CITATION: BMO v. Andrzej and Associates Property Management Inc., 2025 ONSC 1556
COURT FILE NO.: CV-23-00002971-0000
DATE: 2025-03-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bank of Montreal, Plaintiff

AND:

Andrzej and Associates Property Management Inc. and Miguel Russell, Defendants

BEFORE: Kurz J.

COUNSEL: Jakob Bogacki for the Plaintiff

No one appeared for the Defendant

HEARD: February 6, 2025, by video conference

ENDORSEMENT

Introduction

[1] This is a motion for default judgment by the Plaintiff bank ("BMO") against both the corporate Defendant, Andrzej and Associates Property Management Inc. ("AAPMI") and the personal Defendant, Miguel Russell ("Russell"). BMO's claim is based on a dishonoured cheque deposited into the BMO corporate account of AAPMI. There is no question that AAPMI is liable for the amount of the dishonoured cheque.

[2] Rather, the issues in this motion are:

1. Should the court grant BMO judgment and a declaration of fraud against Russell, personally, which survives bankruptcy pursuant to the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, ("*BIA*") s. 178?

2. Should Russell be personally liable to BMO, jointly and severally with AAPMI, for the claim in this action under the Ontario *Business Corporations Act*, R.S.O. 1990, c B.16 ("*OBCA*") s. 248?

3. Should the court award punitive damages against the Defendants?

Background

[3] On June 29, 2023 a cheque in the amount of $36,156.74 (the "Cheque") was deposited into the business banking account of AAPMI (the "Account"). The cheque stated on its face that it was drawn by The Working Centre and payable to AAPMI. Various withdrawals and Interac e-Transfers were made from the Account over the following 32 days, with no further deposits. By July 31, 2023, when the Cheque was dishonoured, the Account was $36,128.68 in overdraft.

[4] Pursuant to the banking agreement between BMO and AAPMI, entitled "Agreement for Business Banking: Execution and Account Information" (the "Banking Agreement"), the Account was not authorized to be in an overdraft position. In the event of any overdraft, interest on the amount of overdraft is payable at the rate of 21% per annum.

[5] The Agreement also incorporates BMO's Banking Guide, which states:

> You will maintain procedures and controls to detect and prevent thefts of Instruments or losses due to fraud or forgery involving Instruments. You will diligently supervise and monitor the conduct and work of all Authorized Signatories and all agents and employees having a role in the preparation of your Instruments and your bank statement reconciliation or other banking functions.

[6] BMO claims that the cheque was dishonoured because of "material alteration". However, the cheque, on its face, does not display any material alteration. The only evidence of material alteration offered by BMO is an internal form which states that the Cheque was returned due to "material alteration". The form does not offer any particulars of the alleged alteration. I also note that the signature on the back of the Cheque does

not appear to match the signature of Russell found on BMO's Certificate and Authorization Form dated November 6, 2020. That form confirms that AAPMI has authorized, by resolution, the opening of the Account and that Russell is an authorized signing officer for the Account.

Pleadings in the Statement of Claim

[7] BMO's statement of claim seeks judgment as follows:

1. $36,807.33 upon the following bases:

    i. Against Russell for oppressive conduct against BMO under *OBCA* s. 248;

    ii. Against both Defendants for the face amount of the Cheque plus 21% annual interest from July 31, 2023, the date it was dishonoured;

2. Against both Defendants, $5,000 in punitive damages; and

3. Against both Defendants (although it is mostly relevant to Russell) a "Declaration that the debt and liability of the Defendants herein results from obtaining property or services by false pretences or fraudulent misrepresentations".

[8] BMO further pleads:

1. Following the deposit of the Cheque into the Account[1], "Russell made various withdrawals and Interac e-Transfers that depleted the funds in the Account";

[1] Which BMO refers to as the "Bad Cheque"

2. “The Bad Cheque was subsequently dishonoured by the issuing bank, Royal Bank of Canada [“RBC”], and was returned on or about July 31, 2023 due to a material alteration”, resulting in the Account being overdrawn;

3. “Russell perpetuated a fraud upon the Bank. Russell deposited the Bad Cheque into the Account and then withdrew the Bank’s funds when he knew or ought to have known that the Bad Cheque would be returned. He ensured the Bank’s funds would be used for his benefit prior to the Bad Cheque being returned which caused the unauthorized overdraft.”

