

Date: 20251103
Docket: CI 23-01-44400
(Winnipeg Centre)
Indexed as: Norfield Enterprises Ltd. v.
Comtech (Communication Technologies) Ltd.
Cited as: 2025 MBKB 136

2025 MBKB 136 (CanLII)

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

NORFIELD ENTERPRISES LTD.,)	<u>Mouchir Ayoub</u>
)	for the Plaintiff
)	
plaintiff,)	
)	
- and -)	
)	
COMTECH (COMMUNICATION TECHNOLOGIES))	<u>Michael G. Finlayson</u>
LTD.,)	for the Defendant
)	
defendant.)	
)	
)	Judgment Delivered:
)	November 3, 2025

McKELVEY J.

I. INTRODUCTION

[1] Three motions are to be determined in this Rule 20A expedited action. Those motions are:

- (i) on May 21, 2025, the defendant ("Comtech") filed a notice of appeal of an order granted by an Associate Judge on December 5, 2024, as regards an award of solicitor-and-client costs in favour of the plaintiff ("Norfield") (document no. 22);

- (ii) on May 27, 2025, Norfield filed a notice of appeal of the Associate Judge's December 5, 2024 decision which had set aside default judgment entered against Comtech (document no. 23);
- (iii) Comtech, by virtue of a notice of motion filed June 9, 2025, sought to set aside the noting of default obtained against it by Norfield on May 28, 2025, and asked that leave be granted to file a statement of defence (document no. 26);

Norfield had filed, on June 23, 2025, a notice of motion seeking leave of the Court to adduce further evidence at the appeal hearing, being a second affidavit sworn by Grant Stevenson (document no. 32). This motion was resolved as Comtech consented to the use of the second Stevenson affidavit.

II. SUBJECT MATTER OF THE LITIGATION

[2] A.S.H. Management Group ("A.S.H."), a third party agent of Norfield, entered into a lease agreement with Comtech on December 19, 2016, for the rental of premises in the City of Winnipeg. Subsequently, and with the consent of Norfield, Avocado Motorsports Corporation ("Avocado") entered into a sub-lease agreement for the use of the leased premises for the period of July 1, 2020 through to December 30, 2022. There were lease conditions beyond payment of rent which included the performance of all terms, covenants and conditions, including insurance requirements.

[3] There were issues between Comtech and Avocado involving non-payment or late rental payments during the course of the sub-lease (see Grohn affidavit, document no. 7). On or about May 19, 2022, the leased premises experienced flood damage. Comtech

asserts that despite locks being changed on a number of occasions, Avocado continued to access the leased premises and to operate their business therefrom up to and including the date of the flood damage, after which they vacated (document no. 37, para. 11).

[4] Comtech was notified by A.S.H.'s insurance adjuster that the flood damage had been caused by the intentional removal of a water valve located under a sink. Comtech maintains that it incurred costs to clean the leased premises in the amount of \$11,200, as well as losing its damage deposit and related fees which totalled a further \$10,675.73. Norfield's statement of claim is similarly related to costs to remediate the flood damages occasioned to the leased premises.

[5] Comtech's insurer denied coverage under its policy on the basis that indemnity should be sought through Avocado's insurance. Comtech submits that Avocado held a certificate of property damage and public liability insurance as required by the terms of the lease and sublease and was also listed as an insured on A.S.H.'s insurance certificate. It is contended that the insurance policy named both A.S.H. and Avocado directly, with Comtech having no involvement, as it was not named in the policy. That policy of insurance expired on July 16, 2021. Comtech asserts it never received notice of the expiration of the policy from either A.S.H. or Avocado.

[6] On March 27, 2023, Comtech issued a statement of claim against Avocado and Boyang Zhu for unpaid rent and for damages it contends were incurred for remediating the flood damage. The claim initially sought \$119,822.93, with \$21,617.80 said to be related to the remediation of flood damages. An amended statement of claim was filed on May 15, 2023, seeking judgment in the amount of \$166,078.96, which reflected an

increase in the remediation costs to \$67,863.83 (Affidavit of Holly Kullman, filed November 25, 2024, document no. 12, Exhibits B and C). Default judgment was entered against Avocado on September 11, 2023, in the amount of \$169,359.59 (Kullman affidavit, Exhibit D). Comtech has undertaken steps to enforce the judgment.

