

KING'S BENCH FOR SASKATCHEWAN

Citation: 2026 SKKB 149

Date: 2026 08 18
Docket: KBG-SA-01187-2023
Judicial Centre: Saskatoon

BETWEEN:

INDUSTRIAL MACHINE & MFG. INC.

Plaintiff

- and -

CLEAN SEED AGRICULTURAL TECHNOLOGIES
LTD.

Defendant

Counsel:

Tom M. Baldry
Walker A. Paterson

for the plaintiff
for the defendant

FIAT
August 18, 2026

DANYLIUK J.

Background

[1] This is a matter that has come to the Court's attention in a somewhat odd fashion.

[2] On October 5, 2023 the statement of claim was issued, then served by

prepaid registered mail on October 11, 2023. The address used was the defendant's address filed with British Columbia Registry Services. No defence was delivered.

[3] Then, on November 21, 2023 the plaintiff did not note for default. Instead the plaintiff filed an "affidavit for default judgment on a debt or liquidated demand". The plaintiff took, and has maintained, the position that it did not have to note the matter for default but only had to file this affidavit to obtain judgment. The plaintiff also maintains its claim was for a debt or liquidated demand. I don't think it is.

[4] Why the plaintiff did not note for default and proceed to obtain judgment in the normal course shall forever be shrouded in mystery. This Court has never received a satisfactory explanation for this bizarre choice.

[5] Here's a free practice tip. When *The King's Bench Rules* provides an easy, straight-line, widely accepted and almost universally-followed practice to do something, a practice supported by decades of case law, follow that practice. Do not create some convoluted, non-sensical alternate practice in your mind and follow that instead. Just do the normal thing.

[6] On November 21, 2025 the filing of this affidavit somehow induced a Deputy Local Registrar to issue a default judgment for \$421,412.49 (including interest) plus costs, for a total judgment of \$422,773.54. Then, on March 12, 2026 the plaintiff sought and obtained a certificate that would allow it to register its judgment in British Columbia.

[7] It appears this brought the judgment to the notice of the defendant and its counsel, because on March 27, 2026 the defendant brought an application without notice to set aside the default judgment obtained "improperly or otherwise prematurely". On March 30, 2026 I wrote the fiat previously referred to, raising some items for consideration by both sides and directing that the defendant's application

proceed by way of a hearing on notice, there being no basis to apply *ex parte* for such relief. (*Industrial Machine & Mfg. Inc. v Clean See Agricultural Technologies Ltd.* (30 March 2026), Saskatoon KBG-SA-01187-2023 (SKKB))

[8] The hearing was held on April 9, 2026 and I reserved my decision. In the interim further enforcement attempts were enjoined by order.

Failure to Note for Default and Taking Out Irregular Judgment

[9] Prior to my first fiat and the argument at the full hearing of this matter, plaintiff's counsel sent the Court an email on March 27, 2026. In it he provided his views on why it was not required that the matter be noted for default of defence before the plaintiff could obtain default judgment. In it he stated:

On my review of the Rules, my initial position is that a noting for default is not required in circumstances where judgment is obtained for a debt or liquidated demand. I note that Rule 3-22 does not require a defendant to be noted for default before an Affidavit is filed for judgment on a debt or liquidated demand, or for such judgment to be granted. I further note that Rule 3-24 draws a distinction between claims for debt or liquidated demand – in respect of which judgment can be obtained on filing an affidavit in Form 3-22 (as occurred here) – and claims for pecuniary damages, which require a defendant to be noted for default.

[10] Respectfully, for the following reasons I disagree with counsel's position.

[11] First, Subdivision 4 of Part 3 of *The King's Bench Rules* deals with "Failure to Defend". The rules in this Subdivision deal with a principle of general application, then with particular situations. The plaintiff has failed to deal with the Rule of general application regarding default of defence. This is Rule 3-21, which reads:

3-21(1) If any defendant fails to deliver a statement of defence

and the time for so doing has expired, the plaintiff may, on filing proof of service of the statement of claim, require the local registrar to note the default of that defendant.

(2) On filing proof of service pursuant to subRule (1), the local registrar shall:

- (a) endorse on the statement of claim and on the fly-leaf accompanying the court file the words “Noted for default the _____ day of _____, 20 _____”;
- (b) sign the statement of claim and fly-leaf; and
- (c) make an entry in the court registry database that the default has been noted.

