KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 133**

Date: **2024 07 18**
File No.: KBG-RG-00250-2023
Judicial Centre: Regina

BETWEEN:

SCOTIA MORTGAGE CORPORATION

PLAINTIFF

- and -

EDNA KEEP and WARREN KEEP

DEFENDANTS

Counsel:

Erica Klassen	for the plaintiff
No one appearing	for the defendants

FIAT
July 18, 2024

ROBERTSON J.

Contents

INTRODUCTION

[1] This decision addresses an application for assessment of costs following judicial sale. The plaintiff, Scotia Mortgage Corporation [Bank], argues for a more expansive and generous approach to the assessment of costs. The Bank asks for $7,964.47 in legal fees and $11,736.56 in property management costs.

[2] This application provides the court with an opportunity to review the law governing the assessment of costs, the process for assessment of costs, and issuance of deficiency judgment.

[3] For the reasons which follow, the application is granted, in part.

BACKGROUND

[4] The foreclosure proceedings were routine. The Bank's applications for leave to commence action, order *nisi*, and order confirming sale were unopposed. The applications for leave and order *nisi* were granted on first appearance. The application for order confirming sale was granted on second appearance, but only because the Bank had asked to adjourn on first appearance. Except for that appearance, the Bank's counsel appeared by telephone. All appearances were brief.

[5] The litigation timeline is summarized below.

LITIGATION TIMELINE

2022

December 4 Bank secures property

2023

January 30	Notice of leave to commence action filed, naming Edna Keep and Warren Keep as then respondents
April 20	Mitchell J. granted leave to commence action at first appearance; no one appearing for then respondents
April 24	Statement of claim filed naming Edna Keep, Warren Keep, Olympia Trust Company, Sunova Credit Union, and Lorie Regehr as defendants
May 25	Edna Keep and Warren Keep noted for default of defence
May 30	Olympia Trust Company noted for default of defence
June 5	Sunova Credit Union noted for default of defence
July 5	Unnamed defendant noted for default of defence
August 2	Amended statement of claim adding mineral parcel to description of mortgaged land
August 30	Edna Keep, Sunova Credit Union, and Lorie Regehr noted for default of defence
September 5	Warren Keep noted for default of defence
September 15	Olympia Trust noted for default of defence
October 4	Notice of application filed seeking order *nisi* for sale by real estate listing
October 19	Robertson J. granted order *nisi* for sale by real estate listing with 20-day redemption period and upset price of $167,025; no one appearing for defendants
October 23	Order *nisi* issued

2024

February 7	Notice of application filed seeking order confirming sale
February 22	Tochor J. granted order confirming sale for $225,000; no one appearing for defendants
February 29	Order confirming sale issued
May 10	Notice of application for assessment of costs filed, seeking legal fees of $7,964.47 and property management fees of $11,736.56
June 13	Robertson J. adjourns application at request of Bank to June 20: no one appearing for defendants
June 20	Robertson J. hears application, reserving decision: no one appearing for the defendants

ISSUE

[6] The issue is whether costs should be allowed and, if so, what costs and in what amounts. This issue raises the following questions:

a) What is the process for the assessment of costs?

b) What costs are excluded?

c) What eligible costs must be assessed?

d) What factors should be considered in assessing costs?

e) What property management costs can be claimed?

f) What legal fees can be claimed?

g) How does the assessment of costs relate to the calculation of the deficiency judgment?

POSITION OF THE BANK

[7] The Bank applies for assessment of costs, identifying solicitor-client costs in the amount of $7,964.47 and property management costs in the amount of $11,736.56. The Bank, in its brief of law at para. 14, states that it has no onus to establish a legal basis for costs claimed:

> 14. … The LCRA [*The Limitation of Civil Rights Act*, RSS 1978, c L-16] does not create an onus on mortgagees to establish a separate legal basis for each heading of costs claimed under a mortgage, absent any specific legal or factual challenge to such claims.

[8] The Bank, in its brief of law at para. 6, states that the benchmark for solicitor-client costs is now $5,500, citing *Scotia Mortgage Corporation v Irvine*, 2023 SKKB 171 [*Irvine*]; and *Scotia Mortgage Corporation v Yamniuk*, 2024 SKKB 48 [*Yamniuk*].

[9] The Bank, in its brief of law at para. 23, states that the prohibition against inspection fees in s. 7 of *The Limitation of Civil Rights Act*, RSS 1978, c L-16, does not exclude the Bank's claim for its property manager's charges for attendance at the property. The Bank acknowledges decisions of this Court to the contrary at paras. 25-26, but states at para. 27 that "… the issue of post-securing visits to preserve and protect the mortgage property has not been finally determined."

LAW

[10] In this part, I will:

a) Identify the governing legislation;

b) Discuss the legislative policy promoted by that legislation and its relevance to both the application and interpretation of the legislation;

c) Review the duty of counsel to the court in foreclosure proceedings;

d) Summarize the court's supervisory and equitable jurisdiction;

e) Identify the steps in foreclosure proceedings; and

f) Review the law governing assessment of costs and deficiency judgment in foreclosure actions.

[11] The purpose of this review is to inform the analysis of the assessment of costs claimed in this application. The hope is that this review will also help counsel and the court in future applications for assessment of costs.

Governing Legislation

[12] The Legislature of Saskatchewan has enacted laws which govern foreclosure proceedings:

a) *The Land Contracts (Actions) Act, 2018,* SS 2018, c L-3.001;

b) *The Land Titles Act, 2000,* SS 2000, c L-5.1, Part XVII, Division 1, Mortgages and Agreements for Sale;

c) *The Limitation of Civil Rights Act*; and

d) *The King's Bench Act,* SS 2023, c 28, in particular ss. 10-11 to 10-13.

[13] This Court has also adopted procedural rules in *The King's Bench Rules*, in particular Part 10, Divisions 5 and 6. The Rules provide specific forms for foreclosure proceedings.

Legislation Prevails over Contract

[14] *The Land Contracts (Actions) Act, 2018* in ss. 4 and 14, and *The Limitation of Civil Rights Act* in ss. 16 and 40(1) provide that any agreement to waive

or deviate from the terms or authority of those statutes is void. In other words, borrowers cannot contract away their statutory rights. These limitations reflect a long-standing legislative policy which seeks to mitigate the power imbalance that exists between most mortgagor-borrowers and mortgagee-lenders. In *First Nations Bank of Canada v Ledoux*, 2005 SKQB 262 at para 11, [2006] 1 WWR 190, Wilkinson J. wrote:

> [11] With respect to the argument that *The Land Contracts (Actions) Act* was not meant to affect contract rights, it must be stated that even before the Court's broad discretion was statutorily enshrined in s. 3(11) of the *Act*, it could not be ousted by agreement of the parties.

Power Imbalance

[15] The power imbalance between mortgagee (lender) and mortgagor (borrower) may exist in several ways: large sophisticated financial institutions as mortgagees versus generally unsophisticated individuals as mortgagors; standard mortgage agreements written by the mortgagee which are difficult to understand and favour the lender; mortgagees who are represented by lawyers in court versus most mortgagors who are unrepresented or do not appear to contest applications; and vulnerable mortgagees in financial difficulty, often involving other personal turmoil, such as job loss or marital breakup which adds to the stress of facing loss of their home. Most mortgagors have never been to court before, which can be a stressful experience. Justices of this Court try to bear this reality in mind when hearing foreclosure applications.

