Court of King's Bench of Alberta

Citation: 2114223 Alberta Ltd v Lougheed, 2026 ABKB 78

Date: 20260204
Docket: 1203 00841
Registry: Edmonton

Between:

2114223 Alberta Ltd and McDonald & Bychowski Ltd.
Operating As CMB Insurance Brokers

Plaintiffs/Appellants

- and -

Kevin Lougheed

Defendant/Respondent

Reasons for Decision
of the
Honourable Justice Douglas R. Mah

Appeal from the Order by
The Honourable Applications Judge L.R. Birkett
Filed on the 29th day of April, 2025
(Docket: 1203 00841)

A. Background

[1] The Plaintiffs appeal the April 29, 2025 Decision of the learned Applications Judge (AJ). In that decision, the AJ granted the Defendant's application to set aside Default Judgment against him and to outright dismiss the Plaintiffs' Action for long delay.

[2] I will refer to the Plaintiffs collectively as 211 and the Defendant as Mr. Lougheed. The litigation history is briefly summarized as follows:

- On January 17, 2012, 211's predecessor entities sued Mr. Lougheed as a former key employee of their insurance brokerage for breach of an employment contract and breach of fiduciary duty after he switched employment to a competing brokerage. The Statement of Claim alleges that Mr. Lougheed misappropriated confidential information and stole clients from 211, thus causing 211 loss and damage. Mr. Lougheed filed a Statement of Defence on February 15, 2012. His defence all along has been that there is no "ownership" of insurance clients and those who followed him to the new brokerage did so as a matter of right.
- Mr. Lougheed was questioned for discovery in October 2015 and responded to undertakings the following year. His defence was being funded by his then employer. Mr. Lougheed changed employers again in 2017, which resulted in that counsel withdrawing. After that, Mr. Lougheed did not have counsel until recently.
- In 2020, 211's counsel wished to question Mr. Lougheed again. Efforts were made by counsel's office to locate him. A Notice of Appointment for Questioning was sent by registered mail to an address that 211's then counsel believed was Mr. Loughead's current home address. He did not appear at the Questioning on October 1, 2020.
- Counsel for 211 then filed an application seeking a declaration of contempt for failing to attend the Questioning and an Order striking out the Statement of Defence. Attempts to serve the application documents personally on Mr. Lougheed at the same home address were unsuccessful. A process server then posted the documents on the front door on February 16, 2021. A further copy was sent to Mr. Lougheed's work email the next day.
- The Contempt/Striking Out Application was heard by a Justice on March 1, 2021. Mr. Lougheed did not attend the hearing. The Justice struck out the Statement of Defence.
- Time passed. 211 applied for Default Judgment against Mr. Lougheed under *Rule* 3.37 (which permits the application on a without notice basis) on October 3, 2024, which was granted by a different Applications Judge by way of Desk Application on October 16, 2024.
- Mr. Lougheed says he first learned about the Default Judgment on February 20, 2025, when his current employer was served with a garnishee summons. He retained his current counsel and brought his application before the AJ to vacate the Default Judgment and for dismissal due to long delay.

- As stated, that application was successful on both counts, which leads to the appeal before me.

B. AJ Decision

[3] The learned AJ determined that:

- Mr. Lougheed satisfied the three-part common-law test that informs the application of *Rule* 9.15(3), thus permitting the Court to set aside a Default Judgment; and
- The period of inactivity between the Striking Application before the Justice (on March 1, 2021) and the submission of the desk application for Default Judgment (on October 3, 2024) was in excess of three years and therefore the entire Action is struck for long delay under *Rule* 4.33.

