

CITATION: Business Development Bank of Canada v. Henderson et al.,
2026 ONSC 3852
COURT FILE NO.: CV-25-90598
DATE: 20260702

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Business Development Bank of
Canada

Plaintiff

- and -

Douglas Henderson and Troy Brake

Defendants

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) D. Lilko, for the Plaintiff
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) D.A. Robichaud, for the Defendant,
) Troy Brake
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) **HEARD:** June 9, 2026

REASONS FOR DECISION

Associate Justice J. Kriwetz

Overview

[1] The plaintiff, Business Development Bank of Canada (“**BDC**”) made two loans to a company called Henderson Security Solutions Inc. (the “**Borrower**”). The first loan was in the principal sum of \$250,000.00. The second loan was in the principal sum of \$29,238.75. Each of the defendants signed unlimited personal guarantees of the Borrower’s obligations for each loan.

[2] The Borrower made an assignment in bankruptcy on November 1, 2024. This constituted an event of default under the loan agreements. BDC then made a demand upon the defendants pursuant to their guarantees on April 21, 2025.

[3] The statement of claim was issued on June 6, 2025.

[4] The defendant, Douglas Henderson (“**Mr. Henderson**”) made an assignment in bankruptcy on June 25, 2025. Consequently, the proceedings were stayed against him.

[5] On August 20, 2025, BDC obtained default judgment against the defendant, Troy Brake (“**Mr. Brake**”), which judgment was signed by the registrar.

[6] Mr. Brake now moves to set aside the default judgment. BDC opposes the motion.

Law and Analysis

[7] I have read the materials filed by the parties, including their respective factums, and I also considered their submissions. There is little disagreement between them with respect to the applicable law.

[8] Rule 19.08(1) gives the court the power to set aside or vary a default judgment signed by the registrar on such terms as are just. Therefore, it is a discretionary order.

[9] In *Franchetti v. Huggins*, 2022 ONCA 111, the Ontario Court of Appeal discussed the principles to be applied on a motion to set aside the noting of default, which includes the strong preference for civil matters be decided on the merits, the preference for construing rules and procedural orders in a non-technical way and in a way that gets to the merits of the proceeding, and whether there is non-compensable prejudice to either party; para 8.

[10] Summarising the jurisprudence, *Franchetti* provided the following non-exhaustive list of factors to be considered at paragraph 9:

“(1) The parties’ behaviour;

(2) The length of the defendant’s delay;

(3) The reasons for the delay;

- (4) *The complexity and value of the claim;*
- (5) *Whether setting aside the noting of default would prejudice a party relying on it;*
- (6) *The balance of prejudice as between the parties; and*
- (7) *Whether the defendant has an arguable defence on the merits.”*

[11] The Court of Appeal also stated that, because motions to set aside the noting of default usually occur early in the litigation process, courts will rarely require a defendant to show an arguable defence on the merits. In such cases, it is sufficient for the defence to have an “air of reality”. Where, however, there has been a significant delay, the moving party is required to show an arguable defence on the merits: para. 10.

[12] In *Trayanov v. Icetradings Inc.*, 2023 ONCA 322, the Court of Appeal affirmed the principles in *Franchetti* and also made it clear that the list of seven factors were not exhaustive and were not to be applied as rigid rules: at para. 20.

[13] It is important to note that this motion is not just to set aside the noting of default but is for an order to set aside a default judgment. In this regard, the Court of Appeal stated the following in *Mountain View Farms Ltd. v. McQueen*. 2014 ONCA 194, at paragraphs 47 to 52:

"[47] The court's ultimate task on a motion to set aside a default judgment is to determine whether the interests of justice favour granting the order. The approach to be taken to this determination has been considered numerous times by this court. The following draws heavily on the summary of the principles in those cases by Perell J. in Watkins v. Sosnowski, [2012] O.J. No. 2971, 2012 ONSC 3836 (S.C.J.), at paras. 19-20 and 23-24.

[48] The court must consider the following three factors:

- (a) whether the motion was brought promptly after the defendant learned of the default judgment; [page568]*
- (b) whether there is a plausible excuse or explanation for the defendant's default in complying with the Rules; and*
- (c) whether the facts establish that the defendant has an arguable defence on the merits.*

[49] To this list, I would add the following two factors the court should have regard to, as set out in Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd. (2007), 87 O.R. (3d) 479, [2007] O.J. No. 1685, 2007 ONCA 333, at para. 2:

- (d) "the potential prejudice to the moving party should the motion be dismissed, and the potential prejudice to the respondent should the motion be allowed"; and*
- (e) "the effect of any order the motion judge may make on the overall integrity of the administration of justice."*

[50] These factors are not to be treated as rigid rules; the court must consider the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of his or her default.