III. BACKGROUND OF LITIGATION

[7] Norfield filed a statement of claim against Comtech on December 20, 2023, with respect to expenses incurred related to emergency services and repairs to rectify flood damage. The flood damage was occasioned to the property that was leased to Comtech through A.S.H., in 2016. A subtenant, being Avocado, entered into a sublease for the leased premises in 2020, but was contended by Norfield to have vacated before the damage occurred. Norfield claimed that Comtech breached the lease agreement and was negligent in the circumstances surrounding the flood damages.

[8] On January 4, 2024, Norfield's statement of claim was served on an employee of Comtech, in the City of Winnipeg. Comtech conceded that there was "no good explanation" as to why the employee, a tower technician, did not pass the statement of claim up the "chain of command" to be dealt with in some manner (Affidavit of Aaron Grohn, document no. 7, para. 5).

[9] On March 7, 2024, Norfield secured a \$75,147.78 default judgment against Comtech (document no. 4) with respect to emergency services and repairs said to be required to remediate the damages to the leased premises. Norfield, on May 30, 2024, filed an application in the Saskatchewan Court of King's Bench seeking an order to register the Manitoba judgment. The application was served on Comtech's Saskatchewan power

of attorney. It was at that time that Comtech became aware of the existence of the action and the Manitoba default judgment. Comtech is extra-provincially registered in both Manitoba and Saskatchewan and has designated-appointed attorneys for service in each province (Grohn affidavit, document no. 7, Tab B, Corporate Profile Report).

[10] The Saskatchewan application was to be heard on June 4, 2024, but was adjourned at Comtech's request. Further adjournments were requested, with two resulting in \$1,000 costs awards against the company. The Saskatchewan matter was ultimately adjourned *sine die* on July 30, 2024, pending the determination of Comtech's Manitoba motion to set aside default judgment, which had been filed on July 29, 2024 (document no. 5).

[11] The notice of motion to set aside default judgment was heard by the Associate Judge on December 5, 2024. The default judgment against Comtech was set aside with solicitor-client costs awarded in favour of Norfield to the date the motion was filed (Affidavit of Kala Fawcett, filed June 10, 2025, document no. 27, Exhibit A). The order further stipulated that Comtech was to file a statement of defence within 20 days from when the order was signed. Comtech was awarded costs on a tariff basis with respect to the motion setting aside the default judgment.

[12] Subsequent to the Associate Judge's decision, the parties entered into a dispute with respect to the scope of the solicitor-client costs awarded. Comtech's counsel sought clarification of the order by way of a letter to the Court dated January 31, 2025 (document no. 17). Norfield provided its position through correspondence dated February 11, 2025 (Fawcett affidavit, Exhibits C and D). The Court responded and confirmed Norfield's

position that costs were awarded to the date the motion to set aside default was filed (Fawcett affidavit, Exhibits E and F). Norfield then endeavoured to secure Comtech's consent to the order for filing and signing purposes. It was not until May 5, 2025, that consent as to form was received, which was the deadline set by the Sr. Associate Judge. The order was filed and entered on May 7, 2025 (document no. 21). On May 21, 2025, Comtech filed the notice of appeal of the solicitor-client costs awarded, with Norfield filing a cross-appeal on May 27, 2025, as regards the setting aside of default judgment. The Bill of Costs submitted by Norfield totalled \$19,938.89 and covered the period from the inception of the claim to the date the motion to set aside default judgment was filed. The Bill of Costs included the Saskatchewan proceedings.

[13] On May 28, 2025, Norfield noted Comtech in default for failing to file a statement of defence within 20 days of the order's signing, as was stipulated in the Associate Judge's order (document no. 24). Comtech contends that it did not file a defence within the 20 day period through inadvertence and a failure by Norfield to advise that the order had been entered. Accordingly, Comtech seeks an order setting aside the noting of default and granting leave to file a statement of defence. It is the position of Norfield that Comtech's motion to set aside the noting of default should be dismissed with solicitor-client costs awarded.

