

CITATION: TD Bank v. 1633092 Ontario Ltd., 2026 ONSC 4620
COURT FILE NO.: CV-16-69905
DATE: 2026/08/12

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE TORONTO-DOMINION BANK	)	
Plaintiff/Defendant by Counterclaim	)	Adam Goldenberg and Foti Vito, Counsel for the Plaintiff/Defendant by Counterclaim
– and –	)	
1633092 ONTARIO LTD., 2362378	)	Margot Pomerleau and Bre Quinelle
ONTARIO INC., MATTHEW ROONEY,	)	Boudreau, Counsel for the
and HALEY ROONEY	)	Defendants/Plaintiffs by Counterclaim
Defendants/Plaintiffs by Counterclaim	)	
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	)	HEARD: February 2 to 19, 2026 and April 15, 2026

REASONS FOR DECISION

R. Smith, J.

Overview

[1] This case primarily involves a counterclaim by the defendants (collectively referred to as the “Rooneys”) for damages against the Toronto Dominion Bank (“TD” or the “Bank”) for negligent breach of contract for failing to fully advance a small business loan of \$350,000 to partly fund the rebuilding of the Tosh Steakhouse after it was destroyed by fire.

[2] The Rooneys operated a successful steakhouse restaurant in Arnprior until it was destroyed by fire in April 2014. This trial is to determine the damages, if any, that were suffered by the Tosh Steakhouse, Tosh Meats and Catering (“Tosh Catering”), and Matthew and Haley Rooney

personally as a result of TD's breach of the loan agreement. The Rooneys seek damages of \$3,149,378 for losses suffered by Tosh Steakhouse; \$1,592,230 for losses suffered by Tosh Catering; \$3,010,478 for losses suffered personally by Matthew and Haley Rooney; and, \$1,081,688 for judgements against the defendants by counterclaim, for a total of \$8,833,776.

[3] TD submits that the plaintiffs by counterclaim have failed to prove that TD's failure to advance the full amount of the loan of \$350,000, (its breach of the loan agreement) was the effective cause of the business failures of Tosh Steakhouse, Tosh Catering, or of the amount claimed for personal damages by Matthew and Haley Rooney. TD also denies that it is responsible to pay for any of the judgments against the plaintiffs by counterclaim

[4] TD also denies that it committed the tort of deceit when it reduced Haley's HELOC interest rate from prime plus 1% to prime plus 0.5%. It further denies that it is liable for punitive or exemplary damages for any of its conduct including for failing to advance the full amount of the \$350,000 loan.

Litigation History

[5] Both parties initially brought motions for summary judgement. TD sought summary judgement against the defendants for loans and a line of credit (a "HELOC") that were in default in the total amount of \$929,106. The defendants, 1633092 Ontario Inc. ("163" or "Tosh Steakhouse"), 2362378 Ontario Inc. ("236"), and Matthew and Haley Rooney (the "Rooneys") counterclaimed against TD, seeking damages of approximately \$9,000,000.

[6] The plaintiffs by counterclaim alleged negligence, negligent misrepresentation, and breach of contract by TD for its failure to advance the full amount of a small business loan of \$350,000. The plaintiffs by counterclaim also sought damages against TD for alleged negligence in appraising the value of Haley Rooney's home at too high a value, pleading that TD had committed a breach of honesty and good faith. They subsequently amended their claim to allege that TD had committed the tort of deceit. The Rooneys also sought punitive and exemplary damages against TD.

Decision on the Summary Judgement Motions

[7] O'Bonsawin J. (as she then was) decided that a) because Haley Rooney had agreed to an amended home equity credit agreement (HELOC), the defendants' claim for damages based on TD's alleged negligence in appraising Haley Rooney's home at too high a value, was defeated by the principle of "accord and satisfaction". She held that Haley Rooney had agreed to an amended credit agreement at a reduced interest rate of prime plus 0.5%, after she was aware of the alleged error in TD's appraisal. As a result, Haley received the benefit of the lower interest rate and could no longer make a claim against TD based on its alleged negligent appraisal of the family home; b) that TD had negligently breached its contract with the defendants when it failed to advance the full amount of the small business loan (the "CSBFL") of \$350,000; and, c) the issue of damages was bifurcated and was to be decided at a subsequent trial.

Decision of the Court of Appeal

[8] The Court of Appeal for Ontario granted the first ground of TD's appeal and held that the judgement for negligent breach of contract should not be in favour of all respondents (defendants) but rather should only be in favour of 163. The issue of whether TD negligently breached its contract regarding the other defendants was referred to trial.

[9] The Court of Appeal for Ontario did not grant TD's request for an immediate judgement for the amount owing on the HELOC or for possession of the home.

[10] The Court of Appeal for Ontario upheld the motion judge's decision that Haley Rooney could not claim for damages because of TD's alleged negligence regarding the appraisal of her home for the HELOC.

[11] The Court of Appeal for Ontario referred the counterclaim for TD's negligent breach of contract to trial, along with issues related to Foss and Harbottle and damages including the rights of set off for any of the parties, 163's line of credit, 163's Visa account, and the unlimited guarantees provided by 236 and each of the Rooneys personally.

Issues

[12] The parties agree that the following six issues must be determined in this trial:

1. What are 163's damages, if any, for the TD's breach of contract concerning the loan ("CSBFL")?
2. Do any of the remaining defendants have causes of action against TD for failure to perform its contractual obligations honestly, or are any such causes of action foreclosed by the decision of the Court of Appeal?
3. Is TD liable for the tort of deceit to any of the defendants?
 - a. Is the pleading of the tort of deceit statute barred by
 - ii. the disposition of the HELOC valuation issue at summary judgement?;
 - or
 - iii. the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B?
 - b. If not,
 - iv. which defendants, if any, may assert a claim for the tort of deceit?; and
 - v. what remedy, if any, should be granted if the tort of deceit is made out?
4. Are the defendants, or any of them, entitled to punitive or exemplary damages?
5. In calculating TD's damages, what rates of interest and post judgement interest rates should apply to the amounts owed by the defendants to TD on the amount of the CSBFL, the HELOC, the tax arrears and expenses charged to the HELOC, Haley Rooney's TD Visa card, and Matthew Rooney's two TD Visa cards.
6. To what extent should damages on the claim and counterclaim be set off against one another?

[13] The plaintiffs by counterclaim submit that the following issue should be determined, but TD Bank does not agree:

7. Did TD fail in its duties to 236, Matthew Rooney, or Haley Rooney in failing to fund the project, in renegotiating terms of interest, or in enforcing their security? If so, what remedy and damages flow from those breaches to these particular defendants?

FACTS

[14] The parties agree to the following “Agreed Statement of Facts”.

AGREED STATEMENT OF FACTS

The parties, by their respective lawyers, agree and admit as true the statements of fact set out below, and consent to the filing of this Agreed Statement of Facts and the chronology found at **Schedule “A”** as an exhibit at the trial of this action.

The Parties

1. The plaintiff, The Toronto-Dominion Bank (“**TD Bank**”), is a Schedule I bank incorporated under the *Bank Act*, S.C. 1991, c. 46.
2. TD Bank commenced this action by way of a Statement of Claim issued September 12, 2016, against Haley Rooney, Matthew Rooney, 1633092 Ontario Ltd. (“**163**”), and 2362378 Ontario Inc. (“**236**”). Haley Rooney and Matthew Rooney (the “**Rooneys**”) are individuals residing in the Province of Ontario. They are married to one another.
3. 163 is a corporation incorporated pursuant to the laws of the Province of Ontario. It is owned and controlled by the Rooneys. The Rooneys operated a restaurant business through 163.
4. 236 is a corporation incorporated pursuant to the laws of the Province of Ontario. It is owned and controlled by the Rooneys.
5. The Defendants issued a counterclaim against TD Bank by a Statement of Defence and Counterclaim dated September 28, 2016, amended by way of an Amended Statement of Defence and Counterclaim dated April 26, 2022.

The TD Loan

6. 163 operated as Tosh Steakhouse & Bar (“**Tosh**”) from approximately September 2008 to April 2014 at 39 Staye Court Drive, Arnprior, Ontario.
7. As a result of a fire in April 2014, Tosh closed.

