

KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 60**

Date: **2024 04 09**
File No.: KBG-RG-02836-2023
Judicial Centre: Regina

BETWEEN:

101052035 SASKATCHEWAN LTD.

APPLICANT

- and -

NEW HORIZON FIRST NATIONS ADMINISTRATION INC.

RESPONDENT

AND:

File No.: KBG-RG-00354-2024
Judicial Centre: Regina

BETWEEN:

NEW HORIZON FIRST NATIONS ADMINISTRATION INC.

APPLICANT

- and -

101052035 SASKATCHEWAN LTD.

RESPONDENT

Counsel:

Nathan Xiao-Phillips
Jason M. Clayards

for New Horizon First Nations Administration Inc.
for 101052035 Saskatchewan Ltd.

FIAT
April 9, 2024

POPESCU C.J.K.B.

[1] Counsel for New Horizon First Nations Administration Inc. [New Horizon], has filed an amended request for case management order with respect to both KBG-RG-02836-2023 [02836] and KBG-RG-00354-2024 [00354], pursuant to Rule 4-5 of *The King's Bench Rules*. Counsel for 101052035 Saskatchewan Ltd. [101052035] opposes the request.

[2] On December 15, 2023, 101052035 commenced an originating application (02836) against New Horizon. Within that originating application, 101052035 requested a variety of remedies including relief against forfeiture pursuant to ss. 10(3) of *The Landlord and Tenant Act*, RRS 1978, c L-6. On February 20, 2024, New Horizon filed an application within the context of 02836 seeking several remedies, including a request to strike the originating application of 101052035 or, alternatively, a declaration that certain parties be added to 101052035's originating application and that certain issues be dealt with pursuant to Rule 7-1 (application to resolve a particular issue).

[3] On February 21, 2024, New Horizon commenced its own originating application (00354) requesting the appointment of an arbitrator pursuant to s. 11 of *The Arbitration Act, 1992*, SS 1992, c A-24.1, and that Jason Peszko be appointed the arbitrator. In response, 101052035 filed an application on March 1, 2024, seeking to strike out New Horizon's originating application in 00354 on the basis that it is an abuse of process. It seeks several other remedies as well. Then, on March 11, 2024, New Horizon filed an application, within 00354 seeking, among other things, the striking of portions of certain affidavits filed by 101052035 to support its March 1, 2024 application.

[4] Voluminous materials have been filed by the parties on both actions and the issue or issues in dispute have become obscured by the volume of paper that has been filed.

[5] It is within this context that counsel for New Horizon has filed its request for case management. Counsel for 101052035 opposes the appointment of a case management judge on the basis that it is neither “warranted nor appropriate”. He aptly points out that, absent agreement or a court order, Rule 4-5 requests are not available because Rules 3-51 and 3-53 specifically state that Parts 4 and 5 of *The King’s Bench Rules* do not apply to actions brought by originating application. Those Rules read as follows:

3-51 Part 4 and Part 5 do not apply to an action started by originating application unless the parties otherwise agree or the Court otherwise orders.

3-53 At any time in an action started by originating application, the Court may, on application, direct that all or any rules applying to an action started by statement of claim apply to the action started by originating application.

[6] Counsel for 101052035 argues, in the letter submitted to the Court in opposition to the request for the appointment of a case management judge, that:

... New Horizon has not served an application seeking to have Part 4 of the Rules apply to this originating application. Further, New Horizon has not established that there is a “a triable issue that is not capable of a fair and just resolution on the basis of the materials submitted, given the scale of the interests at issue”...

[7] Neither of the reasons advanced for denying the request for case management stand in the way of granting the request.

[8] First, although it would have been better for counsel for New Horizon to specifically acknowledge in his request for case management that Part 4 was not available without agreement of the parties or order of the Court and explicitly request the Court to exercise its discretion to resort to Rule 4-5, such was not the case. In my view, it is not necessary to bring a separate discrete application specifically requesting the Court to exercise its discretion to permit the use of Rule 4-5. For Rule 4-5 requests, it is sufficient to simply acknowledge in the request for case management that resort to

Rule 4-5 is being asked for and that although presumptively unavailable, the requesting party is asking the Court to exercise its discretion pursuant to Rules 3-51 and 3-53. This should be accompanied by brief reasons as to why it would be appropriate for the Court to exercise its discretion. There is no practical reason to require a separate application. Accordingly, the mere fact that a separate application requesting the Court to exercise its discretion was not filed does not prevent the Court from granting a Rule 4-5 request.