Legislative Policy is Consumer Protection

[16] The public policy behind or purpose of this legislation is to provide consumer protection, in particular to protect mortgagors against harm from temporary economic reversals and downturns and predatory lenders. This public policy recognizes the importance and value of home ownership, both to homeowners and their communities. The home is often the owner's greatest financial asset. Home ownership

provides security for the family and social and economic stability for the community. It represents the owner's commitment to and investment in the future of the community.

[17] The genesis of this public policy is found in the Saskatchewan Legislature's response to the economic hardship and social dislocation wrought by the combination of the Great Depression and "dust bowl" years of the 1930s. This created a crisis for the future of the family farm, which provided both a home and livelihood for most Saskatchewan residents. Then Attorney General of Saskatchewan, T.C. Davis, K.C., explained the conditions requiring legislative action in his second reading speech for The Debt Adjustment Act, 1934. (*Debt Adjustment and The Personal Covenant, Speeches delivered by The Hon. T.C. Davis, K.C. (Attorney General) in moving the Second Reading of The Debt Adjustment Act, 1934 and An Act to Amend The Limitation of Civil Rights Act, 1933 in the Legislative Assembly of Saskatchewan, Session 1934-35*, (Regina: King's Printer, 1935) at 5:

> In the first place let me say that I am of the opinion that this Legislature is practically unanimous upon the necessity of debt adjustment, and that it is absolutely essential that legislation to provide a means of debt adjustment should be enacted at the earliest possible moment.
>
> All are only too well aware that, at this time, we are passing through the greatest period of depression the world has ever known, a depression which, of necessity, has been accompanied by a state of unusually depressed prices for agricultural commodities. Agriculture is the basic industry of Saskatchewan and, by peculiar coincidence, this period of depressed prices for agricultural products has been accompanied by the severest and most intense drought that Western Canada has ever experienced. Then, too, associated with the drought has been the affliction of grasshoppers and other pests disastrous to agriculture. As a result, the value of agricultural production, in many instances during the last few years, has been entirely wiped out or seriously curtailed.

[18] This public policy had remained intact over the following 90 years and was recognized by the Court of Appeal in *Lozinski v Mayoh and Mayoh* (1984), 32 Sask R 312 at paras 10-12 (CA); and *Walker v Bank of Montreal*, 2017 SKCA 42 at paras 7-10, 415 DLR (4th) 277.

[19] In *Co-operative Trust Company of Canada v Target 21 Industries Ltd.*, [1988] 3 WWR 97 at paras 12 and 18 (CanLII) (Sask CA) [*Target 21*], Sherstobitoff J.A. made this point in reference to the mortgagee's unlawful resort to an extra-judicial remedy of sale:

> [12] The fundamental principles important to this case are protection of the mortgagor against overpayment and strict and effective accountability of the mortgagee in respect of any property permanently alienated from the mortgagor.
>
> …
>
> [18] If s. 133 [of *The Land Titles Act*, RSS 1978, c L-6] is viewed in this light, it is apparent that, notwithstanding that the words of the section appear to be permissive rather than mandatory, the effect of the section is to make all major remedies of the mortgagee, namely, action for payment, foreclosure, sale, possession and lease, subject to the supervision of the court. The remedies may not be exercised extra-judicially. Surprisingly, there seem to be few reported judgments dealing with the section or its predecessors. Perhaps that is because the principle is so obvious.

[20] In *Saskatoon Credit Union Ltd. v MacKay*, [1989] 1 WWR 178 at para 10 (CanLII) (Sask QB) [*MacKay*], Wright J. referred to this legislative policy in the context of supporting denial of an application for pre-leave costs:

> [10] The argument that a mortgagor ought to pay all the costs occasioned by the mortgagee in having to comply with consumer protection legislations such as the *Land Contracts (Actions) Act* is, with respect, a pernicious one. The whole purpose of the legislation is to give a defaulting mortgagor time to order his or her affairs before being caught up in the extremely costly and potentially disastrous process of actual foreclosure. Most respondents in proceedings under the *Land Contracts (Actions) Act* are individual homeowners who have gotten into financial difficulty. The suggestion that they must pay for the protection assured them as of right fails to recognize the philosophy behind the legislation. After all, if the mortgagor could pay, he or she would not be in default. To cast upon the financially troubled mortgagor the additional burden of solicitor and client costs would do violence to this statute and would constitute a bizarre misapplication of the principles set down in cases such as *Mayhew v. Adams* (supra) [*Mayhew v Adams*, [1930] 3 WWR 539 (Sask CA)].
>
> [Emphasis in original]

Statutory Interpretation

[21] The modern principle of construction of statutes was stated by Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada, 2008) at 1:

> ***Introduction.*** More than thirty years ago, in the first edition of the *Construction of Statutes*, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[22] Driedger's modern approach has been repeatedly cited by the Supreme Court of Canada as the preferred approach to statutory interpretation (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, [2002] 2 SCR 559). More recently, in *PCL Construction Management Inc. v Saskatoon (City)*, 2020 SKCA 12 at para 45, 444 DLR (4th) 433, the Court of Appeal for Saskatchewan repeated its acceptance of the modern approach:

> [45] The proper approach to issues of statutory interpretation is the so-called modern approach – see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 [*Rizzo Shoes*] – which has now been codified in s. 2-10(1) of *The Legislation Act*, SS 2019, c L-10.2: see also *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 37, [2006] 1 SCR 140, and *Liquid Capital Propane Corp. v Mainline Industrial Limited Partnership*, 2019 SKCA 66 at para 26, [2019] 11 WWR 310 [*Mainline Industrial*]). This principle or approach holds that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo Shoes* at para 21, quoting Elmer Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1993) at 87). Benefit-conferring statutes "ought to be interpreted in a broad and generous manner" (*Rizzo Shoes* at para 21). Further, s. 2-10(2) of *The Legislation Act* requires every enactment to be interpreted in a remedial fashion and be given a "fair, large and liberal interpretation" that best attains the objects of the statute.

[23] The object of any legislation, or legislative policy, is relevant when interpreting that legislation. Where there are reasonably plausible alternate constructions, the courts will generally prefer the interpretation which is consistent with the purpose of the legislation. This purposive approach was applied in *National Trust Co. v Mead*, [1990] 2 SCR 410 at 419 – 422 [*Mead*]; affirming *National Trust Co. v Mead*, [1988] 5 WWR 365 (Sask CA), with respect to the application of s. 2 of *The Limitation of Civil Rights Act*. The Supreme Court in *Mead* stated that "The meaning to be attributed to the provisions of the Act should reflect these policy concerns" in holding that "any exception to the principle in s. 2 that individual mortgagors be insulated from personal liability should be construed as narrowly as possible." (at p. 423):

