KING'S BENCH FOR SASKATCHEWAN

Citation: **2026 SKKB 47**

Date: **2026 02 24**
Docket: KBG-SA-01388-2023
Judicial Centre: Saskatoon

BETWEEN:

DOUGLAS JOHNSON

Plaintiff

- and -

THE NIPAWIN JUNIOR A HAWKS INC., SCOTT ANDERSON, STEVE SLUSAR, TOM BARRIE, OWEN SCHILLING, DERWYN WILSON, WYATT LYCKEN, KEN SNAITH, JON VICTOR, LISA FAST and DEREK SECKINGER

Defendants

Counsel:

Michael W. Owens — for the plaintiff
Kenneth B. Blake — for the defendants

FIAT — DANYLIUK J.
February 24, 2026

Introduction

[1] This is an application by these named defendants to set aside the noting for default made against each of them. Sounds straightforward, right? Not so fast.

[2] Counsel for the applying defendants was not counsel at the outset of this

matter. He seeks the order setting aside the noting for default despite the passage of considerable time. The defendants' position is that unique circumstances exist in this case which explain and justify the delay.

[3] Plaintiff's counsel opposes the order sought, largely on the basis that on an objective analysis of the facts these defendants are simply out of time. It is asserted that these defendants took too long to seek this relief and the law now prohibits the Court from granting same.

[4] For the reasons set out below I am granting the order sought, on terms.

Facts

[5] At its essence this is a wrongful dismissal claim. The plaintiff Johnson was employed by the defendant hockey team [Hawks] which is a non-profit corporation. All the individual defendants are or were the directors of the Hawks. Commencing in April 2019 Johnson had a three-year contract to be a coach of the Hawks. Johnson says his contract for services was terminated on December 4, 2021. He says he was not in breach of any terms of his employment contract. He says the termination of his contract did not comply with the terms of the contract itself and was wrongful.

[6] The statement of claim was issued November 23, 2023, and was brought under Part 8 of *The King's Bench Rules*, the expedited procedure. A number of the defendants were served with the claim on May 15, 2024: the Hawks, Steve Slusar, Ken Snaith, Derek Seckinger, Lisa Fast, John Victor and Owen Schilling. Scott Anderson was served on May 23, 2024. Derwin Wilson, Wyatt Lycken and Tom Barrie could not be served so the plaintiff obtained an order extending the time for service for a period of 90 days. Derwin Wilson was served on July 9, 2024; Wyatt Lycken on July 14, 2024; and Tom Barrie was not served as of the date of the appearance before Justice Dovell.

[7] The defendants (or at least some of them) retained counsel and there was communication between counsel for the plaintiff and the defendants. Plaintiff's counsel advised defendants' counsel that he would note for default on a given date. Not having been served with any defences, plaintiff's counsel noted the applying defendants for default on June 13, 2024 and noted the Hawks for default on June 28, 2024.

[8] Rather than applying to set the noting for default aside, counsel representing the defendants at that time instead applied pursuant to Rule 7-9(1)(a) and Rule 7-9(2) for an order striking out the statement of claim. In her fiat of August 8, 2024 (*Johnson v Nipawin Junior A Hawks Inc.* (8 August 2024), Saskatoon KBG-SA-01388-2023 (SKKB)), Dovell J. raised the issue of standing and ultimately determined that because the defendants had been noted for default they had no standing to bring the striking application. She dismissed it with costs to the plaintiff in any event of the cause.

[9] The next step was an application seeking two heads of relief: an order setting aside the noting for default and an order striking out the claim. Strangely, this application was only brought on behalf of the Hawks. It was not brought on behalf of the remaining named defendants, all but one of whom had also been noted. Justice Morrall issued his fiat on September 23, 2024 (*Johnson v Nipawin Junior A Hawks Inc.* (23 September 2024), Saskatoon KBG-SA-01388-2023 (SKKB)), and set aside the noting for default against the Hawks. He commented (para. 33) that it was strange the application had only been brought on behalf of the Hawks and not the other noted defendants, with a small costs award to the plaintiff as costs thrown away.

[10] Given that statement by Justice Morrall it is odd that counsel then representing the remaining defendants took no steps to bring a similar application to set aside the noting for default as against them.