[9] Second, there is no requirement for counsel requesting case management to establish a triable issue. Counsel for 101052035 relies upon the decision in *Hildebrand v Hattum*, 2021 SKQB 136 at para 46 [*Hildebrand*], to support the notion that a triable issue is a prerequisite for the engagement of Rule 4-5. In *Hildebrand*, Brown J. examined the extent to which additional procedural steps should be permitted when resolving actions brought by originating applications. After referencing the Foundational Rules that acknowledge proportionality (while ensuring that justice is done), Brown J. points to the discretionary aspects of Rules 3-51 and 3-53. At para. 46, he says this:

46 It is also important to keep in mind that Rules 3-51 and 3-53 of *The Queen's Bench Rules* provide a discretion to the court including whether to order that aspects of Part 4 and Part 5 of the Rules ought to apply to an originating application. This discretion extends to the court ordering that any Rules applying to an action by statement of claim apply to the action started by originating application. These should, however, only be applied where a triable issue that is not capable of a fair and just resolution on the basis of the materials submitted, given the scale of the interests at issue, exists. Where additional procedural steps should be put in place in order to enable an appropriate, fair and just result then that should happen.

[10] I agree wholeheartedly with the comments made by Brown J. in relation to the discretionary nature of the applicability of Parts 4 and 5 of the Rules to originating applications. Generally, they do not apply because most often they are not necessary, especially when taking into account the proportionality component of the Foundational Rules. See *Kassian v Dynamic Glass & Door Ltd.*, 2017 SKQB 22 [*Kassian*]. However,

where appropriate, as expressly stated by Rules 3-51 and 3-53, the Court has the discretion to permit access to all or any of the processes and procedures contained within Parts 4 and 5. See *Kassian*.

[11] Counsel for 101052035 points to the passage in *Hildebrand* which states that Parts 4 and 5 should only be applied to originating applications after it is established that there is a “triable issue that is not capable of a fair and just resolution on the basis of the materials submitted ...”. While I do not take exception to that statement, it is not applicable to the context of this case. In *Hildebrand*, the question involved the extent to which additional procedures should be permitted in a contested estate case where a trial of an issue was determined to be necessary.

[12] The case before me is different. Rather than requesting “additional processes”, counsel for New Horizon is seeking the assistance of the Court to streamline the process by appointing a dedicated applications judge – the case management judge – to hear and determine all interim applications. This is a sensible approach given the multiplicity of applications and actions brought thus far. The fact that the case management request provisions (Rule 4-5) happen to be contained within Part 4 makes appointment of a case management presumptively unavailable. However, as noted above, the Court has the discretion to permit the inclusion of some or any of the Part 4 and/or Part 5 provisions where appropriate.

[13] Rule 1-3 of *The King’s Bench Rules* outlines the purpose and intention of the Rules which is to “provide a means by which claims can be justly resolved in or by a court process in a timely and cost efficient way”. It is obvious that the parties need the assistance of the Court to provide focus and to assist them with identifying the true issues. Until the true issues can be identified, and a procedural path can be charted, the resolution of these actions will be either difficult or impossible.

[14] It is painfully obvious that the parties need the assistance of the Court.

The best way to assist them at this time would be with the appointment of a case management judge.

[15] Accordingly, I am prepared to order, pursuant to Rules 3-51 and 3-53 that Rule 4-5 of *The King's Bench Rules* has application to both 00354 and 02836. Further, I am prepared to order that a case management judge be appointed to manage both of these actions. I hereby appoint Justice Klatt to be the case management judge. As a result, pursuant to Rule 4-7(2), unless I or Justice Klatt otherwise direct, she shall hear every application filed with respect to both 00354 and 02836 for which she is now appointed the case management judge.

[16] The local registrar is hereby directed to convene a conference call with Justice Klatt and counsel for both parties after which the parties will take their direction from Justice Klatt.

C.J.K.B.
M.D. POPESCU