(3) After default has been noted in accordance with subRule (2), the defendant shall not file a statement of defence without leave of the Court or the written consent of the plaintiff.

(4) **On default being noted as provided in this rule, the plaintiff may enter judgment** or take any other proceedings that the plaintiff may be entitled to take on default of defence.

[Emphasis added]

[12] The plaintiff’s position entirely ignores this rule. Rule 3-21(4) clearly sets out that once the noting for default is entered, **then** the plaintiff may take out judgment or other steps.

[13] A significant difficulty with the plaintiff’s position is that Rule 3-21 does not impose any burden on a plaintiff. Proof of service of the claim is filed. A request is made to the Local Registrar’s Office to note for default. Unless there is a problem, the matter is noted. Few things in law come this close to being mechanical.

[14] The second impediment to the plaintiff taking out default judgment is its characterization of the claim as one for debt or liquidated demand. Rule 3-21 does not allow a judgment to be taken out in this way for any other type of claim, only debt or liquidated demand. Irrespective of how the claim is phrased if it is, in fact, for damages

rather than debt or liquidated demand the plaintiff must apply to have damages assessed prior to being in a position to take out judgment. This is abundantly clear from the authorities. See, for example, *Shinkaruk v Neufeld Building Movers Ltd.*, 2013 SKQB 411, and *Luby v 101144734 Saskatchewan Ltd.*, 2019 SKQB 279.

[15] In *Luby* Justice Elson dismissed a plaintiff's application for default judgment. At paras. 13 to 22 he discussed the nature of a claim for debt or liquidated demand as opposed to a claim for damages. At para. 13 he said that "an action for a debt or liquidated demand is the only type of claim for which default judgment may be made by entry, as opposed to an application to the court. This unique feature arises from the nature of a debt or liquidated demand". I will not repeat all of those referenced paragraphs here but adopt same and incorporate them by reference into this decision. He also noted that Rule 17-1 defines "liquidated demand". Here, it is beyond question this claim cannot fit within that Rule.

[16] It must also be noted that the Rules are to be read together, in context, rather than artificially isolating particular Rules or parts thereof which can skew the interpretation of same. This was done here. Rule 3-21 must be read in conjunction with Rules 3-22 and 3-23. The plaintiff did not do this before proceeding to take out judgment.

[17] Thirdly, as noted above, the plaintiff's claim is actually a claim for damages. It is not a claim for a debt or liquidated demand. This distinction has received significant attention in the case authorities. See, for example, *Canada Capital Energy Corporation v Barracuda Energy Ltd.*, 2013 SKQB 134, where Justice Whitmore (as he then was) explained the distinction between the two types of claim as well as the overarching purpose in having different processes pertain to obtaining judgment for each type of claim.

[18] Even without applying those authorities a simple reading of the plaintiff's

statement of claim shows the plaintiff and its counsel characterized this action as a damage claim. I refer to the following portions of the claim, which comprises a non-exhaustive list, in this regard:

- The prayer for relief of “Conclusion” in para. 13(a) of the claim asks for “damages in the amount of \$404,888.60.
- Paragraphs 10 and 11 claim for breach of contract. Paragraph 12 claims for unjust enrichment. These are damage claims, both as stand-alone pleadings and when read in conjunction with para. 13(a).

[19] Are these picayune issues? Am I being rigid and pedantic? No. these issues have been raised previously and decided in the manner I am now deciding same. See for example *C.D.R. Developments Inc. v ACI Holdings Inc.*, 2017 SKQB 163 at paras 10 to 14. Also see *Air Exchange v North Canada Air*, 1985 CanLII 2694, 42 Sask R 81 (SKQB), where Justice Walker stated (in the context of a garnishment, which matters not for present purposes) at para. 3: “If a claim is not “a debt or liquidated demand”, it cannot be made so by simply describing it as “a debt or liquidated demand”. A similar result pertained in *Winfield Developments Ltd. v Banton Industries Ltd.*, 1996 CanLII 4931, 141 Sask R 21 (SKCA).

[20] The within action was never set up as a claim for debt or liquidated demand. From inception it was a damage claim. A similar situation existed in *Luby* and was noted by Justice Elson at para. 5 of his decision. This being so, Rule 3-23 applies and after the plaintiff notes for default it may make an application without notice for the Court to assess those damages.