> I agree with Cameron J.A. that these cases are not of much assistance. I turn therefore to a consideration of the purpose of s. 2 of the Act. Section 2 protects individual mortgagors from being personally liable on a mortgage and restricts the mortgagee's remedy to the property. Individuals usually take out mortgages to secure residential houses or farms. Their home is typically the largest single asset they have. One can well imagine that once that is lost the individual in many instances has little else to seize and imposing the additional burden of personal liability would be onerous and perhaps futile. I note in passing that s. 2 was originally enacted by the Saskatchewan legislature in 1934 (S.S. 1934-35, c. 89, s. 4) at a time when many prairie farmers were "losing the farm" thanks to the notorious and disastrous effects of the "dustbowls" and the Depression.
>
> Section 40 of the Act was enacted through a series of amendments to the statute between 1953 and 1961. The purpose in permitting corporate borrowers to waive the protection provided under the Act was, in my view, aptly described by Malone J. in *Disney Farms Ltd. v. Canadian Imperial Bank of Commerce*, [1984] 5 W.W.R. 285 (Sask. Q.B.) at pp. 287-88:
>
> > Since 1965 the Limitation of Civil Rights Act [R.S.S. 1965, c. 103, s. 27] has permitted bodies corporate to waive the entire provisions thereof. A similar waiver provision is also found in the Saskatchewan Land Contracts (Actions) Act, R.S.S. 1978, c. L-3 [s. 5]. In my opinion, the purpose of these provisions is to facilitate corporate financing that otherwise may not be available if lenders could not realize upon their

> security on default by a corporate borrower. I am also of the opinion that the provisions of the Limitation of Civil Rights Act were primarily intended to benefit and protect individuals, as distinct from limited companies, who usually are more sophisticated in the management of their affairs and require larger amounts of capital to maintain their operations.
>
> I think it is clear that the policy concerns animating the protection of individuals from personal liability for mortgage deficiencies are not particularly compelling when applied to corporations. The meaning to be attributed to the provisions of the Act should reflect these policy concerns. Thus, any exception to the principle in s. 2 that individual mortgagors be insulated from personal liability should be construed as narrowly as possible.
>
> [*Mead* at 422-423]

[24] See also: *Farm Credit Canada v Tendler*, 2010 SKQB 140 at para 8, 352 Sask R 294.

[25] The *contra preferentem* rule will apply when interpreting mortgage agreements to resolve ambiguity in favour of the mortgagor (*Royal Trust Corporation of Canada v Lloyd Communications Inc.* (1993), 112 Sask R 266 (QB) [*Lloyd*]). In *Lloyd*, the bank claimed a right of entry to the mortgaged property to conduct an environmental assessment under a mortgage term allowing "inspection". Chief Justice MacPherson rejected the bank's position, writing (*Lloyd* at para 5):

> [5] The applicant has presented no evidence to suggest in any way that there is any reason to believe or suspect that there is any aspect of the property which might give rise to an environmental concern. Further, counsel for the applicant could not point out to me, nor could I find, any provision in the mortgage relating to environmental concerns. I cannot find that the various rights and permissions which the applicant seeks in its proposed order fall within the words "inspect the mortgaged premises or the buildings, erections and improvements thereon" as found in the aforesaid paragraph (i). I cannot interpret the word "inspect" in the context of the terms of the mortgage to include the broad powers which are sought in the applicant's proposed order. This is an obvious case for the application of the *contra proferentum* doctrine.

Duty of Counsel to the Court

[26] Lawyers are officers of the court with duties to the court, including to ensure the court is fully informed of both relevant facts and law, and never to mislead, including by omission. This duty is enhanced where the opposing party is unrepresented or absent. That is usually the case in foreclosure proceedings. In those cases, counsel for the mortgagee-applicant has the same duties as expected in without notice applications. Those duties were summarized by Megaw J. in *Bank of Nova Scotia v Herman*, 2016 SKQB 351 at para 10:

> [10] *Ex parte* applications carry with them a heavy onus on the party making application to do four things:
>
> 1. Provide notice of the proceedings to the opposing counsel unless circumstances are such as to compel immediate action by the court;
>
> 2. Provide full, frank, and complete disclosure of all available information to the court;
>
> 3. Provide a complete basis in law for the court's jurisdiction to grant the relief requested including providing the applicable rules and case authority; and
>
> 4. Provide all of the necessary material, including the draft order, to allow the court to review everything before proceeding.

[27] The Law Society of Saskatchewan's *Code of Professional Conduct* (Regina: Law Society of Saskatchewan, September 2023) in article 5.1 states and explains this duty:

> 5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.
>
> Commentary:
>
> Role in Adversarial Proceedings:
>
> …

> [6] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.
>
> …
>
> 5.1-2 When acting as an advocate, a lawyer must not:
>
> ...
>
> (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
>
> ...
>
> (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;
>
> …

[28] *The King's Bench Rules* forms are carefully crafted by the court. Any proposed deviation from those forms must be underlined in the draft form. Any such change must be clearly brought to the attention of the justice reviewing or hearing the application, both in writing and in oral submissions at any hearing of the application.

[29] Rule 10-47(6) of *The King's Bench Rules* expressly states this requirement with respect to Form 10-47 order *nisi*. The court has criticized counsel who fail to comply. For example:

a) *Yamniuk* at paras 22 and 26 (Rothery J.):

> [22] In accordance with Rule 10-47(6), counsel for SMC [Scotia Mortgage Corporation] did underline all the additions it proposed to the draft order nisi for sale in its *ex parte* application. However, no corresponding memorandum accompanied the *ex parte* application, alerting the presiding judge that the relief requested was not in accordance with established law.
>
> …

> [26] In reviewing the draft Order Nisi for Sale by Real Estate Listing that was presented to Justice Layh in *Irvine* and the draft Order Nisi for Sale by Real Estate Listing granted by the *ex parte* judge in this action, one notices an uncanny similarity in the phrases added to the draft that are not in compliance with the law. One also notices that the plaintiff in both cases is represented by MLT [MLT Aikins LLP].

b) *Canadian Imperial Bank of Commerce v Knight*, 2023 SKKB 220 at para 33 (Danyliuk J.):

> [33] In the very unique circumstances of this case I have decided to make a costs order against CIBC. In some respects it may be symbolic but the message sent is important: mortgagees cannot act as they wish, with impunity. Their counsel must bear in mind they are officers of this Court and are not mere mouthpieces or debt collectors.

c) *Manulife Bank of Canada v Holmes*, 2023 SKKB 105 at para 49 [*Holmes*] (Robertson J.):

> [49] It should be emphasized that any application to depart from the general requirement or standard should not only be supported by evidence but must also <u>be clearly brought to the attention</u> of the presiding justice on a with notice application or reviewing justice on a without notice application. Failure to do so erodes the trust in lawyers on which the proper operation of the court depends. See:
>
> (a) *Hanterman* [*Royal Bank of Canada v Hanterman*, 2013 SKQB 158] at paras 9-10 (Gabrielson J.)
>
> (b) *CIBC Mortgages Inc. v Eldstrom*, 2014 SKQB 337 at para 14, 458 Sask R 314 (Layh J.)
>
> (c) *CIBC Mortgages Inc. v Kjarsgaard*, 2015 SKQB 411 at paras 27-28 (Barrington-Foote J.) (as he then was)
>
> (d) *Royal Bank of Canada v Yuzak*, 2019 SKQB 145 at para 27 [*Yuzak*] (Danyliuk J.)
>
> (e) *Affinity Credit Union 2013 v Algner*, 2020 SKQB 174 at para 7 (Danyliuk J.)
>
> (f) *Canadian Imperial Bank of Commerce v Doan*, 2020 SKQB 274 at paras 15-16 (Robertson J.)
>
> (g) *Toronto-Dominion Bank v Ho*, 2021 SKQB 104 at paras 40-41 [*Ho*] (Robertson J.)

