

Court of King's Bench of Alberta

Citation: Steinkey v First Capital Holdings (Alb) Corporation, 2026 ABKB 51

Date: 20260122
Docket: 2003 08062
Registry: Edmonton

Between:

Ashley Steinkey and His Majesty the King in Right of Alberta

Plaintiffs/
Respondents

- and -

**First Capital Holdings (Alb) Corporation, Sun Life Assurance Company of Canada,
Starbucks Corporation, Starbucks Coffee Canada Inc. and ABC Alberta Ltd.**

Defendants/
Applicants

**Reasons for Judgment
of the
Honourable Justice Michael J. Lema**

I. Introduction

[1] Should the Applications Judge's decision declining to set aside a noting in default under Rule 9.15(3) be overturned?

[2] The answer is no, as explained below.

II. Background

[3] Ms. Steinkey alleges she was injured by a wind-tossed patio umbrella on a Starbucks patio in early June 2018. (I will focus on Starbucks Coffee Canada Inc. in these reasons, with (as I understand it) Starbucks Corporation not playing any role here.)

[4] Starbucks appointed an independent adjuster to handle Ms. Steinkey's claim.

[5] After some initial dialogue, Ms. Steinkey filed a statement of claim on May 6, 2020 and served it on Starbucks on May 26, 2020.

[6] Ms. Steinkey initially agreed to suspend the time for a statement of defence from Starbucks.

[7] Ms. Steinkey's counsel and the adjuster had various communications from spring 2020 through summer 2022.

[8] On August 26, 2022, Ms. Steinkey's counsel emailed the adjuster to call for a statement of defence within 45 days, at the same time providing Ms. Steinkey's Affidavit of Records and underlying records.

[9] Having heard nothing, Ms. Steinkey's counsel emailed the adjuster on November 18, 2022 (i.e. 84 days later) to again call for a statement of defence, indicating a December 9, 2022 deadline (i.e. 21 days later).

[10] Again, no response.

[11] Ms. Steinkey noted Starbucks in default on December 22, 2022 and sent a copy of the Noting in Default to the adjuster the next day.

[12] No response.

[13] On April 25, 2023, counsel for Ms. Steinkey contacted a vice-president at the adjuster's office, providing a copy of the Noting in Default.

[14] That day, the VP asked Ms. Steinkey's counsel if she would agree to set aside the Noting in Default. Response: "Not likely."

[15] On May 1, 2023, Ms. Steinkey's counsel spoke with the adjuster, confirming the Noting in Default and advising of Ms. Steinkey's general unwillingness to set it aside. (For simplicity, I will use "Ms. Steinkey" to refer to both plaintiffs.)

[16] Starbucks retained counsel on or about May 4, 2023. He asked if Ms. Steinkey would agree to set aside the Noting in Default. Response (again): "Not likely."

[17] Starbucks' counsel asked the same question on June 5, 23, with Ms. Steinkey's counsel requesting a copy of a set-aside application to consider if there was a reasonable basis for the request.

[18] Starbucks ultimately filed and served a set-aside application on January 9, 2024.

[19] After cross-examinations on certain affidavits, undertakings, and other preparatory steps, the set-aside application was argued before AJ Summers on June 26, 2025.

[20] At the close of the application, he delivered an oral decision declining to set aside the Noting in Default.

[21] Starbucks appealed, leading to the application before me on January 8, 2026.

[22] This endorsement outlines my reasons for dismissing the appeal.

III. Test for setting aside a noting in default

[23] Here is the key part of Rule 9.15:

(3) The Court may, on any terms the Court considers just,

(a) permit a defence to be filed by a party who has been noted in default[.]

[24] *Fort McKay Metis Community Association v Morin*, 2020 ABCA 311 provides the following three-part test for setting aside a noting in default where the procedure leading up to the noting is regular:

(a) an arguable defence;

(b) ... the defendant did not intend to allow the judgment to go by default and offers some reasonable excuse for the default such as illness or a solicitor's inadvertence; and,

(c) ... once the noting in default came to the defendant's attention, they promptly applied to set it aside.

There is a discretion involved; as R. 9.15(3)(a) states, the Court can open up a noting in default "on any terms the Court considers just". [para 11]

[25] The Court of Appeal cited *Kraushar v Kraushar*, 2019 ABCA 186 as the source of that test.

[26] In *Liberty Mortgage Services Ltd v River Valley Development Corp*, 2025 ABCA 346, the Court of Appeal held that, since it featured a noting in default followed by default judgment, *Kraushar* should be characterized as a default-judgment set-aside case. In other words, it did not set the test for setting aside a pure noting in default.

[27] In any case, *Fort McKay* was a pure noting in default case. As were *Anderson v Anderson*, 2020 ABCA 426 (paras 1-5), and *Hunt v Riehl*, 2024 ABCA 298 (para 4).

[28] In each of those three cases, the Court of Appeal approved the noted three-part test. And each cited *Kraushar* as the source or at least an example of that test.

[29] In *Liberty Mortgage*, the Court of Appeal stated that the "test to be met [to set aside a noting in default] was set out in *Al-Ghamdi v Alberta*, 2017 ABCA 208 [Slatter JA in chambers], para 11."

