Court of King's Bench of Alberta

Citation: Wild Rose Meats Inc v Andres, 2025 ABKB 487

Date: 20250821
Docket: 1101 05441
Registry: Calgary

Between:

Wild Rose Meats Inc

Applicant

- and -

Dean Andres and Andres Incorporated

Respondents

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] Dean Andres, the Respondent, performed important roles for the Applicant, Wild Rose Meats Inc ("Wild Rose"), through his corporation, Andres Incorporated, pursuant to a contract. Wild Rose sued Andres Incorporated for breach of contract and Mr. Andres in his personal capacity for breach of fiduciary obligation. Andres Incorporated and Mr. Andres were found in contempt of court for failing to answer undertakings and their Statement of Defence was struck. On November 25, 2013, Wild Rose obtained a default judgment against Mr. Andres and Andres Incorporated for $3,602,475. On July 14, 2022, Mr. Andres filed an assignment into bankruptcy in the Court of King's Bench for Saskatchewan. Mr. Andres was granted an absolute discharge from bankruptcy by the Registrar in Bankruptcy on April 10, 2025.

[2] The question to be decided is whether Mr. Andres' debt to Wild Rose survives his discharge from bankruptcy. Bankruptcy gives debtors a fresh start except where the debt was the result of certain kinds of bad conduct. The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178(1)(d) ("*BIA*") provides that a debt "arising out of ... defalcation while acting in a fiduciary capacity" is not released by a discharge from bankruptcy. Did the $3.6 million judgment debt owed by Mr. Andres to Wild Rose arise out of defalcation while acting in a fiduciary capacity? Wild Rose argues in the alternative that Mr. Andres' judgment debt survives his discharge from bankruptcy pursuant to *BIA* s 178(1)(e) because it was the result of Mr. Andres obtaining property or services through fraudulent misrepresentations.

II. Background

[3] Mr. Andres owned 50% of Andres Incorporated and his wife owned the other 50%.

[4] Andres Incorporated was a minority shareholder in Wild Rose and a party to a Shareholders' Agreement dated December 22, 2005.

[5] Andres Incorporated and Wild Rose entered into a Consulting Agreement dated December 22, 2005. Pursuant to the Consulting Agreement Wild Rose engaged Andres Incorporated as a "consultant" which meant his role was "as an independent contractor and not as an employee or agent...." Mr. Andres personally guaranteed the "due and punctual performance by Andres Incorporated of each and every obligation arising under this Agreement...."

[6] The Consulting Agreement contained a non-competition covenant wherein Andres Incorporated acknowledged that it would obtain knowledge of Wild Rose's business and that competition against Wild Rose would harm Wild Rose. The Consulting Agreement required Andres Incorporated to abide by the confidentiality and non-competition provisions of the Shareholders' Agreement.

[7] Mr. Andres was styled the "Chief Operating Officer" of Wild Rose until December 1, 2010, when he resigned and terminated the Consulting Agreement. Wild Rose pleaded that "[i]n his position as consultant and COO, Andres' principal responsibilities were to secure supply of bison to Wild Rose."

[8] The Statement of Claim filed April 18, 2011 conflated the legal personalities of Mr. Andres and Andres Incorporated by defining them collectively as "Andres." The failure to distinguish between Mr. Andres and Andres Incorporated is unhelpful, but the pleading can be understood to assert breach of contract against Andres Incorporated and breach of fiduciary obligation against Mr. Andres. Since the contractual provisions alleged to have been breached are the non-competition covenants in the Consulting Agreement and Shareholders' Agreement, there is considerable overlap with the breach of fiduciary obligation pleading.

[9] Wild Rose pleaded "[i]n his position as consultant and COO, Dean Andres was a key employee of Wild Rose and was responsible for communicating with and securing supply from existing and new suppliers." Further, "Andres was provided access to all of Wild Rose's contacts, pricing lists and supplier lists.... He ... was the primary person who had regular contact with Wild Rose's supplier customers." Accordingly, Wild Rose asserted that, "Dean Andres owed fiduciary duties to Wild Rose...." Wild Rose pleaded that Mr. Andres breached his

fiduciary obligations by competing against Wild Rose by selling bison to Wild Rose's competitors and customers.

[10] Wild Rose filed an application for an injunction to restrain Andres Incorporated's alleged breaches of the Consulting Agreement and Shareholders' Agreement and Mr. Andres' alleged breaches of his fiduciary obligations. The injunction application was heard on August 24, 2011 and a decision was rendered by Justice Romaine on November 4, 2011: ***Wild Rose Meats Inc v Andres***, 2011 ABQB 681. Justice Romaine granted an injunction enforcing the restrictive covenants in the Consulting Agreement and Shareholders' Agreement on an interim basis pending trial. She declined to base the injunction on the alleged breach of fiduciary obligations. She noted at para 62, "[g]iven the decision I have reached on the application for injunctive relief on the basis of breach of restrictive covenants, I do not need to consider the alternate argument of breach of fiduciary duty."