8. In or around the same time, the Rooneys were in the process of renovating other premises at 60/62 Elgin Street West, Arnprior, Ontario. 236 owned the property at 60/62 Elgin Street West at all material times.

9. The Rooneys sought a small business loan from TD Bank.

10. In September 2014, Haley Rooney met with Mr. Richard Bernier, who was then a Financial Advisor at TD Bank's branch located at 270 Raglan Street South, Renfrew, Ontario (the "**Renfrew Branch**") in order to apply for a small business loan.

11. Mr. Bernier requested that the Rooneys provide various financial documents in order to start the application process for a *Canada Small Business Financing Act* loan ("**CSBFL**") on behalf of 163. In November 2014, the Rooneys submitted financial information and a credit application for a maximum CSBFL amount of \$350,000.00. They also submitted a project budget to TD Bank detailing the estimated total costs in the amount of \$827,757.83 as of November 5, 2014. The breakdown was as follows:

• Fit Up Cost:	\$635,049.83
• Furniture, Equipment, etc.:	\$122,337.00
• Inventory:	\$35,000.00
• Marketing & Advertising:	\$35,371.00
• TOTAL:	\$827,757.83

12. The project budget also comprised the source of the funds that was supposed to be used to pay the estimated costs. The project budget showed the various sources of funds, amongst them, the proposed \$350,000.00 CSBFL.

• Future Personal Investment:	\$100,000.00
• Bank Loan:	\$350,000.00
• Investment to Date:	\$377,194.55
• TOTAL:	\$827,194.55

13. TD Bank provided 163 with conditional approval for the CSBFL on April 2, 2015.

14. A number of conditions had to be fulfilled prior to final approval. This

included the discharge of a notice of a security interest in favour of the Business Development Bank of Canada (“**BDC**”) under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (“**PPSA**”).

15. Haley Rooney advised TD Bank that she required the insurance proceeds from the fire in order to pay off the BDC loan owed by 163.

16. On September 18, 2015, Haley Rooney received confirmation from 163’s insurance company that a cheque had been mailed to BDC so that the PPSA registration could be discharged.

17. The conditional approval obtained in April 2015 was set to expire; therefore, an extension was required, which necessitated acquiring further financial information from the Rooneys.

18. The Rooneys provided additional information by mid-November 2015, including a letter from BDC confirming that all loans from it had been paid out. The Rooneys provided this letter to TD Bank on November 17, 2015. The letter from BDC to the Rooneys states: “As you know, [BDC]’s claims against the borrowers and guarantors was settled. Given that the settlement has been completed, neither the borrowers nor the guarantors have any further obligations to the [BDC] with respect to Loan #071897-01.”

19. On November 21, 2015, the conditions were removed and the CSBFL was approved.

20. On November 21, 2015, the Rooneys signed banking documentation in support of the CSBFL, which included a Credit Agreement for \$350,000.00.

21. On November 21, 2015, 236, Haley Rooney, and Matthew Rooney each executed unlimited guarantees for all liabilities incurred by 163 to TD Bank. 236 also granted TD Bank a continuing security interest as collateral.

22. On December 11, 2015, TD Bank registered a collateral mortgage on title of the property owned by 236, municipally known as 60/62 Elgin Street West, in the amount of \$350,000 (registered as Instrument No. RE201244) as security. 236 already had a first mortgage registered on title to the property, payable to John and Trudy McDermott, and a second mortgage registered on title to the property, payable to 2163142 Ontario Inc. Only the second mortgagee, 216314 Ontario Inc., held a PPSA registration on its security interest.

23. On December 14, 2015, Mr. Bernier met with the Rooneys and requested that they complete a Subordination Agreement in order to grant

TD Bank priority under the PPSA. The Rooneys did not sign the Subordination Agreement at the time.

24. On December 21, 2015, Matthew Rooney signed a Loan Registration Form on behalf of 163 from Industry Canada which states that the percentage of asset cost financed by the CSBFL was 55%. This was the first time this figure appeared in the banking documentation signed by the Rooneys in connection with the CSBFL.

25. On or about January 22, 2016, the second mortgagee, 2163142 Ontario Inc., agreed to subordinate the registration of its security interest.

26. On January 23, 2016, 163 submitted \$110,338.20 in invoices to TD Bank for reimbursement under the CSBFL.

27. On February 3, 2016, TD Bank reimbursed 163 for a Rona invoice for building supplies in the amount of \$19,531.30 and funded the \$7,000.00 CSBFL fee to itself. The Rona invoice and the CSBFL fee were funded at 100%. On February 12, 2016, TD Bank reimbursed \$24,231.90 of the remaining invoices that were submitted by 163.

28. TD Bank received a Loan Registration Acknowledgement from Industry Canada dated February 16, 2016, which notes that the date of loan disbursement is February 3, 2016, and states that the percentage of assets financed under the CSBFL obtained by 163 is 55.11%.

29. The Branch Manager of the Renfrew Branch, Ms. Susanne Richter, was providing assistance in reimbursing eligible invoices by this point. On February 18, 2016, she e-mailed Haley Rooney and stated that TD Bank was looking into the funding of the CSBFL. On March 3, 2016, she stated that she was continuing to work on getting 163 funding through the CSBFL and inquired whether the Rooneys had any ongoing kitchen equipment or furniture lease payments.

30. By this point, the Rooneys had retained legal counsel, Mr. Andrew Ferguson, and were seeking reimbursement for 100% of the eligible invoices under the CSBFL.

31. On March 4, 2016, Ms. Richter faxed the Loan Registration Form to Mr. Ferguson that Matthew Rooney previously signed on behalf of 163 from Industry Canada which states that the percentage of asset cost financed by the CSBFL was 55%.

The Home Equity Line of Credit

32. In or about June 2006, the Rooneys purchased a residential property municipally known as 43 Pine Ridge Drive, Arnprior, Ontario (the

“Property”) from Matthew Rooney’s parents for the amount of \$800,000.00.

33. In December 2007, the Property was refinanced with TD Bank. TD Bank obtained an appraisal of the Property which was valued at \$1,002,000 as at December 4, 2007. Based on this appraisal, TD Bank provided Haley Rooney with a HELOC in the amount of \$750,000.

34. On January 8, 2008, Haley Rooney, as mortgagor, and TD Bank, as mortgagee, entered into a mortgage that was registered in the Registry Office for Renfrew (Pembroke) (No. 49) as Instrument No. RE81997. Haley Rooney provided this collateral mortgage on the Property as security.

35. On the refinancing, Haley Rooney paid off the sum of \$602,193.34 that was owing under the previous mortgage registered on title to the Property in favour of TD Bank. Accordingly, Haley Rooney received an additional advance of approximately \$150,000.

36. On or about January 2015, the Rooneys represented to TD Bank that the appraisal underlying the HELOC had overstated the value of the Property. TD Bank investigated this issue from about January 2015 to April 15, 2015. The Manager of Customer Relations at TD Bank who was corresponding with the Rooneys during the investigation process informed them that a decision on interest relief could not be made until the investigation was complete.

37. The investigation was completed on or about April 15, 2015. Haley Rooney received a letter with this date from TD Bank’s Associate Vice President of Retail Products Real Estate Secured Lending which concluded that there was no misrepresentation by TD Bank regarding the value of the Property.

38. On October 19, 2015, Ms. Tanya Laughlin, then a TD employee at the Arnprior Branch, submitted a request for a reduced interest rate on Haley Rooney’s HELOC through TD Bank’s HELOC portal, providing the following rationale: “[H]igh limit HELOC, no longer competitive with OFI [other financial institution] offers client is considering. [A]lso, they are re-opening their business and are looking for ways to save money in order to increase cash flow and succeed.” Ms. Laughlin checked “CARES” in the HELOC portal. The request was automatically approved by TD Bank’s electronic system.

39. On November 16, 2015, Haley Rooney signed a Line of Credit Maintenance Form which varied the interest rate on her HELOC, effectively entering into a new agreement with TD Bank.

40. The Property has been vacant since 2016. It is currently in disrepair and is uninhabitable. The Property has been damaged by frost, mold, flooding, a lack of heating, and has a cracked foundation.

