KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 154**

Date: **2024 08 30**
Docket: QBG-SA-01035-2021
Judicial Centre: Saskatoon

BETWEEN:

TROY LILLICO and HORIZON INFRASTRUCTURE LTD.

Plaintiffs
(Respondents)

- and -

ROYAL BANK OF CANADA

Defendant
(Applicant)

CORRECTED FIAT: The text of the original fiat has been changed *per* the corrigendum released October 7, 2024. (A copy of the corrigendum is appended to this corrected fiat.)

Counsel:

William R. Vavra	for the plaintiffs (respondents)
Steven A. Latos	for the defendant (applicant)

FIAT
August 30, 2024

WEMPE J.

I. Introduction

[1] The plaintiffs in this matter allege that Horizon Mechanical Ltd. [Horizon Mechanical] committed fraud against them and that the Royal Bank of Canada [RBC], as a secured creditor of Horizon Mechanical, owed the plaintiffs a duty of care.

[2] The plaintiffs allege that RBC's duty of care should have prevented them from registering their security interest against equipment in the Personal Property Registry [PPR] for Saskatchewan and that RBC has therefore caused them to suffer damages.

[3] RBC seeks to summarily dismiss the claim brought by the plaintiffs on the basis that there is no genuine issue requiring a trial. RBC argues the only circumstances in which a bank owes a duty of care to a third party (non-client) is if or when the bank has knowledge that one of its clients is committing a fraud against the third party. RBC argues there is no evidence they had the requisite knowledge that Horizon Mechanical committed a fraud against Horizon Infrastructure Ltd. [Horizon Infrastructure].

[4] Counsel for the plaintiffs argues the matter is not appropriate for summary judgment and that a trial is necessary. He argues that RBC was either aware of the fraud by Horizon Mechanical or should have discovered the fraud, and therefore a duty of care was owed by RBC to Horizon Infrastructure. He argues that the issue of when RBC became aware of the fraud and when their duty of care arose is a crucial question of mixed fact and law. A trial is necessary because it is an issue of credibility where witnesses must be cross-examined.

[5] At the end of arguing the summary judgment application and after being questioned by the court, counsel for the plaintiffs sought leave to cross-examine Peter Gordon, the affiant on behalf of RBC.

[6] The plaintiffs' application to cross-examine on the affidavit is denied because it cannot advance the plaintiffs' case in any event. Even if the plaintiffs' case is considered in its best light, I find that no duty of care was owed by RBC to the plaintiffs, which makes this case appropriate for determination by summary judgment.

II. Facts

[7] As stated by the parties, the facts in this matter are not complex and most are not disputed by either party.

[8] Troy Lillico and Horizon Infrastructure are the plaintiffs in this matter. Troy Lillico is the sole director of Horizon Infrastructure. Horizon Infrastructure is a distinct corporate entity from Horizon Mechanical. RBC is not a creditor of Horizon Infrastructure or Mr. Lillico; nor do Horizon Infrastructure or Mr. Lillico operate a bank account or otherwise use RBC's banking services.

[9] Horizon Mechanical is an Alberta corporation with a registered office in Bonnyville, Alberta. RBC is a longstanding creditor of Horizon Mechanical. RBC secured its credit through a general security agreement dated November 3, 2010, further to which Horizon Mechanical granted RBC a first ranking security interest in all of its present and after acquired property as security for all of its present and future liabilities and obligations owed to RBC.

[10] RBC registered its security agreement in the Alberta PPR. RBC did not register its security agreement in the Saskatchewan PPR because, as far as RBC was aware, Horizon Mechanical only operated in Alberta.

[11] From time to time, RBC amended its Alberta PPR registration to reflect and perfect its ongoing security interest in the personal property of Horizon Mechanical.

[12] In November 2018, Horizon Infrastructure sought a legal remedy against Horizon Mechanical for wrongful conversion of assets and equipment and other fraudulent acts. Horizon Infrastructure obtained three orders relating to Horizon Mechanical. Those orders were as follows:

i. The order of Justice A.R. Rothery dated November 20, 2018

(granted in Saskatchewan), restraining Horizon Mechanical and Mr. Karle from disposing of certain equipment with an expiry date of December 11, 2018. (*Horizon Infrastructure Ltd. v Horizon Mechanical Ltd.* (20 November 2018) Battleford, QBG-BF-00287-2018 (Sask QB))

ii. The order of Justice G.S. Dunlop dated November 28, 2018 (granted in Alberta), restraining Horizon Mechanical and Mr. Karle from disposing of certain equipment with an expiry date of December 19, 2018. (*Horizon Infrastructure Ltd. v Horizon Mechanical Ltd.* (28 November 2018) St. Paul, 1814-00435 (Alta QB))

iii. The order of Justice D.B. Nixon (as he then was) dated December 6, 2018 (granted in Alberta) directing the RCMP to assist Goodsoil Credit Union (Goodsoil) with completing seizure of some or all of the equipment. (*Horizon Infrastructure Ltd. v Horizon Mechanical Ltd.* (6 December 2018) St. Paul, 1814-00435 (Alta QB))

[13] Although the plaintiffs state in their brief of law that RBC was served with the orders, they have not provided any evidence or proof of this. RBC specifically denies having any knowledge of the orders until sometime later in 2019.

[14] In the affidavit of Jolene Karle, she states that as an employee of Horizon Infrastructure, she had written and verbal communication with RBC between December 2018 and December 2022; however, in the emails attached to her affidavit, the first communication with RBC appears to have been in October 2019, not in December 2018 as she states in her affidavit.

[15] On April 24, 2019, Horizon Mechanical contacted RBC to advise that some of its property had been seized and was to be sold at auction in Saskatoon,

Saskatchewan. Horizon Mechanical provided RBC with a list of the seized property and informed RBC that the property was subject to RBC's security agreement.