[30] Here is the test as outlined by Slatter JA in the that paragraph:

In circumstances where the defendant was properly noted in default, but in the circumstances it is **fair and just** to allow that defendant an opportunity to defend the claim on the merits. [emphasis added]

[31] In *Liberty Mortgage*, the Court of Appeal expanded on the "fair and just" test:

The court [in *Al-Ghamdi*] emphasized that the decision to set aside a noting in default “is a discretionary matter”, para 13. The test is flexible and allows a court to consider a **variety of factors** with a view to determining whether it is fair and just to grant relief. A court is required to assess the context and factual situation. Although there are no specified elements to that analysis, some courts have considered such non-exclusive factors as the **behaviour of the parties, length of the defendant’s delay, reason for delay, complexity and value of the claim, and prejudice to the parties**: *Intact Insurance Company v Kisel*, 2015 ONCA 205, paras 12, 13, 383 DLR (4th) 130; *Gauthier v Malik*, 2025 ONSC 5332, paras 16 – 21. Courts will **rarely require a defendant who has been noted in default to show an arguable defence on the merits**, but a court may require that where there has been a significant delay: *Franchetti v Huggins*, 2022 ONCA 111, paras 8 – 10.

[32] I reproduce the noted paragraphs from *Franchetti* and highlight the comments on “arguable defence”:

Under r. 19.03, a defendant noted in default may move to have the noting of default set aside, and this may be ordered “on such terms as are just.” In the context of an action that had been dismissed for delay, Weiler J.A. discussed several guiding principles that are also relevant to setting aside a noting of default: *H.B. Fuller Company v. Rogers*, 2015 ONCA 173, 386 D.L.R. (4th) 262, at paras. 25-29. These include the strong preference for deciding civil actions on their merits, the desire to construe rules and procedural orders non-technically and in a way that gets the parties to the real merits, and whether there is non-compensable prejudice to either party.

There are many cases discussing the criteria for setting aside a noting of default. See particularly Laskin J.A.’s detailed exposition in *Kisel*, at para. 13. To summarize the jurisprudence, the **following factors have been found to be relevant** in considering whether a noting of default should be set aside:

- (1) The parties’ behaviour;
- (2) The length of the defendant’s delay;
- (3) The reasons for the delay;
- (4) The complexity and value of the claim;
- (5) Whether setting aside the noting of default would prejudice a party relying on it;
- (6) The balance of prejudice as between the parties; and
- (7) **Whether the defendant has an arguable defence on the merits.**

These factors are not exhaustive nor are they to be applied as rigid rules. An arguable defence on the merits may justify the court in exercising its discretion to set aside a **default judgment**, and for that purpose it is sufficient for the defence to have an “air of reality”: *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, 119 O.R. (3d) 561, at para. 51. **However, perhaps because requests to set**

aside noting in default usually occur early in the litigation process, unlike this case, courts will rarely require a defendant who has been noted in default to show an arguable defence on the merits. In a case such as this one involving a significant delay, the moving party is required to show an arguable case on the merits. [paras 8-10] [emphasis added]

[33] In *Liberty Mortgage*, the Court of Appeal contrasted the “fair and just” test for setting aside a noting in default with the following test for setting aside a default judgment (which, as noted, matches or substantially matches the *Fort McKay*, *Anderson*, and *Hunt* test for setting aside a noting in default):

The test for setting aside a default judgment is prescriptive, applied more strictly than the test for setting aside a noting in default, and recognizes the presumptive finality of a judgment. The tri-partite test consists of the following elements:

- (a) does the applicant have an arguable defence;
- (b) did they not deliberately let the judgment go by default, and have they some excuse for the default; and
- (c) after learning of the default judgment, did they move promptly to open it up.

See *Graylake Holsteins Ltd v Kzam Farms Ltd*, 2004 ABQB 828, para 19, 49 Alta LR (4th) 103; *Alberta v Fjeld*, 2008 ABQB 558, para 16, 459 AR 272; *Palin v Duxbury*, 2010 ABQB 833, para 21, 15 CPC (7th) 191. [para 23]

[34] The Court of Appeal then noted:

While some elements of the test for setting aside a default judgment may inform whether it would be fair and just to set aside a noting in default, those elements are **not generally required**. Instead, as discussed, the court retains **broad discretion** and may consider a variety of factors when determining whether to open up a noting in default. **Critically, the tests must not be conflated.** [para 24]

[35] In *Liberty Mortgage*, the Court of Appeal did not reconsider *Fort McKay*, *Anderson*, and *Hunt* in the sense contemplated by (for example) *JL Energy Transportation Inc v Alliance Pipeline Limited Partnership*, 2024 ABCA 175 (para 5) i.e. if reconsideration were required. Or cite those decisions.

[36] Per *Fort McKay*:

The most important of the criteria for opening up a noting in default is the presence or absence of an arguable defence. A defendant who wishes to open up a noting in default need not prove that the defence will be successful, and need only show an arguable defence. Generally speaking, however, **some credible evidence must be brought forward to demonstrate a viable defence.** Two defences were raised in the court below: “truth and qualified privilege”. [para 14] [emphasis added] [This finding was adopted and applied in *Utah v Zelisko*, 2025 ABKB 582 (Jugnauth J.) (a pure noting-in-default case) (para 74).]

[37] In other words, under the pre-existing test, having an arguable defence is effectively mandatory.

[38] As noted, per *Liberty Mortgage*, arguable-defence analysis is “not generally required” and may only be relevant in cases of long delay.