Debt Accumulated by the Defendants

41. 163 defaulted on the CSBFL in 2016. The principal amount of \$48,459.82 is owed under the CSBFL as of February 18, 2026. Interest has continued to accrue at a rate of 3% per year.

42. Haley Rooney defaulted on the HELOC in 2016. On the date of default, the principal balance on the HELOC was \$752,571.50. Interest has continued to accrue.

43. \$67,086.76 in municipal tax arrears has accumulated on the Property as at January 18, 2026, which TD Bank has paid and charged to the HELOC.

44. TD Bank has also paid additional costs related to the Property, including expenses for occupancy checks, appraisal fees, and ordering tax certificates. These costs have been included in the HELOC payout amount and total \$2,598.20 as of January 18, 2026.

45. Haley Rooney also holds a TD Visa card (ending in 0149) where she owes \$23,108.27 as of January 19, 2026.

46. Matthew Rooney also holds a TD business Visa card (ending in 4825) where he owes \$22,940.71 and a TD Visa card (ending in 6802) where he owes \$5,685.51 as of January 19, 2026.

SCHEDULE “A”

- **June 2006:** Haley Rooney and Matthew Rooney purchase the residential property municipally known as 43 Pine Ridge Drive, Arnprior, Ontario (the “**Property**”) from Matthew’s parents for \$800,000.
- **December 2007:** TD Bank obtains an appraisal of the Property valuing it at \$1,002,000 as at December 4, 2007.
- **December 2007:** Haley Rooney refinances the Property with TD Bank and obtains a Home Equity Line of Credit (“**HELOC**”) in the amount of \$750,000 from TD Bank.
- **January 8, 2008:** Haley Rooney enters into a collateral mortgage in favour of TD Bank, registered as Instrument No. RE81997 on the Property.

- **September 2008 – April 2014:** Haley Rooney and Matthew Rooney operate a restaurant business (known as Tosh Steakhouse & Bar) through 1633092 Ontario Inc. (“163”) at 39 Stave Court Drive, Arnprior, Ontario.
- **April 2014:** A fire occurs at 39 Stave Court Drive, resulting in the closure of the Tosh restaurant business.
- **September 2014:** Haley Rooney meets with Richard Bernier, then Financial Advisor at TD Bank’s Renfrew Branch, to apply for a small business loan to re-open Tosh.
- **November 2014:** Haley Rooney first provides financial documentation and a project budget in support of 163’s application for a *Canada Small Business Financing Act* loan (“CSBFL”).
- **January 2015:** The Rooneys represented to TD Bank that the appraisal underlying the HELOC had overstated the value of the Property.
- **January 2015 – April 2015:** TD investigates the appraisal, HELOC, and the value of the home. TD Bank concludes that there has been no misrepresentation.
- **April 2, 2015:** TD Bank provides conditional approval for the CSBFL to 163.
- **October 19, 2015:** Tanya Laughlin, then a branch employee at TD Bank’s Arnprior Branch requests an interest rate change on Ms. Rooney’s HELOC. Tanya Laughlin submits the request on TD Bank’s HELOC portal. The request is automatically approved.
- **November 16, 2015:** Haley Rooney entered into a new agreement with TD Bank in which TD Bank agreed to decrease the interest rate on the HELOC.
- **November 21, 2015:** Conditions on the CSBFL are removed and the loan is approved. The Rooneys execute the CSBFL banking documentation, including a Credit Agreement, unlimited guarantees, and collateral.
- **December 11, 2015:** TD Bank registered a collateral mortgage on title of the property owned by 236, municipally known as 60/62 Elgin Street West, in the amount of \$350,000 (registered as Instrument No. RE201244) as security.
- **December 14, 2015:** Mr. Bernier met with the Rooneys and requested

that they complete a Subordination Agreement.

- **December 21, 2015:** Matthew Rooney signs a Loan Registration Form on behalf of 163 stating that 55% of asset costs would be financed by the CSBFL.
- **January 23, 2016:** 163 submits invoices totaling \$110,338.20 to TD Bank for CSBFL reimbursement.
- **February 2016:** TD Bank advances a total of \$54,372.37 to 163 under the CSBFL

ADDITIONAL FINDINGS OF FACT

[15] Matthew and Haley Rooney had worked in Toronto for several years before they moved back to Arnprior to start Tosh Steakhouse. Matthew worked renovating houses and reselling them and Haley obtained a degree in electrical engineering and worked as a mortgage broker. As result of her experience, Haley was knowledgeable with financing and mortgaging of property.

[16] The Rooneys incurred debt when they returned to Arnprior in 2006. Haley Rooney purchased Matthew Rooney's family home for the sum of \$800,000. They gave a mortgage back of \$602,193. Haley Rooney then remortgaged with a home equity line of credit ("HELOC") from TD, giving her approximately \$150,000 to invest.

[17] On May 1, 2007, Matthew Rooney purchased the property known as 39 Staye Court Drive, Arnprior. The initial budget to renovate the property in order to operate a steakhouse was \$650,000. In 2010, 163 built an addition of 2,000 square feet onto the building for a banquet hall and catering facilities. The addition cost approximately \$300,000.

[18] On May 2, 2013, title to the Staye Court property (the location of Tosh Steakhouse) was transferred to 2370301 Ontario Inc. ("237").

[19] The Tosh Steakhouse commenced operation in September 2008 and continued until it was destroyed by fire on April 7, 2014. The restaurant was successful, showing a loss of \$63,943 (-8% of sales), a profit of \$64,953 (6%) in 2010, a profit of \$4,305 (0%) in 2011, a profit of \$175,495 (17%) in 2012, and a profit of \$176,095 (16%) in 2013.

[20] The Rooneys did not take fixed salaries from Tosh Steakhouse but had the business pay for their personal expenses as needed.

[21] In 2012, the Rooneys planned to expand their restaurant and began looking for locations in Kanata, Barrhaven, and Stittsville.

[22] As of May 22, 2013, Matthew Rooney had a very good credit rating of 785 and Haley Rooney also had a good credit score of 743.

[23] In 2013, 236 (Tosh Catering) purchased a building located at 60/62 Elgin Street, Arnprior, where the Rooneys planned to operate a catering business and a food preparation area. The Elgin Street property was subject to a first and second mortgage. The premises were not yet renovated or in operation at the time of the fire.

[24] In 2013, at about the same time, 2382805 Ontario Inc (“238”) leased premises in Kanata in order to expand the Rooneys’ operation by launching a new restaurant called “Skirt Steak”. Between June 2013 and December 2013, 238 took possession and renovated the premises in Kanata. The Rooneys testified that they spent approximately \$2,000,000 renovating the Kanata Skirt Steak restaurant.

[25] At the time of the fire, 163 owed TD \$500,000 on a first mortgage on the restaurant property located at Stave Court Drive. 163 had also obtained a loan from the Business Development Bank (“BDC”) for \$500,000 which it loaned to 238, the corporation that operated the newly opened Skirt Steak restaurant in Kanata. 238 never repaid this loan to 163 and ceased operating in June of 2024.

[26] Skirt Steak opened with negative media publicity and closed after 6 months having sustained operating losses of \$650,000 in the six-month period.

[27] 163 received \$1,300,000 in fire insurance proceeds which it used to pay \$500,000 to TD as the first mortgagee on the property, the amount of the lease with Canadian Leasing Enterprises (“CLE”), and some credit card debts. In addition, 163 was required to pay approximately \$500,000

from the remaining fire insurance funds to repay its loan to BDC. This left a minimal amount, if any, from the fire insurance proceeds to rebuild the Tosh Steakhouse restaurant.

[28] In a separate lawsuit against Skirt Steak's Kanata landlord in Toronto, the Rooneys pleaded that the demand for repayment by BDC of its \$500,000 loan to 163, prevented them from rebuilding the Tosh Steakhouse restaurant at its original location with the fire insurance proceeds.

[29] In August 2014, the Rooneys decided to rebuild and relocate the Tosh Steakhouse at the location of their other property on 62 Elgin Street in downtown Arnprior.