> (h) *Homequity Bank v Lindemann*, 2021 SKQB 326 at para 54 [*Lindemann*] (Robertson J.)
>
> (i) *Bank of Nova Scotia v Smith*, 2022 SKQB 162 at para 15 (Danyliuk J.)
>
> (j) *Toronto-Dominion Bank v Clark* (25 April 2023) Battleford, QBG-BF-00093-2022 (Sask QB) at paras 5 and 11-12 [*Clark*] (Hildebrandt J.).
>
> [Emphasis in original]

Court's Supervisory Jurisdiction

[30] The Court of Appeal has recognized this Court's supervisory jurisdiction over all the processes of foreclosure proceedings and related relief (*Target 21* at para 18; *Saskatoon Credit Union Ltd. v Goertz and Atlas Industries Ltd*. (1989), 73 Sask R 81 at para 10 (CA) [*Goertz*]; and *The Toronto-Dominion Bank v Gibbs*, 2019 SKCA 57 at paras 49-50, [2019] 12 WWR 71 [*Gibbs CA*]).

[31] The court has expressly recognized that its supervisory authority includes assessment of costs (*Royal Bank of Canada v Viloria*, 2014 SKQB 110, 443 Sask R 121 [*Viloria*]; *Toronto-Dominion Bank v Schell*, 2014 SKQB 344 at para 18, 461 Sask R 257 [*Schell*]; *Royal Bank of Canada v Hollmann*, 2017 SKQB 299 at para 17 [*Hollmann*]; and *Royal Bank v Gaudet*, 2019 SKQB 87 at para 30).

[32] The court's exercise of discretion in its supervisory role is properly informed by its understanding of the purpose of the governing legislation. In *CIBC Mortgages Inc. v Taylor*, 2018 SKQB 118 at para 20, [2018] 9 WWR 340, Danyliuk J. referred to the purpose of the legislation in relation to the court's exercise of its supervisory jurisdiction:

> [20] There will be no shock to those experienced with foreclosure practice in Saskatchewan that this court jealously guards, and sedulously fosters, its supervisory jurisdiction. This has evolved through legislation, case law, and longstanding practice. Much of the legislation and case law in this area is designed for the protection of

> debtors, and to ensure that creditors realizing on their security do so in an orderly fashion.

[33] See also *Holmes* at para 17.

Court's Equitable Jurisdiction

[34] Judicial sale is an equitable remedy and will only be granted in accordance with the rules of equity (*Co-operative Trust Company of Canada v O'Grady* (1985), 43 Sask R 317 (CA) at para 4; *Goertz* at paras 11-12; and *Gibbs CA* at paras 49-50). Equity is concerned with fairness.

Foreclosure Steps

[35] There are several stages in foreclosure proceedings:

1. Provincial Mediation Board
2. Leave to commence action
3. Statement of claim
4. Order *nisi* for judicial sale or foreclosure
5. Order confirming sale or final order for foreclosure
6. Assessment of costs and judgment

[36] These stages are summarized in *First National Financial GP Corporation v Churko*, 2024 SKKB 118 at paras 60-61.

Assessment of Costs

[37] In this part I will review the law governing the assessment of costs.

When Assessment of Costs Required

[38] Assessment of costs is required where there is judicial sale and either a surplus to be paid to the former owner or the possibility of a deficiency judgment against that former owner or guarantor of the mortgage debt. In those cases, the allowable costs must be determined so that the amount payable to or owed by the mortgagor or guarantor is accurately calculated.

[39] Section 2 of *The Limitation of Civil Rights Act* prohibits recovery on a personal judgment against the mortgagor in the case of a purchase mortgage for residential property (*i.e.* where the mortgage loan is for the purchase of a home). The mortgagee's right of recovery is in that case limited to the land by foreclosure or judicial sale. This prohibition extends to guarantors and to costs that would otherwise be recoverable by action (*Royal Bank of Canada v Alexander*, 2019 SKQB 58 at para 4 [*Alexander*]; and *Royal Bank of Canada v Partridge*, 2018 SKQB 216 at para 13 [*Partridge*]). In *Alexander* at para 4, Rothery J. wrote:

> [4] And, as directed by *Royal Bank of Canada v Partridge*, 2018 SKQB 216 [*Partridge*], the protection of s. 2 of the *LCRA* [*The Limitation of Civil Rights Act*] extends to not only the principal amount and accrued interest outstanding, but to the other costs of the mortgage. In *Partridge* at para 13 I stated:
>
> > 13 The Saskatchewan Court of Appeal in *Walker* [*Walker v Bank of Montreal*, 2017 SKCA 42] 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 [Royal Bank of Canada] is entitled to judgment against Partridge for 8% of the solicitor-client costs, condominium fees and property management charges.

[40] Assessment of costs is not usually required in foreclosure actions (as compared to judicial sale actions). Costs in foreclosure actions only become relevant when the mortgagor seeks to redeem or reinstate the mortgaged property, in which case costs should be assessed at that time (*The King's Bench Act*, ss 10-11). Otherwise, the final order of foreclosure operates in full satisfaction of the debt, as provided by s. 6 of *The Limitation of Civil Rights Act* (*Yamniuk* at para 32).

Eligible Costs

[41] Recoverable costs are those costs allowed by statute or contract, keeping in mind that the statute prevails over any contractual term.

Apportionment of Costs

[42] Where the judicial sale involved both a purchase mortgage and non-purchase mortgage, the mortgagee is entitled to costs on the non-purchase mortgage claim. This requires the court to apportion the recoverable costs based on the amounts of the different mortgage debts (*Walker v Bank of Montreal*, 2017 SKCA 42, [2017] 12 WWR 130; *Partridge*; and *Alexander*).

Sale Proceeds

[43] All sale proceeds must be paid into court unless a judge directs otherwise (Rule 10-47(2) of *The King's Bench Rules*; and *Yamniuk* at paras 17-18 and 28). In *Yamniuk* at para 28, Rothery J. warned that applications which fail to comply with this requirement will be met with appropriate sanctions:

> [28] The law is clear that solicitor-client costs are assessed after any balance of sale proceeds are paid into court. Monies are not retained by counsel for the mortgagee until after the application for assessment of solicitor-client costs is decided. Future applications that do not comply with the law will be met with appropriate sanctions.

[44] Sale proceeds may not be disbursed before the assessment of costs (*CIBC Mortgages Inc. v Roberts*, 2006 SKQB 44 [*Roberts*]; *Schell* at paras 15-18; and *Irvine* at paras 8 and 10).

All Costs to be Assessed

[45] All costs claimed or proposed for deduction from the sale price must be specifically identified and approved in the application for assessment of costs. This is necessary for the court to be sure that any surplus payable to the former owner or deficiency judgment is correctly calculated. In *Gibbs CA*, Ottenbreit J.A. explained this in his dissenting judgment:

> [77] In my view, the exercise of the Court's equitable jurisdiction on an application for payment out is defined by the factors that follow. The starting point for the determination of what monies will be paid out is the judgment in personam in the first order nisi for sale in the proceedings. That is the amount owing at the point at which the Court begins to supervise the sale. If there are subsequent orders for sale, as often happens, that fact, the reasons for it, any delay in achieving the sale and the factual matrix of how the sale process was conducted as a whole can appropriately be taken into account on an application for payment out. Likewise, the issue of management fees or miscellaneous fees and costs throughout the proceeding to the extent they are not already incorporated in the judgment in personam in the first order for sale can be considered. Additionally, the matter of the rate and duration of interest payable after the first order for sale can also be considered in the context of exercising equitable jurisdiction.