[39] I acknowledge that “a trial judge ought to interpret the decisions of binding appellate courts in a manner that they are complementary, not inconsistent, whenever a reasonable complementary interpretation is possible” (per *R v Sabattis*, 2012 NSPC 11 (Chisholm J).

[40] However, I do not see how these tests can be reconciled, particularly with the Court of Appeal in *Liberty Mortgage* cautioning that they should not be conflated i.e. with the Court of Appeal explicitly pronouncing them materially different.

[41] I do not understand *Liberty Mortgage* to have overruled *Fort McKay*, *Anderson*, and *Hunt*: it did not mention them, it anchored its new test in a single-justice decision (*Al-Ghamdi*), and it cited only Ontario decisions when elaborating on the new test. And it did not involve a formal reconsideration of the earlier decisions.

[42] Plus, the emergence of a conflicting decision from the Court of Appeal does not, on its own, imply the eclipsing of an earlier conflicting decision or earlier conflicting decisions. Per *R v Arcand*, 2010 ABCA 363, “where a court of appeal has given conflicting precedents in the past, it is entitled and bound to decide which of its own two conflicting decisions it will follow” (para 190).

[43] That implies that a later decision does not, merely on timing, necessarily eclipse an earlier conflicting one. (On this aspect, see also *R v Larouche*, 2014 CMAc 6 -- para 120.)

[44] Am I bound by *Liberty Mortgage* as the later of two conflicting decisions (or sets of decisions)?

[45] I believe the answer is no. Until the Court of Appeal decides which test shall prevail, I can choose the Court of Appeal test perceived as more applicable or otherwise better suited to the circumstances here: see *Jack v Kirkrude*, 2002 CanLII 9922 (ONCA) (para 5) (conflicting findings in *Roberts v Morana*, 2000 CanLII 2950 (ONCA) and *Finlayson v Roberts*, 2000 CanLII 16890 (ONCA); ONCA finding in *Jack*: “... we think that [the trial judge] was right to follow *Roberts* [i.e. the earlier of the two conflicting decisions]”).

[46] See also *R v Matieschyn*, 2014 ABPC 105 (B. Fraser J.) (analogous setting of conflicting QB-level appeal decisions):

... this is a matter for the Alberta Court of Appeal and until then, **when faced with conflicting appellate judgments from the Court of Queen’s Bench, I am not bound by either and I am free to adopt the one I consider correct in law.** I choose to follow the Ontario Court of Appeal in *MacKinnon* as well as *Buffalo* from the Court of Queen’s Bench and find the proper standard of proof is on a balance of probabilities to determine compliance with Section 258(7) as to admissibility of the certificate. [para 13]

[47] And *R v Millar*, 2012 ONSC 1809 (Code J.):

In my opinion, **the above dicta in *Gougeon* [1980 CanLII 2842 (ONCA)] and *Oliveira* [2009 ONCA 219] are irreconcilable and trial judges are left to**

decide which case they should follow. See: *R. v. Hummel* (1987), 1987 CanLII 4075 (ON SC), 36 C.C.C. (3d) 8 at 12 (Ont. H.C.J.). With respect to the many judges who have taken a different view of this issue, I am satisfied that *Oliveira* decided the point correctly and it should be followed. There are four reasons that I rely on in support of this conclusion. ... [para 28] [emphasis added]

[48] Same approach in *Doobay v. Fu*, 2020 ONSC 177 (Bale J.):

Where previous decisions of an appellate court are irreconcilable, it is open to trial judges to decide which of the decisions to follow: *R. v. Hummel* (1987), 1987 CanLII 4075 (ON SC), 60 O.R. (2d) 545, [1987] O.J. No. 763, 36 C.C.C. (3d) 8 (H.C.J.), at para. 10; *Dunning v. Royal Bank of Canada*, 1996 CanLII 8159 (ON SC), [1996] O.J. No. 5078 (Gen. Div.), at paras. 61-65; and [page620] *R. v. Millar*, [2012] O.J. No. 1276, 2012 ONSC 1809 (S.C.J.), at para. 28. [para 10]

[49] And *R v Ryan*, 2018 CM 2033 (Sukstorf MJ):

There is little-to-no guidance either in statute or case law to guide a trial judge when faced with conflicting precedents from coequal appeal courts on an indistinguishable issue. There are various views on how a trial court should de-conflict contradictory decisions. One view is that the later decision should be followed, particularly if it struck down the legislation; another view is that the decision made earliest in time be followed; yet, another view is that the Court should follow the decision which is more accurate. A final view is to follow the decision with the largest panel or the position where the majority of the judges sided.

Until this issue is appropriately resolved by the SCC, I am compelled to make a difficult choice. On principle, it appears to me that I must follow the judgment which appears to lay down the law more elaborately and accurately with respect to the application before me. When there is lingering doubt about which precedent to follow, I must adopt a path that accords with this Court's sense of justice. [paras 28 and 29] [emphasis added]

[50] See also *Eurocar Ltd v Vernich*, 1992 CanLII 7555 (ONSC) (Austin J.):

As I understand those [Division Court] cases, Mast and Schultz are in conflict with one another. As a result, I am in a position where I can choose between them. ...

[51] And *Crane v Worwood*, 1992 CanLII 1387 (BCSC) (Huddart J.):

I cannot read *DeSousa* that way. I find that I am faced with two conflicting, more or less contemporaneous, decisions of our Court of Appeal and must choose which one to apply, just as my colleague, Mr. Justice Cohen did in *Lachance*. ...