[16] In Peter Gordon's affidavit, he states that April 24, 2019, was the first time RBC learned that Horizon Mechanical's property had moved from Alberta to Saskatchewan. RBC had previously believed that Horizon Mechanical only conducted its business in Alberta and that its property remained in Alberta. At this point, RBC had not registered its security agreement in the Saskatchewan PPR because it was not aware that some of Horizon Mechanical's property had moved from Alberta to Saskatchewan.

[17] On April 30, 2019, RBC was informed by email that Horizon Mechanical's property had been seized by Goodsoil Credit Union [Goodsoil]. The seized property was collateral pledged by Horizon Infrastructure to Goodsoil which they intended to sell.

[18] As a result of Goodsoil's seizure, RBC amended its Alberta PPR registration and registered its security agreement in the Saskatchewan PPR on May 2, 2019. RBC effected registration in the Saskatchewan PPR against the following:

i. the equipment listed in the security agreement granted by Horizon Mechanical in favour of RBC;

ii. the equipment of Horizon Mechanical in the Alberta PPR search of Horizon Mechanical;

iii. the equipment of Horizon Mechanical in the Saskatchewan PPR search of Horizon Mechanical;

iv. the equipment of Horizon Mechanical seized by Goodsoil and being held for sale by McDougall Auctioneers Ltd.; and

v. the equipment listed in the expired attachment order.

[19] Although the previous three orders obtained by Horizon Infrastructure in November and December 2018 appeared in the Saskatchewan PPR search conducted by RBC, the orders were expired by the time RBC registered its security agreement on May 2, 2019.

[20] RBC was contacted by Mr. Lillico on June 26, 2019, inquiring why RBC had registered its security agreement against property he believed belonged to Horizon Infrastructure.

[21] On June 28, 2019, RBC advised Mr. Lillico that it had received information Horizon Mechanical's property had been seized and that the PPR registrations were completed to protect RBC's interest.

[22] In October 2019, there was communication between RBC and Horizon Infrastructure regarding the registrations, and RBC provided Horizon Infrastructure with a copy of its security agreement.

[23] On January 28, 2020, Horizon Infrastructure sent RBC an email stating that it had commenced multiple actions against Horizon Mechanical regarding fraudulent activity.

[24] RBC states that the email of January 28, 2020, was the first time RBC was made aware of the allegations by Horizon Infrastructure against Horizon Mechanical regarding fraudulent activity.

[25] An agreement was ultimately reached between RBC and Goodsoil regarding the competing claims of RBC and Goodsoil to the equipment seized by Goodsoil. The equipment was to be sold and the proceeds were to be paid into court and held in trust pending a determination of RBC's, Goodsoil's and Canada Revenue Agency's entitlement to such proceeds.

III. Issues

[26] The issues are:

1. Should the plaintiffs/respondents be provided with an opportunity to cross-examine the affiant at this stage?

2. Is summary judgment appropriate?

3. Did RBC owe a duty of care to the plaintiffs? If so, was that duty breached?

4. If RBC owed a duty of care, have the plaintiffs suffered any damages?

IV. Analysis

1. Should the plaintiffs/respondents be provided with an opportunity to cross-examine the affiant at this stage?

[27] As set out earlier, the issue of whether the plaintiffs should be permitted to cross-examine Mr. Peter Gordon on his affidavit was raised by plaintiffs' counsel near the end of his submissions on the summary judgment application and after being questioned by the court. There are two issues to be determined by this court – firstly, the timing of the application to cross-examine and, secondly, whether permitting cross-examination would assist in resolving the issues and be just in the circumstances.

a. The timing of cross-examination

[28] The timing of cross-examination on affidavits and whether it should be a judge in chambers or the judge who considers the summary judgment application who decides whether cross-examination is permitted depends on the circumstances of the summary judgment application. Several cases have considered the timing of

cross-examination on affidavits in the context of summary judgment applications. Ultimately, it depends on the circumstances of the summary judgment application, but the jurisprudence in the area has held that the decision whether to permit cross-examination on affidavits can either be made prior to the summary judgment application by a chambers judge or by the judge considering the summary judgment application.

[29] The Saskatchewan Court of Appeal held in *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10, 429 DLR (4th) 269 [*Ter Keurs*], as follows:

> [27] It is settled law that a party does not have an automatic or inherent right to cross-examine an affiant on his or her affidavit (see, for example: *Wallace v Canadian National Railway*, 2009 SKQB 178, 338 Sask R 174; *Crown & Hand Pub Ltd. v Bank of America Corporation*, 2013 SKQB 348, 430 Sask R 80). A party making a request of this nature must establish that the cross-examination will assist in resolving the issue before the court and not result in an injustice. Granting leave to cross-examine on an affidavit is a discretionary remedy.

[30] In *Regional Tire Distributors (Saskatchewan) Inc. v Quality Tire Service Ltd.*, 2016 SKQB 411, Barrington-Foote J. (as he then was) held that the cross-examination should occur prior to the summary judgment application. In that case there were numerous conflicts in the evidence which were relevant to the summary judgment application. Justice Barrington-Foote determined that cross-examinations would enable parties to test and better understand those conflicts. He held that cross-examination would assist the court in dealing with the merits of the application and would result in a more timely and effective process. He granted leave to cross-examine on the affidavits and adjourned the summary judgment application until after the cross-examinations.