C. Argument

[4] In this appeal, 211 submits that:

- The three-part common law test informing the application of *Rule* 9.15(3) is prescriptive and must be strictly applied: ***Liberty Mortgage Services Ltd v River Valley Development Corp***, 2025 ABCA 346 at para 23. See also ***Kraushar v Kraushar***, 2019 ABCA 186 at para 5. Here, it has not been met. In particular, the evidence shows that Mr. Lougheed either deliberately or through wilful blindness (i.e., by avoiding service) allowed legal steps to be taken against him, without opposition, leading to the Default Judgment. Mr. Lougheed did not maintain a valid address for service: ***Wilson v Bobbie***, 2006 ABQB 22 at para 10. In any event, 211 showed (through a 'read receipt') that Mr. Lougheed indeed opened and read the email with the Contempt/Striking Application. Lack of diligence is not the same as excusable inadvertence: ***Secure Energy Services Inc v 1331616 Alberta Ltd***, 2024 ABKB 604 at paras 14-15.
- Further, and more importantly, Mr. Lougheed does not have an arguable defence, which is the most important component of the three-part test: ***Fort McKay Métis Community Association v Morin***, 2020 ABCA 311 at para 14. In his Affidavit of March 11, 2025, he fails to address many of 211's allegations. Saying that one has a strong defence is not the same as actually having one.
- Moreover, since Mr. Lougheed's Statement of Defence was struck, he is deemed to have admitted the allegations in the Statement of Claim and now does not have standing to contest them: ***Boyer v Boyer***, 2024 ABKB 727 at paras 58, 59 & 62; ***Cambareri v Cambareri***, 2025 ABKB 396 at para 14.
- Since Mr. Lougheed made no attempt to set aside the Striking Out Order granted by the Justice on March 1, 2021, the attempt to set aside the Default Judgment is no more than an impermissible collateral attack on the March 1, 2021 Order, which is a valid Court Order: ***Christofi v Jeffrey V Kahane Professional Corporation***, 2022 ABCA 284 at para 19.

- While the Court may retain discretion to set aside a Default Judgment under *Rule* 9.15(3) in the interest of fairness, meeting the three parts of the common law test is still a minimum: ***Palin v Duxbury***, 2010 ABQB 833 at para 48.
- With regard to long delay as defined in *Rule* 4.33, there has *not* been a three-year lapse since the last significant advance, which was securing the Default Judgment on October 16, 2024. The three-year period is calculated by counting forward *from* the last uncontroversial significant advance *to* the date that the Rule 4.33 application is filed: ***Rahmani v 959630 Alberta Ltd***, 2021 ABCA 110 at para 16 & 17.
- In addition, Mr. Lougheed has engaged the exception in *Rule* 4.33(2)(b) by participating in the proceedings and accepting the delay, through the very making of his application to set aside the Default Judgment.
- Nor can he rely on his own indolence or obstruction as part of the claimed delay: ***Janstar Homes Ltd v Elbow Valley West***, 2016 ABCA 417 at para 26 & ***Turek v Oliver***, 2014 ABCA 327 at pars 5-6.
- The present Action was prosecuted to judgment and is no longer an Action. Therefore, there is nothing to dismiss under *Rule* 4.33: ***1499925 Alberta Ltd v NB Developments Ltd***, 2023 ABKB 114 at paras 44-45.

[5] Mr. Lougheed responds that:

- He was not given notice of 211's application for Default Judgment and therefore, the AJ in granting his application to set aside that Default Judgment, clearly had jurisdiction under *Rule* 9.15(a) to do so.
- He meets all of the common law criteria applicable to setting aside a Default Judgment: ***Palin*** at para 21 & ***Kraushar*** at para 5. He has a defence on the merits in that customers of one insurance brokerage are legally entitled to change brokerages as they wish. He has further defences in the form of a long delay argument and a quantum argument.
- Overall, the Court retains discretion to set aside a Default Judgment where fairness so requires: ***Kraushar***, again at para 5; ***Don Reid Upholstery Ltd v Patrie***, 1995 CanLII 9147 (AB KB) at paras 24-26 & ***Palin*** at para 43. Here, Mr. Lougheed was never personally served with the Notice of Appointment for Questioning, nor with the Contempt/Striking Out Application heard on March 1, 2021, nor with the Default Judgment Application granted on October 16, 2024, nor did he learn of the Default Judgment itself until his wages were garnisheed in January 2025. Thus, fairness requires a setting aside.
- Moreover, the obtaining of the March 1, 2021 Striking Out Order is irregular, in that the Justice appears to have granted a contempt remedy without finding Mr. Lougheed in contempt.
- Mr. Lougheed's application is not a collateral attack on the March 1, 2021 Striking Out Order because it has been subsumed by and has merged with the Judgment. He challenges the only thing that is left to be challenged.