4. Russell deposited the Bad Cheque with the intent to obtain property from the Bank under fraudulent representations and false pretenses.

5. As a result, “Russell cannot shield himself behind the corporate veil of the Company and is therefore jointly and severally liable to the Bank with the Company for the amounts claimed herein.”

6. In addition or in the alternative, “Russell, in depositing the Bad Cheque into the Account, exercised his powers as a director of the Company in a manner that was oppressive, unfairly prejudicial to, and that unfairly disregarded the interests of the Bank” pursuant to OBCA s. 248. Thus, he is jointly and severally liable, with AAPMI to BMO.

7. The conduct of the Defendants “was high-handed, malicious, and reprehensible, and was carried out in wanton and reckless disregard for the Bank’s rights and accordingly is deserving of sanction by way of punitive damages.”

Rule 19.06 and Deemed Admissions

[9] Rules 19.05 and 19.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, *as am.* deal with the consequences of the noting a defendant in default, including deemed admissions by the defendant(s). Under Rule 19.05, a plaintiff may move for judgment

against a defendant who has been noted in default but judgment has not been signed The Rule reads as follows:

> **19.05** (1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed.
>
> (2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages.
>
> (3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action or order that the action proceed to trial and that oral evidence be presented.
>
> (4) Where an action proceeds to trial, a motion for judgment on the statement of claim against a defendant noted in default may be made at the trial.

[10] From the wording of the rule, the deemed admissions which arise with the noting of default reflect admitted facts, not conclusions of law.

[11] However, under r. 19.06: "[a] plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment."

[12] As Favreau J., as she then was, describes it in *Canada Mortgage and Housing Corp. v. CMC Medical Centre Inc.*, 2017 ONSC 7551, at para. 14, this rule "requires the judge to inquire into whether the deemed factual admissions resulting from the default support a judgment on liability as well as damages."

[13] In support of that statement, Favreau J. cited the decision of Himel J. in *Fuda v. Conn*, [2009] O.J. 188 (S.C.J.), who wrote at para 16:

> [A]lhough the Rules provide the consequences for noting in default, the court has the jurisdiction and the duty to be satisfied on the civil standard of proof that the plaintiff is able to prove the claim and damages. If the court finds the evidence to be lacking in credibility or lacking "an air of reality", the court can refuse to grant judgment or grant partial judgment regardless of fault.

[14] In *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, D.M. Brown J., as he then was, stated at para. 14 that the court considering a motion for judgment must engage in the following enquiry:

> (i) What deemed admissions of fact flow from the facts pleaded in the Statement of Claim?
>
> (ii) Do those deemed admissions of fact entitle the plaintiffs, as a matter of law, to judgment on the claim?
>
> (iii) If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitles it to judgment on the pleaded claim?

[15] As I wrote in *Bank of Montreal v. Mathivannan*, 2021 ONSC 2538 at para. 16, after considering the authorities cited above:

> **16** As r.19.06 implicitly demonstrates, while the facts set out in the statement of claim are deemed to have been admitted, the legal consequences of those facts are not. As Corkery J. wrote in *Nikore v. Jarmain Investment Management Inc.*, 2009 CarswellOnt 5258 (S.C.J.), at para. 20:
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> > Under Rule 19.02 a defendant noted in default is deemed to have admitted all allegations of *fact* in the statement of claim. Allegations of law or mixed fact and law do not bind the court as admissions.

<u>Issue No. 1:</u> Should the court grant BMO a judgment and a declaration of fraud against Russell, personally*?*

[16] While allegations of civil fraud require only proof on a civil balance of probabilities, the trier of fact is entitled to consider the cogency of the evidence and scrutinize it with greater care when serious allegations such as fraud are proffered against a party: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 (S.C.C.), at p. 170, per Laskin C.J.