[30] Approximately a week after BDC demanded payment of its loan of \$500,000 to 163, Haley Rooney attended at the Renfrew branch of the TD Bank and met with Mr. Bernier about obtaining a Canada Small Business Financing Loan ("CSBFL"). She advised Mr. Bernier that she was seeking the loan to fund leasehold improvements at the Elgin Street property in Arnprior. Haley Rooney knew how a CSBFL loan worked because she had obtained one previously. The Federal government guarantees repayment to the lending bank with a CSBFL, provided certain provisions are followed, namely that the bank provided a loan for 55.11% of the leasehold improvements.

[31] Mr. Bernier advised Haley Rooney that he did not have experience with the CSBFL government program. He recommended that Haley should apply at a larger branch. Haley advised that she wished to remain and apply at the Renfrew branch. Mr. Bernie advised that he would obtain support from his regional manager to process the loan application.

[32] The reason the Rooneys decided to relocate the Tosh Steakhouse to the Elgin Street location was because 163 and the Rooneys did not have sufficient resources to rebuild the Tosh Steakhouse at its original location. This occurred because 163 did not receive any proceeds from their fire insurance policy as the fire insurance was used to pay the 1st mortgagee (\$500,000), the BDC loan (\$500,000) and the CLE lease for restaurant equipment and some credit card debt.

[33] In November 2014, the Rooneys submitted a proposed budget to TD for the "fit up" costs of \$635,049 and \$122,337 for furniture and equipment. The proposed budget included \$350,000 from the CSBFA to be obtained from TD, \$100,000 in further personal investment, and \$377,194 that the Rooneys represented they had already invested in the renovations at the Elgin Street

property. The anticipated amount of \$350,000 CSBFA loan amounted to 55.11% of the total fit up costs of \$635,049.

[34] In cross-examination, Haley Rooney agreed that the amount of \$377,194 had not actually already been invested in leasehold improvements to the Elgin Street property because this amount included \$92,238 for a lease from CLE for kitchen equipment and \$27,098 for a lease from RCAP Leasing Inc. (“RCAP”) for furniture.

[35] In April 2015, TD provided conditional approval of the CSBFL to 163 subject to several conditions including a discharge of the security interest in favour of BDC. After the BDC security interest was discharged, the Rooneys signed the credit agreement on November 21, 2015 on behalf of 163.

[36] The loan agreement required personal guarantees from Matthew Rooney, Haley Rooney and 236, and a security agreement on behalf of 236 allowing TD to register a collateral mortgage against the property owned by 236 on Elgin Street in Arnprior.

[37] The loan agreement stated that TD did not owe any duty to the guarantors, that the right to set off and counterclaim were waived by the guarantors, and that the guarantors would be responsible for all of TD’s enforcement costs. The Rooneys had retained a lawyer at that time who could have reviewed the terms of the loan agreement if desired.

[38] On December 14, 2015, Mr. Bernier met with the Rooneys and gave them a document titled “Loan Registration and Subordination Agreement”. The subordination agreement granted TD priority under the PPSA over the second mortgage which held a PPSA registered against the assets located at the Elgin Street property. The second mortgagee on the Elgin Street property signed the subordination agreement in January 2016.

[39] The subordination agreement signed by the Rooneys stated that the value of the leasehold improvements to the Elgin Street building were \$350,000 and that the leasehold improvements were to be financed by TD at 55% of their value.

[40] On January 23, 2016, 163 submitted supporting documents to TD seeking an advance of \$110,338. TD funded the Rona invoice for \$9,531 and its CSBFA fee of \$7000 to itself at 100%. On February 12, 2016, TD approved the advance of 55.11% of the remaining balance of the \$110,330 claim for funds. On February 12, 2016, Ms. Richter, the Renfrew TD branch manager, advised the Rooneys that the second draw of \$24,233 would take place that day.

[41] In mid-February 2016, the Rooneys were informed that TD would only fund 55.11% of the eligible invoices submitted under the CSBFA loan. The Rooneys sought financing of 100% of these amounts, namely the amount of \$350,000.

[42] On March 4, 2016, Ms. Richter advised the Rooneys that TD was considering making a special loan to 163. She asked the Rooneys to bring in as many receipts as possible to support the amount of their investments in the renovations made to date. In March 2016, Haley Rooney defaulted on the HELOC on her residence when the TD advised her it would not advance the full amount of \$350,000.

[43] In April 2016, Haley Rooney and Matthew Rooney attended a telephone conference with three TD representatives to try to find a solution. Haley Rooney and Matthew Rooney both testified that the three representatives of TD agreed to fund the full amount of the promised loan and stated that they would “fix it”.

[44] TD disputes that their representatives made any agreement to fund the balance of the loan at the April meeting and stated that Haley Rooney demanded an extra \$300,000 more than the loan to complete the balance of the renovations. TD’s legal counsel sent a letter dated May 2, 2016 to the Rooneys stating that no agreement had been reached to fund the full amount of the loan but that TD was still prepared to explore possible solutions. In his letter TD’s counsel stated that if TD advanced further funds, Matthew Rooney and Haley Rooney would have to provide a release of any claim that they might have against TD.

[45] On May 17, 2016, TD Bank served the defendants with a Notice of Intent to Enforce Security.

[46] On August 1, 2016, the Rooneys decided to vacate their residential property subject to the HELOC and moved to rental accommodations in Barrhaven.

[47] In August 2016, Matthew Rooney and Haley Rooney entered an agreement to take over management of operations at Greenfields Public House (“Greenfields”) in Barrhaven. The corporation that owns Greenfields is owned by Haley Rooney’s father. Matthew and Haley Rooney do not take a salary from Greenfields, but it paid their personal expenses as needed in a similar manner to when they owned and operated Tosh Steakhouse.

Issue #1: What are 163’s damages, if any, for the TD’s breach of contract concerning the loan (“CSBFL”)?

Analysis

[48] The parties agree on the legal principles applicable to assessing damages for breach of contract. In *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 at paras. 25-26 the Supreme Court of Canada stated that compensatory damages for breach of contract are quantified in accordance with the claimant’s expectation interest.

[49] In *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at para. 27, the Supreme Court of Canada stated that damages are measured by what is required to place the claimant in the position in which they would have been in had the contract been performed, subject to the principal of remoteness and the claimant’s duty to mitigate.

[50] In *Good Mechanical v. Canadian Imperial Bank of Commerce*, 2005 CanLII 33295, the court made a similar statement namely that damages for breach of contract are to put the plaintiff in the position as if there had been a proper performance of the contract by the Bank.

[51] In *Persaud v. Telus Corporation*, 2017 ONCA 479 at para. 10, the Court of Appeal for Ontario stated that as a threshold, there must be a causal connection between the breach of contract and the claimant’s damages. In *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, 1993 CanLII 3431 (ONCA) at p. 13, the Court of Appeal for Ontario stated that the claimant had the burden to

establish on the balance of probabilities that they suffered the damages claimed as a result and probable consequence of the breach of contract.

[52] In *Sunrise Sunset Wellness Ltd. v. Ye*, 2026 ONSC 14 at para. 94, the court stated that “The breach of contract as opposed to some intervening act by a third party, a natural event, or the claimant themselves, must be the “effective cause” of the Defendant’s alleged damages”. At para. 95, the court further stated that “Causation recognizes that a claimant who was the author of their own injury should not be compensated”.

[53] 163 submits that if TD had complied with the contract by advancing the full amount of the loan of \$350,000 by approximately March 1, 2016, it would have been able to complete the renovations to the Elgin Street property without defaulting on the amounts it owed to its creditors and would have operated a profitable steakhouse for approximately the next 10 years.

[54] 163, therefore, claims damages for TD’s breach of contract as follows:

Loss of the value of its shares at March 1, 2016	\$716,218
The rebuild cost for Tosh steakhouse	\$2,000,000
The loss of capital invested in the Elgin Street property	\$377,194
Loss of additional unpaid invoices	\$55,965
<u>Tosh warehouse loss</u>	<u>\$200,000</u>
<u>Total</u>	<u>\$3,149,378</u>

[55] TD denies that its breach of contract was the “effective cause” of 163’s business failure or that it caused any of 163’s losses or the losses claimed by the other plaintiffs by counterclaim.