[11] Mr. Andres and Andres Incorporated defended the action and commenced a counterclaim. During a cross-examination on the Affidavit of Records, Mr. Andres gave several undertakings but then failed to answer those undertakings. Wild Rose obtained an order compelling Mr. Andres and Andres Incorporated to answer the undertakings from Justice Tilleman on July 22, 2013. They failed to answer the undertakings and were found in contempt by Justice Poelman on September 10, 2013. Justice Poelman gave Mr. Andres and Andres Incorporated until September 25, 2013 to answer the undertakings after which their Statement of Defence was struck.

[12] Wild Rose noted Mr. Andres and Andres Incorporated in default and subsequently applied for default judgment before Justice Yamauchi. The Judgment Roll granted November 25, 2013, like most judgment rolls, states the quantum of damages, interest, and costs, but does not specify which of the pleaded causes of action justify the damages award.

III. Does Mr. Andres' Debt Survive Discharge from Bankruptcy?

A. What Kinds of Debts Survive Discharge from Bankruptcy?

[13] Justice Jamal writing for the majority in ***Piekut v Canada (National Revenue)***, 2025 SCC 13 at para 26 affirmed that the *BIA* has two high level purposes: (1) "to equitably distribute a bankrupt's assets among their creditors" and (2) "to financially rehabilitate the bankrupt." Financial rehabilitation means giving a debtor a "fresh start" free from debt.

[14] The fresh start principle, Justice Jamal explained, "must yield to certain overriding social policy objectives that require that certain claims be protected against the discharge" (quoting R.J. Wood, *Bankruptcy and Insolvency Law*, 2d ed, (Toronto: Irwin Law, 2015) at 312-13). The claims protected against discharge are listed in *BIA* s 178(1) which provides that:

> (1) An order of discharge does not release the bankrupt from
>
> ...
>
> > (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

[15] Justice Côté writing for the majority in ***Poonian v British Columbia (Securities Commission)***, 2024 SCC 28 at para 26 held that "[t]he exceptions in s. 178(1)(a) through (h) must be interpreted narrowly and applied only in clear cases." She explained at para 27 that this approach is required because "'the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate.' As a result, '[w]here there is doubt as to whether a creditor falls within an exemption, the benefit should go to the bankrupt.'" [citations omitted]. She added at para 26 that "[s]ection 178(1) is not 'a catchall of debts arising from morally objectionable conduct,' but rather sets out 'categories of specific wrongful conduct that give rise to debts that are not released, and specifies the criteria to be applied.'"

[16] The law is unclear whether to show that a debt is covered by *BIA* s 178(1)(d) a creditor must establish that the debt resulted from dishonest or immoral conduct. One line of cases holds that "[a]n application under section 178(1)(d) of the *BIA* must be supported by a finding of some dishonesty, wrongful act, moral turpitude, or reprehensible conduct, in connection with defalcation while acting in a fiduciary capacity": ***Hillsboro Ventures Inc v Ceana Development Sunridge Inc,*** 2024 ABKB 658 at para 119 citing ***Musat (Re)***, 2020 ABQB 215 at para 20; see also, ***Re Munro***, 2014 ABQB 636 at paras 48-49 leave to appeal dismissed ***Echino v Munro***, 2014 ABCA 422; ***Re McAteer***, 2007 ABCA 137 at para 28 and ***Simone v Daley***, (1999) 43 OR (3d) 511 (CA). Janis P. Sarra, Geoffrey Morawetz, and Lloyd W. Houlden, *Bankruptcy and Insolvency Law of Canada*, 4th ed, (Toronto: Thomson Reuters, online) at §7.196 explain that this line of cases stands for the proposition that defalcation "requires some element of dishonesty, wrongdoing or misconduct and that breach of a fiduciary obligation alone is not sufficient."

[17] Another line of authority, following ***Smith v Henderson***, (1992) 64 BCLR (2d) 144 (CA), holds that no dishonesty or immoral conduct is required for a debt to come under *BIA* s 178(1)(d). This line of cases has been followed in Alberta: see, ***Confederation Life Insurance Co v Waselenak***, [1998] 5 WWR 712 (Alta QB) aff'd 2000 ABCA 136 at para 3. This approach was recently followed in ***Melanson v Melanson***, 2024 BCSC 1943 at para 24. *Bankruptcy and Insolvency Law of Canada* at §7.196 explains that these cases stand for the proposition that "[d]efalcation, while acting in a fiduciary capacity, does not necessarily entail a dishonest or wrongful act: it is sufficient if there is a failure by a fiduciary to meet an obligation, even if that failure results from negligence or incompetence."