[17] Further, as McClung J.A. wrote in *Canada (Attorney General) v. Bourassa (Trustee of)*, 2002 ABCA 205, at para. 9:

> Fraud and its proof have their own distinct biosphere. In commercial disputes, allegations of fraud are frequently levelled. But they must be levelled with caution. At common law the claim must be specified and with particulars, or it will

> be struck: see Canadian Abridgement, vol. R17D, (2d) ed. (Toronto: Carswell, 1991) at Digest 1689 et seq. Regarding evidence of fraud, Kerr on Fraud and Mistake notes that; "fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established."

[18] McClung J.A. concluded on the point at para. 10 that "[h]e who alleges must prove. It is that simple."

[19] A plaintiff asserting a claim for fraud must prove the following elements on a balance of probabilities: (i) a false representation made by the defendant; (ii) some level of knowledge of the falsehood of the representation (whether through knowledge or recklessness); (iii) that the false representation caused the plaintiff to act; and (iv) that the plaintiff suffered a loss: *Bank of Nova Scotia v. Rosario Rosado,* 2024 ONSC 4395, at para. 16 citing *Bank of Montreal v. 1886758 Ontario Inc*., 2022 ONSC 4642, at para. 33.

[20] Nonetheless, a mere pleading of fraud, even in a motion based on a noting of default, is not sufficient to prove fraud. The facts deemed admitted and those proven must align with the law of fraud.

[21] Here, the evidence of fraud is scant. Even the deemed admissions from the undefended statement of claim; that it was Russell who cashed the Cheque and was responsible for the various payments and withdrawals from the Account, are insufficient to meet the bar of fraud, which still rests on the party alleging it.

[22] The clearest claim of fraud in this action is BMO's assertion that the Cheque was dishonoured because Russell materially altered it. If so that would likely be a clear indicia of fraud. But, based on the pleading alone, there are three problems with that assertion:

1. First, BMO's pleading is that the Cheque was dishonoured by RBC "and was returned on or about July 31, 2023 due to a material alteration". That pleading is vague as to whether the finding that there was a material alteration in the cheque was RBC's contention or that of BMO. Either way, the grounds for making the claim of material alteration are not set out in the pleading;

2. Second, BMO's statement of claim does not plead that it was Russell who materially altered the cheque, let alone that he did so deliberately. It leaves open the possibility that the material alteration was the result of an unintentional act by an employee of BMO or RBC.

3. Further, as stated above, the form of material alteration is not specified.

[23] I add that on its face, the Cheque (which is reproduced in BMO's motion materials) shows no obvious signs of material alteration. BMO's supporting affidavit for this motion, sworn by a bank account manager who does not claim any personal knowledge of the matter in issue between the parties, offers no details of the material alteration pleaded by BMO. Rather, it only offers a BMO internal form which simply offers "material alteration" as the cause of the dishonouring of the Cheque.

[24] In short, the only evidence of fraud offered by BMO is the deposit of one cheque, for $36,156.74, which was dishonoured over a month later, and various payments and withdrawals which were made in the 32 days before the cheque was dishonoured.

[25] While the Bank pleads that Russell knew or should have known that the Cheque would be dishonoured, it fails to state why he would be aware of that fact, other than the claim of material alteration. The mere fact of depositing a single cheque, which is later dishonoured, even if the funds that it covers are withdrawn before the default, is not in itself, proof of fraud.

[26] In short, even in the face of the deemed admissions which arise from the noting of default, I cannot find that BMO has proven fraud against Russell. Thus I cannot pierce the corporal veil of AAPMI to find that Russell is personally liable to BMO based on its allegations of fraud. I certainly cannot make the declaration of fraud against Russell claimed by BMO.

Issue No. 2: Should Russell be personally liable to BMO, jointly and severally with AAPMI, under O*BCA* s. 248?