[21] The fourth reason to disallow the plaintiff’s judgment is because the plaintiff, in mischaracterizing its own claim as one for debt or liquidated demand as opposed to properly terming it a damage claim, employed the wrong forms when it

sought judgment. The form used for the default judgment is one designed exclusively for non-damage claims. The same is true of the affidavit, which is the form used for a non-damage judgment. Indeed, the affidavit is actually entitled “Affidavit for Default Judgment on a Debt or Liquidated Demand”. It is the wrong affidavit to be used and does not supply the information required for the Court to properly assess a damage claim. I also note that the affidavit is styled as “AFFIDAVIT OF: Industrial Machine & Mfg. Inc.”. This does not comply with Rule 13-31(1)(d).

[22] Very shortly before the hearing the plaintiff filed the affidavit of Rhonda Jardine-Woodcock, a legal assistant with the plaintiff’s solicitors. She attaches a copy of the court runner memo, which contains a notation to seek to note for default. However, it is an unassailable fact that this file was never noted for default. There is no evidence from the court runner. Was there ever an actual request for the matter to be noted? Did the court runner err? Did a member of the Registrar’s staff? There is no evidence on these issues.

[23] Simply put, I can only conclude that the plaintiff failed to follow a basic court process.

[24] I note that two days before this hearing the plaintiff filed the lengthy affidavit of Thomas Foster, a director and officer of the plaintiff. While this affidavit attempts to explain the transactions between the parties and to show why this claim should be treated as a debt or liquidated demand, that is an *ex post facto* analysis. The claim must be examined on its face, not in hindsight with the “benefit” of the plaintiff’s explanations coming after the judgment has been impugned.

[25] For all these reasons I must set aside the judgment issued November 21, 2023. On the preponderance of the evidence, it was obtained irregularly by the plaintiff. It cannot stand. As well, if that judgment has been registered in British Columbia that registration ought to be discharged, as the Registrar’s Certificate on which it was based

falls with the judgment.

Leave to defend

[26] The defendant seeks further relief. It suggests that in addition to setting aside the default judgment it be granted leave to file a statement of defence in this action.

[27] The test 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;
- (2) the applicant must provide a satisfactory explanation for his failure in responding to the claim;
- (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.

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.).

[28] 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 *per*

Cameron J.A. at para 58; and *Ballentyne v Benard*, 2012 SKCA 23 at para 5.

[29] 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].

[30] 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.

[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.

[Emphasis added by Popescul C.J.]

[21] *Ballentyne* would seem to signal a bit of a shift in favour of making it easier for defendants to open up default judgments.

[31] The defendant initially applied on the basis that the default judgment had been improperly or prematurely obtained, thus should be set aside *ex debito justitiae*. In my initial fiat I noted that this may not be a complete answer and the defendant may wish to consider the classic test. There can be a distinction between setting aside the actual judgment and granting leave to defend.

[32] As a result the affidavit of Steven Brassard was filed by the defendant. He is the defendant's Chief Financial Officer. In his affidavit he essentially admitted the defendant had been properly served (para. 3) and further states, "I do not recall when I became aware of the Statement of Claim, but it was likely in October 2023".

[33] As well, at para. 4 he states that the first indication he personally had of the defendant being in default of defence was on February 4, 2026 due to receipt of an

email from the president of the plaintiff. At that paragraph he also states, “Prior to this point, I have not been able to identify any correspondence in possession of Clean Seed from IMM or their counsel indicating noting us in default of defence or prior warning of seeking default judgment”. Of course, the defendant was not represented by counsel at this time and the plaintiff was not under an obligation to provide such advice or warning. He says the defendant did not have counsel because it was in perilous financial straits and could not afford to hire a lawyer.

[34] Of note, however, are paragraph 15 and Exhibit “D” of the Brassard affidavit. There, he admits that a mere three days prior to the hearing of this application the defendant’s corporate securities counsel gave him a letter from plaintiff’s counsel dated November 23, 2023, stating a judgment had been obtained against the defendant. Mr. Brassard says he does not believe this letter was ever provided to him or the corporate defendant. Still, it is clear the defendant corporation knew as of November 2023 that a judgment had been obtained in this lawsuit.