[52] I find that I do not have to choose between the two tests and explain the choice.

[53] The reason is that whichever test is applied here, the answer is the same.

[54] As explained below, starting with the *Fort McKay* test.

IV. Arguable defence

[55] Both sides agree that, under the three-part test, whether Starbucks has an arguable defence is a material factor in an application to set aside a noting in default.

A. AJ-level position on arguable defence (Starbucks)

[56] In its AJ-level brief, Starbucks stated (on this issue):

... liability hinges on whether the actions of Starbucks and its employees were reasonable. Bearing in mind that this Honourable Court does not expect an occupier to engage in “constant surveillance” nor does it expect “immediate response”, there is no evidence that Starbucks [was] derelict in its duty by not taking down the umbrellas at the time of the incident.

...

In essence, liability hinges on what, if any, duty Starbucks employees have to monitor windspeed.

B. AJ decision

[57] In his unreported decision on June 26, 2025, AJ Summers first observed:

There is some question in my mind on [the “reasonable excuse” and “moving promptly” factors of the traditional test for setting aside a noting in default], but my decision is not based ... on those particular issues. I think the most important issue in an application such as this is whether the Defendant has an arguable defence or a reasonable defence. [Transcript, pp 12-13]

[58] He then found as follows on arguable defence:

... the Applicant must have **some evidence of an arguable defence** or a reasonable defence. The cases make it very clear that the bar is low, and I concur with [Starbucks’ counsel] that Starbucks does not need to, in effect, prove its case or that it was not liable at this stage. But there is a requirement that there be **some evidence of the defence** that is being asserted by the Defendant.

As I understand it from the Defendant’s Brief and submissions, **the defence to be asserted is that the Defendant’s employees took reasonable care or reasonable steps to meet the standard of care** that was imposed upon them under the *Occupiers’ Liability Act*, on the basis of Starbucks being an occupier [which it acknowledged or acknowledges]. In my view, there **is no evidence whatsoever regarding the Defendant Starbucks exercising reasonable ... care for the protecting of people on its premises**. I agree with [Starbucks’ counsel] that it is not an absolute duty to ensure safety, but is one of taking reasonable steps. But again, in my view, there is **no evidence whatsoever that any steps were taken by the Defendant Starbucks with respect to the duty of care** imposed upon them.

...

... even if [certain umbrella-test results circa 2013 and Environment Canada wind data for the day in question] were true or admissible, it does not show Starbucks exercising a reasonable standard of care.

... although there is a low threshold, there is still an evidentiary threshold that has to be met in order to – in order for the Court to order a setting aside of the noting in default.

Based on these reasons, I am dismissing the application of Starbucks to set aside the noting in default. [Transcript, pp 13-14] [emphasis added]

C. New affidavits on appeal

[59] On the appeal, Starbucks introduced two new affidavits, on which cross-examinations were conducted by Ms. Steinkey’s counsel.

[60] One was from a new corporate representative for Starbucks, Ms. Shaylee Butler, a district manager whose territory now includes the Starbucks in question (Unity Square in Edmonton, just west of 116th Street).

[61] She deposed (in part):

Attached hereto and marked Exhibit “D” is an excerpt of the Cleaning & Equipment – Facilities and Outdoor Cleaning **policies and procedures manual** dated March 30, 2016. Included at Exhibit “D” are the table of contents and the pages pertaining to the use and maintenance of umbrellas. These were the policies and procedures ... in place at the alleged date of loss in the within action.

From implementation, until it was revised, **all Starbucks employees were trained using Exhibit “D”** as part of the initial employee intake and training.

I am informed by Exhibit “D” and ... believe that it was **Starbucks’ policy for the employees to collapse umbrellas if wind speeds exceeded 40 km/h.**

I am informed by the Persons on Duty list, attached hereto and marked as Exhibit “E”, that **Joshua Marusiak was the shift supervisor on duty at the time** of the alleged incident.

Attached ... and marked Exhibit “F” is a **draft Statement of Defence** that Starbucks proposes to file in the within action. [emphasis added]

[62] In cross-examination, Ms. Butler acknowledged (among other things):

- having no first-hand knowledge of the incident involving Ms. Steinkey, what was done at the store in question (“management operation”) in June 2018, what equipment and items were in the store, the then-staff at that store then, the condition of the umbrellas or how they were set up on the day in question, or what happened to Ms. Steinkey that day;
- no incident report [i.e. of the alleged incident] is in existence; and
- she was not “100 per cent sure” that the umbrellas described in the policy were the one used on the patio on the day in question, albeit such umbrellas are standard equipment at other Starbucks stores with which she was familiar.

[63] The other new Affidavit was from Mr. Marusiak. He deposed (in part):

On June 4, 2018 [i.e. the day of the alleged incident] I worked as a Shift Supervisor at [the store in question].

I did not witness the [alleged] incident as I was in the back on my break. However, I was present ... when the incident occurred and was notified of the incident upon it taking place.

...

In the course of my training, I was trained on the use and deployment of umbrellas on Starbucks' patios. Attached as Exhibit "A" are the policies and procedures regarding the use and deployment of umbrellas [at] Starbucks which I believe Starbucks had in place on June 4, 2018 [i.e. the document exhibited to Ms. Butler's affidavit].

It was the practice of Starbucks employees at [the store in question], including myself, to collapse the umbrellas in the event of heavy winds.