IV. SHOULD THE DEFAULT JUDGMENT AND NOTING OF DEFAULT AGAINST COMTECH BE SET ASIDE?

[14] It is necessary to evaluate both Norfield's appeal of the Associate Judge's order to set aside default judgment against Comtech, as well as the notice of motion brought by Comtech to set aside Norfield's May 28, 2025 noting of default.

[15] In cases such as this, the burden rests with Comtech to show why default judgment and the noting of default should be set aside. These matters are to be heard on a *de novo* basis.

[16] King's Bench Rule 19.03(1) permits a judge to set aside a noting of default on such terms as are just.

[17] The court's jurisdiction to set aside a default judgment is stipulated in Rule 19.08:

Under rule 19.04

19.08(1) A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

As with the setting aside of the noting of default, the court has a broad discretion in the determination of whether a default judgment should be set aside. The decision in

Thermo Applicators Inc. v. CIR Mechanical Installations Ltd. et al, 2016 MBCA 94, states:

[6] With regard to the second ground of appeal, as everyone is well aware, the standard of review of a discretionary judgment is highly deferential. Rule 19.08(1) of the *Court of Queen's Bench Rules* states that the Court may set aside or vary a default judgment on such terms as are just. The judge's discretion to do so is broad, and may consider a number of factors including, but not limited to, whether there is a meritorious defence, whether there was delay on the part of the defendant in bringing the motion and whether there will be irreparable harm to the plaintiff...

[18] The decision in ***GFK Capital Base Corp. v. Fernando***, 1993 CarswellMan 150 (MBCA) (WL) ("**GFK**"), discussed what constitutes a meritorious defence as follows:

13 In disclosing the nature of his or her defence, an applicant for relief will no doubt pay heed to the words of Beaubien J.A. in *De Rzonca v. Kummerfield* (1956), 19 W.W.R. 577 (Man. C.A.), at p. 579:

It is not sufficient to merely state that the applicant has a good defence on the merits; the affidavit must show the nature of the defence and set forth facts which will enable the court or a judge to decide whether or not there is a matter which affords a defence to the action ...

14 It is not, of course, the function of a motions judge to decide whether the defence will succeed. His or her primary concern is whether there is any purpose to be served in revoking the expression of the court's coercive power and permitting the action to be heard on its merits. The judge should be satisfied that the proposed defence is arguable, in the sense that if the facts are proved it might well succeed, and that the wish to defend the action is genuine, in the sense that the defendant is not merely trying to further delay or to defeat a valid claim.

[19] The case of ***Sunnyday Heating and Airconditioning Ltd. v. 6125328 Manitoba Ltd. et al***, 2014 MBQB 80, discussed the necessary evidence required to substantiate the existence of a meritorious defence. There must be evidence and sufficient facts before the court in order to enable a determination as to whether an arguable case/defence exists.

[20] The Manitoba Court of Appeal in ***Beardy v. Sass***, [1997] M.J. No. 332 (CA) (QL), discussed the difference between setting aside default judgment as opposed to setting aside the noting of default. The test for setting aside default judgment is more onerous in nature:

1 ... emphasized that there is a clear difference between the noting of default and the entering of default judgment. Each is a separate but necessary step in the prescribed procedure. She concluded that the wording of the rule applying to each step need not and ought not to be interpreted as having the same meaning. The same conclusion was reached by the Court of Appeal of Ontario in *Metropolitan Toronto Condominium Coloration No. 706 v. Bardmore Developments Ltd.* (1991),

3 O.R. (3d) 278. More specifically, Keyser J. determined that in order to set aside the noting of default in Manitoba, it is not necessary to show a meritorious defence...

...

9 Unlike the noting of default, the entry of default judgment is not an automatic administrative act. Even where the claim is for a debt or liquidated sum, the registrar must exercise his discretion and may decline to sign judgment if he is uncertain as to the classification of the claim or the amount or rate that is properly recoverable for prejudgment interest...

...

11 Rule 19.08(1) stipulates that:

A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

12 This is not the Rule which is here at issue or under which the defendant has applied. Although the words are similar to those employed in Rule 19.03(1), there is no reason why they should evoke the use of the same criteria. The first applies to a preliminary mechanical requirement; the second relates to the discretionary setting aside of a final judgment already entered.