[35] Mr. Brassard does aver to facts that may give rise to a defence (in whole or in part) on the merits to the plaintiff’s claim.

[36] Taking the evidence on this application as a whole, two of the four factors are in direct issue. Has the defendant given a satisfactory explanation for his failure in responding to the claim? Further, was the application brought as soon as possible after the judgment came to the defendant’s attention and, if not, has the delay been explained in a satisfactory manner?

[37] I am satisfied that the defendant has raised arguable trial issues on the merits. At the very least, if the plaintiff must re-apply for judgment these could be raised by the defendant at that time as they may affect whether there is any proof of the amounts claimed by the plaintiff. Further, there is not going to be any prejudice to the plaintiff. The judgment remains outstanding. There is not some ongoing collection

effort that is about to bear fruit.

[38] Has the defendant given a satisfactory explanation for its failure in responding to the claim? No. Mr. Brassard personally has explained why he was not aware of the claim or the judgment for some time, and why he did nothing to defend. However, he is a corporate officer. He is not the company. There is no explanation from “corporate securities counsel” as to whether the claim or judgment was sent to anyone at the defendant. There is no explanation from other officers as to why nothing was done. As noted above Mr. Brassard acknowledges that the statement of claim was served on the defendant in October 2023. There is no clear evidence as to who handled that claim, whether it was forwarded to anyone at the defendant, whether any decision was made about defending the claim – no such evidence is before me.

[39] Further, was the application brought as soon as possible after the judgment came to the defendant’s attention and, if not, has the delay been explained in a satisfactory manner? Defendant’s corporate counsel was aware of the existence of the claim in October 2023. There is no evidence as to what happened with the claim after it was delivered to defendant’s corporate securities counsel. There is no evidence from the lawyers as to what (if anything) was done with the November 23, 2023 letter from the plaintiff advising of obtaining the judgment. There is no evidence from anyone at that law firm about anything. Mr. Brassard states he only saw the November 23, 2023 correspondence on April 6, 2026 – three days before the hearing of this application.

[40] It seems reasonable to me that the corporate lawyers had a duty to forward such information to officers of the defendant. I have no idea whether they did so. If so, I have no idea what any of those officers did, if anything.

[41] On the two identified criteria this leaves me unsatisfied of two of the four criteria on which the defendant bears the onus of proof. I cannot find the explanation of the failure to defend is satisfactory. Even if it was, I cannot find that the application to

open up the judgment and be given leave to defend was brought in a reasonable time or that proper circumstances exist to support such an order being made. The defendant's evidence is simply too fragile on that point.

[42] I recognize that the prevailing judicial trend is to grant these orders and give parties their "day in court". Here, however, it strikes me the defendant has conflated what is required to set aside the improperly obtained judgment and what is required to obtain leave to defend. I am satisfied of the former and am setting aside that judgment. I am not satisfied of the latter, and find the defendant has not met the legal test for defending this action some two and one-half years after judgment was obtained.

[43] This leads to a somewhat odd result, in that while the judgment itself cannot stand as obtained, the defendant is not entitled to defend at this late juncture. The prejudice can be ameliorated by directing that the plaintiff's application for judgment proceed in chambers on notice to the defendant, so the defendant can make any relevant submissions at that time.

[44] Finally, costs. While very often costs thrown away are given to the party who obtained the judgment, here success has very much been divided. The plaintiff's obtaining of the default judgment was highly irregular and, to an extent, the plaintiff authored its own misfortune. However the defendant has been unsuccessful in obtaining leave to defend. This is an appropriate case to exercise my discretion as to costs, and award no costs of this application to either party.

Conclusion

[45] Accordingly the following order may issue:

1. The judgment issued in favour of the plaintiff on November 21, 2023 in the total sum of \$422,773.54 is hereby set aside, without prejudice to the plaintiff applying for judgment in chambers on notice to the

defendant. The defendant has leave to make submissions on that application.

2. The plaintiff shall take steps to discharge any registration of its November 21, 2023 judgment in any registry for same in the Province of British Columbia, and shall provide proof of such discharge to the defendant and to the Court within 120 days of this date.
3. The defendant's application for leave to file a statement of defence in this action is dismissed.
4. Each party shall bear its own costs of this application.

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

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