[56] TD submits that 163’s inability to complete the renovations to the Elgin Street property and to carry on the successful operation of a steakhouse restaurant was caused by itself because it lacked sufficient equity after the fire destroyed Tosh steakhouse and it was unable to use fire insurance proceeds to rebuild. In particular, 163 loaned \$500,000, secured on its assets, to 238

(Skirt Steak) to open a new restaurant in Kanata. This loan became uncollectible and worthless when 238's business failed, when its landlord terminated its lease due to default. This uncollectible loan prevented 163 from having sufficient equity to complete the renovations and operate a successful restaurant business.

[57] TD further submits that the amount of damages claimed is excessive due to projecting an unreasonable level of future profitability of the steakhouse, which was not supported by the evidence.

[58] O'Bonsawin J. (as she then was) held that the TD Bank had negligently breached its contract, namely the CSBFA Loan Agreement but she did not specify how this breach had occurred. I infer that she held that TD breached the contract by failing to advance the full amount of the \$350,000 loan, namely that TD failed to pay 100% of the eligible leasehold expenses up to \$350,000. This decision was upheld by the Court of Appeal for Ontario and is final and binding.

[59] TD submits that even if it had advanced the full amount of the \$350,000 loan to 163, it would not have been able to complete the renovations on the Elgin Street property, and operate a successful steakhouse restaurant. It submits that 163 would still have gone out of business and would have incurred the same losses because it had loaned \$500,000 to 238 and had too much debt and insufficient capital. In other words, TD submits the Rooneys' decision to expand and open another steakhouse restaurant in Kanata, which failed after six months, and not its failure to advance the full amount of the \$350,000 loan was the effective cause of the failure of 163's business.

[60] 163 submits that the loan agreement was not limited to reimbursing it for 55.11% of the leasehold improvements it made to the Elgin Street property. However, this was a condition of Industry Canada approving the CSBFA loan and of Industry Canada's guarantee of repayment to the TD Bank. This was a term of the agreement between Industry Canada and TD.

[61] Greg McEvoy was qualified as an expert in business valuation. He provided an opinion quantifying the losses suffered by 163 (Tosh Steakhouse), 236 (Tosh Meats and Catering), and the personal losses suffered by Haley and Matthew Rooney. He estimated the losses as the fair market

value of 163 and 236 as of March 1, 2016, the date of the breach of contract because the businesses failed and did not continue as a going concern.

[62] Mr. McEvoy testified that in his opinion, a discounted cash flow valuation was the correct approach to valuing the 163 and 236 businesses. Mr. Polson, TD's business valuation expert, did not disagree with this method but offered several criticisms of Mr. McEvoy's opinion on the damages suffered.

Critiques of Mr. McEvoy's valuation evidence

[63] Mr. Polson was a very qualified expert witness on business valuation and in assessing damages resulting from a breach of contract. Mr. Polson and Mr. McEvoy were both chartered accountants and chartered business valuers and both had extensive experience in the business valuation area. However, Mr. Polson is currently the chair of the Canadian Business Valuation Institute and past national chair of the Canadian Financial Analyst Society of Canada and I prefer his evidence for reasons outlined below:

(1) Future profits assumption

[64] Mr. Polson critiqued Mr. McEvoy's opinion on the quantification of the damages incurred by 163 and by 236. The first difference of opinion was Mr. McEvoy's assumption of the future profitability of the steakhouse restaurant.

[65] Mr. McEvoy accepted the Rooneys' assumption that had the Tosh Steakhouse rebuilt, it would have earned net profits of 16% per year in the future. Mr. McEvoy did not verify with any independent data from the restaurant industry to determine what the reasonably expected profit margins were for restaurants of this type. He only relied on the assumptions provided by the Rooneys. I prefer Mr. Polson's evidence because he verified with the industry standard profit margins for restaurants of this type of 3% to 6% of sales. This is well below the 16% of sales used by Mr. McEvoy.

[66] Mr. McEvoy estimated that the fair market value of Tosh Steakhouse at March 1, 2016 was as follows: a low level of \$805,000, a mid level of \$883,000 and at the high-end, \$961,000. He

evaluated the business as a “going concern” and used a discounted cash flow approach. He used a capitalization rate of 16% for the low-end valuation and 18% for the high-end valuation.

[67] I accept Mr. Polson’s evidence that sit-down restaurants typically operate with a net profit margin of approximately 2% to 3%. He considered a study by Restaurant Resource Group that found that restaurants typically earned net profits of 2% to 6% with fast food restaurants at the higher end and sit-down restaurants at the lower end.

[68] In 2012 and 2013, Tosh Steakhouse reported net profits of 17% and 16% respectively. In 2012, Tosh Steakhouse showed a revenue increase in gross sales of 18% and in 2013, showed a gross revenue increase of 9% without any higher costs for food, beverages, labour, or marketing. Neither expert could explain the increase in gross profit without a corresponding increase in the cost of goods. One factor is that Matthew Rooney and Haley Rooney did not take any regular salary from the Tosh Steakhouse but only paid their personal living costs from this business.

[69] Tosh Steakhouse’s profitability was -8% in 2009; 6% in 2010; and, 0% in 2011. When the 5 previous years profitability are considered together, the average net profitability of Tosh Steakhouse without Haley and Matthew taking any regular salaries was 6.2%. I find that when adjusting for the lack of an expense for Matthew Rooney and Haley Rooneys’ salaries, a reasonable expectation for net profitability would be 5% of gross sales. This amount is slightly greater than Mr. Polson’s estimated profitability of 2% to 3% but is at the upper range of the study finding that the range of profitability for restaurants in Canada was from 2% to 6%. This amount is much less than the 16% projected profitability that Mr. McEvoy used in his calculations based on the information provided to him by the Rooneys.

[70] I find that on a balance of probabilities, Tosh Steakhouse would have earned net profit of 5% which is at the high-end of the typical net profit for a sit-down restaurant like Tosh Steakhouse. This would reduce the damages suffered by 163 substantially based on the amounts estimated by Mr. McEvoy.

(2) Mr. McEvoy failed to deduct the uncollectible loan of \$524,000 163 made to 238 from his valuation.

[71] Mr. McEvoy agreed in cross-examination that if a receivable on 163's books could not be collected then the value of 163 would have to be reduced by this amount. Matthew and Haley Rooney testified that Skirt Steak ceased operations after operating for approximately six months when the landlord terminated the lease. 238 lost approximately \$624,000 in the six-month period and has not operated since 2014. I infer that this receivable was uncollectible and should be deducted from the valuation of 163. When the assumed future profitability is reduced to 5% from 16% and when the receivable of \$524,000 is deducted Mr. McAvoy's estimate of the value of 163 at March 1, 2016 is reduced to nil.

(3) Other Critiques of Mr. McEvoy's damage Estimate

[72] Mr. Polson critiqued a number of other aspects of Mr. McEvoy's opinion on damages; a) Mr. McEvoy agreed in cross-examination that he should have made an adjustment for the requirement for 163 to make sustaining capital expenditures each year in the amount of approximately 5.4% of gross revenue; b) he failed to consider and deduct an amount for debt owed by 236 in the value he assigned to 236; c) he did not make any consideration for the effect of the Covid pandemic which adversely affected the profitability of restaurants for several years; d) he did not reduce the profitability estimates for 163 to account for management to salaries that would be required to be paid; and, finally e) he also failed to take into account a duty of Matthew Rooney and Haley Rooney to mitigate their damages for loss of employment income by finding other employment.

[73] I find that the above critiques by Mr. Polson of Mr. McEvoy's estimate of damages were valid and I accept his evidence.

Was TD's failure to advance the full amount of the loan of \$350,000 the effective cause of 163's inability to complete the renovations and its resulting business failure?

[74] The court must determine what damages, if any, 163 would have suffered if TD had fulfilled its contract and advanced 100% of the receipts for leasehold improvements to the Elgin Street property. In other words what damages were caused to 163 by TD's breach of the loan agreement?