[11] The application to strike had been adjourned and later was heard by

Justice Mills. In his fiat of March 18, 2025 (*Johnson v Nipawin Junior A Hawks Inc.* (18 March 2025), Saskatoon KBG-SA-01388-2023 (SKKB)), he dismissed that application.

[12] The current application to set aside the noting against the remaining defendants was brought in November 2025. It was initially returnable on December 16, 2025 but was adjourned by consent until it was argued before me on February 12, 2026. Mr. Blake, current counsel for the defendants, brought this application.

[13] The application was supported by the affidavit of Robert Nicholas sworn November 20, 2025. Mr. Nicholas became a board member for the Hawks in 2023, after the events leading to the termination of Johnson's employment contract. In his affidavit he clarifies which board members were on the board at relevant times. As well, he adopts and incorporates by reference two earlier affidavits sworn by Shayne Pickering in support of the first application to strike and the application to set aside the noting against the Hawks.

[14] Of more importance to the application before me are the averments concerning the steps taken by board members before and after the noting for default, and after the noting against the Hawks was opened up. Salient portions of the Nicholas affidavit are as follows:

(a) He was at a May 21, 2024 meeting with prior legal counsel for the defendants in which he personally told prior counsel "several times" that the next step should be to file defences on behalf of all the defendants.

(b) Prior counsel did not serve or file any defences prior to June 12, 2024.

(c) The individual defendants were noted for default on June 13, 2024.

The Hawks were noted on June 28, 2024 which was consistent with Johnson's counsel warning prior defence counsel on June 17, 2024 that he would note on that date.

(d) Prior counsel brought the applications discussed above. At no time did prior counsel attempt to set aside the noting for default of the individual defendants; he only applied to set it aside regarding the Hawks. The firm of prior counsel never made any application at all concerning the noting for default of the individual defendants.

(e) A different lawyer within the same firm as prior defence counsel served and filed the Hawks' defence on October 8, 2024.

(f) The defendants reported this matter to their insurer and removed carriage of this matter from the office of prior counsel. Mr. Blake, as current counsel for the defendants and in-house counsel for the defendants' insurer, filed a formal notice of change of representation on May 20, 2025. Mr. Blake obtained file materials from prior counsel and reviewed same. By June 6, 2025 he was attempting to contact a Law Society of Saskatchewan Practice Advisor, and was contemplating making contact with the Saskatchewan Lawyers' Insurance Association [SLIA] because of what he believed to be neglect on the part of prior counsel.

(g) By June 25, 2025 Mr. Blake had contacted a Practice Advisor who told him to contact SLIA. The next day Mr. Blake left several telephone messages for Stephen McLellan, legal counsel at SLIA. He also sent an email with respect to this matter, requesting that SLIA investigate prior counsel's actions and inaction.

(h) Mr. McLellan emailed Mr. Blake on July 2, 2025 to request further information. Mr. Blake replied on July 4, 2025 providing information as well as a copy of the fiat of Morrall J. He sent SLIA another email on July 8, 2025 in which he requested that SLIA appoint repair counsel to apply to set aside the remaining instances of noting for default. He further advised Mr. McLellan that if a judgment in default issued against the defendant directors he anticipated receipt of instructions to commence litigation against prior counsel.

(i) Mr. McLellan replied July 14, 2025 stating only an insured member could make a claim to SLIA, and no counsel would be retained to act for the defendant directors. On July 21, 2028 Mr. Blake faxed a letter to prior counsel to suggest he should report himself to SLIA as his conduct prejudiced the defendant directors who remained noted in default of defence. Further, Mr. Blake emailed Mr. McLellan on July 29, 2025 to inquire whether SLIA was investigating prior counsel. He never received a reply to that email.

(j) On August 12, 2025 Mr. Blake wrote to plaintiff's counsel enclosing a copy of his letter to prior counsel and indicating he would be making an application to set aside the noting. By fax letter dated October 8, 2025 Mr. Blake sought Mr. Owens' consent to set aside the noting for default of all the director defendants. Mr. Owens replied on October 20, 2025 indicating that he would not do so.