I saw no indication prior to the incident that the umbrellas were a potential hazard or that the winds were too excessive for the umbrellas to be used.

[64] In cross-examination, Mr. Marusiak acknowledged (among other things):

- not recalling if an incident report was prepared or ever seeing one for the incident in question;
- not recalling specifically which employees were working at the store on the day in question;
- not recalling whether the "policy umbrellas" were those used on the patio on the day in question;
- not specifically recalling the weather on June 4, 2018;
- not recalling whether there were winds that day;
- the store had no instruments installed to measure wind speed or weather generally; and
- having no specific recollection of when the umbrellas were put up that day, what happened to them after, or "any of that stuff."

D. Appeal position on arguable defence (Starbucks)

[65] Here is Starbucks' appeal position on "arguable defence";

As can be seen in the exhibit attached to Butler and Marusiak's affidavits, at the time of the incident Starbucks **had a policy in place** for the deployment or non-deployment of umbrellas: "Do not leave umbrellas open in wind conditions that exceed 25 mph / 40 kmh."

Starbucks **employees were trained in these policies** and indeed the Shift Supervisor [Mr. Marusiak] ... confirmed these were implemented.

... the hourly recorded wind speed from Blatchford station indicates that the wind speeds recorded did not fall afoul the 40 kmh threshold.

... the Plaintiffs' historical wind data indicates there were gusts in excess of 40 kmh, but that historical data is not specific as to when those gusts occurred [that day]. The Plaintiffs will likely also point out that [certain umbrella-manufacturer wind specifications] [are] not consistent with the 40 kmh threshold. If Starbucks' historical wind data is preferred, this is a moot point as the recorded wind speeds do not exceed 18 mph (29 kmh) [i.e. the manufacturer's take-umbrellas-down threshold], either.

... the responsibility of Starbucks employees is **not one of constant surveillance and instant response.**

Umbrellas are a common feature of Edmonton restaurants with outdoor patios. To impose a standard of care for restaurants that use patio umbrellas to have a **dedicated employee equipped with an anemometer constantly monitoring wind speed, who, with immediate dispatch, will collapse the umbrellas the second a gust exceeds the defined threshold is far too onerous and is unreasonable.**

The standard of care (which, given the unique nature of this case is itself a triable issue) should rather be that employees be given guidance as to the operational limits of the equipment and *reasonably supervise said equipment while deployed.*

There is no indication that prior to the incident the umbrella in question showed any signs that the conditions were outside of its operating parameters or posed any danger to patrons. [emphasis added]

E. Policy and procedure document

[66] The umbrellas portion of the "Facilities and Outdoor Cleaning" policy consists of four pages, almost exclusively devoted to mechanical (how to set up (including securing the umbrella in its base) and dismantle umbrellas) and cleaning aspects.

[67] The only "safe operation" content is the following "Warning" on two pages:

Do not leave umbrellas open in wind conditions that exceed 25 mph / 40 kmh.

Security lever [umbrella to base] must be in the down and locked position when umbrella is in place.

[68] The policy did not address how and how often windspeed should be gauged, who should check, the logging of wind checks, who was responsible for closing or bringing in the umbrellas in case of excessive winds, or any other operational details i.e. beyond the two noted aspects.

F. Analysis of "arguable defence"

[69] As reflected in the above synopses of Starbucks' position on arguable defence, it acknowledges a proper focus on its actions (or inactions) on the day in question. Again, from its AJ-level brief:

... liability hinges on **whether the actions of Starbucks and its employees were reasonable.** Bearing in mind that this Honourable Court does not expect an

occupier to engage in “constant surveillance” nor does it expect “immediate response”, there is **no evidence that Starbucks [was] derelict in its duty by not taking down the umbrellas at the time of the incident.**

...

In essence, liability hinges on **what, if any, duty Starbucks employees have to monitor windspeed.**

[70] And, again, from its appeal brief:

The **standard of care** (which, given the unique nature of this case is itself a triable issue) **should rather be that employees** be given guidance as to the operational limits of the equipment and *reasonably supervise said equipment while deployed.*

There is **no indication that prior to the incident the umbrella in question showed any signs that the conditions were outside of its operating parameters or posed any danger to patrons.** [emphasis added]

[71] I find that Starbucks failed to demonstrate such (or any) arguable defence.

1. Having a policy is not enough

[72] It is not sufficient to have a policy; it must be implemented. See, for example, *Anderson v Canada Safeway Limited*, 2004 ABCA 239:

The appellant submits the trial judge misapprehended the evidence that the [floor inspection] policy was in fact being implemented at the time of the accident. Further, it argues that the trial judge erred in drawing an adverse inference against it in circumstances where he was not entitled to do so. **We agree.**

The trial judge appears to have **overlooked the evidence of Mr. Zahn, an employee on duty the day of the accident, who testified the policy in place was in fact being followed at the time of the accident.** Mr. Zahn was actually present in the store at the time of the accident. He did not appear to resile from that position in cross-examination. However, his evidence was not referred to at all in the reasons of the trial judge. [paras 7 and 8] [emphasis added]

[73] For more examples of policies in action (or not), see *Swagar v Loblaws Inc. (The Real Canadian Superstore)*, 2014 ABQB 58 (Campbell J.) (policy not followed)

... I find that Superstore employees **did not adequately adhere to the Defendants’ floor maintenance system** or its customer incident procedures. I therefore find **that although the Defendants had a reasonably adequate floor maintenance system in effect, the Defendants failed to discharge the onus on them to prove that there was proper compliance with those policies** by its Superstore employees on the day of the Accident.

