

# KING'S BENCH FOR SASKATCHEWAN

Citation: 2024 SKKB 50

Date: 2024 03 22  
Docket: KBG-YT-00032-2024  
Judicial Centre: Regina

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BETWEEN:

THE ESTATE OF ROBERT FREDRICK WALKINGTON

APPLICANT

- and -

102087390 SASKATCHEWAN LTD.

RESPONDENT

**Counsel:**

Josée Thorarinsson  
Mark Persick

for the applicant  
for the respondent

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FIAT  
March 22, 2024

ROBERTSON J.

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## INTRODUCTION

[1] The applicant, The Estate of Robert Fredrick Walkington, [Estate] applied by originating application for an order for possession of its property, following expiry of a lease agreement with the respondent, 102087390 Saskatchewan Ltd. [7390 Sask.]. For the reasons which follow, the application is adjourned *sine die*, with leave for the applicant to return to chambers on seven days' notice to the respondent's lawyer.

## **BACKGROUND**

### **Affidavit Evidence Filed for the Application**

[2] The Estate filed affidavits of Troy Walkington and Cory Walkington, both sworn February 13, 2024. 7390 Sask. filed an affidavit of Mark Lukash sworn February 29, 2024 [Lukash Affidavit]. (The Lukash Affidavit was filed late.)

[3] The Walkington affidavits state that no notice of option to purchase was received at the postal address for service from 7390 Sask. between December 1-30, 2023, being the period for exercise of the option to purchase, and that the Estate has not entered into any agreement to extend the lease. On or about January 5, 2024 the Estate lawyers notified 7390 Sask. that its tenancy was considered terminated (Troy Walkington affidavit, para. 10 and Exhibit “E”). The Estate regards 7390 Sask. as an overholding tenant.

[4] The Lukash Affidavit states Mark Lukash’s belief that “reasonable efforts were made to exercise the option to purchase contained in the lease ... given Robert’s death” (para. 3), referring later to a conversation he had with Cory Walkington in December 2023 (paras. 10-11) and unsuccessful efforts later in December to contact Cory Walkington (paras. 14-17). Mark Lukash confirms that “I did have a copy of the Contract and I know it specified written notice to a specific post office box. However, I did not expect that P.O. Box to be available after Robert’s death.” (para. 19).

[5] The Lukash Affidavit states that the property is used for 7390 Sask.’s trucking business and that “It would be extremely detrimental to the Corporation to be ordered to vacate the land in question while the matter is being litigated.” (para. 25).

### **Facts**

[6] Robert Fredrick Walkington, as owner, and 7390 Sask., as tenant, entered

into an agreement dated 28 October 2019 for lease of real property described as Parcels L and M, Plan No. CI6050 located in the Organized Hamlet of Westview [Property]. The term of the lease was from November 1, 2019 to December 1, 2023. The rent payable was \$5,000 a month. The tenant was also responsible for payment of property tax after 2019.

[7] The agreement in the preamble and article 9 included an option to purchase the Property by giving option notice in writing at any time “during the last calendar month of the Term of this Agreement being December 1<sup>st</sup> 2023 to December 30<sup>th</sup> 2023, inclusive.” (December has 31 days) (Tory Walkington affidavit, Exhibit “D”).

[8] The agreement in article 6 provided for all notices to the landlord to be in writing and addressed to:

Robert Fredrick Walkington  
Box 1876  
Melville, Saskatchewan S0A 2P0 ph. (306) 728-7876

[9] Robert Frederick Walkington died on December 26, 2022. His executors are his sons, Troy Walkington and Cory Walkington.

[10] No written option notice was received at the address specified in the agreement during the month of December 2023.

[11] On February 14, 2024, the Estate filed the originating application seeking an order for possession of the Property.

[12] On February 24, 2024, 7390 Sask. filed a statement of claim in a separate action (KBG-YT-00036-2024) against Cory Walkington and Troy Walkington as executors of the Estate seeking specific performance of a legally binding contract of sale of the Property. 7390 Sask. also filed a certificate of pending litigation.

[13] The application was heard in Yorkton, Saskatchewan chambers on March 5, 2024, with decision reserved.

## **ISSUE**

[14] Should the application be granted to give possession of the Property to the Estate as owner? This issue raises questions as to whether the application is ready to proceed and in what manner it should be heard?