[15] It is argued by the defendants that the combination of the Nicholas affidavit and the two Pickering affidavits explain the delay in bringing the application to set aside the noting for default and provide details of a meritorious defence.

Issue

[16] The issue in this application is:

1. Should the noting for default be set aside as against the subject defendants?

Analysis

1. Should the noting for default be set aside as against the subject defendants?

[17] The test for setting aside a noting for default is well-established. Justice Popescul (as he then was) reviewed the authorities and outlined the criteria for such an order at para. 43 of *Strange (Middle Lake Hotel 2002) v Saskatchewan (Advanced Education, Employment and Labour)*, 2008 SKQB 481:

> [43] …
>
> (1) the application is to be made as soon as possible after the judgment sought to be set aside comes to the attention of the applicant in the event of any delay, the applicant must justify and satisfactorily explain the reasons for the delay;
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> (2) the applicant must provide a satisfactory explanation for his failure in responding to the claim;
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> (3) the applicant must disclose the defence that raises arguable issues; and
>
> (4) the applicant must satisfy the court that an order setting aside the judgment will not seriously prejudice the party who has obtained the judgment.
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> See: *Royal Bank v. Jenson* (1988), 71 Sask. R. 277 (Q.B.); *Klein v. Schile* (1921), 59 D.L.R. 102, [1921] 2 W.W.R. 78 (Sask. C.A.); *Bank of Montreal v. Pauls* (1984), 35 Sask. R. 204 (C.A.).

[18] The application is a discretionary one. It is for the judge hearing such an

application to decide whether relief should be granted, provided he or she has due regard to the relevant criteria. See, for example, *Rimmer v Adshead*, 2002 SKCA 12 at para 58 *per* Cameron J.A.; and *Ballentyne v Benard*, 2012 SKCA 23 at para 5.

[19] Guidance in the proper use of that judicial discretion is found in many authorities including *Willrun Payroll Services Inc. v Prairie Land & Investment Services Ltd.*, 2010 SKCA 42 at para 34:

> [34] That said, I turn to the basis on which an application to open up a default judgment was made. Such an application is not based on the defendant having an established legal right to an order setting aside a properly entered default judgment or a writ of execution based thereon. Thus**, it essentially is a request for an indulgence; a request that the court intervene and grant the applicant relief from the consequences of the applicant having failed to comply with the law. Courts often will grant the relief sought based on the principle that an application of their rules and procedures should not violate the principles of fundamental justice and equity.** Consequently, an application to set aside a default judgment brings into play the conflicting interests of the parties and potential prejudice to either of them if relief is or is not granted.
>
> [Emphasis added].

[20] This guidance was applied by Chief Justice Popescul in *Sparrow v Schnurr*, 2017 SKQB 358. Of importance to the case at bar are the comments of the Chief Justice at paras. 11, 12, 16, and 19 to 21:

> [11] Generally speaking, a default judgment is a binding judgment obtained by a plaintiff as a result of the defendant's failure to file a defence within the time prescribed. The practical need to establish a deadline within which a defendant must file their defence is obvious – without a time limit a defendant could delay eternally.
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> [12] A default judgment, unlike a judgment rendered after trial, is not an adjudication based upon the merits, but, as mentioned, is obtained as a result of the defendant's failure to follow process. Recognizing this distinction and the reality that

there may be extenuating circumstances or a variety of valid reasons why a defence was not filed within the prescribed time, *The Queen's Bench Rules* anticipates applications to set aside or vary default judgments. Rule 10-13 reads as follows:

> **Setting aside default judgment**
> 10-13 Subject to rule 9-13, in the case of any judgment by default, whether by reason of non-delivery of defence or non-compliance with any of these rules or with any order of the Court, the Court may set aside or vary the judgment on those terms as to costs or otherwise that the Court considers fit.

…

[16] The task of the court when considering an application to set aside a default judgment involves determining if the rigid application of the Rules should yield to the justification set forth by the defendant as to why a default judgment was obtained. Each situation is unique and must be assessed by carefully examining the specific circumstances. In the end result, the court, in exercising its discretion must simply do what is fair. When the court acts fairly, by implication, it is ensuring that the principles of fundamental justice and equity are respected.