Application for Costs

[46] An application for assessment of costs must be made with notice (*Roberts* at paras 1 and 8; and *Schell* at para 15).

Timing of Application for Costs

[47] Application for assessment of costs must be made within three weeks of sale (*The King's Bench Rules*: Form 10-47A, para. 16 & Form 10-47B, para. 14; Form 10-47C, para. 6(f)(ii); and Form 10-47D, para. 7(f)(ii)). The assessment of costs may

be done at the same time as application for order confirming sale (*Schell* at paras 17-18; *Viloria* at para 25). In *Viloria*, the bank attempted to obtain deficiency judgment without prior assessment of costs. Danyliuk J. criticized this attempt as improper. In doing so, he stated the rationale and proper process for assessment of costs at paras. 23-25:

> [23] Finally, an equitable reason behind the court's continued supervision of these matters relates to the mortgagees' claims for costs. Most often, a clause in the mortgage provides a *prima facie* entitlement to seek costs on a solicitor-client basis. Those claims, however, are not unfettered. The court determines the reasonableness of such cost claims, considering all the circumstances of the action. The court does not allow those costs to be excessive. Those costs must be assessed by the court. Rule 11-20 of *The Queen's Bench Rules*, (Rule 565 of the former *Queen's Bench Rules*) alerts mortgagees and their counsel that a claim for solicitor-client costs under a mortgage is subject to judicial discretion.
>
> [24] In determining the propriety of solicitor-client costs, the case law directs a court to consider a wide range of factors. Plaintiff's counsel was unable to explain how the court would engage in this assessment given the procedure he employed to try to obtain a deficiency judgment, a judgment which included solicitor-client costs.
>
> [25] It should therefore be plain and obvious that the process used to pursue a deficiency in this case is highly improper. The correct process is to seek leave in the order nisi for sale or order confirming sale to obtain a deficiency judgment and seek leave to have a claim for costs (including solicitor-client costs) assessed. After the property sells, the issue of the amount of the deficiency and costs is to be addressed through a separate application, usually on notice, to this court. Sometimes the application for an order confirming sale may be combined with the application fixing the amount of the deficiency.

Onus on Applicant to Justify Costs

[48] The applicant on assessment of costs has the onus both to establish a right to recover the costs claimed or deduct those costs or fees from the sale proceeds and to justify the amounts claimed. The application should clearly:

1. Identify and itemize each eligible cost or fee claimed and the amount;

2. State the basis for each cost claimed, including reference to the mortgage term or statutory provision which allows recovery; and

3. Explain and justify the amounts claimed, with reference to individual circumstances of the case.

[49] The application should include materials supporting each claim for costs (*Royal Bank of Canada v Viloria*, 2014 SKQB 424 at para 53, 464 Sask R 177).

Costs in Discretion of Court

[50] Costs are in the discretion of the court. The court may order any party to pay costs of the action (ss. 10(3) of *The Land Contracts (Actions) Act, 2018*). In *Hollmann* at para 10, Barrington-Foote J. (as he then was) wrote: "The discretion to award costs must always be exercised in a principled manner, and on the facts." The court may deprive a party of costs where the costs are not appropriate or to sanction misconduct by that party (*Rozdilsky v Kokanee Mortgage M.I.C. Ltd*., 2020 SKCA 1 at paras 10-11 [*Rozdilsky*]).

Reduction or Disallowance of Costs for Mortgagee Misconduct

[51] Costs may be reduced or disallowed for vexatious or oppressive conduct on the part of the mortgagee or its lawyers (*Mayhew v Adams* (1930), 25 Sask LR 204 (CanLII) (CA) at para 17; *Roberts* at para 5; and *Rozdilsky* at paras 10-11). In *Rozdilsky*, Kalmakoff, J.A. wrote for the Court of Appeal:

> [10] This general proposition, however, is not an absolute rule; the court retains discretion to deprive a party of solicitor-client costs, even in the face of an express contractual obligation, where such costs are not appropriate in the circumstances: *Fidelity Trust Company v Hawrish, Ward and Ward* (1986), 55 Sask R 10 (CA); *1269917 Alberta Ltd. v FMI Developments Ltd.*, 2011 SKCA 94, 375 Sask R 175; *Karkoulas v Farm Credit Canada*, 2005 SKQB 535, 274 Sask R 152. An agreement between the parties does not supersede the court's discretion over costs. The court may refuse to enforce a contractual

> provision regarding recovery of solicitor-client costs where there is good reason for so doing. Such reasons may include vexatious, oppressive, fraudulent or otherwise inequitable conduct on the part of the mortgagee, or other circumstances particular to the case that render the imposition of solicitor-client costs unfair, excessive or unduly onerous: *Bossé* at para 65 [*Bossé v Mastercraft Group Inc.* (1995), 123 DLR (4th) 161 (Ont CA)]; *Ledoux* [*First Nations Bank of Canada v Ledoux*, 2005 SKQB 262] at para 19.

[52] Costs may be reduced or disallowed for delay in foreclosure proceedings attributable to the mortgagee (*Hollmann* at para 19; *Royal Bank v Wolff*, 2017 SKQB 318 at paras 18-20, 17 CPC (8th) 395 [*Wolff*]; *Toronto-Dominion Bank v Gibbs*, 2018 SKQB 12 at para 8 [*Gibbs QB*], appeal dismissed *Gibbs CA* at paras 48-50; and *Bank of Nova Scotia v Moore*, 2019 SKQB 122 at paras 33-34 [*Moore*]). In *Wolff* at para 36, Layh J. reduced property management fees by 50% and limited recovery of property taxes and interest because of delay attributed to the mortgagee.

[53] The onus is on the applicant to justify apparent delay. In *Moore*, Pritchard J. wrote:

> [33] Extensive and growing Saskatchewan case law establishes that this Court does not take a passive role in supervising a lender's enforcement of its mortgage security. (See: *Bridgewater* [*Bridgewater Bank v Mulligan*, 2017 SKQB 208]; *Gibbs* [*QB*]; *Partridge*; *Wolff*; *Royal Bank of Canada v Hollmann*, 2017 SKQB 299; *CIBC Mortgages Inc. v Taylor*, 2018 SKQB 118, [2018] 9 WWR 340 [*Taylor*]; *Toronto-Dominion v Forsyth*, 2017 SKQB 235) The court's supervision has always included fixing costs and determining the amount to be paid to a bank from the proceeds of sale, or for a deficiency. This includes assessing whether the solicitor-client costs and other fees and disbursements claimed by a bank are "appropriate, necessary and reasonable in the circumstances" (see *Toews* [*Royal Bank of Canada v Toews*, 2007 SKQB 142] at para 14).
>
> [34] It is axiomatic that a mortgagor should not be required to bear the increased interest, taxes and other costs and expenses that result primarily from unreasonable delay by the Bank. …

[54] In *Gibbs QB*, Barrington-Foote J. (as he then was) wrote:

> [14] The mortgagor should not be obliged to bear the increased interest, taxes and costs that have resulted from the inordinate delay

> caused by the Bank. Further, the statement of account not only reflects the inordinate time spent as a result of those missteps, but contains limited information as to the services provided. …

Increased Costs for Mortgagor Delay

[55] Conversely, unreasonable delay caused by the mortgagor may call for an increased cost award (*Rodzilsky* at para 48). The mortgagor's legitimate exercise of their rights, however, will not warrant increased costs. In *MacKay* at para 10, Wright J. wrote:

> [10] The argument that a mortgagor ought to pay all the costs occasioned by the mortgagee in having to comply with consumer protection legislations such as the *Land Contracts (Actions) Act* is, with respect, a pernicious one. The whole purpose of the legislation is to give a defaulting mortgagor time to order his or her affairs before being caught up in the extremely costly and potentially disastrous process of actual foreclosure. Most respondents in proceedings under the *Land Contracts (Actions) Act* are individual homeowners who have gotten into financial difficulty. The suggestion that they must pay for the protection assured them as of right fails to recognize the philosophy behind the legislation. After all, if the mortgagor could pay, he or she would not be in default. To cast upon the financially troubled mortgagor the additional burden of solicitor and client costs would do violence to this statute and would constitute a bizarre misapplication of the principles set down in cases such as *Mayhew v. Adams* (supra).
>
> [Emphasis in original]

Some Costs Not Recoverable

[56] *The Limitation of Civil Rights Act* prohibits any claim for the following fees, costs or charges:

i. Section 7 inspection fees;

ii. Section 8 collection costs;

iii. Section 9 late payment charges;

iv. Section 10 taxes other than property taxes; and

v. Section 11 life insurance premiums on the mortgage.

[57] Section 43 of *The Limitation of Civil Rights Act* makes it an offence to violate ss. 7 or 8.

[58] A mortgagee cannot evade these prohibitions by re-naming the prohibited cost or fee, or including it with an allowable cost (*Royal Bank of Canada v Leschinski*, 2012 SKQB 286 at para 5, 401 Sask R 242; *CIBC Mortgages v Eldstrom*, 2014 SKQB 337 at paras 8-9, 458 Sask R 314; *Hollmann* at para 20; and *Yamniuk* at para 38). In *Yamniuk* at para 38, Rothery J. rejected a claim for inspection fees included as part of property management fees:

> *(d) Whether the mortgagee is entitled to the cost of inspection fees incurred in its claim for property management fees*
>
> [38] Counsel for SMC [Scotia Mortgage Corporation] seeks an order for the payment of property management fees incurred in the sum of $6,203.33. Counsel for RBC [Royal Bank of Canada] objects to the inspection fees included in these fees, which are $1,037.40. Counsel for RBC submits the inspection fees are prohibited from being added to the mortgage account by operation of s. 8(1) of *The Limitation of Civil Rights Act*, and are not recoverable. This principle is explained in *CIBC Mortgages Inc. v Eldstrom*, 2014 SKQB 337 at paras 8-9, 458 Sask R 314. In short, the total property management fees that may be paid to SMC from the sale proceeds are in the amount of $5,165.93.

Property Management Costs

[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 (*Moore* at para 10; and *Partridge* at paras 11 and 41).

Legal Fees

[60] The judge awarding legal costs must assess those costs (Rule 11-20 of *The King's Bench Rules*). Legal fees are assessed as part of the general assessment of costs after the sale proceeds are paid into court (*Yamniuk* at para 28).

[61] The court accepts and encourages the appropriate use by law firms of paralegals in foreclosure work to reduce the cost of legal services. In *Canada Trustco Mortgage Co. v Ludwig Enterprises Inc.*, 2004 SKQB 370 at paras 10-11, 255 Sask R 72, Klebuc J. (as he then was) wrote:

> [10] In my opinion, it is appropriate for legal assistants to provide routine services in foreclosure actions under the supervision of a lawyer provided the following requirements are met:
>
> (1) The nature of the services performed are regarded as not being beyond the competence of legal assistants: conducting searches, drafting simple pleadings, attending to the service of documents, and correspondence with clients generally can be provided by experienced legal assistants.
>
> (2) The hourly rate charged for work done by legal assistants should reflect their lack of legal training and the lack of complexity of the work performed.
>
> (3) The supervising lawyer must not bill for the same service.
>
> (4) The cost to the client, when viewed as a whole, should be less than if a lawyer had performed the non-complex services involved.
>
> These factors are not intended to be definitive for other factors that may come into play in other circumstances.
>
> [11] In the instant case, there is no suggestion that the legal assistants involved were incompetent or spent unwarranted time in performing their work. I therefore conclude that the cost of their work is recoverable as part of a solicitor-and-client account. In addition, I would note that there will be circumstances where a solicitor-and-client account may be taxed down because the services of a legal assistant were not employed; for example, where a lawyer charges $240.00 for performing a specific routine service in a foreclosure

> action that could have been performed by a legal assistant at a cost of $80.00 or less.

[62] Klebuc J. went on at para. 15 to disallow $700 in legal fees for what he described as "non-productive activities" where fees were charged for a lawyer or legal assistant passing the file or a facet thereof to another lawyer or legal assistant.

[63] The court usually awards a standard amount for legal fees but can award more or less (*Fidelity Trust Company v Hawrish, Ward and Ward* (1986), 55 Sask R 10 (CA); *Roberts*; *Hollmann* at para 10; *CIBC Mortgages Inc. v Greyeyes*, 2017 SKQB 313, 17 CPC (8th) 410 [*Greyeyes*]; and *First National Financial GP Corporation v Maurice*, 2021 SKQB 248 [*Maurice*]). The standard amount is neither a floor nor a ceiling. The cost award may be more or less than the current standard, where the facts warrant.

[64] The standard amount, referred by the Bank's lawyer as a "benchmark", applies to a normal or routine foreclosure proceeding, recognizing that a normal foreclosure proceeding may be more or less involved. The standard amount is intended to cover all legal services involved in post-leave foreclosure proceedings. In *Yamniuk* at para 31, Rothery J. rejected an attempt to claim a separate set of legal fees for closing the sale of the mortgaged property, noting at para. 35 that the issued order confirming sale is the transfer authorization submitted to Land Titles Office to transfer title.

Costs Award Determines Net Sale Proceeds

[65] All costs must be determined by the court in the assessment of costs (*The Limitation of Civil Rights Act*, ss 8(2)). This includes legal fees, real estate fees, selling officer fees, taxes, and property management costs. A mortgagee which fails to obtain court approval of costs cannot later include those costs in a deficiency judgment.

[66] The court's award of costs – in particular, the amount of costs allowed – determines the net sale proceeds. This necessarily affects the calculation of any deficiency judgment.

Deficiency Judgment

[67] Any deficiency judgment should be submitted for issuance at the time of or immediately after assessment of costs (*Schell* at para 18).

[68] The amount of any deficiency judgment is determined as the final aspect of foreclosure proceedings (*Viloria*). Costs not claimed by the mortgagee and allowed by the court in assessment of costs may not be added to any deficiency judgment.

[69] The application for deficiency judgment should show the calculation of all parts of the judgment, including clearly identifying the costs included in the deficiency judgment and their prior approval by the court. Deficiency judgments are usually issued by the Local Registrar (Rule 10-4 of *The King's Bench Rules*). The Local Registrar has no authority to add any costs not allowed by a justice and should not be asked to do so.

[70] Deficiency judgments should not be issued where there is any doubt about the calculation. In that case, the Local Registrar may refer the application to a justice, preferably the justice who approved the assessment for costs, or direct the applicant to file an application with notice for hearing in chambers.

ANALYSIS

[71] The Bank, in its brief of law, makes some assertions, as summarized above under the heading "Position of the Bank". Before turning to the issues, it may be as well to address one of those assertions.