13 The scheme which I have described above differs from the one that existed in Manitoba prior to March 1, 1989, and differs to some extent from the schemes in effect in other provinces, save Ontario and New Brunswick. Accordingly, much of the jurisprudence referred to, including such decisions as *De Rzonca v. Kummerfield et ux.* (1956), 64 Man.R. 215 (C.A.), have little relevance to this case. Where default judgment has not yet been entered and it is only the noting of default that a defendant seeks to set aside, there is no burden upon a defendant to make out a valid defence on the merits before the notation of default will be set aside.

[21] With respect to setting aside the noting of default, the decision in ***Schaworski v. Unrau***, 2024 MBKB 150, held:

[29] ... the frequently referenced decision of the Honourable Justice Greenberg in ***MPIC v. Landry***, 2005 MBQB 141 ("***Landry***") contains a non-exhaustive list of factors for the Court to assess when determining whether default should be set aside (commencing at para. 11):

[11] Queen's Bench Rule 19.03(1) provides that the noting of default may be set aside by the court on such terms as are just. There are no criteria set out in the rule to guide the court's discretion. A review of the cases under this rule indicates that courts in Manitoba have looked at a variety of factors in determining whether or not to set aside default, including:

- 1) whether the defendant had an ongoing intention to defend;
- 2) whether the defendant adequately explained why there was delay in filing a defence;
- 3) whether the delay in filing a defence was willful;
- 4) whether the motion to set aside the noting of default was brought with dispatch; and
- 5) whether the delay in filing a defence caused prejudice to the plaintiff.

There is no single factor that is determinative in arriving at a decision as to whether default should be set aside.

V. POSITIONS OF THE PARTIES

Position of Comtech

[22] Comtech maintains that it has demonstrated an ongoing intention to defend the action from the time it became aware that default judgment had been entered. A draft statement of defence is attached to the Grohn affidavit (Tab A, filed August 28, 2024). That defence is submitted to be meritorious in nature. Further, Norfield has had notice of Comtech's intention to defend and the basis of the defence for a significant period of time. This intention was also submitted to have been demonstrated by the fact that the notice of appeal was filed to challenge the costs award. The grounds for the defence include:

- (i) Comtech had no reason to believe that Avocado was not following the terms of the sub-lease during the time that Avocado occupied the property;

- (ii) Comtech was never informed by A.S.H. or Avocado that Avocado's insurance policy had expired and had not been renewed or reinstated;
- (iii) the fact that Avocado's insurance policy had expired and had not been renewed or reinstated was almost certainly known to A.S.H.;
- (iv) Norfield, through A.S.H., ought to have known Avocado's insurance policy had expired and had not been reinstated, but Norfield did not take steps to notify Comtech; and
- (v) Avocado alone is responsible at law for the flood damage.

[23] The statement of defence, as proposed, also addresses Norfield's allegations of Comtech's negligence and whether the property was vacant, both of which are denied. Comtech has also contended that additional defences could be put forth either by an amendment to the proposed statement of defence or by the filing of a reconstituted defence. The additional defences could include estoppel, contributory negligence and reliance upon the lease terms as affording a complete defence (Supplemental Appeal Brief of Comtech, document no. 41). Comtech further argues that it was required to pay a portion of the landlord's insurance premiums to insure the building as "additional rent" under the lease. Accordingly, it should benefit from what it paid for, as outlined within the lease terms. This amounts to an allocation of risk: ***Ross Southward Tire v. Pyrotech Products***, [1976] 2 SCR 35.

[24] Comtech argues that pursuant to Rule 19.04(1)(a), where a defendant has been noted in default, the registrar may only sign judgment in respect of a debt or liquidated demand in money. In this case, it is submitted that the damages alleged (para. 1(a) of

the statement of claim) were not liquidated, as they were not in an amount reasonably ascertainable at the time of a possible contract breach, were not measurable by a fixed or established external standard or by a standard apparent from documents upon which Norfield based its claim. Further, no amount was agreed upon by the parties through contractual terms or fixed by operation of law in circumstances where a breach of contract has occurred. Accordingly, it is argued that a motion for judgment before a judge with appropriate affidavit evidence and service on Comtech should have been the course followed (Rules 19.05 and 19.06).