- With regard to long delay under *Rule* 4.33, a defendant may still apply for dismissal even where there has been judgment on liability, but where damages or quantum have yet to be resolved: ***1499925 Alberta Ltd*** at para 50. Even a defendant noted in default or subject to a judgment for liability is still entitled to expect a Plaintiff to pursue the damages portion of the claim in a diligent manner: ***Yaremchuk v Haight***, 2001 ABCA 7 at para 6. The lapse of activity on 211's part between the Striking Out Order and the Default Judgment is in excess of three years and is inexplicable.
- Accordingly, the AJ was correct both in setting aside the Default Judgment and dismissing the action for delay.

D. Standard of Review

[6] The standard of review for an appeal of an AJ decision to a Justice of this Court is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30; ***Stavro Melathopoulos Architect Ltd v Webber Academy Foundation***, 2018 ABCA 38 at para 10 & ***Singh v Noce***, 2019 ABCA 55 at para 8.

E. Ruling re Long Delay Issue

[7] I will deal with this branch of the appeal first since I feel it is the least controversial of the two.

[8] There is no doubt that more than three years elapsed between the striking out of the Statement of Defence (March 1, 2021) and the application for Default Judgment (October 3, 2024). 211 did not attempt to explain or justify why there was no activity during that span.

[9] Rather, 211 says that having regard to the last significant advance taken on the matter, the entry of Default Judgment on October 16, 2024, three years have not yet elapsed. In other words, the two definition points are, first, the date of the last uncontroversial significant advance in the action, and second, the date on which the *Rule* 4.33 application was filed. The Court of Appeal in ***Rahmani*** at paras 16 and 17 set out the calculation as follows:

> [16] First, it is necessary to address the rules for calculating time. When counting time, one counts forward from the date of the last uncontroversial significant advance, not backward from the date on which the r 4.33 application was filed. This is clear from the wording of r 4.33(2); "if three or more years have *passed* without a significant advance in an action" (emphasis added). The time has to be measured *from* a date and so must be measured from the last significant advance: ***Trout Lake Store Inc v Canadian Bank of Imperial Commerce***, 2003 ABCA 259 at paras 25-33; ***Barath v Schloss***, 2015 ABQB 332 at para 9. In this case, the last uncontroversial significant advance was the provision of answers to undertakings on July 8, 2014.
>
> [17] When counting time following a significant advance, the count stops on the date the r 4.33 application was *filed*, not the date that the application was heard. The time between the application being filed and the application being heard does not count against the respondent: ***Flock v Flock Estate***, 2017 ABCA 67 at para 17(8); ***Ma v Kwan***, 2018 ABQB 852 at paras 11-14. Therefore, the

> relevant window of time in this case is July 8, 2014 to July 13, 2018, when the application to dismiss for long delay was filed. Was there a three year period between these dates without any significant advance in the action?

[10] See also ***Kallis v Schiffner***, 2025 ABKB 443 at para 41 for an application of this calculation method by this Court.

[11] By using the date of the Striking Out Order as the start date, the AJ overlooked the obtaining of the Default Judgment on October 16, 2024, as being a significant advancement. And it is uncontroversial that it was a significant advancement. It not only advanced the Action, it put an end to it.

[12] I fully realize that more than three years went by without an advancement between the Striking Out Order and the Default Judgment. Mr. Lougheed says that he is entitled to diligent prosecution of the damages portion of the claim. But the cases he relies on are cases where prosecution was not yet final and final monetary judgment had not yet been rendered, as it has been in this case.

[13] I interpret the method of calculation established in ***Rahmani*** as meaning that a defendant may not invoke *any* three-year hiatus on the plaintiff's part as a basis for a *Rule* 4.33 dismissal but rather one where the endpoint for the period in excess of three years is marked by the defendant bringing a *Rule* 4.33 application, and not some other event in the litigation.