[18] The root cause of the confusion in the law is the *BIA*'s use of the word "defalcation" which is categorized by most dictionaries as "archaic." Legg JA in ***Smith v Henderson*** at para 21 adopted a definition of defalcation from *Black's Law Dictionary* to the effect that defalcation meant "the act of a defaulter ... failure to meet an obligation...." Such a meaning is so loose as to potentially encompass all manner of breaches by a fiduciary, including negligence, which would undermine what is supposed to be a narrow exception to the fresh start principle. The loose definition of defalcation in ***Smith v Henderson*** is wrong as a matter of the historical use of the word defalcation in Canadian law and offends the interpretive direction given in ***Poonian***.

[19] The word "defalcation" in Canadian case law from the late nineteenth century onward is used to describe the dishonest handling of money by a person in a position of trust. Though not a bankruptcy case, the decision of Justice Anglin in ***R v Minchin***, (1914) 18 DLR 340 (SCC) illustrates the meaning of defalcation in common legal usage. Minchin, an assistant municipal treasurer, was charged with theft of $5,000 from the City of Calgary. Anglin J concluded at 345-46:

> The evidence established that the moneys taken in by the assistants of the accused were, each evening, accounted for and handed over to him. Although the method in which this was done was certainly loose, there was sufficient [evidence] to justify a conclusion by the jury that the moneys which were taken had come to the hands of the accused. When it was established to their satisfaction that the falsification of the books, which was obviously done for the purpose of concealing the defalcation which had taken place, was the act of the accused, they had evidence of almost irresistible cogency that he had committed the defalcation.

[20] The US Bankruptcy Code, Chapter 5, §523 provides that "[a] discharge under section ... of this title does not discharge an individual debtor from any debt – ... (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny...." This provision dates to 1867 and was likely the model for what is now *BIA* 178(1)(d). The question of the meaning of defalcation in §523 came before the US Supreme Court in ***Bullock v BankChampaign, N.A.***, 269 US 267 (2013). The specific issue in ***Bullock*** was the mental state required for defalcation. The appellant asked the court "whether the bankruptcy term 'defalcation' applies 'in the absence of any specific finding of ill intent...'" (at 271). This is the same question that has divided Canadian courts.

[21] Justice Breyer, writing for the Court in ***Bullock***, rejected broad definitions of defalcation, including the *Black's Law Dictionary* definition adopted in ***Smith v Henderson***. He held at 273 that "where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong." He explained at 273-74 that "intentional [wrongdoing] is not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent." Justice Breyer's concept of intentional wrongdoing includes what we call willful blindness and reckless indifference. Breyer J's interpretation of defalcation is consistent with that in ***Simone v Daley*** and persuades me that the loose definition of defalcation stated in ***Smith v Henderson*** is incorrect and should not be followed.

[22] A second definitional question relevant to the present case is whether defalcation covers all manner of fiduciary breaches or if it is limited to specific kinds of fiduciary breaches. The key words in *BIA* s 178(1)(d) – fraud, embezzlement, misappropriation, and defalcation – are similar but not synonyms. Justice Lambert explained in ***SMAB v JNH***, [1995] 2 WWR 744 at para 21 that "the words 'fraud, embezzlement, misappropriation or defalcation' in s. 178(1)(*d*) of the *Bankruptcy and Insolvency Act* must be read in accordance with the principle of statutory interpretation usually referred to as *noscitur a sociis*. The meaning of each of the words is coloured by its association with the others. They are words of fiscal impropriety." This approach is consistent with Justice Côté's direction in ***Poonian*** to interpret *BIA* s 178(1) narrowly. Defalcation as used in *BIA* s 178(1)(d) means wrongful conduct by a fiduciary in relation to money or property that is akin to money under the fiduciary's management or control.

B. Did Andres Defalcate While Acting in a Fiduciary Capacity?

[23] A default judgment results in a deemed admission of the plaintiff's pleading: ***Trinier v Shurnaik***, 2011 ABCA 314 at paras 20-23. This rule, however, applies to the facts pleaded, not to the plaintiff's characterization of the causes of action. Where *BIA* s 178(1)(d) is in issue, the Court must look to the substance of the debt in question. Nordheimer JA in ***Lawyers' Professional Indemnity Company v Rodriguez***, 2018 ONCA 171 clarified that in the context of

a debt arising from a default judgment a judge may consider material on the court file to ascertain the substance or nature of the debt. Nordheimer JA explained at para 6:

> To be clear, in characterizing a judgment debt under s. 178(1)(d), a judge is not confined just to the cause of action pleaded in the action that produced the judgment debt. The issue under s. 178(1)(d) relates to the substance of the judgment debt. The judge can therefore look at the material filed that led to the obtaining of the judgment debt, including the facts pleaded in support of the action that led to the judgment debt, any evidence that was presented at the time to secure that judgment debt, and any reasons that might have been given.