[74] And *Daniels v. Westfair Foods Ltd*, 2004 ABQB 746 (Lee J.) (policy followed):

Despite some breaches of store policy and some doubts with respect to the reliability of Mr. Phan’s evidence at trial, I am **unable to find that the sidewalk**

in front of Extra Foods in Devon was not reasonably maintained on December 19, 1999. **The sidewalk was inspected and was found to be safe at 9:30 am and again at 10:00 am.** [para 47] [emphasis added]

[75] And *Axani v QSR Edmonton Ltd*, 2004 ABPC 230 (Ingram J.) (policy not followed) (see para 14 for many examples of policy breakdowns).

[76] Per Janet E. Smith in *Cause of Action: Occupiers' Liability* (2011 – Thomson Reuters Canada Ltd):

Organizations often introduce policies to minimize the risk of potential injuries to employees, customers and visitors. **Such policies are ineffective without compliance.** Courts will look to the defendant's failure to comply with such policies, as a factor in evaluating the standard of care. [p 18] [emphasis added]

2. Application of those principles here

[77] No evidence showed that, on the day in question, any particular Starbucks employee:

- a) ensured the umbrellas, which were set up anew each day they were used, were properly secured to their bases or checked, at any point during the day, that they were, or continued to be, so secured;
- b) checked the (or a) weather or (at minimum, wind) forecast (online, TV, radio, other) at the start of the day or at any point during the day;
- c) checked any wind gauge or other physical wind-speed indicator on or near the premises at any point during the day;
- d) stepped outside to even informally gauge the prevailing winds (none, light, modest, stiff, heavy, etc) at any point during the day; or
- e) watched the skies, from inside or outside the café, for signs of changing weather (fast-moving clouds, whipping tree branches, or whatever natural wind-speed signals may have been available);
- f) watched the patio umbrellas themselves, from inside or outside the café, for wind activity; or
- g) asked incoming customers about the weather and, in particular, the wind (“How is it out there?”); or
- h) otherwise took any step to keep an eye on the weather and, specifically, the wind.

[78] As noted, the policy document did not outline any particular weather- or wind-monitoring steps (or the required or suggested times they should be taken) or assign them to any particular staff position(s).

[79] Mr. Marusiak's evidence was that the policy was “implemented.” But recall its limited scope as to safe operation. And the absence of any details about how it was implemented on the day in question e.g. by whom, when, as reflected by what activities, etc.

[80] Starbucks set up and knocked down the straw man of a full-time wind monitor, armed with wind-speed equipment and ultra-vigilant for the slightest variation in wind speeds.

[81] But the key here is that, on the evidence, *no* monitoring was being done, not even any of the easily accomplished steps identified above.

[82] Taking the policy at its highest (“umbrellas down if winds reach 40 kmh” and “ensure umbrellas properly secured”), no evidence shows that any Starbucks personnel on hand were doing anything to monitor or check either aspect at any point until after the incident occurred (late afternoon).

[83] The mere existence of this (rudimentary) policy is insufficient for Starbucks here.

[84] Using Starbucks’ own formulations here – “whether the actions of Starbucks and its employees were reasonable” and “employees [must or should] reasonably supervise said equipment while deployed”, the evidence does not reflect *any* actions relating to the safe operation of umbrellas or *any* supervision of them while deployed.

[85] In a nutshell – no arguable defence in the senses argued by Starbucks.

V. “Reasonable excuse”

[86] The *Fort McKay* test (discussed further below) also includes whether the party noted in default has a reasonable excuse for not filing a timely defence.

[87] Here is Starbucks’ position from its AJ-level brief:

Starbucks’ excuse for not defending is simple: its third party [adjuster] accidentally deleted emails and was unaware of the demand for a Statement of Defence. By consequence, Starbucks was also unaware of the demand for a Statement of Defence. Mistakes happen, and accidentally deleting emails is common among them.

In the context of applications to set aside [a] noting in default, *Kraushar* [*v Kraushar*, 2019 ABCA 186] explicitly mentions solicitors’ negligence as a potential excuse for failing to file a Statement of Defence. It is easy to analogize the inadvertence of a solicitor to that of a third party adjuster: both are the faces of a claim on behalf of their principals.

[88] In her affidavit sworn November 28, 2023, the adjuster deposed (among other things):

[Our company’s] information technology department investigated to discover what happened with regard to the [emails in question – reviewed above], and they advised the Emails were apparently deleted.

I do not know how the Emails were deleted. I did not intentionally delete the Emails. I did not read these emails prior to their deletion.

[89] Starbucks did not offer any further submissions on this aspect in its appeal brief or its submissions at the appeal hearing.

[90] The Alberta case law observing that “illness or solicitor’s inadvertence” may constitute a sufficient excuse, including *Kraushar* (para 5), when traced back, has its headwaters in *Graylake Holsteins Ltd v Kzam Farms Ltd*, 2004 ABQB 828 (para 19), where Veit J. observed that the *Alberta Civil Procedure Handbook* summarized the three-part setting-aside test with those as examples of potentially acceptable excuses.

[91] The 2025 version of the *Handbook* cites various cases in support (page 9-41) and observes: “Even serious neglect by the defendant’s lawyer is enough ground to open up default judgment, *if there is an arguable defence and a prompt application on learning of the problem: 3S Res. V Improvisations*, 2014 ABQB 746 [Greckol J. as she then was] ... cf. *Kraushar v Kraushar* (cited above), paras 8 and 11.”