## **ANALYSIS**

### ***The Landlord and Tenant Act***

[15] *The Landlord and Tenant Act*, RSS 1978, c L-6, in s. 50 authorizes the court to grant a writ of possession to the owner of real property as against an overholding tenant. Section 52 provides for a summary procedure in deciding such an application. Where the tenant appears to oppose the application, ss. 52(2) and (3) provides for hearing from the parties and their witnesses, but only if no order has been made by the Provincial Mediation Board:

#### **Proceedings in default of appearance**

**52(1)** If at the time and place appointed, the tenant fails to appear, the judge, if it appears to him that the tenant wrongfully holds against the right of the landlord and that the right to possession may properly be determined in a proceeding under this Part, may order the issue of a writ of possession (form C), directed to the sheriff acting at the judicial centre nearest to which the land or part of the land is situated, commanding him forthwith to place the landlord in possession of the land.

#### **In case of appearance**

(2) If the tenant appears the judge shall, in a summary manner, hear the parties and their witnesses, and examine into the matter, and if it appears to the judge that the tenant wrongfully holds against the right of the landlord and that the right to possession may properly be determined in a proceeding under this Part, he may order the issue of the writ.

### **Orders of Provincial Mediation Board**

(3) Notwithstanding subsections (1) and (2), the judge shall not proceed with a hearing unless it is shown by affidavit that no order made by the Provincial Mediation Board prohibiting the proceedings has been filed with the local registrar of the Court of Queen’s Bench.

#### **Same**

(4) If a prohibition order made by the Provincial Mediation Board is filed with the local registrar of the Court of Queen’s Bench before the time appointed for hearing the application there shall be no costs allowed against the tenant with respect to the application.

### ***The King’s Bench Act***

[16] *The King’s Bench Act*, SS 2023, c 28, s 3-2 allows a justice sitting in chambers to move into court sitting:

#### **Powers of judge in chambers sitting in court**

**3-2(1)** If a judge sitting in chambers announces that the judge is sitting in court, the judge has all the powers, authorities, rights, privileges, immunities and incidents of the court.

(2) Any judgment, decision, determination, rule, order or decree made by a judge while sitting as described in subsection (1) with respect to any issue lawfully brought before the judge is subject to appeal to the Court of Appeal.

### ***The King’s Bench Rules***

[17] Although chambers applications are normally heard on the basis of affidavit evidence or agreed statements of facts only, *The King’s Bench Rules*, in Rules 3-55(e), 6-11 and 6-13 allow for witness evidence to be received at chambers hearings:

#### **Originating application evidence (other than judicial review)**

**3-55** When making a decision about an originating application, other than an originating application for judicial review, the Court may consider the following evidence only:

- (a) affidavit evidence, including an affidavit by an expert;
- (b) an admissible document that is an exhibit to an affidavit;

- (c) anything permitted by any other rule or by an enactment;
- (d) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party 5 days or more notice of that party's intention and obtains the Court's permission to submit the evidence;
- (e) **with the Court's permission, oral evidence, which if permitted must be given in the same manner as at trial.**

...

### **Court may direct application to be turned into application for judgment or hearing**

**6-11(1)** If the Court is satisfied on the hearing of any application that may be pending before the Court that it is conducive to the ends of justice to permit it, the Court may direct any application to be turned into:

- (a) an application for judgment; or
- (b) a hearing of the cause or matter.

(2) In making a direction pursuant to subrule (1), the Court may make an order respecting:

- (a) **the time and manner of giving the evidence in the cause or matter;** and
- (b) the further conduct of the cause or matter as the circumstances of the case may require.

(3) On a hearing directed pursuant to subrule (1), the Court may:

- (a) pronounce judgment; or
- (b) make any order that the Court considers expedient.<sup>9</sup>

...

### **Evidence on applications**

**6-13(1)** On any application or petition, evidence may be given by affidavit, but the Court may, on the application of either party, order the attendance for cross-examination of the person making the affidavit.

(2) The party applying for any cross-examination pursuant to subrule

(1) shall bear the costs of the cross-examination.

[Emphasis added]

### **Summary Hearing or Order for Trial**

[18] Under *The King's Bench Act* and *The King's Bench Rules*, reproduced above, the court has flexibility, when sitting in chambers, to move into court sitting, which is then on the record in trial mode, to hear witness evidence. This allows for summary hearings, incorporating evidence as at trial. These kinds of hearings will be exceptional. More often, if witness evidence is required, an order for trial will be the appropriate way to proceed.