[31] In *Casbohm v Winacott Spring Western Star Trucks*, 2018 SKQB 15, 30

CPC (8th) 175 [*Casbohm*], Kalmakoff J. (as he then was) analyzed the cumulative effect of (i) the wording of Rule 6-13(1) of *The Queen's Bench Rules* (now *The King's Bench Rules)*; (ii) the absence of any specific contrary provision in the Rules or any relevant legislation; (iii) the jurisprudence relating to summary judgment applications, including the "best evidentiary foot forward" principle; and (iv) the requirement for proportionality expressed in the Foundational Rules. He concluded that the decision whether to permit cross-examination can be made by any judge in chambers or by the judge hearing the summary judgment application. He also held that cross-examination does not always have to occur prior to the summary judgment application.

[32] While the summary judgment rules do not provide a right to cross-examination, they do specifically contemplate cross-examination. Rule 7-3(2) of *The King's Bench Rules* states that a court may draw an adverse inference if a party fails to cross-examine on an affidavit or to file responding or rebuttal evidence. The Rules, however, are silent respecting the procedure and timing of cross-examination on affidavits in summary judgment applications.

[33] Part 7 of the Rules gives the court broad discretion, and the power to shape the process in a summary judgment application to achieve the goals of flexibility and proportionality (see *Magna Electric Corporation v Tesco Electric Ltd.*, 2015 SKQB 35, 469 Sask R 15).

[34] In *Casbohm*, Justice Kalmakoff noted that nothing in the Rules specifically exempts summary judgment applications from the operation of Rule 6-13(1) – the rule which provides for cross-examination on affidavits in any other application or petition.

[35] At paragraphs 65 and 66, Justice Kalmakoff cited the case of *Brisette v Cactus Club Cabaret Ltd*., 2017 BCCA 200, 413 DLR (4th) 317, as standing for the proposition that cross-examination does not always have to occur prior to the summary

judgment application, but also that it does not have to be made by the judge hearing the summary judgment application. In some cases, cross-examination on affidavits may be ordered by the judge hearing the summary judgment application rather than dismissing the summary judgment on the basis that a conventional trial is needed.

[36] Based on the rules and the jurisprudence, I find that as the judge considering the summary judgment application, I have the authority to order cross-examination on the affidavits and adjourn the summary judgment application until after the cross-examination is completed.

b. Should the plaintiffs be permitted to cross-examine?

[37] I must now consider whether cross-examination should be permitted in the circumstances of this case.

[38] The Saskatchewan Court of Appeal has stated in numerous cases that leave to cross-examine must be generously granted in the context of summary judgment applications (*Blue Hill Excavating Inc. v Canadian Western Bank Leasing Inc.*, 2019 SKCA 22 at para 31, [2019] 4 WWR 393 [*Blue Hill*], and *Ter Keurs*, at paras 30 and 54). The court explained that this is because of the court's expectation that each party will put its "best foot forward" in leading evidence and "the court's need to decide whether it can 'reach a fair and just determination on the merits on [the] motion for summary judgment' which is the litmus test for whether a genuine issue requiring trial exists (*Hryniak* at para 49)" (*Blue Hill*, at para 31).

[39] In *Wallace v Canadian Pacific Railway*, 2009 SKQB 178, 338 Sask R 174 [*Wallace*], Popescul J. (as he then was) outlined the principles governing applications to cross-examine on affidavits filed in support of chambers applications. At paragraph 5, he noted:

> [5] The law with respect to when a court ought to exercise its

> discretion in favour of a request to permit cross-examination on a deponent's affidavit is well settled. The general principles and criteria considerations gleaned from the jurisprudence in this jurisdiction may be summarized as follows:
>
> 1. There is no inherent right to cross-examine a deponent on his affidavit.
>
> 2. Granting leave to cross-examine on an affidavit is a discretionary remedy.
>
> 3. Permission to cross-examine on the affidavit may be granted by the Court pursuant to Rule 317.
>
> 4. The party making the request must establish that the cross-examination will assist in resolving the issue before the Court and that it will not result in an injustice.
>
> 5. Leave to cross-examine will be sparingly, and not routinely, granted.
>
> 6. Generally, leave to cross-examine ought only be granted where there is contradictory evidence before the Court; however, in the absence of contradictory evidence, the Court may nonetheless grant leave where there is a sincere and legitimate need for clarification of the information deposed to and that information is solely within the knowledge of the affiant.
>
> 7. Generally, leave to cross-examine on an affidavit ought not be granted on interim applications.

[40] In *Ter Keurs*, the Saskatchewan Court of Appeal held that whether to permit cross-examination is a case-specific decision. One factor guiding this decision is the proportionality principle in Rule 1-3(4) which includes resolving a claim in a timely and cost-effective way, so far as practicable, conducting the proceeding in ways that are proportionate to: (a) the amount involved in the proceedings, (b) the importance of the issues in dispute, and (c) the complexity of the proceeding. The court went on to elaborate on other factors to consider:

> [33] Other factors may include the need to test any conflict in the evidence, the need to allow for exploration of specific issues, and the possibility that evidence generated by cross-examination may actually assist parties in deciding whether to even proceed by way of summary judgment (*Regional Tire* [2016 SKQB 411,] at para 12). On the other hand, there may be occasions where the purpose of cross-examination

> is not self-evidently to facilitate resolution, but to thwart it. Courts must be alert to "the need to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases their costs" (*Casbohm* at para 62; see also: *Regional Tire* at para 11). Where cross-examination is considered unlikely to assist in resolving the substantive issues, or is little more than a fishing expedition, cross-examination will be denied (*Wells v General Motors of Canada Company*, 2018 SKQB 253).

[41] Applying the criteria set out in *Wallace*, the key questions that I must determine are whether the plaintiff has demonstrated that cross-examination will assist in resolving the issues before the court, and whether permitting cross-examination will result in an injustice. That determination must take into account that the application to which the affidavits relate is a summary judgment application, and must respect the principle of proportionality, as set out in Rule 1-3.