[14] Further, I see Mr. Lougheed's bringing of an application to set aside the Default Judgment as engaging the exception in sub-paragraph (b) of *Rule* 4.33(2) in that Mr. Lougheed's participation in proceedings warrants the Action continuing. What purpose is there to setting aside a Default Judgment other than a desire to carry on with the Action as a defendant?

[15] That is not to say that 211's period of more than three years of apparently doing nothing between March 2021 and October 2024 should be or is condoned. It seems that 211 did not embrace the spirit of the *Rules* which requires parties pursuing litigation to do so with alacrity. Instead, 211 benefits from a rather fortuitous combination of circumstances: first, the method of calculating the time period under *Rule* 4.33 as set out in caselaw, and second, that *Rule* 3.37 allows the Default Judgment application to be made without notice to anyone. (Had notice been given, Mr. Lougheed could have brought his long delay application in response.)

[16] The last significant advance was not the granting of the March 1, 2021 Striking Out Order. Rather, it was the securing of Default Judgment on October 16, 2024. The AJ overlooked the Default Judgment occurrence. Three years have not yet elapsed between the last uncontroversial significant litigation event and the bringing of the *Rule* 4.33 application. Given the caselaw regarding how the time period is calculated, I feel that I have no alternative but to allow the appeal with regard to the long delay issue.

F. Ruling re Setting Aside Default Judgment

[17] This issue is quite a bit trickier. It is complicated by a number of sub-issues:

- Whether the Court of Appeal's recent pronouncement in ***Liberty Mortgage*** regarding the prescriptive nature of the three-part test at common law limits the degree of discretion (based on fairness considerations) available to the decision-maker under *Rule* 9.15.

- Whether the Striking Out Order (resulting in a deemed admission of the facts) is a legal impediment to Mr. Lougheed even raising a defence at this stage.
- Whether Mr. Lougheed has shown on a balance of probabilities that he has met all three parts of the test and if so (or even if not), the role that fairness plays in the Court's decision.
- The effect of the March 1, 2021 Striking Out Order on whether the AJ's Set Aside Order should be affirmed or overturned, given the irregular nature of how the Striking Out Order came into being.
- Would the AJ's Set Aside Order, if affirmed, have any practical meaning, given that Mr. Lougheed's Statement of Defence was struck out and he is therefore not legally capable of filing a Statement of Defence in order to continue the Action?

i. Whither *Liberty Mortgage*?

[18] *Rule* 9.15(3) at sub-paragraph (a) empowers the Court to "permit a defence to be filed by a party who has been noted in default." The exercise of this power is often called "setting aside a noting in default." At sub-paragraph (b), the Court is empowered to "set aside, vary or discharge a judgment granted upon application against a defendant who was noted in default *or* whose defence was struck out under *Rule* 3.37." If done, this act by the Court is commonly referred to as "setting aside a default judgment." Either way, the Court may impose terms it considers just.

[19] In the present case, Mr. Lougheed obtained a remedy under sub-paragraph (b) of *Rule* 9.15(3) from the AJ (setting aside a default judgment) and seeks to have it affirmed by me in this appeal.

[20] The Court of Appeal in ***Liberty Mortgage*** at paras 13-24 drew a distinction between setting aside a noting in default and setting aside a default judgment. At para 22, the Court noted that setting aside a noting in default is inherently discretionary and "[T]he 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."

[21] The basis for the distinction lies in the finality of judgment, however obtained, as opposed to a noting in default where obtaining judgment is still a step to be taken and may be defended (at paras 14, 15 & 17).

[22] On the other hand, with regard to setting aside a default judgment, the Court stated at para 23:

> 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.

[23] At para 24, the Court noted that while some of the prescriptive elements for opening up a default judgment may inform whether it is fair and just to set aside a noting in default, they are not mandatory for the latter.