…

[19] In *Ballentyne*, at para. 13, the Court of Appeal refined these considerations by directing that the "applicable principle" requires,

> … consideration of all the circumstances and a strong reason to deny a defendant his or her day in court when he or she can demonstrate an arguable defence to the claim and the delay has not caused the plaintiff unreparable harm.

[20] This concept was then further amplified by explaining that conduct on the part of the defaulting defendant that falls short of a deliberate decision to allow a default judgment to issue does not, on its own, justify denial of an application to set aside a default judgment. At para. 14, in *Ballentyne*, Caldwell J.A. put it this way:

> 14 … Despite the cautionary wording on the face of a statement of claim, it is not uncommon that an individual will fail to appreciate that not responding in a legal way to

> a statement of claim will result in a legally enforceable judgment against him or her by default. There may be many reasons for this. For example, an individual may fail to read the document out of fear, or he or she may read it but not understand it or what it requires, or may fail to read it carefully enough, or may simply ignore it as yet another tactic in an on-going dispute with the party opposite. Such conduct may well be negligent; but, if it falls short of a deliberate decision to allow a default judgment to issue, such conduct, in and of itself, does not justify denial of an application to set aside a default judgment brought in a timely way where the applicant has shown an arguable defence and no irreparable prejudice to the plaintiff if the default judgment is set aside. In short, in my opinion, a "wilful" default (*i.e.*, one which could in and of itself justify dismissal of an application to set aside the default judgment) occurs where the defendant understands the import of a statement of claim and deliberately decides to let the matter go to default judgment, whether to vex the plaintiff with the cost, delay and inconvenience of defending an application to set it aside or otherwise. And, that is not the case here.
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> [Emphasis added]
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> [21] *Ballentyne* would seem to signal a bit of a shift in favour of making it easier for defendants to open up default judgments.

[21] In chambers, the arguments of counsel centred on the delay. Plaintiff's counsel did not concede any of the applicable criteria but argued that the delay here was inordinate and inexcusable.

[22] In reviewing this matter I find that the criteria set out in the authorities have been met by these defendants.

[23] The defendants have given a satisfactory explanation for the failure to defend the claim. There is uncontroverted evidence that prior defence counsel was specifically instructed to file a statement of defence for all defendants. It is unclear why he failed so utterly to do so. To be accurate, the failure to defend was that of counsel not the defendants. Very often it is the converse. Subject to a review of compliance with

the other criteria, it would not be just and equitable to deprive these defendants of their day in court and a merits-based adjudication only because the lawyer they hired failed in his duty to them. I am satisfied with the explanation for the failure to defend.

[24] I am further satisfied that the facts set out in the three affidavits relied upon are sufficient to ground arguable defences. The plaintiff has advanced the interpretation of the contract most favourable to him, but the alleged deficiencies in the defendants' manner of terminating that contract are, to say the least, arguable.

[25] I am also satisfied that an order setting aside the noting for default will not seriously prejudice the plaintiff. While the plaintiff notes that some of the defendants have died since the claim was issued, he has sued ten individuals as well as the non-profit corporate defendant. There is nothing before me that the deceased former directors were crucial witnesses in this matter. Mr. Nicholas was able to set out the history and circumstances in his affidavit. I further note paras. 30 and 31 of Justice Morrall's fiat, where he noted that "Mr. Owens rightly conceded that there was very little prejudice to Mr. Johnson should the notice be set aside". I cannot see how there would be any more prejudice *vis-à-vis* the individual defendants than there was regarding the corporate defendant. The only prejudice might be in some costs thrown away and that can be addressed through an award of costs covering this application.

[26] Finally, I come to the crux of the matter. Can I be satisfied that the defendants' application was made as soon as possible after the judgment came to their attention or, if there was delay, has that delay been explained?

[27] I find this criterion has been satisfied. I do agree with Mr. Owens that this is a long delay, and it would be difficult to find many cases with longer delay. But again, the defendants instructed prior counsel to file statements of defence. Counsel failed to do so. To that point, the defendants are blame-free.