[42] Despite the case law weighing in favour of permitting cross-examination in the context of a summary judgment application, I am of the view that the factual circumstances of this case are distinguishable from those cases. I am not prepared to grant the plaintiffs leave to cross-examine Peter Gordon on his affidavit because it will not assist the court in resolving the issues on the summary judgment application.

[43] I will explain further below in my analysis on whether there was a duty of care owed and whether that duty was breached; however, I am of the view that the cross-examination of Peter Gordon will not change the end result of the summary judgment application. Even if the plaintiffs are able to get the best-case scenario evidence through their cross-examination, it will not change my finding that no duty of care was owed in the circumstances. Rather than assisting the court in reaching a just resolution, cross-examination would only delay matters without adding any evidence that would impact the result.

[44] The only area where the evidence is contradicted in the affidavits is on the issue of when RBC became aware that Horizon Infrastructure was alleging Horizon

Mechanical had committed fraud and absconded with its equipment. Whether RBC became aware of the allegations in November 2018 or in January 2019 makes no difference ultimately – either way no duty of care was owed. I will explain further below, but this case is significantly different from those cases which have considered the issue of when a bank will owe a duty of care to a third party (non-client). The alleged fraud in this case had nothing to do with RBC or RBC's accounts. The conduct that the plaintiff alleges breached the duty of care (*i.e.*, registering their security interest) occurred well after the fraud.

[45] The plaintiffs argue that RBC breached a duty of care by registering their security interest in the Saskatchewan PPR; therefore, the only time when RBC's knowledge is relevant is at the time they registered their security interest. Even if the plaintiffs could establish through cross-examination that RBC was aware that Horizon Infrastructure was alleging they had priority over the equipment, that knowledge is not sufficient to create a duty of care.

[46] This is an issue of priorities under *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*], not whether a duty of care was breached. The plaintiffs' appropriate remedy is to bring an application under the *PPSA* to determine who has priority to the equipment or to the funds paid into court after the sale of the equipment.

[47] Even if this court allowed cross-examination on Peter Gordon's affidavit, I am of the view that it would not change the result of the summary judgment application in any event. The issue in this matter is whether RBC owed a duty of care to Horizon Infrastructure which they breached by registering their security interest. I am of the view that the cross-examination of Peter Gordon would not lead to any further evidence regarding RBC's involvement or knowledge of Horizon Mechanical's fraud on Horizon Infrastructure.

[48] It also bears mentioning that this matter was managed by Justice

Elson leading up to the summary judgment application. There were five appearances/conference calls with Justice Elson to manage the file, and all parties agreed that cross-examination on the affidavits was not necessary. Justice Elson's fiat dated November 10, 2023 (*Lillico v Royal Bank of Canada* (20 November 2023) Saskatoon, QBG-SA-01035-2021 (Sask KB)), specifically states that the parties do not anticipate that cross-examination on any of the affidavit evidence will be either necessary or likely.

[49] While I recognize that plaintiffs' counsel changed after the case management process was complete, if the new counsel disagreed with Justice Elson's fiat, then he had a responsibility to raise that prior to the hearing of the application and prior to the end of the argument on the summary judgment application. I have no evidence when plaintiffs' counsel changed; however, Mr. Vavra could have contacted the court prior to May 15, 2024, when the application was argued, and sought an adjournment to allow him to cross-examine Peter Gordon on the affidavit. Mr. Vavra also could have asked for an adjournment to allow the cross-examination at the beginning of court on May 15, 2024. Instead, he argued the entire summary judgment application and, after being questioned by the court, sought leave to cross-examine the affiant.

[50] This Court has stated on many occasions that both parties in a summary judgment application are obligated to put their best foot forward (see *McKercher v Stantec Architecture Ltd.*, 2019 SKQB 100 at para 26, [2019] 11 WWR 707). The plaintiffs have an obligation to put their best foot forward on the summary judgment application. Instead, they waited until the end of argument to ask to cross-examine the affiant.

2. Is summary judgment appropriate?

[51] Rules 7-5(1) and (2) of *The King's Bench Rules* govern applications for

granting summary judgment. Those rules provide:

> **Disposition of application**
> **7-5**(1) The Court may grant summary judgment if:
>
> (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.
>
> (2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:
>
> (a) shall consider the evidence submitted by the parties; and
>
> (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
>
> (i) weighing the evidence;
>
> (ii) evaluating the credibility of a deponent;
>
> (iii) drawing any reasonable inference from the evidence.

[52] In *Tchozewski v Lamontagne*, 2014 SKQB 71 at para 30, [2014] 7 WWR 397, Barrington-Foote J. (as he was then) concisely summarized the steps to be taken and principles to be applied in assessing an application for summary judgment:

> [30] The central question posed on a Rule 7-2 application, accordingly, is whether summary judgment will achieve what Karakatsanis J. calls (at para. 28) the "principal goal", and Popescul C.J.Q.B calls "the overarching consideration" (at para. 49, *Pervez* [2013 SKQB 377, [2013] 12 WWR 794]): that is, a fair process that results in a just adjudication of the dispute before the court. The answer to this question calls for an analysis of the affidavit and other evidence presented and the issues raised by the application, in the context of the litigation as a whole. In *Hyrniak* [2014 SCC 7, [2014] 1 SCR 87], Karakatsanis J. breaks that analysis down into discrete steps and key principles – a "roadmap" – based on the various elements of the summary judgment rules. In brief, the key elements of that roadmap, in the context of a Rule 72 application, are as follows:
>
> 1. The court must first decide if there appears to be a genuine issue requiring a trial within the meaning of Rule 7-5(1)(a)), based solely on the evidence before the court, and without using the powers provided by Rule 7-5(2)(b) to weigh the

evidence, evaluate credibility and draw inferences. (*Hryniak*, para. 66)