[25] The Affidavit of Grant Stevenson filed November 25, 2024 (document no. 13), sets out the incurred expenses related to the flood damages, along with repair and emergency services costs. The documentation also illustrates the inclusion of flooring selections along with hydro bills which extended into the fall of 2022. It is submitted that these types of claims are not supportable as liquidated damages and, at best, only default should have been noted by the registrar. The extent of the damages claimed is also contended to be in issue. In such circumstances, the awarding of solicitor-client costs against Comtech is submitted to be inappropriate.

[26] As indicated, Comtech submits that there are insurance issues that arise with respect to this matter, including the fact that it was a contributor, through rental payments to the operating costs of Norfield, including insurance, as illustrated within the terms of the lease. Accordingly, Comtech argues that it or Avocado should have received the benefit of Norfield's insurance coverage in these circumstances. There was also no evidence of any negligence on the part of Comtech for the flood damage. Comtech relies

on such matters in support of its contention of a meritorious defence, along with the fact that many items claimed by Norfield were not supported by proof or evidence.

[27] With respect to the noting of default in May 2025, Comtech maintains that it was not served with the order filed on May 7, 2025. Accordingly, it had no notice that the time period for filing a defence had begun. In the event Comtech had been informed that the order had been entered, it would have immediately filed a defence. The delay in filing a statement of defence was not in any way wilful, but instead constituted inadvertence. As soon as Comtech learned on June 2, 2025, that default had been noted, immediate steps were undertaken and a motion was filed within one week to set aside the noting of default (Fawcett affidavit, para. 11). Further, a meritorious defence does not have to be shown in order to set aside the noting of default: ***Beardy***.

[28] Comtech further submits that no prejudice was experienced by Norfield who has always been aware of the intention to file a statement of defence and had a copy of the proposed defence at an early point in this litigation (August 2024).

Position of Norfield

[29] Norfield submits that the key components of Comtech's proposed statement of defence are simply irrelevant factual allegations which do not constitute legal defences. Norfield's position is that the components of the defence act as a setoff against amounts owed to Norfield, which can be pursued without setting aside default judgment. In essence, that has already been accomplished by virtue of Comtech securing default judgment against Avocado for the same damages. Norfield also contends that Comtech's claim against Avocado for repair and remediation costs reflects an acknowledgment of its

liability for the damages under the terms of the lease agreement. Further, Comtech should not be permitted to profit by virtue of its claim against Avocado for remediation costs it did not incur.

[30] Norfield submits that there is no affidavit evidence or facts relied upon by Comtech in support of the existence of a meritorious defence. The assertions made in terms of the “key components” of the proposed statement of defence, as indicated, are argued to be irrelevant, speculative, and do not address the nature of the claim. Additionally, there is no evidence before the court that Comtech paid any sums with respect to remediation of the flood damages. In essence, it has admitted responsibility by virtue of the claim brought against Avocado. A party’s best case must be set forth from the outset of litigation - ***Mystar Holdings Ltd. v. 247037 Alberta Ltd.***, 2009 ABQB 480, held:

[24] The Court commented on the nature of the proposed amendments, at para. 8:

...neither pleadings nor any other of the court process are a game to be played according to what appears to be a strategic advantage at the time. The court expects a party to take a position which is consistent with its evidence and to maintain that position in its dealings with the court. In other words, saying something to one judge and saying the opposite to another will not be countenanced.

[25] The Court continued, at para. 16 to state:

However, Bullen and Leake states at page 42 that a party must not in a subsequent pleading make any allegation of fact, raise any new ground, or claim inconsistent with the previous pleading of his.

. . .

[49] In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims. Whether this pronouncement has any application to the facts of this case remains to be determined.

[emphasis in original]

To allow Comtech to proceed with the proposed statement of defence and possible amendments would result in an undermining of the integrity of the court process.