[28] After the error was discovered new counsel was obtained. Perhaps Mr. Blake could have moved swifter. But perfection is not the standard. Mr. Blake, as new counsel, investigated whether SLIA would provide coverage and/or repair counsel. That process took time. Once it was discerned SLIA was uncooperative Mr. Blake moved the matter toward this application. There was delay, but I find it has been properly explained.

[29] It must also be kept in mind that, as set out in *Willrun*, it is a given that the defendants have not complied with all their legal obligations. They are literally in default of a legal obligation. The very nature of this type of application is an appeal to this Court's equitable jurisdiction, a request for an indulgence. As led by the Court of Appeal, modern Saskatchewan judges now assess these matters flexibly, with an eye on fundamental justice and equity. Gone are the days of rigid application of set criteria.

[30] As noted in the authorities set out above, equitable considerations are at work in this case. Here the plaintiff has not been irrevocably or even seriously prejudiced. The original slip in not defending has been explained, as has the delay in proceeding with this application.

[31] This is a situation falling squarely within the contemplation of the Court of Appeal in *Ballentyne*. There is no upper time limit or ceiling on when these applications can be brought. Each will depend upon its own circumstances, and decisions in this area of the law tend to be context specific. While it is true that significant time has elapsed between the noting and this application, there is an explanation for that passage of time.

[32] The conduct of the defendants' prior counsel may well be negligent, but it certainly was not a deliberate decision on the part of the defendants to allow the noting for default to occur. This is not a case of wilful default; in fact, the evidence before me shows the individual defendants expressly instructed prior counsel to file a defence.

Even if prior counsel was negligent the conduct of the defendants themselves does not justify denial of an application to set aside a default judgment given that I am satisfied of the other three relevant criteria.

[33] I therefore exercise my judicial discretion to set aside the noting for default as against all defendants applying in this application.

[34] I do so on terms. Clearly I have the jurisdiction to exercise my discretion as to setting terms upon which this order is granted.

[35] In chambers Mr. Owens suggested the plaintiff has spent $8,300.00 in fees, plus disbursements and applicable taxes. While this exhibits considerable chutzpah, respectfully these are not “costs thrown away”. This is akin to a costs order for solicitor-and-own-client costs. Mr. Owens did not particularize how this figure was arrived at nor is there any breakdown as to what those legal bills covered, nor the time period that amount covered. For example, does this include counsel’s fees for drafting the statement of claim? Those are not “costs thrown away”. While this is an ambitious request, it is not one that can be countenanced at law.

[36] There is a trend for many counsel to seek solicitor-client costs (or costs akin to same) on many matters where that is not an appropriate request. Counsel must bear in mind the principles governing such cost awards, as set out in cases such as *Phillips Legal Professional Corporation v Vo*, 2017 SKCA 58 at para 151; *Hope v Gourlay*, 2015 SKCA 27 at para 47; *Siemens v Bawolin*, 2002 SKCA 84 at para 118; and the very recent decision delivered by Chief Justice Leurer in *Kidd v Unity (Town)*, 2026 SKCA 12 at para 79.

[37] In chambers Mr. Blake suggested that his clients were prepared to pay up to $5,000.00 in costs thrown away. This is a generous assessment of such costs but not reflective of either the Tariff or costs thrown away.

[38] Justices Dovell and Morrall each ordered $450.00 in costs to the plaintiff. At least some of the work done for the plaintiff would presumably have already been covered by those cost orders.

[39] I am therefore prepared to order $1,000.00 in costs thrown away, all-inclusive, payable in any event of the cause and within 30 days of the date of this order. The payment of these new costs is a condition precedent to these defendants filing a statement of defence.

Conclusion

[40] Accordingly the following order may issue:

1. The named defendants Scott Anderson, Steve Slusar, Ken Snaith, Derek Seckinger, Lisa Fast, John Victor and Owen Schilling are given leave to serve and file a statement of defence provided this is done within 30 days of the date hereof, and provided that prior to doing so they collectively pay one set of costs fixed in the sum of $1,000.00 to the plaintiff.

2. Those costs of $1,000.00 are payable by these defendants in any event of the cause.

[41] My thanks to counsel for their assistance in this matter.

"R.W. Danyliuk" J.
R.W. DANYLIUK