[27] BMO argues in addition or in the alternative that the court should impose personal liability on Russell for the Cheque based on *OBCA* s. 248's oppression provisions. The relevant provisions of *OBCA* s. 248 read as follows:

> **Oppression remedy**
>
> **248** (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).
>
> **Idem**
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.
>
> **Court order**
>
> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
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> …
>
> (j) an order compensating an aggrieved person;

[28] In *Wilson v. Alharayeri*, 2017 SCC 39, at para. 24 the Supreme Court of Canada summarized the test for determining both whether conduct is oppressive and the manner

in which the relevant statutory oppression provisions[2] allow for personal liability by corporate directors:

1. First, the complainant must "identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held"

2. Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of "any security holder, creditor, director or officer.

[29] At para. 47 of *Wilson*, the Court reiterated a “two-pronged approach” to personal liability by a corporate director in the face of an oppression claim:

1. the director or officer must be implicated in the oppressive conduct – that is, the director must have exercised or failed to exercise his or her powers to effect the oppressive conduct.

2. Second, personal liability must be fit in all the circumstances. Fitness turns on fairness and equitable considerations. Bad faith and personal benefits are factors to consider. The order made should go no further than necessary to rectify the oppression.

[30] The court added, at para. 48, that the first requirement, implication in oppressive conduct, “is an inadequate basis for holding a director personally liable.” The second prong must be met. That is, “the imposition of personal liability be fit in all the circumstances.” At paras. 32 and 49, the court adopted five potential factors cited by author, Markus Koehnen[3] , as a non-exclusive list of relevant considerations regarding personal liability:

1. Where directors obtain a personal benefit from their conduct.

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[2] While the court in *Wilson* was considering the oppression provisions of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, any difference between those provisions and those of the *ONCA* are irrelevant to the issues in this motion.

[3] Now Justice Markus Koehnen of this court, *Oppression and Related Remedies*, Toronto: Thomson/Carswell, 2004, at p. 201

2. Where directors have increased their control of the corporation by the oppressive conduct.

3. Where directors have breached a personal duty they have as directors.

4. Where directors have misused a corporate power.

5. Where a remedy against the corporation would prejudice other security holders. [Footnotes omitted.]

[31] The court added the following points at para. 50:

1. The five factors are not a "closed list to be slavishly applied".

2. "Neither a personal benefit nor bad faith is a necessary condition in the personal liability equation."

3. "The appropriateness of an order under s. 241(3) turns on equitable considerations, and in the context of an oppression claim, '[i]t would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise'" [citation omitted]

4. "[P]ersonal benefit and bad faith remain hallmarks of conduct properly attracting personal liability." One is usually present when personal liability is found.

[32] During the course of argument, I asked BMO counsel to point me to any cases in which dishonoured cheques have resulted in personal liability under the OBCA's oppression provisions. He provided the court with two unreported decisions, both obtained by his firm.

[33] In *Bank of Montreal v. 10041947*, Toronto Court File No. CV-23-00710621-0000, December 13, 2024, Brownstone J. of this court made a declaration of fraud after the defendants (a corporation and its principal) had deposited two cheques, totalling $139,782.42 into a corporate bank account. While some funds were returned to the corporate account, $43,071.83 remained owing. Brownstone J. found that the personal defendant deposited the two cheques into the account knowing they were not payable to him, with the intent that BMO rely on the cheques to provide him money in circumstances

where he knew or ought to have known the cheques were not properly payable to him. He knew the cheques would not be honoured, and purposely deposited them into the account as part of a fraudulent scheme to defraud the bank. Based upon the same findings, Brownstone J. also made a declaration of oppression and personal liability against the personal defendant under the *OBCA.*

[34] In *Bank of Montreal v. Govindan Reno Inc., Govindan Muthukumaran,* unreported, Milton Court File No. CV-23-00002643-0000, September 27, 2024, Yamashita J. of this court made a finding of fraud against both the corporate and personal defendant when they deposited two cheques on the same day, totalling $118,920.44, which were subsequently dishonoured. Yamashita J. found that the personal defendant "made various withdrawals that do not appear to have been spent on normal business transactions". The day after the cheques were deposited, they were dishonoured, but by that time the corporate account was $33,926.77 in unauthorized overdraft. In the circumstances, she granted a declaration of fraud (but not a declaration that her judgment would survive bankruptcy) against the defendants as well as an order of personal liability under *OBCA* s. 248.