2. There will be no genuine issue requiring a trial if the judge is able to reach a fair and just determination on the merits based on the affidavit and other evidence. That will be so if the summary judgment process:

   (a) allows the judge to make the necessary findings of fact;

   (b) allows the judge to apply the law to the facts; and

   (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial. (*Hryniak*, para. 49)

3. The issue is not whether the summary judgment process is as thorough or the evidence is as complete as at trial. It is whether the judge is confident he or she can find the facts and apply the relevant legal principles so as to fairly resolve the dispute. If the judge has that confidence, proceeding to trial is generally not proportionate, timely or cost effective. A process that does not give the judge confidence in his or her conclusions, on the other hand, is never proportionate. (*Hryniak*, paras. 50 and 57)

4. If there appears to be a genuine issue requiring a trial, the court should next determine if a trial can be avoided by using Rule 7-5(2)(b) powers to weigh evidence, evaluate credibility and draw inferences, and whether it is in the interests of justice that those powers be exercised only at trial. (*Hryniak*, para. 56)

5. In deciding whether there is a genuine issue requiring trial, and whether it is in the interests of justice to use the powers provided by Rule 7-5(2)(b) to avoid a trial, the court must consider the nature of the evidence and issues. It must also consider proportionality in the context of the litigation as a whole. The relevant factors may include, but are not limited to:

   (a) the complexity of the claim;

   (b) the amount at issue;

   (c) the importance of the issues;

   (d) the relative cost and speed of a summary judgment application, as compared to trial;

   (e) whether better evidence will be available at trial than on the application, and the nature and extent of the conflict in the evidence, including:

(i) whether there is competing evidence from multiple witnesses, the evaluation of which would benefit from cross-examination;

(ii) whether credibility determinations are at the heart of the issues to be determined;

(iii) and whether credibility determinations are made more difficult by the shortage of reliable documentary yardsticks.

(f) whether the court is able to fairly evaluate the evidence, including the extent to which it would assist the court to have evidence presented by way of a trial narrative, to hear and observe witnesses and to have the assistance of counsel in reviewing the facts and the law within the conventional trial process;

(g) whether summary judgment would resolve all claims against all parties, or whether a trial will be necessary in any event, raising, among other things, the possibility of duplicative proceedings or inconsistent findings of fact; and

(h) whether the application could dispose of an important claim against a key party, thereby reducing cost and delay. (Rule 1-3, *Hryniak*, *supra*, paras. 58, 60 and 66, and *Pervez*, para. 48)

6. The court also has the discretion to permit a party to present oral evidence pursuant to Rule 7-5(3) if it would allow the court to reach a fair and just adjudication on the merits and is the proportionate course of action. (*Hryniak*, para. 63)

[53] Justice Kalmakoff (as he then was) in *LaBuick Investments Inc. v Carpet Gallery of Moose Jaw Ltd.*, 2017 SKQB 341, described the shifting burden of proof on a summary judgment application as follows:

> [25] When faced with an application for summary judgment, the court must first determine if there is a genuine issue requiring a trial, based solely on the affidavit evidence filed with the application. The burden of proof, in this respect, is on the applicant to demonstrate the absence of a genuine issue requiring a trial, on a balance of probabilities. Once the applicant discharges this burden, the evidentiary burden then shifts to the respondent to demonstrate: (i) that there is arguable merit to an issue or issues in the matter; and (ii) that there is a compelling reason why a conventional trial is required to decide the issue: *Peter Ballantyne Cree Nation v Canada*

(Attorney General), 2016 SKCA 124, 485 Sask R 162.

[54] I am satisfied based on the evidence before the court that the matter is appropriate for summary judgment. There is no genuine issue requiring trial, and the court can reach a fair and just determination on the merits based on the affidavits filed. The ultimate issue on this summary judgment application is the legal issue of whether RBC owed the plaintiffs a duty of care and if that duty of care was breached by RBC's registration of its security interest in the Saskatchewan PPR. A full-blown trial will not add any evidence which would assist in answering this question.

3. Did RBC owe a duty of care to the plaintiffs? If so, was that duty breached?

[55] The plaintiffs in this matter assert that RBC owed them a duty of care and failed to meet that duty causing them to suffer damages. The case law is clear that there are only very limited circumstances where a bank will owe a third party a duty of care. This duty of care will only arise where the bank has knowledge of facts demonstrating fraudulent activity or proposed fraudulent activity.

[56] Any analysis of whether a duty of care is owed must start with the case of *Kamloops (City) v Nielsen*, [1984] 2 SCR 2, where the Supreme Court adopted the House of Lord's two-step test from *Anns v Merton London Borough Council*, [1978] AC 728 [*Anns*]. The two-stage test includes first asking whether there is sufficient proximity between the parties to impose liability? If sufficient proximity exists, a *prima facie* duty of care is created. The court then goes on to determine, secondly, whether that *prima facie* duty of care should be limited or negatived based on overriding policy considerations. The main concern for the court is if a *prima facie* duty is so broad that it creates potentially indeterminate liability for an indeterminate class. (*Ramias v Johnson*, 2009 ABQB 386 at para 27, 475 AR 387 [*Ramias*])

[57] The plaintiffs rely on the case of *Semac Industries Ltd. v 1131426 Ontario*

Ltd. (2001), 16 BLR (3d) 88 (Ont SC), as supporting the proposition that RBC owed a duty of care in the circumstances; however, in *Semac*, the court was clear that a duty of care only arises where the bank has actual knowledge of the fraudulent scheme. At paragraph 68, the court stated:

> [68] I am satisfied that the test in *Barclays Bank* [[1992] 4 All ER 363 (Eng QB)] and *Silverman Jewellers Consultants Canada Inc.* [(2001), 53 OR (3d) 97 (Ont CA)] is an appropriate standard to raise the liability. If a bank knows of the customer's fraud in the use of its facilities or has reasonable grounds for believing or is put on its inquiry and fails to make reasonable inquiry, the bank will be liable to those suffering a loss from the fraud. The bank should not be liable unless it is aware of the clear probability of fraud, that is the civil standard for finding fraud. A lesser standard would be unfair to the bank and possibly unfair to the customer.