[75] Haley Rooney knew that the CSBFA loan required 163 to provide receipts for the leasehold improvements it made because she had previously obtained a similar CSBFA loan in 2008 or 2009. The Rooneys testified that their understanding of the CSBFA loan was that TD would reimburse 163 for 100% of the leasehold improvements it made to the Elgin Street property up to the sum of \$350,000. TD refused to advance 100% of the receipts for leasehold improvements and in February 2016, advised the Rooneys that it would only advance 55.11% of the leasehold improvement receipts. O'Bonsawin J. found this to be the breach of contract by TD.

The Rooneys provided TD with a summary of amounts they required to complete the renovations at the Elgin Street property and the amount they had already incurred for leasehold improvements. The Rooneys submitted a document to TD setting out the amounts needed as follows:

Need

Fit Up	\$635,049
Furniture	\$122,337
Inventory	\$35,000
Marketing and Advertising	<u>\$35,371</u>
	<u>\$827,757</u>

Have

Personal Investment to Come	\$100,000
CSBL	\$350,000
Investment infused to date	<u>\$377,194</u>
	<u>\$827,194</u>

[76] However, the Rooneys included leased furniture and equipment as part of the investment

[77] they had infused to date for leasehold improvements. The amount of \$377,194 included \$95,238 for leased kitchen equipment and \$27,098 for leased furniture.

[78] 163 submitted \$110,330 of receipts to TD under the CSBFA loan. Notwithstanding that 163 only provided receipts to TD for \$110,330 of leasehold improvements, I infer that the breach of contract by TD amounted to a failure to advance the full amount of the \$350,000 loan amount. In other words, TD failed to advance the further sum of \$301,540 to 163 (\$350,000 - \$48,459).

[79] There are several important events that occurred, in addition to the fire on April 7, 2014, which caused the failure of the Tosh Steakhouse business. They are as follows:

- a. Between March and December 2013, the Rooneys decided to expand their steakhouse business to Kanata. They incorporated 2382805 Ontario Inc. ("238") and entered a lease in Kanata. The Rooneys testified that they spent approximately \$2,000,000 to renovate the leased premises to establish Skirt Steak, which opened on December 2, 2013;
- b. 163 borrowed \$500,000 from BDC and gave its assets as security for the loan. 163 then loaned the sum of \$500,000 to 238 ("Skirt Steak") to finance the startup of its restaurant in Kanata.
- c. Skirt Steak closed in June 2014 after the landlord terminated the lease for nonpayment of rent, having lost \$657,183 since it opened six months earlier. As a result, 238 became unable to repay the \$500,000 loan it received from 163.
- d. Tosh Steakhouse did not have any money remaining from the fire insurance proceeds after it paid the first mortgagee, the BDC loan, and various other creditors. 163 had \$1,300,000 of fire insurance coverage on the Tosh Steakhouse premises. The first mortgagee received \$500,000 from the fire insurance proceeds and BDC insisted on being repaid its loan of \$500,000 from the proceeds. The balance of the fire insurance proceeds were used to pay the CLE lease and various credit cards. This left 163 with a

negligible amount from the fire insurance policy which was insufficient to rebuild the Tosh Steakhouse at the Stave Court location.

- e. On July 28, 2014, 238 and the Rooneys sued their Kanata landlord in the Superior Court in Toronto. In its pleadings, the Rooneys stated that they were unable to rebuild the Tosh Steakhouse after the fire due to Skirt Steak's Kanata landlord's action of terminating the Kanata lease. The Rooneys pleaded that the Kanata landlord's actions caused BDC to call its \$500,000 loan forcing 163 to surrender the fire insurance proceeds which were intended to be used to re-build Tosh Steakhouse. The Rooneys pleading in their Toronto action alleging that their Kanata landlord's action of wrongfully terminating 238's lease was the cause of 163's inability to rebuild Tosh Steakhouse. This pleading is a deemed admission which supports the TD's position in this action.
- f. In April 2016, counsel for 163 demanded that TD loan 163 an additional amount of \$357,000 in addition to advancing the balance of the CSBFA loan. 163 stated that advancing the balance of the CSBFA loan of \$350,000 was not sufficient to make it current with its creditors. This is evidence that even if TD advanced the full amount of the CSBFA, it would not have been sufficient to allow 163 to complete its renovations and reestablish its restaurant business at the Elgin Street location.
- g. Mr. Polson testified that 163's loss of foregone income estimate, would be approximately \$175,000-\$240,000 with the loan to Skirt Steak shown as an asset on 163's financial statements. However, since the loan to 238 was now worthless, the amount of \$524,000 had to be deducted from the value of the business. This made the value of 163's business negative. I accept Mr. Polson's opinion evidence in this regard. Even if Mr. McEvoy's opinion of the mid point loss of \$883,000 was accepted, the sum of \$524,000 would have to be deducted from his estimate to account for the uncollectible loan to 238. When a further reduction to his estimate is made for the excessively high assumption of profitability of 16% as opposed to my finding of the more probable estimate to be 5% and a further reduction to account for the additional

expense of hiring managers because the Rooneys did not take a salary from the business, the value of the losses suffered by 163 would be nil.

- h. I prefer the opinion evidence of Mr. Polson and I accept his evidence over that of Mr. McEvoy for the reasons given previously and find that the failure of TD to advance the full balance of the CSBFA loan of approximately \$301,000 was not the effective cause of 163's inability to complete the reconstruction and its business failure.
- i. The fire at Tosh Steakhouse, where 163 was not left with any fire insurance proceeds after paying creditors, left 163 and the Rooneys with insufficient money or capital to rebuild and operate a successful Tosh Steakhouse at the Elgin Street location. Matthew Rooney testified that he invested \$2,000,000 to open the Skirt Steak restaurant in Kanata, which is consistent with finding that TD's failure to advance a further \$301,000, did not cause 163's business failure. This is also consistent with the Rooney's counsel advising TD that they needed a further \$337,000 in addition to advancing the full amount of the CSBFA loan.

Disposition of Issue #1

[80] For the above reasons, I find that the defendants and plaintiffs by counterclaim have failed to prove that the breach of contract by TD Bank, in failing to advance the full amount of the CSBFA loan, was the effective cause of 163 being unable to rebuild and re-establish its steakhouse business. I find that 163's damages caused by TD's breach of contract was nil for the above reasons.

Issue #2: Do any of the remaining defendants have causes of action against TD for failure to perform contractual obligations honestly, or are any such causes of action foreclosed by the decision of the Court of Appeal?

[81] 236, Haley Rooney, and Matthew Rooney were all guarantors of the CSBFA loan to 163. The guarantee signed by each of them stated that "the Bank does not owe you any duty (as a fiduciary or otherwise) and you hereby waive any right to make any claim or counterclaim, raise

any right of set off, equitable or otherwise.... and The Bank will not be liable to you nor shall you make any claim for negligence.”.

[82] I find that there are no special circumstances such as undue influence or any other circumstances that would support a finding that TD owed tort duties to the guarantors. The contract, namely the CSBFA loan agreement, was only between TD and 163. As a result, I find that 236, Haley Rooney, or Matthew Rooney cannot successfully make a claim for damages in breach of contract against TD.

[83] I also find that TD did not act dishonestly or make any negligent misrepresentations with regards to the CSBFA loan. Mr. Benier was the bank employee handling the loan. He was transparent in sharing with Haley that he was not experienced with the CSBFA loan procedure. He recommended that Haley go to a larger branch with more experience in this type of loan, but she preferred to stay with his branch. He did not make any representations to the Rooneys and acted as an intermediary forwarding applications and information to his supervisors and he followed his supervisors’ instructions. His uncertainty over whether 100% of the receipts for leasehold improvements would be reimbursed or only 55.11%, simply reflected his lack of knowledge about a CSBFA loan.

[84] I also find that Tanya Laughlin acted honestly and in good faith in reducing Haley Rooney’s interest rate on her HELOC from prime +1% to prime +0.5%. She followed the Bank’s policy and the approval was made by the Bank’s computer system without any input from her. This resulted in a new HELOC agreement being signed and the summary motion judge held that the doctrine of “accord and satisfaction” applied. As a result, Haley Rooney’s claim for damages because of the alleged error in the appraisal could not be maintained. Her claim regarding the appraisal for the HELOC was dismissed and this decision was upheld by the Court of Appeal for Ontario and is final.