[19] The court's ability under ss. 52(2) of *The Landlord and Tenant Act* to deal with applications for writ of possession in a summary manner was addressed by Chicoine J. in *101142191 Saskatchewan Ltd. v Gustafson*, 2011 SKQB 76 [*Gustafson*]. His review of Saskatchewan case law concludes that the individual circumstances of each case will determine whether the court determines the application by summary proceeding or orders trial of the issue:

[44] It is well settled that summary proceeding under s. 50 of *The Landlord and Tenant Act* should not be utilized if there are involved questions of fact, there are involved questions of law, or there is doubt as to whether there would be complete justice between the parties (per *Cavalier* [*Cavalier Enterprises Ltd. v Country Style Donuts Ltd.*, 42 Sask R. 28 (QB), *supra*]).

[20] See also: *Subway Franchise Systems of Canada Ltd v Laich*, 2011 SKQB 249 at paras 47-48, 380 Sask R 54 [*Subway*].

[21] This Court has in some cases utilized the summary hearing procedure allowed by ss 52(2). See: *589208 Saskatchewan Ltd. v Wilhelm* (1995), 132 Sask R 309 (QB) [*Wilhelm*]; *Holowka v Howe*, 2001 SKCA 61; *Bryndan Holdings Inc. v Gastronomica Enterprises Ltd.*, 2003 SKQB 121, 231 Sask R 63; *Molnar v Kashuba*, 2004 SKQB 95; *McDougall v 101048690 Saskatchewan Ltd.*, 2004 SKCA 11, [2004]

10 WWR 424; *Saskatchewan (Minister of Highways and Infrastructure) v James*, 2015 SKQB 311, 473 Sask R 102; *Kuderewko v Kuderewko*, 2019 SKQB 206, affirmed 2020 SKCA 22; *Suffern Lake Regional Park Authority v Wildman*, 2020 SKQB 147.

[22] This Court has, in other cases, directed a *viva voce* hearing (witnesses testifying in person) or directed a full trial. See: *Cavalier Enterprises Ltd. v Country Style Donuts Ltd.* (1985), 42 Sask R 28 (QB); *Wilhelm; Imperial Oil v Bulani Agro Inc.*, 2001 SKQB 354; *Regina & District Food Bank Inc. v Independent's Choice Distribution Ltd.*, 2009 SKQB 435, 355 Sask R 14; *Gustafson; Subway* at para 47, 101068682 *Saskatchewan Ltd. v Al-Can Distributors Inc.*, 2014 SKQB 426 at para 3, 464 Sask R 125; and *Pincemin v Pincemin*, 2013 SKQB 383, 431 Sask R 274.

### **Provincial Mediation Board**

[23] From my review of the filed materials, I see no affidavit or other proof that no order has been made by the Provincial Mediation Board. The Estate, in its brief of law at para. 15 appears to acknowledge this omission:

15. The Estate submits that, subject to an order of the Provincial Mediation Board being filed with the Local Registrar, the Estate has complied with the requirements of section 50 of the *LTA [The Landlord and Tenant Act]* and, accordingly, the Court may consider the within application.

[24] This seems to put the cart before the horse. Without proof that the Provincial Mediation Board has not made an order, ss. 52(3) of the *Act* precludes proceeding with a hearing. On that basis, I decline to decide the application at this time.

### **Relative Harm to Parties of Delay in Hearing Application**

[25] I also consider the relative harm if the application is deferred. While the Estate presents a clear case supporting its application, granting a writ of possession would likely cause significant economic harm to the respondent. Leaving the *status quo*

in place is unlikely to cause equivalent harm to the Estate.

### **Files to be Cross-Referenced**

[26] I also consider that 7390 Sask. has commenced another legal action in relation to the Property and filed a certificate of pending litigation. It may be the files should be consolidated. At this point, I direct only that they be cross-referenced.

### **Conclusion**

[27] For these reasons, I decline to decide the application at this time. The application is not dismissed, but is adjourned *sine die*. The Estate may bring its application back to chambers with evidence addressing the question of any order made by the Provincial Mediation Board. The parties should, in that case, also be prepared to address the other procedural issues raised in this fiat.

[28] Costs are reserved to the justice hearing the application on the merits.

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