[24] In ***Steinkey v First Capital Holdings (Alb) Corporation***, 2026 ABKB 51 Lema J, on appeal, was dealing with an AJ's refusal to set aside a noting in default and considered the effect of ***Liberty Mortgage*** on the previous Court of Appeal jurisprudence on the subject. He noted that cases such as ***Fort McKay Métis Community*** (at para 11), ***Anderson v Anderson***, 2020 ABCA 426 (at paras 1-5) and ***Hunt v Riehl***, 2024 ABCA 298 (at para 4) all involved the set-aside of a noting in default, not the set-aside of a default judgment, but still invoked the prescriptive three-part test as the basis of decision.

[25] For set-aside of a noting in default, Lema J felt he could still apply the three-part analysis as ***Liberty Mortgage*** did not expressly overrule ***Fort McKay Métis Community***, ***Anderson*** and ***Hunt*** (see paras 41-45 of ***Steinkey***).

[26] The question I confront in this case is the converse of that faced by Lema J in ***Steinkey***. Given the prescriptive nature of the test for setting aside a default judgment as stated in ***Liberty Mortgage***, what is the extent to which I am allowed to exercise discretion based on fairness considerations when dealing with set-aside of a default judgment?

[27] Applications Judge Smart grappled with that question as follows in ***Ghaoui Group LLC v Global Health Imports Corporation***, 2026 ABKB 63 at para 9:

> This is a situation where the Defendants were noted in default before the Plaintiff proceeded to obtain default judgments. As noted the test for setting aside a default judgment has been said to be prescriptive recognizing the presumptive finality of a judgment (***Liberty Mortgage Services Ltd v River Valley Development Corp***, 2025 ABCA 346). The "prescribed" 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 some excuse for the default; and (c) after learning of the default, did they move promptly to open it up (***Kraushar v Kraushar***, 2019 ABCA 186). Notwithstanding, the decision to set aside is discretionary, not based on a rigid set of rules but to achieve fairness and not blind adherence to mere formalism (***Don Reid Upholstery Ltd v Patrie***, 1995 CanLII 9147 (ABQB). Ultimately, the only rule on such motions as this is that the Court must apply its discretion judicially.

[28] I conclude from all of the foregoing that *Rule* 9.15(3) remains inherently discretionary and does not mandate a particular result. I must have regard to the three-part test, which is now prescribed as a framework, but the decision must still reflect fundamental fairness given the facts and circumstances of the case.

ii. Deemed Admissions

[29] 211 takes the position that the striking of the defence means that Mr. Lougheed is deemed to have admitted the allegations and cannot now adduce contrary evidence.

[30] I respond to this argument by referring to Lema J's comments in ***Boyer*** at paras 86-91 (and the cases cited therein) to the effect that admissions relate to pleaded facts and do not extend to questions of law or of mixed fact and law. Whether Mr. Lougheed was a key employee, occupied a fiduciary role with 211 (or its predecessor), breached his employment

contract, misappropriated confidential information from 211 and conspired with others to harm 211 go beyond mere fact and are legal characterizations applied to facts.

[31] Thus, despite the defence being struck, Mr. Lougheed has not admitted that whatever he did constitutes legal wrongdoing as alleged. Indeed, his main defence is that in law one cannot deprive another of something over which there is no ownership.

iii. The Three-Part Test

[32] The first part of the test is whether there is an arguable defense. I will put aside for the moment the fact that the defence has been struck out.

[33] 211's point is that while Mr. Lougheed may have refuted part of the allegations in the Statement of Claim, he did not refute all of them. Also, 211 says he merely asserts rather than articulates a defence supported by evidence. As stated, his main defence is that customers do not belong to any particular service-provider and they are free to choose whatever service provider they wish.

[34] I note, as Mr. Lougheed's counsel submitted, that he did have a defence to the Statement of Claim that stood for nine years, until it was struck out for reasons unrelated to merit. In that time, no application for summary judgment was made to any part of the defence. Mr. Lougheed was questioned once on the merits of the case and was due to be questioned again by counsel for 211 but, as described above, that never occurred.