[31] Norfield asserts that Comtech's actions throughout these proceedings have reflected wilful delay attempts and do not demonstrate an intention to defend. This contention of delay includes the adjournments sought during the Saskatchewan proceedings, as well as the delay that resulted from the costs dispute subsequent to the Associate Judge's December 5, 2024 order. Effectively, from December 5, 2024, until a consent order was secured on May 5, 2025, five months had passed as a consequence of Comtech's extemporaneous actions. Further, Comtech failed to file its statement of defence within the 20 days from the time the order was entered on May 5, 2025. There is no requirement in the Associate Judge's order or in the Court of King's Bench Rules that service of the filed order was required to be made on Comtech. It was incumbent upon Comtech, once the order was finally consented to, to ensure it complied with the terms of the order. It had clear notice that the order was in an appropriate state to be entered with the Court.

[32] Norfield also contends that the notice of motion to set aside the noting of default was not timely and that it has suffered prejudice. That prejudice includes increased legal costs and the taking of unnecessary procedural steps, along with delay in the ultimate resolution of this claim.

VI. ANALYSIS

[33] I have considered carefully what counsel have argued and submitted by way of voluminous affidavits and briefs. Comtech has the burden of proof with respect to matters such as this; however, the threshold is low, particularly as regards the setting aside of the noting of default. As was stated in *Schaworski*:

[31] While recognizing that the circumstances of every case must be carefully analysed, generally speaking, the onus or threshold to satisfy is considered to be low when it comes to setting aside default.

There is no single determinative factor when considering matters of this nature.

[34] I am in agreement with the Associate Judge's order to set aside default judgment. The explanation provided for Comtech's failure to file a statement of defence was satisfactory based upon the existing set of circumstances. Comtech's Manitoba power of attorney for service had no notice of the statement of claim, nor did appropriate staff because of the failure of a line employee to bring it to their attention. While there was "no good explanation" for the employee's failure to undertake that process, the Associate Judge's decision was an appropriate exercise of discretion in the circumstances. This is particularly so when the documented attorney for service as shown in the corporate filings was not served.

[35] As was indicated in the *Thermo Applicators Inc.* decision (para. 6), a judge's discretion to set aside default judgment is broad. Certain of the factors to consider include whether there is a meritorious defence, whether there was delay on the part of the defendant in bringing the motion, and whether there was irreparable harm to the

plaintiff. Clearly, the Associate Judge determined that those factors had been satisfactorily addressed - a decision with which I agree.

[36] Comtech's contention of a meritorious defence was supported through affidavits and briefs filed, and, particularly, the Grohn affidavit as regards the nature of the defence. That affidavit and other filed materials have set forth facts which enable the Court to consider whether there may be a defence/defences to the action. It is unnecessary to determine whether those defences will succeed, only that an arguable case has been demonstrated. Comtech, in its proposed statement of defence, has put forth grounds why it does not accept liability for the flood damages suffered during Avocado's occupancy of the premises, including a denial of the amounts claimed. There are insurance issues raised as regards applicable policies and notice under the policies, as well as a denial of Norfield's allegations of Comtech's negligence. Comtech also proposes to add further defences.

[37] I acknowledge that Comtech has taken legal action against Avocado and secured a default judgment which could constitute an arguable contention by Norfield of an acceptance of liability. That said, I am satisfied, as was the Associate Judge, that there is a meritorious defence and an intention demonstrated to defend the claim. As soon as Comtech became aware of the statement of claim through service of the Saskatchewan application to register the default judgment, steps were undertaken to set it aside. I do not find that there was an intention to delay the process, despite the fact that there were a number of adjournments during the Saskatchewan proceedings which resulted in costs being awarded against Comtech.

[38] Comtech has argued that the registrar was not entitled to enter default judgment as the damages Norfield sought were not liquidated in nature as required by Rule 19.04(1)(a). I am satisfied after a review of Grant Stevenson's affidavit, filed November 25, 2024 (document no. 13, Tab A), that there are arguable aspects to that contention. The damages in the amount of \$56,337.10 were not agreed to pursuant to a contractual term in the event of a breach, fixed by operation of law or by virtue of any fixed or established external structure/standard. The allegations in the statement of claim relate to expenses incurred related to emergency services and repairs to rectify the flooding damage. These allegations as to the damages sought may not necessarily equate to a fixed or ascertained amount, even if taken to be true. There were arguably aspects of the "loss" related to scope of work, overtime, replacement of carpet, selection of new carpet/flooring, betterment, hydro bills that extend into September 2022, and emergency services that may not be aspects of liquidated damages or a debt claim. Consequently, I accept that there are concerns that the claim may have been improperly categorized as a "liquidated amount", which would negate the registrar's ability to enter default judgment. Accordingly, default should have been noted and the matter placed on the uncontested civil motions list with the requirement of affidavits and service on Comtech (see June 21, 2024 Practice Direction of the Court of King's Bench).