[85] 236 seeks damages of \$1,592,230 from TD, made up of the value of its shares in Tosh Meats and Catering of \$744,473, the loss of its down payment for the 60 Elgin Street property in the amount of \$20,000; and, \$827,757 for the cost to rebuild the 236 Tosh Meats and Catering store.

[86] I have found that the failure of TD to advance the balance of about \$301,000 on the CSBFA loan was not the effective cause of 163's business failure. 236 was a guarantor of TD's CSBFA loan to 163. 236 never operated any business but if it had operated a business, I find that TD's breach of contract with 163 was not the effective cause 236's business failure. The failure of 236's business was caused by 163's business failure, which I found was not caused by TD's breach of contract with 163. The terms of the guarantee also stated that TD did not owe any duty to the guarantors, which applied to 236, and it waived any right to make a claim or set off against TD.

[87] I accept Mr. Polson's expert opinion that 236 had never operated as a business, did not have any clients or goodwill, did not have any equipment, furniture or any other assets. As a result, it was only an idea of a business that could potentially be started. In his opinion, the fair market value of such a non unique idea for a business that had not yet operated and had no assets or goodwill, would be nil. I agree with his opinion and as such, I would not award any damages to 236 for its hypothetical loss of future profits, for the costs to complete the renovation of the Elgin Street property, the loss of the down payment to purchase the Elgin Street property. The breach of contract between 163 and TD Bank was not the effective cause of the 236's business failure for the reasons previously given.

Haley Rooney and Matthew Rooney's claim for loss of income

[88] Haley Rooney and Matthew Rooney also claim losses of \$343,000 and \$327,000 respectively for the amount that they could have earned managing a restaurant from 2016 until 2025. They were guarantors of 163's CSBFA loan from the TD Bank and the guarantee they signed stated that they were not owed any duty of care and they waived any right to claim or counterclaim or set off against the TD Bank. In addition, they agreed that they would not make any claim for negligence.

[89] Matthew Rooney and Haley Rooney decided not to seek employment following March 1, 2016 and decided to move from their home in Arn prior to rented premises in the Barrhaven area near the Greenfield Public House ("Greenfields"). Greenfields is a restaurant and bar owned by Haley Rooney's father. Matthew Rooney and Haley Rooney both work as part of the management

of this restaurant and bar. They were not paid a regular salary by Greenfields, but the business paid their personal expenses, similar to how they operated with Tosh Steakhouse.

[90] Matthew Rooney and Haley Rooney chose not to work for an independent restaurant or bar because he did not want their creditors to garnish their wages. In short, they sought to avoid paying their creditors. They owed third-party creditors \$1,081,688 made up of \$229,272 to SYSCO, \$91,146 to the Royal Bank, \$481,878 to CLE for leasing furniture and equipment, and a further sum of \$279,391 to SYSCO.

[91] I find that any loss of salary incurred by Matthew Rooney and Haley Rooney was not caused by TD's failure to advance the full amount of the \$350,000 CSBFA loan, but by their decision not to work for a regular salary to avoid being garnished by their creditors.

[92] The Rooneys submit that they have a separate claim from that of 163 for damages from the TD Bank because TD's actions damaged their credit rating. I find that Matthew Rooney and Haley Rooney's credit ratings were damaged because they failed to pay creditors with judgements against them for more than \$1,000,000 and not by any actions or breach of contract by TD.

[93] According to the rule in *Foss v. Harbottle* the shareholders of 163 do not have a right to claim damages for breach of a contract between 163 and the TD Bank, just because they are shareholders. The shareholders of 163 and 236 have not proven any separate breach of a duty of care or breach of contract with them by the TD Bank.

[94] The breach of contract between 163 and TD occurred when the Rooneys were advised that TD Bank would only advance 55.11% of the receipts for leasehold improvements in accordance with Industry Canada's terms for a CSBFA loan. This occurred on or about February 12, 2016 when TD advised the Rooneys that it would only reimburse 163 for 55.11% of eligible leasehold expenses and took the position that it would not fund 100% of the leasehold improvements.

[95] The fact that Haley Rooney did not have any further equity in her home to finance the reconstruction of Tosh Steakhouse was not caused by TD. The issue of whether TD may have advanced Haley Rooney too much money under her HELOC, leaving no equity to finance the rebuilding of 163 was decided by the summary motion judge. She held that Haley Rooney was

barred from any right of action against TD by the principle of “accord and satisfaction”. This finding was upheld by the Court of Appeal for Ontario. Therefore, Haley Rooney does not have any claim against TD for the amount of the HELOC that was loaned to her. Matthew Rooney was not an owner of the property; therefore, he does not have any basis to claim any damages against the TD Bank related to the appraisal or the granting of the HELOC to Haley at a reduced interest rate.

[96] Haley Rooney’s claim for \$42,000 because TD seized her vehicle after she defaulted on the lease or loan payments was also not caused by TD’s breach of contract relating to the CSBFA loan to 163 but rather was caused by her failure to make the required payments. Her claim for damages against TD for seizing her vehicle, when her payments were in default, is dismissed.

[97] Haley Rooney also claims damages in the amount of \$898,978 to rebuild and I infer to repair her house in Arnprior, which is still subject to a HELOC in favour of TD. She also claims damages of \$199,500 for rental expenses of \$21,000 per year for household accommodations she leased in Barrhaven since 2016. The Rooneys voluntarily decided to vacate their home in Arnprior, subject to the HELOC, and move to rental premises in Barrhaven. TD did not evict the Rooneys and TD was not permitted to enforce its security against the Rooney’s home until this trial on damages was completed.

[98] I find that the Rooney’s voluntarily abandoned their home in Arnprior in 2016 and moved to rental accommodation in Barrhaven to be closer to the Greenfield Public House, the restaurant and bar owned by Haley Rooney’s father and managed by Matthew Rooney and Haley Rooney to the present. As a result, I dismiss any claim made by Haley Rooney against TD for the cost to rebuild or repair her home in Arnprior, subject to the HELOC, and also dismiss any claim for rent that she paid for accommodation in Barrhaven for the above reasons.

[99] For the same reasons, I dismiss the claim by Haley Rooney for the loss of the value of her home in Arnprior for \$1,200,000. This would amount to double recovery as she has claimed a similar amount to rebuild and repair the same house. This property is subject to a HELOC, originally for \$750,000, and together with interest at present, the amount of approximately \$800,000 is owing to TD. There may not be any equity in Haley Rooney’s Arnprior home because

Haley testified when she considered selling the home in 2016, she was advised that it could only be sold for approximately \$650,000, which was less than the amount owing on the HELOC. This was also part of the reason the Rooney's abandoned their Arnprior home rather than selling it.

[100] The shareholders of 163 did not present any evidence at trial to show that they, namely Haley Rooney and Matthew Rooney were personally wronged by the TD Bank. The wrong was done to 163 because the breach of contract was between 163 and TD.

[101] Matthew Rooney and Haley Rooney argue that TD should not be allowed to rely on the guarantees given by them to the bank because of TD's breach of the CSBFA loan. In *Bank of Montréal v. Javed*, 2016 ONCA 49, the Court of Appeal for Ontario refused to discharge the guarantees. It held that the guarantees were a contract, that the ordinary principles of contract law applied and that only the most serious misconduct on the part of the creditor would discharge a guarantee. I find that there was no such serious misconduct by TD, rather it breached the loan agreement by failing to advance the full amount of the CSBFA loan based on a misunderstanding between the parties on how much of the loan would be advanced. I will deal with the alleged tort of deceit which I find has not been proven by the plaintiffs' by counterclaim.

[102] TD did not promise to finance 163 until the restaurant was completely rebuilt, rather it only committed to grant a CSBFA loan which was subject to terms and conditions in order to obtain a guarantee of repayment by the federal government. I found that the failure of 163 to rebuild and operate as a profitable business after the tragic fire, was not caused by TD's failure to advance the balance of the \$350,000 loan (\$301,000) but rather by the fire which destroyed the Tosh Steakhouse premises, the loan to 163 of \$500,000 from BDC which was loaned to Skirt Steak to expand in the Kanata, by Skirt Steak's failure as a business after the Rooney's spent approximately \$2,000,000 to start up the Skirt Steak restaurant, and lost \$650,000 in the first six months of operation, and the Kanata landlord terminating the lease, which made 163's loan to Skirt Steak worthless. These factors caused 163 to receive insufficient fire insurance proceeds, after repaying the first mortgage, the BDC loan and the equipment lease and a few other debts, leaving it with insufficient capital in order to allow it to rebuild the Tosh Steakhouse restaurant and to operate a successful restaurant business.