[72] The Bank seems to argue that it has no onus to establish a legal basis for the costs it claims, except when challenged. With respect, this is incorrect. Most assessment of costs are unopposed. But the court, in the exercise of its supervisory jurisdiction, must be satisfied that the costs claimed are both authorized by law and appropriate as to amount. The onus is on the applicant to show that on its application for assessment of costs.

Costs Claimed

[73] The Bank's application for assessment of costs seeks approval for payment from the sale proceeds of $7,964.47 in legal fees and $11,736.56 in property management costs. Before addressing the assessment of those costs, I will identify some improper practices in this proceeding relevant to costs.

Failure to Pay Sale Proceeds into Court

[74] The application does not state whether the sale proceeds were paid into court. The order *nisi* for sale by real estate listing was based on Form 10-47B of *The King's Bench Rules*, but omitted paras. 13 or 14 of that form. Paragraph 13 of Form 10-47B requires payment into court. Paragraph 14 requires application for confirmation of sale to be made to court within three weeks after the sale.

[75] I did not find anything in the application or draft order *nisi* which would have brought this omission to the attention of the court. The omission of prescribed terms in this manner does not remove those requirements. As discussed above, if the plaintiff wants to deviate from standard requirements, that deviation and any change to the forms must be clearly brought to the attention of the court authorizing the order. If the plaintiff proposed to have the sale proceeds held elsewhere in trust, that should have been set out in the order *nisi* as a substitute term for the standard term requiring payment into court and identified in the application and at the hearing of the application.

Delay in Assessment of Costs

[76] As discussed above, costs may be reduced or disallowed where delay attributable to the mortgagee has increased those costs.

[77] Leave to commence action was granted on April 20, 2023. The order confirming sale was granted on February 29, 2024. The Bank's application for assessment of costs was heard June 20, 2024. The total elapsed time from leave to hearing of assessment of costs was 14 months. There are two periods of delay attributable to the Bank.

[78] The Bank's original statement of claim, issued on April 24, 2023, did not include the mineral title. The Bank issued an amended statement of claim correcting this omission on August 2, 2023. In addition to occasioning additional legal fees and disbursements, this resulted in a delay of proceedings of over three months.

[79] The order confirming sale was approved on February 22, 2024, and issued on February 29, 2024. Application for assessment of costs must be made within three weeks of sale. The notice of application was filed May 10, 2024 – well beyond the three week time limit.

No Claim for Other Costs

[80] The application for assessment of costs makes no claim for property taxes, selling officer fee, or real estate commission, all of which I expect the Bank would want to claim as recoverable costs. As set out above, all costs should be identified and claimed in the assessment of costs. To do otherwise, as appears to have been done here, evades the review and approval of the court and thereby defeats its supervisory function.

[81] Given the recent criticisms of similar practice by the Bank's law firm in *Irvine* and *Yamniuk*, it is more than surprising to see this improper practice continuing. Plaintiffs are warned that future failures to claim costs may result in costs being denied.

[82] Rather than do that in this case, I give leave to the Bank to file a revised draft order and supplementary materials adding and detailing those costs, which I presume have already been paid from whoever is holding the sale proceeds. Any claim for property taxes should be reduced to account for the three month delay by reducing the claim for 2023 property taxes by one-quarter.

[83] With this in mind, I will proceed to consider the two costs claimed.

Legal Fees

Authority

[84] *The Land Contracts (Actions) Act, 2018* in s. 10(3) authorizes the court to award legal costs.

The Bank's Claim for Increased Legal Fees

[85] The Bank's claim for legal fees is $7,964.47. The supporting affidavit of Erin Newton breaks down the claim for legal fees into three separate categories which include the legal fees, legal disbursements, and taxes: 1. legal costs totalling $6,667.07 (presumably for post-leave legal costs); 2. $249.78 for the application for assessment of costs; and 3. $1,097.62 for sale closing on the mortgaged land. (This method of adding legal costs was criticized in *Yamniuk* at paras 29-35.) While not stated in its materials, the totals claimed are: $5,831.40 for legal fees; $1,450.82 in disbursements; and $682.25 in taxes on the legal fees and disbursements.

Has or Should the Benchmark Increase to $5,500?

[86] The Bank, in its brief of law, stated that the current benchmark for legal fees in a standard foreclosure action is $5,500, arguing that the benchmark was increased by Layh J. in *Irvine* and then applied by Rothery J. in *Yamniuk*. If so, I decline to depart from the $5,000 benchmark for the following reasons.

[87] First, any change to the benchmark would usually be preceded by a discussion during the court's *en banc* meeting, held twice a year, or through the court's Civil Practice Committee to see if there is a consensus for change. Such discussion has not occurred.

[88] Second, I do not read *Irvine* as expressly changing the "benchmark" from $5,000 to $5,500. Neither *Irvine* nor *Yamniuk* engages in the kind of analysis found in decisions which previously signalled an increase to the benchmark, such as *Greyeyes* and *Maurice*.

[89] Third, the justices in *Irvine* and *Yamniuk* awarded legal fees above the benchmark, whether $5,000 or $5,500. In *Irvine*, Layh J. referred to the current benchmark of $5,000 in posing the question "Should Assessed Costs Exceed $5,000.00?". Layh J. awarded increased costs of $8,500, plus applicable taxes and disbursements. Nowhere in *Irvine* is $5,500 identified as the new benchmark. At the same time, *Irvine* can be viewed as implicitly favouring an increase to the $5,000 benchmark. *Irvine* at para 29 states that "one might also generally consider a rise in the Consumer Price Index, which, the court notes, has gained significant public attention in 2022, and the first half of 2023." I view *Irvine* as beginning a judicial conversation about whether the court should consider an increase to the standard fee, not an edict on behalf of the court announcing a change. In *Yamniuk*, Rothery J. awarded costs of $7,500 for legal fees, plus disbursements and applicable taxes. In doing so, she did find

at para. 36 that *Irvine* increased the standard legal fees to $5,500 "taking the rise in Consumer Price Index into consideration."

[90] Fourth, the consumer price index is only one factor to be considered in determining an appropriate standard fee or "benchmark". The court should avoid contributing to inflation by rote or automatic increases in standard costs. Instead, the court should encourage efficiency in foreclosure practice to reduce legal fees. In *Royal Bank of Canada v Toews*, 2007 SKQB 142 at para 12, 296 Sask R 129, Ryan-Froslie, J. (as she then was) made this point.

> 12) As pointed out in *Saskatchewan Trust Co. (Liquidation of) v. Dion, supra*, [(1994) 127 Sask R 64 (QB)] at para. 5, a mortgagor's liability for solicitor-client costs extends only to such reasonable expenses as have been necessarily incurred. The time spent by a mortgagee's solicitor is not necessarily an accurate measure of what is reasonable. As pointed out by Justice Wimmer of this Court in *Saskatchewan Trust Co. (Liquidation of) v. Dion, supra* at para. 7, "... to measure value by reference to time spent will frequently reward inefficiency...."

[91] During the Covid-19 pandemic (from 2020 to 2023), the court changed some of its practices. One change is increased acceptance of telephone appearances in chambers. As noted above, the lawyer handling this file made her three appearances by telephone. That is typical in foreclosure proceedings. When counsel do appear in court on foreclosure proceedings, they often have multiple files – again reducing the time spent per file. This recent change in practice should be reducing the time spent by lawyers in court and thereby reducing their fees. This alone should give pause to any proposed increase to the $5,000 standard cost or benchmark.