[39] There has been a degree of prejudice suffered by Norfield with respect to this matter in terms of lengthening the proceedings and increasing the legal costs associated with this litigation. That said, there is no real prejudice that cannot be compensated by

way of a costs award. There has been no irreparable injury sustained by Norfield in this matter.

[40] I am satisfied that Comtech has met the burden of proof and, accordingly, I uphold the Associate Judge's order to set aside default judgment for the aforesaid reasons. A party is not entitled to a judgment merely because facts are deemed to be admitted by virtue of a default. The statement of facts and supporting documentation must entitle the plaintiff to the judgment being sought.

[41] With respect to setting aside the May 28, 2025 noting of default, the court is permitted to set aside a noting of default on such terms as may be just. Further, it is unnecessary to show a meritorious defence when setting aside the noting of default.

[42] The explanation for failing to file a statement of defence within 20 days of the signing of the Associate Judge's order was argued to be inadvertence, as well as a failure on the part of Norfield to advise when the order was entered with the court. As soon as Comtech learned on June 2, 2025, that default had been noted, it quickly took steps to file the motion to set aside default. The *Landry* decision has outlined a number of the factors to be considered when evaluating whether or not to set aside the noting of default. In taking those factors into consideration, I acknowledge that this expedited action involves a claim of approximately \$75,000 and is not complex in nature. Clearly, Comtech failed to meet a filing deadline.

[43] There is no requirement, beyond professional courtesy, to alert opposing counsel that an order has been filed and signed with the court. Due diligence in these circumstances required that Comtech take appropriate steps to review the court registry

in order to determine if the time to file a defence had begun. That said, the threshold to set aside the noting of default is, as indicated, low. I am prepared to set aside the noting of default because Comtech's failure to file was not wilful. Instead, it was inadvertent with any prejudice to Norfield compensated through a costs order.

VII. COSTS

[44] Section 96(1) of *The Court of King's Act*, C.C.S.M. c. C280, affords the court with authority and discretion with respect to the awarding of costs:

Costs

96(1) Subject to the provisions of an Act or the rules, the costs of or incidental to, a proceeding, or a step in a proceeding, are in the discretion of the court and the court shall determine liability for costs and the amount of the costs or the manner in which the costs shall be assessed.

The factors to be considered in a costs award are established pursuant to Rule 57.01, as follows:

Factors in discretion

57.01(1) In exercising its discretion under section 96 of *The Court of King's Bench Act*, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,

- (a) the amount claimed and the amount recovered in the proceeding;
- (b) the complexity of the proceeding;
- (c) the importance of the issues;
- (d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;
 - (d.1) the conduct of any party which unnecessarily complicated the proceeding;
 - (d.2) the failure of a party to meet a filing deadline;
- (e) whether any step in the proceeding was improper, vexatious or unnecessary;
- (f) a party's denial or refusal to admit anything which should have been admitted;
 - (f.1) the relative success of a party on one or more issues in a proceeding in relation to all matters put in issue by that party;
- (g) whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and
- (h) any other matter relevant to the question of costs.

[45] Solicitor-client costs are generally only awarded in exceptional circumstances and where a party's conduct is deemed to be scandalous, outrageous or reprehensible (see: **Schaworski** at para. 32 and **Ultracuts v. Magicuts**, 2024 MBCA 45, at para. 12).

[46] In this matter, the Associate Judge's order reflected an award in favour of Norfield for solicitor-client costs of the action to the date the motion to set aside was filed by Comtech. The Bill of Costs presented by Norfield was in the amount of \$19,938.89 and encompasses costs incurred for the entire proceedings in both Saskatchewan and Manitoba. The Bill of Costs includes such matters as the preliminary review of file materials received from the client, legal research, drafting a demand letter, drafting and arranging service of the statement of claim and associated disbursements, as well as the engagement and time of Saskatchewan counsel to prepare and file documentation and appearances with respect to the application to register the default judgment in Saskatchewan.

