISSUE**

[18] The issue is whether an application for leave to commence a foreclosure action can continue after the default is rectified?

## **RELEVANT LEGISLATION**

[19] *The Land Contracts (Actions) Act, 2018*, SS 2018, c L-3.001 [*LCAA*], and *The King’s Bench Act*, SS 2023, c 28 contain provisions relevant to the issue.

### ***The Land Contracts (Actions) Act, 2018***

[20] The *LCAA* in s. 5 provides that no action to enforce an action for foreclosure, sale, possession of land or recovery of moneys payable under a mortgage shall be commenced except by leave of the court. Section 3 provides that the *LCAA* does not apply to a mortgage or agreement for sale of land “used solely for commercial purposes”.

[21] Sections 7 and 8(1)(b) of the *LCAA* requires the applicant include with the application the state of the respondent’s account and to file updated information on

the state of the account not more than 25 days and at least 5 days before the hearing date. This ensures the court has current and accurate information before it at each hearing, including adjourned dates.

[22] Subsection 8(2) of the *LCAA* allows the court to adjourn the application from time to time for a period of not more than eight months, to grant the application, dismiss the application or make any other order that the judge considers appropriate. Subsection 8(3) provides that dismissal of an application is not a bar to a future application for leave to commence an action.

### ***The King's Bench Act***

[23] *The King's Bench Act* in s. 10-11 allows a mortgagor to rectify the default that prompted the application for leave to commence action.

#### **Relief of mortgagor in default**

**10-11** If default is made in the payment of money due under a mortgage or in the observance of a covenant contained in a mortgage and, under the terms of the mortgage, the payment of other portions of the principal money is accelerated by reason of the default and those portions become due and payable:

- (a) the mortgagor may, notwithstanding any provision of the mortgage to the contrary and at any time before sale or before the grant of a final order of foreclosure, perform the covenant or pay the arrears that are in default, with costs to be taxed; and
- (b) on performing a covenant or paying arrears pursuant to clause (a), the mortgagor is relieved from immediate payment of the portion of the money secured by the mortgage that has not become payable by lapse of time.

## **ANALYSIS**

### **Material default required for leave**

[24] Mortgage default refers to some occurrence during the mortgage term

which is a breach of the mortgage agreement. A material default entitles the mortgagee-lender to begin legal proceedings to enforce the agreement. The most common default is failing to make the regular payments required under the mortgage agreement. But there can be material defaults of other mortgage covenants, such as failing to pay property taxes or failing to keep fire insurance in place. Those defaults are material because they put the lender's security – the value of the real property – at risk.

### **Right to remedy default**

[25] While a mortgagee-lender can begin legal proceedings after default, *The King's Bench Act* in ss. 10-11 allows the mortgagor-borrower to remedy the breach (or default), such as by paying the outstanding mortgage arrears or property taxes. This is called rectification or remedy of the default.

[26] Since the Mortgage was for the purchase of residential property, it is described as a purchase mortgage. This Mortgage is for a five-year term with a fixed rate of interest, which ensures that the monthly payments are known and do not change during that term. Because the term of the mortgage has not yet expired, the mortgage is described as a non-matured mortgage. Default in non-payment of a non-matured mortgage can be remedied by paying the arrears, which are the missed payments. In the case of a matured mortgage, however, the entire mortgage loan is due. Payment of that amount usually requires re-financing or sale of the mortgaged property.

[27] Rectification of default can occur before or after leave is granted. The order *nisi* for judicial sale includes a redemption period during which the property owner can stop the sale by payment of the amount owing. Reinstatement of the mortgage occurs when the mortgagor pays the arrears owing on a non-matured mortgage. Redemption occurs when the mortgagor pays the entire balance owing on a matured mortgage. In either case, if the mortgagor remedies the default, the legal

proceeding is ended because there is no longer any breach to justify the application or action. The only remaining issue can be costs.

[28] In *First National Financial GP Corporation v Churko*, (23 May 2019) Regina, QBG-RG-02355-2018 (Sask QB), at page 1, Mills J. succinctly described the applicant-mortgagee's (lender) requirement to establish mortgage default in a leave application and the respondent-mortgagor's (borrower) ability to rectify that default and thereby end the application.

I agree with Mr. Churko that the general proposition is that the bank must establish that a default has occurred before it will be entitled to obtain leave to commence a claim. There can be no claim unless the defendant has breached some term of the contract. The contract includes the mortgage document and any legislation which varies the terms of the mortgage. The point of *The Land Contracts Act* [*The Land Contracts (Action) Act*, RSS 1978, c L-3] is to provide a mortgagor of property an opportunity to cure a default before a statement of claim based on the mortgage is issued. The bank identifies the actionable breaches, quantifies them where appropriate and provides that information to the mortgagor as part of the application. The court then has jurisdiction to adjourn the application from time to time to a maximum of eight months to allow the alleged breaches to be cured. If they are cured, leave to commence the action is not given under *The Land Contracts Act* and the court process is halted.