[58] Other courts have considered whether a duty of care owed by banks to third parties should be extended beyond where the bank has actual knowledge of fraudulent activity. In *Dynasty Furniture Manufacturing Ltd. v Toronto-Dominion Bank*, 2010 ONSC 436, 74 CCLT (3d) 286 [*Dynasty Furniture*], aff'd (on this point) 2010 ONCA 514, 321 DLR (4th) 334, the court considered whether there were circumstances where a bank may become subject to an obligation to investigate the affairs of its customer, other than circumstances involving actual knowledge of, or willful blindness or recklessness with respect to, fraudulent activities of a customer. The court rejected the plaintiff's arguments and stated as follows:

> [60] Fourth, as a related matter, the case law does not support the proposition implicit in the plaintiffs' assertion of a general duty of care that a bank is to be treated as having knowledge of all banking activities of its customers or, alternatively, of all "suspicious transactions" of its customers. Nor does the case law support the proposition that a bank has an on-going duty to actively monitor all banking transactions of its customers to identify "suspicious transactions". In this connection, it is noteworthy that in *Semac*, the case that comes closest to addressing the issue on this motion, any duty of care to which the bank might have become subject (as *Semac* involved a summary judgment motion, liability was never established) would have arisen after, and in consequence of, the third party's presentation to the bank of evidence of fraudulent activity by its

> customer.
>
> [61] Accordingly, I conclude that the duties alleged by the plaintiffs do not fall within, nor are they analogous to, a category of cases in which a duty of care has previously been recognized. While courts have recognized a duty of care owed by banks to third parties to take steps to prevent the use of the bank's facilities for fraudulent purposes, this duty arises only upon the bank becoming aware of facts demonstrating fraudulent activity or proposed fraudulent activity — that is, upon the bank acquiring actual knowledge of the use, or proposed use, of its facilities for fraudulent purposes. The case law cited to the Court does not support the existence of a duty of care in either of the circumstances addressed in the statement of claim. The duty of care recognized at law does not encompass either an obligation to ensure the legitimacy of a client's affairs and or an obligation to investigate suspicious circumstances. These are qualitatively different categories of liability from those that have been recognized at law to date.

[59] The court went on to find that under the first branch of the *Anns* test, the circumstances of the case were not capable of establishing a relationship of sufficient proximity to found a duty of care owed by the bank to the plaintiffs. Even if a *prima facie* duty of care could be established under the first branch of the *Anns* test, the court held it would be negated at the second stage based on overriding policy:

> [73] First, in *Ramias* [2009 ABQB 386, 475 AR 387], S.L. Martin J. concluded that such a duty of care would create the possibility of (1) indeterminate liability to an undetermined class with (2) a standard of conduct that cannot be articulated with sufficient precision. I agree with both parts of this statement. On the plaintiffs' theory, T-D could be held liable to all parties who have dealt with SIB and have claims against it, and not just those who bought certificates of deposits. Indeed, any party who had transactions with SIB in which money was invested in SIB or by SIB in a trustee capacity could hold T-D liable for their losses.
>
> [74] Second, the alleged duty of care ignores the important specialization of roles in the financial industry. In recognition of the significance of a stable financial system to the economic health of Canada, the federal and provincial governments have created a highly developed, interrelated supervisory regime involving banking, securities and insurance regulators. Under this regime, the responsibility for establishing rules to protect against fraudulent participants in the Canadian financial system, and for supervising the use of the Canadian financial system, among other things, to prevent the fraudulent distribution of securities, rests with these regulatory

> authorities. Similarly, the investigation and prosecution of any such fraudulent activity is conducted by governmental regulatory authorities. The proposed duty of care would impose a significant responsibility on banks that does not currently exist and is unnecessary in light of this existing regulatory regime. In addition, any decision to impose an obligation on banks to establish a second investigatory regime by the creation of private rights involves significant policy considerations that should be the subject of deliberation by Parliament.
>
> [75] Third, as a related matter, to protect themselves, banks would be required to establish policies and procedures to identify circumstances suggestive of fraudulent activities, including possible widespread systematic fraud, and to conduct investigations into such circumstances – an enterprise in which banks have little experience or competence. It is also trite to observe that the cost of compliance would be onerous given the volume and complexity of transactions handled daily by Canadian banks. Ultimately, such cost would be borne by customers and shareholders of the bank.
>
> [76] Fourth, as the facts of this case reveal, imposition of a duty of care on a national bank would be ineffective in thwarting a fraudulent scheme perpetrated by trans-national entities. An effective investigation of the affairs of SIB would have required the active cooperation of regulators and other governmental authorities in multiple jurisdictions. Teamwork between governmental agencies inside and outside Canada is required to police fraud of the scale and geographic scope alleged in the statement of claim. A Canadian chartered bank is not in a position to obtain such cooperation nor does it have the extensive investigatory powers available to governmental agencies, even within Canada, to conduct such an investigation.
>
> [77] Fifth, the proposed duty of care would, in practice, effectively transform a chartered bank into an insurer of parties who invested in, or with, the bank's customers in the circumstances in which it failed to discharge its duty of care.

