

KING'S BENCH FOR SASKATCHEWAN

Citation: 2025 SKKB 8

Date: 2025 01 13
File No.: KBG-SA-00339-2023
Judicial Centre: Saskatoon

BETWEEN:

HOME TRUST COMPANY

PLAINTIFF

- and -

MARK ANTHONY HAUGHIAN, CAMILLE DAWN
MONGOVIUS, DEBRA STITES, CAPITAL ONE BANK
(CANADA BRANCH), CO-OPERATORS GENERAL
INSURANCE COMPANY, AND ROYAL BANK OF CANADA

DEFENDANTS

Counsel:

Michael W. Marschal
James P. Kroczyński

for the plaintiff, Home Trust Company
for the defendant, Royal Bank of Canada

FIAT
January 13, 2025

WEMPE J.

I. Introduction and Background

[1] This decision addresses an application for assessment of costs following a judicial sale.

[2] Home Trust Company [Home Trust] sued Mark Anthony Haughian, Camille Dawn Mongovius and Debra Stites for foreclosure of a mortgage that was granted for the purchase of the property. Capital One Bank and Royal Bank of Canada [RBC] were added as defendants because they had an enforcement charge registered

against the property which was subordinate to the mortgage of Home Trust.

[3] The foreclosure action proceeded in the normal course. Home Trust was granted leave to commence on June 6, 2023. They issued a statement of claim on October 13, 2023 and noted the defendants for default of defence on February 9, 2024. On January 19, 2024, an order for substitutional service was granted. Home Trust applied, on a without notice basis, for an Order Nisi for Sale by Real Estate Listing, and obtained that order on February 14, 2024. Finally, counsel for Home Trust obtained an Order Confirming Sale on September 10, 2024.

[4] Home Trust is now seeking legal fees totalling \$8,368.41 and \$13,822.54 in property management fees which includes post-securement fees for weekly occupancy checks.

[5] RBC is opposed to the \$5,500.00 claimed for standard legal fees and the post-securement fees for occupancy checks which total \$4,357.50.

II. Issues

[6] This application raises two issues:

- (1) What is the appropriate amount of post-leave solicitor-client costs?
- (2) Should Home Trust be permitted to recover the post-securement maintenance fees for weekly occupancy checks?

III. Analysis

(1) What is the appropriate amount of post-leave solicitor-client costs?

[7] Counsel on behalf of Home Trust argues that the standard amount or “benchmark” for general legal fees is \$5,500.00, whereas RBC argues that the standard

amount is \$5,000.00. There appears to be differing opinions from this Court on the issue and counsel have asked that I provide some clarification.

[8] From reviewing the case law, it appears that both Layh J. in *Scotia Mortgage Corp. v Irvine*, 2023 SKKB 171 [*Irvine*], and Rothery J. in *Scotia Mortgage Corp. v Yamniuk*, 2024 SKKB 48 [*Yamniuk*], held that \$5,500.00 was an appropriate standard amount for solicitor-client legal fees, however, in *Scotia Mortgage Corp. v Keep*, 2024 SKKB 133 [*Keep*], Robertson J. held that \$5,000.00 was still the appropriate amount.

[9] Looking at the history of how these standard “benchmark” amounts came to be, it appears that Mills J. in *CIBC Mortgages Inc. v Greyeyes*, 2017 SKQB 313, 17 CPC (8th) 410 [*Greyeyes*], increased the amount to \$4,500.00. Then Danyliuk J. followed suit in *First National Financial GP Corp. v Maurice*, 2021 SKQB 248 [*Maurice*], and increased the standard “benchmark” amount to \$5,000.00.

[10] Recently, in *Yamniuk*, Rothery J. discussed Layh J.’s decision in *Irvine* and at para. 36, held as follows:

[36] The ratio in *Irvine* does stand for the proposition of awarding standard solicitor-client costs, plus additional solicitor-client costs being awarded for additional court applications above and beyond the standard legal fees. At paragraphs 28-29 of *Irvine*, Justice Layh increased the standard solicitor-client costs from \$5,000.00 as set out in *Maurice*, to \$5,500.00, taking the rise in the Consumer Price Index into consideration. Justice Layh assessed solicitor-client costs for each additional court application at \$1,000.00 per application.

[Emphasis added]

[11] In *Keep* however, Robertson J. took a different view by declining to depart from the \$5,000.00 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-Froslic, 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.

[12] I am inclined to follow the decisions in *Irvine* and *Yamniuk* by granting standard solicitor-client fees of \$5,500.00 for a number of reasons.

[13] First, looking at the development of the case law on this issue, it appears that the amount has been increased approximately every three years taking into account inflation and the passage of time. In 2017, in *Greyeyes*, Mills J. increased the amount to \$4,500.00 and then in 2021, Danyiuk J. in *Maurice* increased the amount to \$5,000.00. An increase in 2024 to \$5,500.00 is in keeping with the pattern of increases.

[14] Secondly, I note that this Court recently (April 1, 2024) amended the tariff in *The King's Bench Rules* taking into account the fact that inflation has caused the cost of legal services to increase. My following suit by finding that \$5,500.00 is the appropriate amount for the standard benchmark legal fees in a judicial sale, is consistent with the increase in the tariff amounts.