[35] In deciding this question, I look at all of the circumstances, including the fact that the defence had been litigated for nine years, was subject to ongoing questioning and was struck out for a reason not related to the merits. I conclude (apart from the fact that the defence is struck, which I will deal with separately in a moment) that while parts of the defence may be stronger or more obvious than others, there is an arguable defence or would be but for being struck out. The test requires an arguable defence, not that every allegation from the Plaintiff be rebutted in fact and law.

[36] Further, as I will elaborate upon in a moment, Mr. Lougheed is entitled to dispute quantification of damages, which is a form of defence. In the circumstances of this case, he was not given the chance to exercise this defence.

[37] As the next step in the analysis, I must consider whether Mr. Lougheed deliberately allowed the Default Judgment to be taken. It is difficult to say that Mr. Lougheed did so when he was given no notice of the application for Default Judgment and therefore was not given any opportunity to either contest or even simply allow the Default Judgment to occur.

[38] There is a tension between how *Rule* 3.37 allows an application for default judgment to be made on a without notice basis and what the Court of Appeal, and this Court, have said about a Defendant's right to contest quantification even after noting in default or the striking out of a defence.

[39] In ***Liberty Mortgage***, the Court of Appeal stated at para 15:

> When noted in default, a defaulting party may no longer contest liability, without permission from the court, but continues to be entitled to contest damages in the case of an unliquidated claim.

[40] At para 18 of ***Fort McKay Métis Community***, the Court stated:

> In conclusion, the appellant has not met the test for opening up the noting in default, and the appeal is dismissed. The respondents are entitled to the reasonable costs of the appeal, assessed on Column 1. However, the deemed admission of liability by the appellant resulting from the noting in default should not extend to the quantification of the damages. The appellant is entitled to participate in the assessment of damages, at which time the effect that the defamatory statements had on the reputations of the respondents, and the quantification of their damages, will be determined ...

[41] In ***Boyer***, Lema J, after canvassing the applicable caselaw at paras 111-119, allowed a defendant in a family law matter whose pleadings were struck (as a contempt sanction) to participate as a defending party in the damages trial (at paras 132-133).

[42] At paras 52-57 of ***Boyer***, Lema J noted that being noted in default and having one's defence struck are functionally equivalent and lead to the same consequences, i.e., default judgment under *Rule* 3.37.

[43] I do not think I can resolve the tension between what *Rule* 3.37 says about no notice being required and the observations of the Court that the Defendant who is Noted in Default (or whose defence is struck) is still entitled to defend regarding damages. For the purposes of this case, I only make the point that Mr. Lougheed did not deliberately allow the Default Judgment to occur. He has an excuse. He did not know that it was taking place.

[44] 211 has argued that the appropriate point for determining whether Mr. Lougheed deliberately permitted the Default Judgment to proceed is when 211's then counsel attempted to serve him with the Contempt/Striking Out Application in 2021 and before that in 2020, when they attempted to serve him with the Notice of Appointment for Questioning. 211 contends that because Mr. Lougheed avoided service of both sets of documents or deliberately stuck his head in the sand so as not to know about them, such conduct on his part inevitably led to obtaining the Default Judgment in 2024. In effect, 211 argues that deliberate default part way through the chain of causation infects the entire chain.

[45] I admit to being somewhat skeptical about Mr. Lougheed's assertion during questioning on affidavit that the email from counsel's office in 2021 attaching the application documents was opened but not read because it possibly had been flagged by his employer's email system as a phishing email.[1] This explanation strikes me as somewhat like the person who has concerning medical symptoms but avoids the doctor in order not to get an adverse diagnosis.

[46] In his affidavit, Mr. Lougheed gives an alternative explanation. He deposes that the email may have been inadvertently deleted. Similarly, he did not see the email that served the striking out Order on him on September 27, 2021.

[47] After canvassing the law on unintentional deletion of email as a reasonable excuse for default, Lema J said at paras 95-97 of ***Steinkey***:

> [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.

[1] March 21, 2025 Transcript of Mr. Lougheed's Questioning on his March 10, 2025 Affidavit, p 26, lines 8-20.