[92] Starbucks did not offer any cases equating an adjuster or other agent with the defendant’s counsel.

[93] I query whether the adjuster adequately explained the “apparent delet[ion]” of the key emails, as she did not:

- provide a copy of any report (formal or informal) from her IT department of the steps it took to investigate the claimed deletions and associated questions e.g. when they happened, how they happened, (if no definite cause) what might have caused them (e.g. power surges, changes from one email system to another or one computing system or another, etc.), or the step(s) taken, if any, to address any actual or possible causes of the deletions;
- offer any explanation of her own that might account for the deletions e.g. migration of emails from own database to another; or
- advise whether she learned of any other “apparent deletions” of emails, whether of her own emails or those of colleagues, versus this phenomenon being limited to the three key emails to her.

[94] Courts have been willing to find unintentional or otherwise unobjectionable deletion of emails or other electronic communications where an actual or potential causes or causes are provided. See, for example:

- *R v Levin*, 2014 ABQB 178 (Hughes J. as she then was) (paras 27-34) (police officer provided detailed explanations of email deletions; explanations accepted as reasonable);
- *Grande Yellowhead Regional Division No 35 v Canadian Union of Public Employees, Local 1357*, 2009 CanLII 90161 (AB Grievance Arbitration Board) (“Like many of us in his age cohort, his skills dealing with a large volume of emails on a daily basis were limited, increasing the risk of unintended consequences [including intentional or inadvertent deletion]”);
- *R v Guindon*, 2022 ONCA 821 (para 10) (“The parties read an agreed statement of facts into the record that explained how anonymous email services work and how messages are deleted and rendered irretrievable”);
- *R v Nowack*, 2024 ONCA 180 (paras 6 and 8) (police officer and IT department explanations provided for email deletions; found reasonable);
- *Zigomanis v 2156775 Ontario Inc*, 2016 ONSC 7053 (Stinson J.) (para 15) (“computer upgrade” explanation for loss of emails accepted); appeal dismissed – 2018 ONCA 116; leave denied – 2018 CanLII 105392 (SCC);

- *Blatherwick v Blatherwick*, 2015 ONSC 2606 (Ricchetti J.) (para 295) (“emails not backed up and automatically deleted” – apparently accepted yet did not explain why no preservation steps taken);
- *Zenex Enterprises Ltd v Pioneer Balloon Canada Ltd*, 2012 ONSC 7243 (Morgan J.) (para 12) (defendant “explained the reason that some emails may have been deleted prior to litigation arising”); appeal dismissed 2016 ONCA 594; and
- *Kinsman v Walker*, 2022 ONCJ 588 (P.J. Jones J.) (para 24(1)) (party’s “emails into junk mail and automatically deleted in bulk” explanation not particularized; not accepted).

[95] All to say: the adjuster did not discharge her practical burden to explain how the key emails were deleted or, in the absence of a discernible cause, offer plausible explanation(s) about what might have happened.

[96] I find that, absent such evidence, a party alleging accidental deletion of critical communications should not be treated as having provided a reasonable, or any, excuse for the deletion.

[97] Otherwise, it would be too easy for anyone wishing to distance themselves from communications carrying serious impacts when left unanswered to avoid those impacts (“I received them but they disappeared before I read them”) i.e. with no explanation of how that occurred or may have occurred.

VI. Prompt response

[98] That leads to the third step of the traditional test (“prompt response”).

[99] The chronology of events from Starbucks first becoming aware of the noting in default (April 25, 2023) through to its filing its set-aside application (January 9, 2024) is detailed in paras 13-18 above.

[100] In its AJ-level brief, Starbucks provided this position on prompt response:

Admittedly, there was some gap between when the default was discovered and when the application and supporting materials were eventually filed.[i.e. 8.5 months].

Delay should be viewed in the **context** of the matter. The **defence demand was not issued until over two years after the action had been commenced**. Starbucks does not wish to weaponize either courtesy or settlement efforts against the Plaintiffs, but nevertheless **those pre-default timelines give an overall sense of the pace of the action**.

The Plaintiffs’ refusal to set aside has caused far more delay in this action than the gap in between when the noting in default was discovered and when the application was filed. **Had the Plaintiffs agreed to set aside** the noting in default in May or June 2023, this matter would likely be resolved or on its way to trial. Instead, the Plaintiffs have maintained their procedural advantage in the face of what they know or ought to know is a **meritorious defence**. Now the Plaintiffs have chosen to exercise their advantage, which for a litigant is fine, but it does not lie in the Plaintiffs’ mouths to complain of one

delay when their own approach has, practically speaking, caused another far more substantial delay. [emphasis added]

[101] Starbucks did not add anything to this prompt-response argument in its appeal-level brief.

[102] I find that, on any reasonable scale, Starbucks did not move promptly after learning of the noting in default i.e. in waiting 8.5 months before bringing its application.

[103] Here the catalogue of comparator cases provided by the Plaintiffs is helpful (some reproduced here): *Fort McKay* (cited above) (applying within one month of notice was prompt) (para 12); *Gowling WLG (Canada) LLP v Tsybulnyk*, 2020 ABQB 479 (C Jones J.) (two months not prompt) (para 93); *Palin v Duxbury*, 2010 ABQB 833 (Poelman J.) (approximately four months not prompt) (paras 38-40); *Atlantic (HS) Financial Ltd v Punjabi*, 2017 ABQB 87 (Master Robertson) (ten months not prompt); and *James v Male*, 2011 BCCA 81 (49 days not prompt).