[35] Here, unlike in the two previous cases, I have not made a finding or declaration of fraud against Russell. In both of the cases relied upon by BMO in this motion, the facts behind the finding of fraud is the basis of the finding and declaration under *OBCA* s. 248.

[36] I cannot make a finding of oppression here based upon the facts before me, which involve a single dishonoured cheque, where the basis offered for the dishonour is not proven, it took over a month for the cheque to be dishonoured and the withdrawals from the corporate account took place gradually over that period of time. Based on those findings, it is possible that the cheque dishonour is innocent and that the withdrawals were made without knowledge of the dishonour. I cannot find that a declaration of oppression and personal liability by Russell would be equitable under *OBCA* s. 248.

<u>Issue No. 3:</u> Should the Court Award Punitive Damages Against the Defendants?

[37] In *Whiten v. Pilot Insurance Co.,* 2002 SCC 18**,** [2002] 1 S.C.R. 595, at para. 36, the Supreme Court of Canada, citing *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196, described the purpose and scope of punitive damages awards as follows: **"**Punitive damages are awarded against a defendant in exceptional cases for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency'".

[38] In *Bank of Nova Scotia v. Rosario Rosado*, Charney J. outlined the applicable principles for an award of punitive damages as follows, at paras. 20-23:

> **20** Punitive damages are an extraordinary remedy. The Supreme Court has held that they should receive "the most careful consideration" and their award "should be most cautiously exercised". Further, "conduct meriting punitive damages awards must be 'harsh, vindictive, reprehensible and malicious', as well as 'extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment'": *Honda Canada Inc. v. Keays*, 2008 SCC 39, at para. 68.
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> **21** In *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, the Court of Appeal stated, at para. 59:
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> > Punitive damage awards are not compensatory. They are meant to punish the defendant in exceptional cases where the defendant's conduct has been "malicious, oppressive and high-handed" and "represents a marked departure from the ordinary standards of decent behaviour", see *Whiten*, at para. 36.
>
> **22** A Court may award punitive damages on a motion for a default judgment: *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416, *Bank of Montreal*, para. 34.
>
> **23** Punitive damages are awarded only where compensatory damages are insufficient to deter the conduct at issue.

[39] In *Bank of Montreal v. 10041947*, Brownstone J. granted the plaintiff bank punitive damages of $5,000, finding:

> the circumstances here are egregious; the conduct is reprehensible and deserving of denunciation and deterrence. While the amount sought in this case is not large,

> parties should be aware that this type of conduct will be sanctioned not merely by ordering the funds owing to be repaid, but by awards of punitive damages.

[40] Here, considering the principles set out above, I find that this is not a case for punitive damages. Based on the evidence before me, I have not made a finding of either fraud or oppression. Further, I cannot find that the conduct of the Defendants is malicious, oppressive or high-handed. Nor can I find that it offends the court's sense of decency. Rather, this is a case of a dishonoured cheque and the overdraft on a corporate banking account.

Costs

[41] Regarding costs, I find that this is a case for partial indemnity costs in light of BMO's mixed success and the fact that the majority of this case concerned BMO's claim for personal indemnity against Russell. Having reviewed BMO's bill of costs, I find that costs fixed at $7,500 are fair, reasonable and proportional in the circumstances. I so order.

Conclusion:

[42] For the reasons cited above, I grant judgment to BMO against Andrzej and Associates Property Management Inc. for:

1. Damages of $36,156.74.
2. Costs of $7,500.
3. Pre-judgment interest on the damages award at 21% per annum commencing July 31, 2023.
4. Post-judgment interest on the damages award at 21% per annum.
5. Post-judgment interest on the costs award per the *Courts of Justice Act* R.S.O. 1990, c. C. 43.

[43] I dismiss the balance of the claims against Russell.

Justice Marvin Kurz

Date: March 11, 2025