[24] Wild Rose alleged that Andres Incorporated competed with Wild Rose contrary to non-competition covenants and that Mr. Andres breached his fiduciary obligations to Wild Rose by competing with Wild Rose. Though two causes of action were pleaded, success on only one cause of action would be sufficient to justify the damages award in the default judgment. Indeed, Justice Romaine proceeded on the application for the interim injunction by only considering the claim in respect of the non-competition covenants.

[25] Looking to the material on the court file, including the Consulting Agreement and the Shareholders' Agreement, it is not clear to me that Mr. Andres was a fiduciary. The criteria for identifying fact-based fiduciary relationships are:

(a) The fiduciary has scope for the exercise of some discretion or power;

(b) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;

(c) The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power; and

(d) The existence of an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries.

See ***HRC Tool & Die Mfg Ltd v Naderi***, 2016 ABCA 334 at para 6 and ***Starratt v Chandran***, 2024 ABKB 253 at para 47.

[26] Wild Rose's statement of claim against Mr. Andres pleads the first three criteria. The difficulty with Wild Rose's pleading is with the fourth criteria which concerns the nature of the undertaking. Mr. Andres was not an employee of Wild Rose because he supplied consulting services through Andres Incorporated. Wild Rose did not plead that Mr. Andres acted in a personal capacity distinct from Andres Incorporated nor is there any evidence to that effect in the court file. The allegation that he used an officer title is not sufficient because it is consistent with the duties assigned to him pursuant to the Consulting Agreement. Critically, there is no pleading to the effect that Mr. Andres undertook in his personal capacity to act in the best interests of Wild Rose. Moreover, Wild Rose knew that it was contracting with Andres Incorporated, not Mr. Andres, and it protected itself by requiring a personal guarantee from Mr. Andres. I am not satisfied that the deemed admission of the facts in the Wild Rose pleading means that the default judgment amounts to an implicit finding that Mr. Andres breached fiduciary obligations to Wild Rose.

[27] Wild Rose sought to recover damages for breach of a non-competition covenant and breach of a fiduciary obligation not to compete. There was no allegation that Mr. Andres

diverted or dissipated money or other property, which is the essence of defalcation. The facts asserted by Wild Rose against Mr. Andres do not meet the test for defalcation which is:

> (a) the money taken by the debtor to create the debt must have belonged to someone other than the debtor;
>
> (b) the taking must involve a wrongful use of the money; and
>
> (c) the debtor must have received the money as a fiduciary.
>
> *Bankruptcy and Insolvency Law of Canada* at §7.196.

[28] Mr. Andres did not engage in defalcation; instead, Andres Incorporated wronged Wild Rose by competing against them when it had contracted not to do so. Mr. Andres is accountable for Andres Incorporated's breach of contract because of his personal guarantee. But that is the extent of his responsibility to Wild Rose. Even if I had found that Mr. Andres had breached a fiduciary obligation not to compete with Wild Rose, that would not constitute defalcation as it was not a fiduciary breach concerning the management of money or financial assets. To find that Mr. Andres' judgment debt to Wild Rose was not discharged pursuant to *BIA* s 178(1)(d) would be, in effect, to find that judgment debts originating from any kind of fiduciary breach may never be discharged in bankruptcy and that cannot be correct.

IV. Fraud

[29] Wild Rose asserts that the debt survives Mr. Andres' discharge from bankruptcy pursuant to *BIA* s 178(1)(e). *BIA* s 178(1)(e) provides that an order of discharge does not release the bankrupt from "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation...."

[30] Wild Rose, however, did not plead fraudulent misrepresentation. Wild Rose attempts to recharacterize the facts pleaded and found in affidavits on the court file as supporting a cause of action of fraudulent misrepresentation. As I explained earlier, the Statement of Claim discloses two causes of action: (1) breach of contract against Andres Incorporated; and (2) breach of fiduciary obligation against Mr. Andres.

[31] Justice Côté in ***Poonian*** explained at paras 69 that a creditor must establish false pretences or fraudulent purposes for the purposes of *BIA* s 178(1)(e) with "clear and cogent" evidence. Wild Rose has not satisfied this evidential burden. Even assuming the alleged statements to have been made and be false, there is no evidence to connect the statements to the obtaining of property or services. Without such evidence, the Court, more than ten years after a default judgment issued, will not engage in a reimagining of the action to deny Mr. Andres a fresh start after his discharge from bankruptcy.

V. Conclusion

[32] Wild Rose's application is dismissed. If the parties are unable to agree on costs, they may submit a brief of argument of three pages or less supported by a bill of costs.

Heard on the 5th day of August, 2025.
Dated at the City of Calgary, Alberta this 21st day of August, 2025.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Angelo Merani, Nicol Law
for the Applicant

Paul Olfert and Carly Toronchuk, MLT Aikins LLP
for the Respondents