[60] The *Ramias* case, cited by the court in *Dynasty Furniture*, also considered the issue of the duty financial institutions may owe to a third party investor when their client uses the banking system in a fraudulent scheme. In *Ramias*, Justice Martin struck the claim and stated as follows:

> [42] However, I reach a contrary conclusion in regard to the claim in negligence that BMO ought to have known that Johnson was conducting fraudulent activities, as the claim that financial institutions owe a general duty of care to third party investors of their clients is

> impossible. The alleged nexus is simply too remote and it is plain and obvious that such a duty must be denied on policy grounds. It fails at both stages of the *Anns* inquiry, because it raises the spectre of indeterminate liability to an indeterminate class, with a standard of conduct that cannot be articulated with sufficient, or any precision. The volume of transactions conducted daily by financial institutions is immense. To create tort duties to non-customers in relation to unknown underlying fraudulent transactions would impose a disproportionate and unwieldy burden. The banks cannot be asked to act as guarantors of the legality of their client's transactions when they lack actual knowledge of any impropriety.

[61] The more recent case of *1169822 Ontario Limited v The Toronto-Dominion Bank*, 2018 ONSC 1631, considered a similar issue - when does a bank owe a duty to protect third-party victims of a fraud scheme perpetrated by one of its own customers. In that case, the plaintiffs were victims of a Ponzi scheme perpetrated by a client of the Toronto-Dominion Bank. None of the victims were clients of the Toronto-Dominion Bank nor had any relationship with the bank. The plaintiffs argued that the common law had not closed the door to extending the bank's duty of care to instances where it was put on inquiry that should have led the bank to knowledge of the fraud. They argued that the case cried out for an advance in the common law to be made.

[62] The court held at paragraph 217 that the "common law has not yet embraced the idea of imposing upon a bank a duty of care to prevent harm to a stranger by a dishonest customer of the bank where the bank has no more than constructive knowledge of the fraud in question."

[63] Justice Dunphy concluded as follows:

> [15] Finally, I am not persuaded that a bank owes third parties such as the plaintiffs a stand-alone duty of care to avoid economic loss arising from mere constructive knowledge of a potential fraud. At all events, I am satisfied that none of the facts known to or learned by TD were sufficient to have put TD on notice to make an inquiry the outcome of which would have had a reasonable likelihood of detecting the fraud or reducing or avoiding any of the plaintiffs' losses.

[64] Considering this caselaw, I turn to the plaintiffs' case. If considered in its best light:

a. RBC may have been put on notice as early as October 2018 if it was served with the court orders. But the fraudulent conduct of Horizon Mechanical that Horizon Infrastructure alleges had already occurred.

b. None of the alleged fraudulent conduct was facilitated through RBC accounts operated by Horizon Mechanical or by way of other RBC services.

c. While Horizon Infrastructure argues the RBC owed it a duty of care, the only breach of that duty alleged by Horizon Infrastructure was the registration by RBC of its security interest against property in Saskatchewan that Horizon Infrastructure owned. In personal property security law terms, Horizon Infrastructure says RBC's security interest did not attach to the property owned by Horizon Infrastructure.

d. The damage claim made by Horizon Infrastructure against RBC arises because Horizon Infrastructure says RBC's registration against Horizon Infrastructure equipment prevented it from being able to use its value to refinance its debt.

e. Goodsoil was a secured creditor of Horizon Infrastructure and seized the equipment. It did so pursuant to a security agreement between it and Horizon Infrastructure. The priority dispute between Goodsoil, RBC and CRA to the proceeds of sale of that equipment has not been resolved.

[65] While there are no Saskatchewan cases on point, it is clear that no court

in Canada has found that a duty of care is owed by a bank to a third party unless there is knowledge, willful blindness or recklessness with respect to fraudulent activity of the bank's client. The plaintiffs in this case are asking the court to extend the duty of care even further and find there was a duty on the bank not to register its security interest. This is a new and novel argument.

[66] I agree with the reasoning in the cases from Ontario and Alberta cited above. Extending the duty of care owed by a bank to a third party fails at both stages of the *Anns* test. A bank does not have a relationship of sufficient proximity to a third party (non-client) unless they have knowledge or are willfully blind or reckless that a client is or will commit a fraud against that third party. As stated in *Ramias* at para 42, it raises the spectre of indeterminate liability to an indeterminate class, with a standard of conduct that cannot be articulated with sufficient precision:

> [42] … The volume of transactions conducted daily by financial institutions is immense. To create tort duties to non-customers in relation to unknown underlying fraudulent transactions would impose a disproportionate and unwieldy burden. The banks cannot be asked to act as guarantors of the legality of their client's transactions when they lack actual knowledge of any impropriety.

[67] Applying the *Anns* test in this case, I find that there is not sufficient proximity to ground a duty of care. The circumstances here are even more remote than the cases cited above because it is not the fact that Horizon Mechanical used RBC to perpetrate the fraud (as in the cases cited above), but it is the fact that RBC registered its security interest in the Saskatchewan PPR that the plaintiff alleges breached their duty of care. Neither RBC nor RBC's accounts had any involvement whatsoever in the fraud or absconding of equipment. RBC only became involved after the fact when they were advised that their client's equipment, which they had a security interest in, was being seized.

[68] Not only did RBC not have knowledge of the fraud but the fraud had

already been concluded and had nothing to do with RBC. This case is not like the cases cited above where a bank's accounts or products were being used to perpetrate the fraud. Rather the fraud was completed and had nothing to do with the bank.

[69] The plaintiffs are making a new and novel argument that the bank had a duty not to register their security interest in the PPR. They are asking the court to extend the duty of care even further than the arguments in the cases cited above and find that where a bank becomes aware of a priority dispute it has a duty not to register its security interest.