[51] For instance, the presence of an arguable defence on the merits may justify the court exercising its discretion to set aside the default judgment, even if the other factors are unsatisfied in whole or in part. In

showing a defence on the merits, the defendant need not show that the defence will inevitably succeed. The defendant must show that his or her defence has an air of reality.”

The Promptness of the Motion / Excuse or Explanation for the Default

[14] In his affidavit, Mr. Brake admitted to having been served with the statement of claim on June 11, 2025. He then states that he “immediately” took steps to obtain legal representation. He initially contacted Andrej Litvinjenko, who had previously written to BDC on his behalf (which correspondence will be discussed in further below). He states that he waited for “*further instructions and follow-up over the summer of 2024*” (I am assuming the reference to “2024” was a typographical error and that it was intended to be “2025”) but there was no follow-up from said counsel and that he “*was not informed that no defense had been filed on (his) behalf.*” He then states that he only became aware of the default judgment on August 20, 2025.

[15] I pause here to note that there is no evidence that Mr. Brake made any efforts to follow up with said counsel after he initially contacted him. There is no evidence that the said counsel contacted BDC’s counsel advising that he had been retained, or that he would be delivering a defence, or requesting an extension of time to deliver a defence. There is also no evidence as to why a defence could not be served within the prescribed time.

[16] Mr. Brake's affidavit also states that, after he became aware of the default judgment, he then contacted BDC's counsel on September 24, 2025, requesting that the default judgment be set aside and for time to "*obtain legal assistance.*" This was more than a month after Mr. Brake became aware of the default judgment. There is no explanation of why it took Mr. Blake so long to do so and there is no evidence of him taking any other steps during that period.

[17] According to his affidavit, the next thing Mr. Brake did was to retain counsel. He attaches, as an exhibit, a redacted copy of a Professional Services Agreement between he and his counsel, which was signed by Mr. Brake on December 2, 2025. I note that this is more than three months after Mr. Brake stated that he became aware of the default judgment and more than two months after he contacted BDC's counsel. There is no explanation for this delay.

[18] Mr. Brake's motion material was served on January 29, 2026. The original return date was February 26, 2026. It was then adjourned, on consent.

The Proposed Defence

[19] With respect to the proposed defence, I first note that Mr. Brake has not included a draft proposed statement of defence in his materials. Instead, during

submissions, his counsel advised that the nature of the defence is outlined at paragraph 15 of Mr. Brake's notice of motion.

[20] In summary, Mr. Brake's defence to the claim is as follows:

- a) He had held 25% of the shares in the Borrower but was not a director and, therefore, should not be held liable for the debts incurred by the Borrower.
- b) He expressed reservations about signing the loan agreement from the outset, which resulted in multiple exchanges with BDC's representative and Mr. Henderson, who was the Chief Executive Officer of the Borrower.
- c) His alleged reservations are corroborated by e-mails showing that the loan was temporarily on hold because he refused to provide certain documents.
- d) He only signed the documents after receiving repeated and express assurances from Mr. Henderson and BDC's representative, Kevin Pryce, that he would not be personally liable.

- e) He left the Borrower's employ in December 2023, at which time Mr. Henderson confirmed to him *"that he would be removed from any personal obligations under the loan agreement."*
- f) He never had access to the monies loaned to the Borrower, he had no control over the funds, and he had no decision-making authority regarding their use.

[21] In paragraph 6 of his affidavit, Mr. Brake acknowledges signing the unlimited guarantees dated October 3, 2022, and May 24, 2023. He also confirms the basic terms of the two loans made by BDC. In its materials, BDC included copies of the loan documents, the guarantees and evidence of the default.

[22] Regarding the proposed defence that Mr. Brake should not be held personally liable because he was not a director but only a 25% shareholder of the Borrower at the time the loans were made, I note the following:

- a) The terms of the guarantees are quite clear in that the signatories personally (not on behalf of the Borrower), on joint and several basis, unconditionally guaranteed payment to BDC of all amounts owing under the loans made to the Borrower, together with interest from the date of demand plus all legal and professional fees

incurred by BDC in the enforcement of the guarantees. The guarantees also include a provision that the obligation to pay will not be reduced or discharged for any reason.

- b) The materials show that Mr. Brake was the President and an authorised signing officer of the Borrower at the time the loans were made, and the guarantees were signed.
- c) There is nothing in the guarantees or any other document in the record which require him to be a director or states that the guarantees are only enforceable as against a director of the Borrower. ‘
- d) In his affidavit, Mr. Brake states that he transferred his shares in the Borrower to Mr. Henderson on or about December 22, 2023, but there is no evidence that the guarantees were amended, and BDC’s evidence is that there was no amendment.
- e) Mr. Brake’s affidavit also states that on or about June 3, 2024, Mr. Litvinjenko wrote to Mr. Pryce requesting that he be released as a guarantor, but he did not receive a response. There is no evidence

that BDC ever released Mr. Brake from his guarantees. In fact, the evidence filed by BDC indicates that there was no such release.