[47] Comtech submits that all solicitor-client costs in this matter should be awarded in its favour. This is based on the fact that Norfield secured a default judgment to which it was not entitled by virtue of the "service" issue and the registrar not being in a position to sign such a judgment given that damages were not liquidated in nature. Comtech argues that any harm caused to Norfield related to the setting aside of the default judgment can be compensated by an award of "thrown away" costs. The decision in **Limneos v. Knispel**, 2004 MBQB 118, is relied upon in holding that thrown away costs are appropriate in circumstances of this nature.

[48] As regards the noting of default, Comtech contends it was not apprised as to when the Associate Judge's order was filed and signed. The failure of Norfield to provide such notification is argued by Comtech to be contrary to civil practice where counsel so advises or provides a copy of the entered order to opposing counsel.

[49] Norfield submits that where a plaintiff's default judgment is set aside, an award of solicitor-client costs is generally warranted to facilitate full indemnity and to avoid irreparable harm. As was stated in **GFK**:

17 The first concern of the motions judge must be the costs thrown away. A plaintiff whose regularly-obtained default judgment is set aside should not have to pay these costs. In Manitoba, where party and party costs normally fall short of a full indemnity, the usual order should be that the defendant pay an amount assessed on a solicitor and client basis. Otherwise, the plaintiff will have suffered irreparable harm.

[50] Norfield also relies upon the **Peltier v. Campanella**, 2023 MBKB 106, decision where the plaintiff was awarded costs on a solicitor-client basis up to the filing of the motion by the defendant to set aside default judgment, despite granting the setting aside of the default judgment.

[51] An award of costs must always be reasonable in nature. In this case, I am satisfied that Comtech's appeal as regards costs awarded by the Associate Judge must be granted, but for a different reason than was argued. All actions conducted pursuant to Rule 20A must reflect proportionality. The solicitor-client costs awarded in these circumstances fails to embrace that proportionality concept. In evaluating the factors in which discretion should be exercised, I am mindful that this is a Rule 20A proceeding. In the circumstances, the sum of approximately \$20,000 as awarded in terms of solicitor-client costs reflects approximately 26 per cent of the default judgment secured.

[52] The actions of Comtech as regards questioning the costs order do have the flavour of endeavouring to invoke delay of the proceedings. The conduct of Comtech with respect to disputing the costs award and not signing the form of order in a timely manner has unnecessarily lengthened the duration of this litigation. That said, I am not prepared to hold that the disagreement raised by Comtech as to the costs awarded was improper, vexatious or unnecessary. However, I am satisfied that:

- the amount claimed in this matter is within the parameters of a Rule 20A action and proportionality must be considered;
- the proceedings are not complex;
- Comtech has unnecessarily prolonged the duration of the proceedings; and
- Comtech failed to meet a prescribed filing deadline and disregarded procedural obligations as demonstrated by the delay in consenting to the form of order.

[53] While the Bill of Costs is too high after a proportionate weighing of all the circumstances, I am prepared to grant the all-inclusive amount of \$10,000 as constituting reasonable solicitor-client costs and disbursements in favour of Norfield encompassing the period up to the date of filing by Comtech of its notice of motion to set aside default judgment (July 29, 2024). The reasoning followed in the *GFK* and *Peltier* decisions is appropriate in this matter.

[54] Comtech is awarded costs on a tariff basis for the filing of the notice of motion to set aside default judgment on July 29, 2024, and proceedings related to the hearing before the Associate Judge.

[55] I grant Norfield tariff costs with respect to the setting aside of the noting of default despite Comtech being successful in having the noting of default set aside. As indicated, such costs may be awarded even in those circumstances where the defence is ultimately successful on its motion to set aside default judgment and the noting of default.

[56] Comtech has fourteen days to file its statement of defence.

[57] Counsel should immediately undertake resolution discussions as the economies of this litigation do not support protracting this matter into the future.

_____J.