[70] The plaintiffs argue that there were a number of red flags which should have caused RBC to have constructive knowledge of the fraud. They argue that RBC was contacted as early as October 2018 about Horizon Mechanical's fraudulent activity and would have been aware of the orders from November 2018. They also argue that RBC being informed by Horizon Mechanical that their equipment had been seized on April 24, 2019, and by email on April 30, 2019, was another red flag. Then in June and October 2019, the plaintiffs made inquiries of RBC regarding RBC's registrations in the Saskatchewan PPR, which they argue was another red flag. Although the plaintiffs contacted RBC regarding their registration, the first mention they made to RBC of a fraud perpetrated by Horizon Mechanical against Horizon Infrastructure was in an email sent on January 28, 2020.

[71] Even if RBC became aware that Horizon Infrastructure was alleging Horizon Mechanical had committed a fraud against them as early as October 2018, the fraud was long completed by that time. The only remaining issue was who was entitled to priority over the seized equipment and/or the funds from the sale of that equipment.

[72] The plaintiffs are asking the court to find that because RBC was aware there was a dispute over who had priority over the seized equipment, they had a duty of care not to register their security interest. The plaintiffs' argument can be

summarized as follows:

a. the duty of care arose because of the knowledge of the fraudulent activity;

b. notwithstanding that the fraudulent activity occurred before the bank was aware of it, the bank had a duty not to register its security interest; and

c. the damages sought do not relate to the theft or conversion of the equipment but because of the inability to refinance.

[73] I find that not only did RBC have no knowledge of Horizon Mechanical's fraud prior to or during the period it is alleged to have occurred, but RBC had no involvement with that fraud as its accounts or services were not used to perpetuate the alleged fraud. It had no opportunity to intervene and prevent the alleged fraud and, in any event, could not have prevented where the nature of it is theft or conversion.

[74] There was no duty of care owed in the circumstances to the plaintiffs and, even if there was, RBC did not breach any duty of care by registering its security interest in the Saskatchewan PPR; rather, they did as any prudent lender would do in the circumstances and protected their interests. The issue is who had priority to the equipment seized or the proceeds of that equipment if it was sold. The plaintiffs' remedy is under the *PPSA*, not through a court action in negligence.

[75] The *PPSA* is a complete code which provides remedies for the plaintiffs in certain circumstances. Sections 63 to 66 of the *PPSA* provide broad jurisdiction to the court to remedy wrongs and protect persons with an interest in collateral. Section 65, among other things, provides that:

a. all rights, duties or obligations that arise pursuant to a security

agreement are to be exercised or discharged in good faith and in a commercially reasonable manner;

b. a person does not act in bad faith merely because the person acts with knowledge of the interest of some other person; and

c. if a person, without reasonable excuse, fails to discharge any duties of obligations imposed on the person by the *PPSA*, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.

[76] This case also fails on the second branch of the *Anns* test. There are numerous policy reasons why a court ought not extend a duty of care in the circumstances of this case. Firstly, all the policy reasons in the cases cited above (*Ramias* at paras 73-77, and *Dynasty Furniture*) apply to this matter as well.

[77] Additionally, in this case, for a court to hold that a secured creditor has a duty not to register its security interest where it becomes aware that there is a priority dispute would undermine the entire system of the *PPSA* and the PPR. The purpose of the *PPSA* and the PPR is to resolve priority disputes and provide a means for secured creditors to register to protect their interests. As stated earlier, the *PPSA* is a complete code. The fact that the plaintiffs have a remedy under the *PPSA* is another policy reason weighing against extending the duty of care in this new and novel circumstance.

[78] Further, s. 65 of the *PPSA* specifically states that the principles of the common law and equity supplement and continue to apply except to the extent that they are inconsistent with the *PPSA*. To impose a duty of care on RBC to not register its security interest in the circumstances of this case could be seen as inconsistent with the *PPSA*.

[79] To conclude, RBC's application to summarily dismiss the claim is

granted for the following reasons:

a. there was no knowledge of the alleged fraud at a time when RBC could have prevented Horizon Infrastructure's loss.

b. even if RBC had some knowledge of the alleged fraud when it registered its security interest, it was not sufficient to rise to the level where a duty could be imposed;

c. there was not sufficient proximity between Horizon Infrastructure and RBC to create a duty for RBC not to register its security interest; and

d. in any event, extending a duty of care in the circumstances must be denied on policy grounds.

4. If RBC owed a duty of care, have the plaintiffs suffered any damages?

[80] Because I find that there was no duty of care owed by RBC, it is not necessary to consider whether the plaintiffs suffered damages. If I had found that RBC breached a duty of care to the plaintiffs, I would have held that the evidence of damages is insufficient. I would have directed that there be a trial on the issue of damages.

V. Costs

[81] On the issue of costs, I order costs under Column 2 of the Tariff of Costs, which I fix at $2,000.00. Those costs are payable by the plaintiff to the defendant forthwith.

J.
R.C. WEMPE

KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 154**

Date: **2024 08 30**
Docket: QBG-SA-01035-2021
Judicial Centre: Saskatoon

BETWEEN:

TROY LILLICO and HORIZON INFRASTRUCTURE LTD.

Plaintiffs
(Respondents)

- and -

ROYAL BANK OF CANADA

Defendant
(Applicant)

Counsel:

William R. Vavra	for the plaintiffs (respondents)
Steven A. Latos	for the defendant (applicant)

CORRIGENDUM to 2024 SKKB 154 (August 30, 2024) WEMPE J.
October 7, 2024

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[1] On page 1 of my fiat of August 30, 2024, in this matter (2024 SKKB 154), counsel shall be corrected to read:

William R. Vavra	for the plaintiffs (respondents)
Steven A. Latos	for the defendant (applicant)

"R.C. Wempe" J.
R.C. WEMPE