[15] Thirdly, after carefully examining Layh's J.'s reasons in *Irvine*, I note he does state at para. 29 that in arriving at the \$5,500.00 amount he considered the rise in the consumer price index, which he states has gained significant public attention in 2022 and 2023. The consumer price index and rising costs were contemplated by both Layh J. and Rothery J. when they ordered \$5,500.00.

[16] I, therefore, order post-leave solicitor-client fees are as follows:

- (a) Legal fees: \$6,500.00 consisting of:
 - a. \$5,500.00 in general legal fees;
 - b. \$1,000.00 in additional fees for the substitutional service application;
- (b) Taxes on legal fees: \$715.00;
- (c) Taxable disbursements: \$617.41;
- (d) Non-taxable disbursements: \$536.00.

(2) *Should Home Trust be permitted to recover the post-securement maintenance fees for weekly occupancy checks?*

[17] This Court has held that property management fees for securing and caring for the property, appraisal fees and utilities are valid and recoverable under the mortgage: *Royal Bank of Canada v Partridge*, 2018 SKQB 216 at para 11 [*Partridge*].

[18] Section 7 of *The Limitation of Civil Rights Act*, RSS 1978, c L-16 [*LCRA*], however excludes inspection fees when it states:

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.

[19] Counsel on behalf of Home Trust argues that the post-securement maintenance fees of \$4,229.00 are not inspection fees within the meaning of s. 7 cited above but are property management fees as contemplated in *Partridge*. He argues that because the property was abandoned forcing Home Trust to take possession, they had to maintain the property which included weekly checks. He argues that because the

weekly checks occurred after Home Trust took possession of the property, they are distinct from occupancy checks which occurred before they took possession. The occupancy checks prior to possession are inspections barred by s. 7, however the weekly attendances after Home Trust took possession are maintenance fees not barred by s. 7.

[20] Counsel for RBC while acknowledging it is a creative argument, objects to the post-securement maintenance fees being included in the property management fees. The amount in dispute is the \$4,357.50 which Home Trust refers to as post-securement maintenance fees. Counsel for RBC submits that changing the terminology does not change the fact that these are inspection fees which are prohibited from being added to the mortgage account by operation of s. 7 of the *LCRA* and are therefore not recoverable.

[21] Similar fees were rejected in both *Yamniuk* and *Keep*. At para. 38 of *Yamnuik*, Rothery J. stated:

[38] Counsel for SMC seeks an order for the payment of property management fees incurred in the sum of \$6,203.33. Counsel for RBC 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.

[22] In *Keep*, Robertson J. similarly rejected such arguments on the basis of statutory interpretation. At para. 106, he stated:

[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.

[23] Counsel on behalf of Home Trust urges me to take a more modern approach to statutory interpretation by reading the words of the *LCRA* 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 as set out by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.

[24] He points out that the purpose of the legislation is to provide consumer protection, in particular, to protect mortgagors against harm from temporary economic reversals and downturns and predatory lenders. (para. 16 of *Keep*)

[25] He argues that occupancy checks are significantly different when a mortgagee is forced to take possession of the property and maintain the property until it can be liquidated. When a mortgagor abandons a property, a significant burden is placed on the mortgagee in order to protect its security. A residential property cannot simply be left abandoned and unattended for long periods of time. In this case there were break-ins at the property which would not have been discovered without the weekly attendances.

[26] I cannot find any other cases in Saskatchewan where such fees were allowed by the Court or where the Court drew a distinction between inspection fees before and after the mortgagee took possession of the property.

[27] While attempting to distinguish occupancy checks or inspection fees

which happen after the mortgagee takes possession of the property as a way to get around s. 7 is creative, the legislation is clear and says nothing about when the occupancy checks occur. It only states that the mortgagee is not entitled to these fees. As Robertson J. held in *Keep*, the legislation clearly prohibits inspection fees with only one exception for the purposes of mortgage approval. By creating one exception, the legislature clearly contemplated why the exception was appropriate and by mentioning only the one exception excluded others. To use Robertson J.'s words, "It is not for the court to re-write legislation."

[28] I am following the decisions in *Yamniuk* and *Keep*. I find that the post-securement maintenance fees in the amount of \$4,357.50 are barred by s. 7 of the *LCRA* and therefore Home Trust is not entitled to them.

IV. Conclusion

[29] In summary, Home Trust is entitled to the following from the sale proceeds:

Legal costs of \$8,368.41 which consists of:

- (i) General legal fees - \$5,500.00
- (ii) Additional fees for the substitutional service application - \$1,000.00
- (iii) Taxes on legal fees - \$715.00
- (iv) Taxable disbursements - \$617.41
- (v) Non-taxable disbursements - \$536.00

Property management fees of \$9,465.04 which consists of:

- (i) Cleaning fees - \$4,229.40
- (ii) Utilities - \$3,972.49

(iii) Securing and winterizing - \$819.00

(iv) Repairs - \$444.15

[30] The balance of the funds are to be paid to RBC with the funds to be directed to counsel on behalf of RBC.

[31] If any issues arise with respect to implementation of the corresponding order, either party has leave to bring the matter back on short notice.

J.
R.C. WEMPE