Should the Bank's Claim for Legal Fees Above $5,000 be Allowed?

[92] The Bank in its application for assessment of costs sought payment of its full legal fees. On questioning at the hearing of the Bank's application, the Bank's counsel did allow that the claim for legal fees could be decreased to $5,500 as the new

benchmark. As discussed above, I am of the view that $5,000 should remain for now as the benchmark or standard award for legal fees.

[93] The standard legal fee, whatever the amount, is intended to cover all normal steps of foreclosure proceedings. As discussed by Rothery J. in *Yamniuk* at paras 29-35, the bank and its lawyers cannot increase its claim for legal fees by segmenting the normal legal steps in foreclosure proceedings. Regardless, there was nothing in this mortgage proceeding to justify any increase from the standard legal fee of $5,000. On the contrary, this foreclosure proceeding was as straightforward as could be. As noted above, the Bank's counsel appeared by telephone for most court appearances, reducing the time required for that necessary function. While a case could be made for reducing the standard legal fee in this case, the standard legal fee is intended to cover a range of foreclosure proceedings, some of which may be more or less involved. This case would be at the lower end of the range.

[94] Further, the legal fees related to the amended statement of claim should be disallowed. The Bank – not the mortgagors – should pay for the cost of correcting the Bank's lawyers' mistake.

[95] The Bank's claim for legal fees is reduced to $5,000. While the allowed legal services were near the bottom of the range of work covered by the standard fee, it was still within the range.

[96] Disbursements identified in the MLT Aikins invoices attached as Exhibits "A" and "B" to the Affidavit of Erin Newton includes court filing fees, process server, real estate appraisal, land title fees, and property tax search. The legal disbursements of $1,450.82 claimed plus applicable taxes must also be reduced to remove any disbursements related to the amended statement of claim, including court and service fees.

Property Management Fees

[97] The Bank identified clause 15(C) in the mortgage agreement as authorizing recovery of property management costs incurred after the owners abandoned the property. Clauses 15(B) and (C), in part, are reproduced below:

> **15. ENFORCING OUR RIGHTS**
>
> …
>
> **B. Default in your obligations including default in payment** – If you default in any obligation included under this mortgage, we can enforce our above rights and we can enter on your property at any time, without the permission of any person, and make all essential arrangements that we consider necessary to:
>
> - Inspect, lease, collect rents or manage your property; or
> - Repair or put in order any building on your property; or
> - Complete the construction of any property on your property.
>
> We can also take whatever action is necessary to take possession, recover and keep possession of your property.
>
> **C. Our expenses** – You will immediately pay all our expenses of enforcing our rights. Our expenses include our costs of taking or keeping possession of your property, an allowance for the time and services of SMC's and/or the Bank's employees utilized in so doing, our legal fees which will be, where the law does not prohibit it, on a solicitor and own client basis and all other costs related to protecting our interest under this mortgage. All our expenses are immediately payable by you. Until paid out expenses will be added to the loan amount and will be a charge against your property. Interest is payable by you on our expenses at the interest rate payable on the loan amount until our expenses are paid to us in full. These expenses can be deducted from the net proceeds of any sale or lease of your property. If the net proceeds from the sale or lease do not cover our expenses, you must pay us the difference immediately.
>
> …

[98] The Bank's claim for property management costs is $11,736.56. The Invoice Reports attached as Exhibit "C" to the affidavit of Erin Newton provides a list of charges.

[99] The affidavit of Erin Newton at para. 5 states that "The mortgaged land was secured on December 4, 2022", and refers to a securing report filed earlier in the foreclosure proceedings attached as an exhibit to the affidavit of Olaniyi Owalabi sworn January 26, 2023. These two affidavits provide little detail about the abandonment of the property.

[100] Newton affidavit:

> 5. The mortgaged land was secured on December 4, 2022. The Securing Report was attached as exhibit "D" sworn by Olaniyi Owolabi on January 26, 2023, which forms part of the Court file herein. Attached as exhibit "C" to this Affidavit are copies of the final post-securing invoices from the property management company, Veranova Properties Limited, which have not yet been paid.

[101] Owalabi affidavit:

> 8. The respondents:
>
> _ Occupies the land
>
> X Does not occupy the land
>
> The mortgaged land was found vacant and abandoned and was secured by Veranova Properties Limited. A copy of the Securing Report, dated December 4, 2022, is attached as exhibit "D" to this Affidavit.

[102] The Securing Report attached to the Owalabi affidavit records that the house was in overall good condition, however the furnace was off, and the property was found frozen. The power was on, and the water was turned off at the street connection.

[103] Counsel explained at the application for assessment of costs that the owners had abandoned the property, leaving the Bank to step in to maintain its security. I do agree with the Bank that, in these circumstances, the mortgagee is entitled to recover the reasonable costs of maintaining the mortgaged property so as to retain its value.

[104] The invoices include charges for $2,391 for “Property Maintenance & Preservation Checks” and $46.29 for “Routine Maintenance & Preservation Check”. The Bank, at para. 30(d) of its brief of law states:

> Although these charges may seem to bear a superficial similarity to the inspections prohibited by section 7 of the LCRA [*The Limitations of Civil Rights Act*], the similarity is just that – superficial. These visits are necessary expenses incurred in order to ensure that the property has not suffered and is not suffering any damage. An interpretation of the LCRA which prevented mortgagees from recovering such costs would create an incentive not to engage in prudent property management.

[105] Section 7 of *The Limitation of Civil Rights Act* is reproduced below:

> **Mortgagee’s inspection fees**
>
> **7** The fees of a mortgagee for inspection of the mortgaged premises except the preliminary inspection consequent upon an application for a loan or a renewal or extension of a loan, shall be borne by the mortgagee and shall not be charged to the mortgagor or to the mortgage account.

[106] Section 7 of *The Limitation of Civil Rights Act* plainly prohibits recovery of inspection fees. It does provide an exception for the preliminary inspection of the property for the purpose of mortgage approval. On the plain words and applying the maxim of statutory interpretation that the mention of one thing implies the exclusion of other things (*expressio unius est exclusio alterius*), s. 7 prohibits recovery of any inspection fees, other than the one exception. It is not for the court to re-write legislation. Further, the caselaw reviewed above supports disallowance of this claim. Finally, the Bank has not made a compelling case to establish that the similarity is “superficial”, to use its words. I am left to conclude that all or some of this charge should be disallowed.

[107] The invoices also include a charge of $1,131.25 for snow removal. No explanation is given as to why snow removal would be required for a vacant property. There may be an explanation, but the court should not be expected to guess.

[108] From my review of these invoices, the claimed charges cover a period of time for services to the property from December 4, 2022, when the property was secured, until March 27, 2024 – or 15 months. As discussed above, this period of time includes the three month delay occasioned by the necessity of issuing and serving an amended statement of claim.

[109] While I accept the claim for property management costs, I reduce the amount claimed because of the three month delay in proceedings resulting from the Bank's amended statement of claim, the inclusion of inspection fees and the questionable snow removal charges.

[110] Given my findings, I reduce the amount claimed for property management costs from $11,736.56 to $8,000. In doing so, I give the Bank the benefit of the doubt on part of the questioned claims.

Deficiency Judgment

[111] The Bank may submit a draft deficiency judgment along with its amended order for assessment of costs. I will remain seized for the purpose of review of the draft order and deficiency judgment.

J.
D.N. ROBERTSON