[29] Mills J. went on at page 3 of the fiat to reject the bank's argument that it could continue to seek leave even after the acts of default had been remedied. The bank argued that the default had triggered a mortgage term which accelerated payment making the entire mortgage loan now due so as to allow the bank to demand payment in full. Mills J. pointed out this mortgage term was unenforceable as contrary to legislation, citing s. 61 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 (now *The Kings Bench Act*, s 10-11). He went on to write:

This is clearly the legislative authority sought by the bank which has been followed in thousands of other foreclosure actions in Saskatchewan.

The bank's legal position is untenable as I have identified. There is no act of default that is currently before the court that would allow the

bank to commence foreclosure action. Therefore, its application for leave to commence action is dismissed. ...

[30] In this case, the mortgagor’s default was falling behind on the monthly payments. But, according to the Credit Union’s lawyer’s letter of April 22, 2024 to the court, this default was rectified as of that date. The purpose of the adjournment on April 23 to June 13, 2024, as stated in that letter, was “to ensure payments continue to be made to keep the mortgage current.”

[31] At the hearing on July 23, 2024, the Credit Union’s lawyer advised that the Homeowners had again made payment to bring the Mortgage account current and proposed adjourning *sine die* (to an undetermined date) to allow “monitoring through the court”. When asked if counsel could point to authority for such a process, counsel conceded they were not aware of any such authority.

[32] Adjourning applications for leave to commence action, after rectification of default, for the purpose of monitoring future payments or other potential breach is not a proper purpose for an adjournment.

[33] The court’s exercise of its supervisory jurisdiction is to ensure compliance with statutory protections for the consumer, not to monitor and enforce future debt payment for the creditor. This is not to say the court does not take account of the interests of both creditors and debtors. It does. But in the case of a leave application, once the mortgagor rectifies the default, there is no judicial reason to continue the leave application. On the contrary, it must then be dismissed because there is no longer an actionable claim for which leave could be granted.

[34] That the Homeowners consented to the April adjournment does not matter. Apart from the fact they did not appear and were unrepresented and reliant upon the Credit Union’s lawyer who requested the adjournment, lenders and borrowers cannot agree to waive the protections of the *LCAA*.

[35] A mortgagee might protest, asking what about the mortgagor who makes mischief by repeated defaults which are rectified after application for leave, but before leave is granted. The answer to that concern is the court’s discretion over costs.

### **Pre-leave costs**

[36] Pre-leave costs can be awarded only at the time of granting leave to commence action. Pre-leave costs are not normally awarded. See: *Affinity Credit Union v Rawlyk*, 2014 SKCA 34 at para 5, 433 Sask R 233; and *Homequity Bank v Lindemann*, 2021 SKQB 326. Once leave is granted and the statement of claim is issued, however, then post-leave costs are usually awarded, even if the default is rectified before foreclosure or judicial sale.

[37] As stated above, ss. 8(4) of the *LCAA* provides that dismissal of a leave application is no bar to a future application for leave to commence action. So if there is another breach occurring after dismissal of a leave application, the mortgagee can bring a fresh application seeking leave to commence action for the new default. Where there is a pattern of repeated default and rectification resulting in dismissal of leave applications, then pre-leave costs may be justified as against a “chronic offender”. See *Saskatoon Credit Union Ltd. v MacKay*, [1989] 1 WWR 178 at 180 (Sask QB). That provides the court with an effective remedy to address the potential mischief of deliberate, recurring breaches which result in repeated applications for leave to commence action.

### **Eight-month limit to adjournment of leave applications**

[38] The court’s discretion to adjourn applications for leave to commence action is usually used to provide the homeowner with an opportunity to rectify the default and thereby avoid the proposed foreclosure action. As stated above, ss. 8(2)(a) of the *LCAA* limits the court’s ability to adjourn applications for leave to commence

action to eight months. This time limit supports my conclusion that the court’s authority to adjourn leave applications was not intended to monitor on-going payments after rectification of default.

[39] In this case, the first appearance was scheduled for December 12, 2023, so the eight month limit would expire on August 12, 2023. So the time for a decision was running out. Adjourning *sine die* was not an option.

**Application for leave dismissed**

[40] The application for leave is dismissed because the Homeowners rectified the default by bringing their mortgage account current in April 2024 and again in July 2024.

\_\_\_\_\_  
J.  
D.N. ROBERTSON