> [96] I find that, absent such evidence, a party alleging accidental deletion of critical communications should not treated as having provided a reasonable, or any, excuse for the deletion.
>
> [97] Otherwise, it would 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.

[48] In both his affidavit and questioning, Mr. Lougheed expresses incredulity at how 211 obtained a Striking Out Order on the basis of failing to attend questioning when he did attend a questioning and responded to undertakings. What he does not talk about is how 211's lawyers attempted to conduct a *second* questioning.

[49] Further, he calls into question the credibility of the process server for 211's counsel in 2021, saying that she could not possibly have defeated the security measures in place at his residence building to post the Contempt/Striking Out application documents on his front door. He contends that he never got the documents.

[50] It is also true that Mr. Lougheed, upon becoming an SRL, did not update his address for service as required by the *Rules of Court*: *Rule* 2.29(3).

[51] I have my suspicions about whether Mr. Lougheed acted reasonably in not responding to either the Notice of Appointment for Questioning or the application documents for the Contempt/Striking Out Application. But those are litigation steps discrete from and antecedent to the Application for Default Judgment. I consider those discrete antecedent steps too remote in time to conclude that they meant that Mr. Lougheed deliberately allowed the Default Judgment to proceed without excuse. As I said, his excuse is that he did not know the Application for the Default Judgment was taking place. The fact that his address-for-service was not updated had no effect as no attempt was made to serve him with notice of the application for Default Judgment.

[52] There is no dispute that Mr. Lougheed satisfies the third part of the test in that he has moved promptly to set aside the Default Judgment upon learning about it through the garnishment incident at his workplace.

[53] I am therefore satisfied that he meets all three parts of the test to set aside a default judgment.

iv. Effect of the March 1, 2021 Striking Out Order

[54] I do not view Mr. Lougheed's application to the AJ as a collateral attack on the Justice's Order of March 1, 2021. At the hearing before the AJ, Mr. Lougheed's counsel acknowledged that the Striking Out Order remains in full effect and that if the Default Judgment is set aside, 211 could make another Default Judgment application.[2]

[55] The transcript of the morning chambers proceeding before the Justice on that date was part of the record for this appeal and read by me. It is quite brief. In reviewing the Notice of Application along with the transcript, it is clear that 211's then counsel was applying for a declaration that Mr. Lougheed was in contempt for not attending the second questioning after

[2] April 29, 2025 Transcript of Proceedings before Applications Judge L. R. Birkett, p 49, lines 21-33.

being served with a Notice of Appointment and seeking the remedy of striking out the Statement of Defence.

[56] There was no allegation that Mr. Lougheed was in contempt of Court because he had breached a Court Order.

[57] Counsel for Mr. Lougheed in his appeal brief at para 54, sub-paragraphs (c) through (k), outlines a number of concerns about what occurred before the Justice on that morning.

[58] The Justice did not make a finding of contempt. The Justice did strike out the Statement of Defence.

[59] I discussed with 211's current counsel how the March 1, 2021 proceeding and its outcome were irregular. Counsel told me that notwithstanding any irregularity, the Order was never appealed or otherwise challenged and thus remains a valid Order of the Court, at least until revoked. I agree with that. See ***Stout (Estate of) v Golinowski (Estate of),*** 2002 ABCA 49 at para 73; ***Mazepa v Embree***, 2014 ABCA 438 at paras 10-11 & ***Tempo Alberta Electrical Contractors Co Ltd v Man-Shield (Alta) Construction Inc***, 2025 ABCA 282 at para 26.

[60] The striking application was brought in the context of a contempt application. The striking of pleadings is a contempt remedy: *Rule* 10.53(1)(d). As a remedy for contempt, Graesser J noted in ***Piikani v McMullen***, 2024 ABKB 575 at para 96:

> Striking pleadings is likely the next level down from imprisonment. This remedy may have the consequence of dismissing a plaintiff's case, or having judgment entered against a defendant.

[61] Judgment against a Defendant, Mr. Lougheed, is exactly what happened here, but with no finding of contempt.