[23] Regarding the proposed defence that Mr. Brake expressed reservations about signing the documents, the record shows the following:

- a) At Exhibit "C" of his Affidavit, Mr. Brake appends copies of some e-mails between Mr. Pryce and him, dated August 29, 2022, and September 1, 2022. These e-mails pre-date the signing of the guarantees. These appear to be in support of his allegations concerning his said reservations. It is not at all clear that the e-mails do, in fact, corroborate such allegations, but even if they do, the fact is that Mr. Brake signed the guarantees thereafter and, once again, their terms are clear.
- b) Furthermore, Mr. Brake did not include in his affidavit, a copy of e-mail correspondence dated August 5, 2022, between Mr. Brake and Mr. Pryce in which Mr. Brake sought clarification regarding his addition as a guarantor and in which Mr. Pryce replied making it quite clear that, by signing as a guarantor, he would assume personal liability for the repayment of the loan to the Borrower in the

event of default. This correspondence was included in BDC's responding materials.

[24] Regarding the allegations concerning the alleged representations and statements made to Mr. Brake by Mr. Henderson and Mr. Pryce,

- a) Mr. Henderson's representations and statements do not bind BDC, and there is no evidence which supports any allegation otherwise.
- b) Insofar as the allegation that Mr. Pryce gave repeated and express assurances to Mr. Brake that he would not be personally liable, Mr. Brake has put forward no evidence whatsoever to support that allegation. In fact, as noted above, there is clear documentary evidence in the record to the opposite.

[25] Regarding Mr. Brake's allegations that he never had access to the loaned funds, that he had no control over them, and that he had no decision-making authority regarding their use, I, again, note the following.

- a) Mr. Brake admitted to being a shareholder of the Borrower at the time the loans were made. He was also the President of the Borrower and an authorised signing officer of the Borrower as evidenced by his signature on its behalf on the letter of offer dated

September 28, 2022, with respect to the first loan. As such, he received the benefit of the loans made to the Borrower in which he held an ownership interest.

- b) More importantly, though, even if such allegations are true, they do not constitute a defence to the claim.

Other Factors

[26] BDC's claim is not complex. It is a claim on a personal guarantee arising from the default on a loan made to the Borrower. It is a document driven claim. The amounts claimed by BDC in the statement of claim is not insignificant, being \$289,994.72, plus interest and costs.

[27] On balance, Mr. Brake will suffer more prejudice if his motion is not granted than the prejudice which BDC will suffer if the motion is granted, as some of the prejudice which BDC could be compensated for by an award of costs.

Disposition

[28] I am mindful that there is a strong preference for deciding civil actions on its merits, the desire to construe rules and procedural orders in a non-technical way and in a way that gets the parties to the real merits, and whether there is non-compensable prejudice to the parties.

[29] In applying the factors set out by the Court of Appeal, as described above, I have considered the all the circumstances of this case as set out in the record before me.

[30] As previously stated, Mr. Brake will suffer prejudice if his motion is not granted, and the balance of prejudice weighs in his favour. These, however, are not the only factors to be considered.

[31] For the reasons previously stated, I am not satisfied that Mr. Brake has fully explained the reasons why he was unable to deliver a statement of defence within the required time. Furthermore, while the delay in moving to set aside the default judgment may not have been overly egregious, it was not insignificant, and he provided no proper explanation for the delays.

[32] Had the delays and the lack of a satisfactory explanation for them been the only issues with Mr. Brake's motion, they would likely have been outweighed by an arguable defence on the merits, or even one which has an "air of reality", but for the reasons stated above, the proposed defence does not raise an arguable defence on the merits, nor does it have an air of reality. As also noted above, this is a document driven claim. The terms of the documents upon which BDC has sued are clear. The issues in this action are not complex.

[33] BDC also submitted that the court should also consider the use of judicial resources and the integrity of the administration of justice. It submits that if the default judgment is set aside, this matter will soon come before the Court once again on BDC's motion for summary judgment. Although it acknowledges the test to be applied on a summary judgment motion is different than the one to be applied on this motion, the outcome will most likely be the same, but it will cause further costs to be incurred, and further judicial resources to be used. I agree with these submissions.

[34] Therefore, for all the foregoing reasons, Mr. Brake's motion is dismissed.

Costs

[35] If the parties cannot otherwise agree upon the costs of this motion, they may make written submissions, not exceeding 3 pages in length, within 7 days of the date of the release of this endorsement.

Associate Justice J. Kriwetz

Released: July 2, 2026

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