[104] I also find that the pre-demand-for-defence period, whether characterized as “delay” or otherwise, is irrelevant to gauging whether Starbucks moved promptly to set aside the noting in default.

[105] In particular, the pre- period does not explain any part of the post- delay.

[106] In any case, I see the pre- period timing as reflecting the parties’ joint approach to the litigation. And Starbucks did not point to any particular segment of the pre- period as “plaintiffs’ delay.”

[107] Once Starbucks became aware of the noting in default, it had a practical duty to move promptly i.e. if it wished to set it aside.

[108] Absent a “pace agreement” with the plaintiffs (e.g. that they had no objection to Starbucks taking 8.5 months or comparable period to bring the set-aside application), Starbucks was not entitled to presume that the plaintiffs had waived any argument on the “prompt response” factor.

[109] The central point here is that Starbucks offered no other explanation for why it took 8.5 months to file.

[110] I do not see the plaintiffs’ “need to see set-aside application first” stance as justifying the delay. Starbucks could not fairly assume that that response equated to an agreement that whatever time taken to eventually bring the application was fine or, in any case, that six more months (from inquiring about consent to setting aside) was fine.

[111] All to say: no “prompt response” here.

VII. Overall fairness

[112] As noted, courts have understood that the three-part test is a guide to gauging overall fairness and justice. See, for example, *Kim v Choi*, 2020 ABQB 51 (Michalyshyn J.):

The parties do not agree however on whether all three parts of the test must be satisfied. That is suggested in *Palin* but no other like authority is before me and I am unable to find any authority binding on me for this ‘all or nothing’ proposition. To the contrary what does emerge from the cases, both in this court and in the Court of Appeal, is the **need to make a decision, that for sure**

addresses r 9.15 and the three-part test, but that is, at the end of the day, fair in all of the circumstances: *Krausher*, at para 6:

... the judge hearing an application to set-aside under r. 9.15(3) retains **discretion to grant that relief where fairness requires it to be granted:** see *Don Reid Upholstery Ltd v Patrie* (1995), 1995 CanLII 9147 (AB QB), 173 AR 233 at para 24, 32 Alta LR (3d) 281, as applied by this Court in *Paloma Investments Ltd v Yuen*, 2016 ABCA 93 (CanLII) at para 4, 616 AR 231.

[113] On this aspect, Starbucks raised comparable prejudice:

Turning to the alternative comparative prejudice approach, the Plaintiffs have not shown any evidence they will be prejudiced by having the noting in default set aside other than the loss of the tactical advantage of having the allegations in the Statement of Claim presumed true. Starbucks, on the other hand, will lose its ability to contest a claim on the merits where it could be exonerated from wrongdoing.

[114] Given the above finding on arguable defence (none), I do not see prejudice in the sense urged by Starbucks here i.e. that it has in fact lost the chance at exoneration.

[115] Given the unliquidated character of the Plaintiffs' claim (or at least the main plaintiff's), I would expect that the next step will or may be an assessment of damages, for which Starbucks will presumably be given notice and an opportunity provide its position on the claimed damages.

[116] Starbucks did not assert any other relevant factor i.e. in the residual "fairness review" step of the three-part test.

VIII. Finding on the *Fort McKay* test

[117] For the above reasons, Starbucks has not satisfied any part of the three-part set-aside test or shown that the overall result is unfair or unjust for any reason.

IX. Finding on the *Liberty Mortgage* test

[118] Per this test, having an arguable defence may not be a factor in the absence of long delay.

[119] It is hard to understand why having an arguable defence is not essential in all cases. If none, why should any noting in default be opened up?

[120] In any case, as explained above, I found long delay here, making it a factor and, as explained above, a negative one from Starbucks' perspective.

[121] Starbucks did not raise any "behaviour of the parties" argument. In any case, I see nothing objectionable in any of the steps or stances taken by the Plaintiffs here.

[122] As for complexity and value of the claim, the individual plaintiff apparently suffered serious injuries in the umbrella incident, to the extent that the arc of her employment life has apparently been materially diminished.

[123] The assessment of damages may accordingly be complex.

[124] But that can be explored, with Starbucks' input, in a damages assessment.

[125] Given the absence of an arguable defence, a trial is not necessary i.e. to explore any legal or factual issues surrounding the incident itself.

[126] I have already addressed the prejudice aspect (see above).

[127] As noted, Starbucks did not raise any other factor.

[128] On this test, I do not see any different outcome: all the indicators point against opening up the noting in the default.

[129] If this is the applicable test, I find that Starbucks failed to meet it.

X. Costs

[130] The plaintiffs are entitled to costs of the application gauged at 40 per cent of their reasonable fees and disbursements or Schedule C, whichever is higher, with the follow-up written submissions being treated for Schedule C purposes as an additional ½ day (application with written briefs).

XI. Closing note

[131] I thank counsel for their very helpful written and oral submissions.

Heard on January 8, 2026 with follow-up written submissions dated January 13, 15, 20, and 21, 2026.

Dated at Edmonton, Alberta on January 22, 2026.

Michael J. Lema
J.C.K.B.A.

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