[62] I do not for a moment suggest that any impropriety occurred in morning chambers on March 1, 2021. It does appear to me that there may well have been some miscommunication or misunderstanding about what was before the Justice for decision.

[63] I take the discretion inherent in *Rule* 9.15 to mean that where the prescribed three-part test is met, I still may decide to allow or not allow the set-aside of a default judgment based considerations of fairness that arise from the particular circumstances and facts of the case.

[64] I have regard to two circumstances here. First, it is true that *Rule* 3.37 allows a plaintiff to dispense with serving the defendant with notice of a default judgment application after that defendant's defence has been struck out. Yet, the reported cases say the defendant, even when noted in default or where the defence is struck, is still entitled to defend quantum. Here, if that entitlement had been given effect by actual notice in October 2024, Mr. Lougheed could have brought a cross-application for dismissal for long delay. The outcome might well have been different.

[65] Second, the Default Judgment was premised on the Striking Out Order from more than three years earlier. Something unusual happened to Mr. Lougheed when he was subjected to a contempt remedy without a corresponding finding of contempt.

[66] Moreover, since judgment against him has been rendered, there is no point in challenging the Striking Out Order unless the Default Judgment is set aside. In this regard, see ***Sherwood Steel Ltd v Odyssey Construction Inc***, 2014 ABCA 320 at para 16.[3]

[67] Both of these circumstances, however fortuitous for 211, worked against Mr. Lougheed and are factors that weigh in favour of upholding the Set Aside Order.

[68] Accordingly, I uphold the AJ's decision to set aside the Default Judgment.

v. What to do about the Striking Out Order?

[69] Even though I have confirmed the setting aside of the Default Judgment, the Statement of Defence remains struck and Mr. Lougheed, without more, cannot proceed with a defence on the merits. No application was ever brought under any *Rule* to set aside the March 1, 2021 Striking Out Order. I express no opinion as to whether it is still possible to do so under any of the sub-rules in *Rule* 9.15 or whether, if made, a Justice under *Rule* 9.16 would agree to hear it, much less grant it.

[70] At this point, I do not know whether Mr. Lougheed wishes to challenge the March 1, 2021 Order or is content to contest damages going forward. That is completely up to him.

[71] *Rule* 9.15(3) allows me to impose terms as part of the Set-Aside Order. Therefore, I direct that:

- If Mr. Lougheed wishes to attempt to set aside the March 1, 2021 Striking Out Order, he has 45 days from the date of this decision to bring that application.
- If the application is attempted, 211 may, of course, argue before the Justice that the application should not be heard, or if heard, should not be granted.
- Should Mr. Lougheed decide not to attempt such an application within 45 days or if the application is unsuccessful, then 211 is at liberty, upon notice to Mr. Lougheed, to make another application for Default Judgment. In that event, Mr. Lougheed is entitled to defend as to the quantification of the damages.

G. Result

[72] On this appeal:

- The AJ's decision to dismiss 211's Action for long delay is overturned.
- The AJ's decision to set aside the Default Judgment is confirmed.
- The terms outlined in the preceding paragraph are imposed as part of the confirmation of the Set Aside Order.

[73] In view of the divided success of this appeal, each party will bear their own costs of appeal and of the original application before the AJ. However, I leave it to the parties to argue at

[3] Per the Court of Appeal at para 16: "The point is that the doctrine of merger prevents a claimant from re-litigating a cause of action that has already been adjudicated. Although the nomenclature "merger" captures the notion of the claim having been merged into the original judgment, a more apt description of the effect of the doctrine is "exhaustion"; that is, upon adjudication, the cause of action is exhausted such that it ceases to exist and cannot support re-litigation."

the end of the Action whether 211's delay between March 1, 2021 and October 3, 2024 should have costs consequences for either side.

Heard on the 23rd day of January, 2026.
Dated at the City of Edmonton, Alberta this 4th day of February, 2026.

Douglas R. Mah
J.C.K.B.A.

Appearances:

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Roger Stephens
Stephens Mah Toogood
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