[103] TD did not impair the value of the security it held or prevent 163 from rebuilding or becoming a viable commercial enterprise. As a result, I find that the guarantees given by Matthew Rooney, Haley Rooney, and 236 are not discharged, as I find there was no deceit or any breach of fiduciary duty to any of defendants or plaintiffs by counterclaim by the TD Bank.

Judgments of other Creditors

[104] For the same reasons, I find that TD is not responsible to pay the judgment creditors of 163 or Skirt Steak in the amount of \$229,272 and \$279,391 to Sysco Canada Inc., \$91,146 to RBC or the lease amount of \$481,878.02 to CLE for a total of \$1,081,688 as at April 10, 2026. TD's breach of contract with 163 was not the effective cause of these debts being incurred.

Mitigation

[105] I accept the expert evidence of Brian Doyle, a bankruptcy trustee who testified that 163 and the Rooneys were in such a terrible financial state that they were unable to mitigate their damages by obtaining financing from some other source after the Tosh Steakhouse restaurant was destroyed by fire. Haley Rooney and Matthew Rooney's credit scores had gone from a very high level of over 700 to a very low level.

[106] 163 had debts and judgement creditors of over \$1,000,000, the fire had destroyed Tosh Steakhouse as a viable business, the Rooneys had lost approximately \$2,000,000 invested to establish Skirt Steak in Kanata, it had a first mortgage of \$500,000 against the Tosh Steakhouse property, it borrowed \$500,000 from BDC secured against its assets which was loaned to Skirt Steak, which ultimately failed making this loan worthless. In addition, there wasn't any equity in Haley Rooney's residence, the Rooneys had personal credit card debts, and car loans. In fact, the Rooneys and 163 had the above debts and no assets other than some equity in the Staye Court property, which they encumbered with mortgages to non-arm's length parties to protect it from being seized by creditors.

[107] The Rooneys had an obligation to mitigate any damages they incurred based on the lack of employment income by seeking employment elsewhere. Instead of seeking alternate employment income, which would be subject to garnishment by their creditors, they chose to manage the

Greenfields restaurant without taking a regular salary. I find that the Rooneys were capable of obtaining alternate employment and failed to take appropriate steps to mitigate their damages from loss of employment income.

Disposition of the mitigation issue

[108] For the above reasons, I agree and accept Brian Doyle's expert evidence that it was not reasonably foreseeable for 163 to obtain financing from another source after TD advised that it would only advance 55.11 % of the leasehold improvement receipts. Matthew Rooney and Haley Rooney had very poor credit scores, 163 and the Rooneys had judgement creditors, 163 did not have any income from a viable operating business due to the fire, and 163 and the Rooneys did not have any unencumbered assets to pledge as security.

[109] TD did not impair the security that it held. Rather, it failed to fully fund a CSBFA loan, which was not the effective cause of 163's inability to rebuild and operate the Tosh Steakhouse as a successful business.

Negligent misrepresentation

[110] The plaintiffs by counterclaim allege negligent misrepresentation by the TD Bank. In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, the legal test for negligent misrepresentation was set out by the Supreme Court of Canada. The plaintiffs by counterclaim must prove that there was a duty of care based on a special relationship, that the representations were inaccurate or misleading, were relied upon and were detrimental in that damages resulted.

[111] The individual guarantors, namely Matthew Rooney and Haley Rooney, were not owed a duty of care in accordance with the terms of the guarantee they gave to the TD Bank. In addition, any misrepresentation regarding the loan amount was not the effective cause of 163's business failure and did not discharge the obligation of the guarantors.

[112] I also find that the defendants and plaintiffs by counterclaim have failed to prove that TD knew that any misrepresentations were false or were made with careless disregard to their truth. The plaintiffs by counterclaim have not proven that any of the employees of the TD Bank intended

to deceive them, rather the TD Bank was seeking a way to assist the Rooneys after the unfortunate fire and the failure of their Kanata restaurant. 163 has not proven any dishonesty or moral turpitude, namely any deceit, on the part of TD Bank with regards to the TD's CSBFA loan

[113] I further find that any damages to Matthew Rooney or Haley Rooney's reputation was not caused by any deceit, fraudulent or negligent misrepresentations by the TD Bank, but because they and 163 were unable to pay their creditors as a result of the fire that destroyed Tosh Steakhouse and their decision to expand into Kanata without sufficient capital to start Skirt Steak, which failed after six months.

[114] I also find that the plaintiffs by counterclaim have failed to prove any deceit or any fraudulent misrepresentations by Tanya Laughlin when TD renewed Haley Rooney's HELOC at a lower interest rate (prime plus 0.5%) in accordance with the bank's policy on November 16, 2015.

[115] Haley Rooney misrepresented to the TD Bank that 163 had contributed \$377,194 of leasehold improvements to the renovations at the Elgin Street property. In fact, the amount of \$95,238 and \$27,098 were leases for kitchen equipment and furniture respectively and were not amounts contributed to the leasehold renovations.

[116] The Rooneys allege that the TD Bank agreed to get them "the rest of the promised loan of \$350,000" at a meeting with three TD Bank employees in the April 2016 meeting. TD disputes that any agreement was reached to advance the balance of the loan with the Rooneys at this meeting. On May 2, 2016, TD's legal counsel wrote to the Rooneys stating that no agreement was reached at this meeting. Haley Rooney testified TD's letter was not accurate and that TD was going to fund the "CSBFA as expected" and that they were demanding additional compensation for damages.

[117] I find on a balance of probabilities, there was no actual verbal agreement at this meeting and the Bank was going to see if it could find a way to advance the full amount of the \$350,000 loan. I also find that there was no agreement by the bank to pay an additional sum of over \$300,000 in damages as the legal counsel for the Rooney's sought in his letter to TD after the April 2016 meeting.

Disposition of Issue #2

[118] For the above reasons I find that the remaining defendants and plaintiffs by counterclaim have not proven any valid claims for damages from any other causes of action arising from TD's failure to perform its contractual obligations honestly or for breaching its contract with 163.

[119] I do not find that the Court of Appeal for Ontario foreclosed any claim for damages for negligence or negligent misrepresentation, but rather referred these for consideration by the trial judge. These issues have been addressed above.

Issue #3: Is the TD Bank liable for the tort of deceit to any of the defendants or plaintiffs by counterclaim?

[120] Haley Rooney pleaded that the TD Bank deceived her into signing a new Line of Credit Maintenance Form reducing the interest rate on her HELOC from prime +1% to prime +0.5%. I find that the claim for deceit regarding the signing of the new HELOC at a lower rate of interest is precluded by the finding of "accord and satisfaction" by the summary motion's judge and upheld on appeal.

[121] The tort of deceit requires a high standard, namely a finding "of dishonesty or moral turpitude" as held by the decision of *Holley v. The Northern Trust Company, Canada*, 2014 ONSC 889 at paras. 114-115 and 118.

[122] Tanya Loughlin, a financial advisor at TD's Arnprior branch, requested a reduction of the interest rate on Haley Rooney's HELOC as a matter of customer service and she followed Haley Rooney's instructions. The TD Bank's computer system approved the reduction of interest on Haley's HELOC. Mr. Armstrong testified that no one at the TD Bank was able to manipulate the automatic approval. His evidence in this regard was not challenged or contradicted.

Disposition of Issue #3

[123] For the above reasons, I find that the plaintiffs by counterclaim have failed to prove that the TD Bank committed the tort of deceit and is not liable to any of the defendants because Ms. Laughlin did not make any misrepresentation to Haley Rooney and simply followed her

instructions and the TD Bank's policy when renewing the HELOC. In addition, this issue was resolved by the Court of Appeal when it upheld the decision of the summary motion's judge.

[124] 236 and Matthew Rooney did not present any evidence to support a claim for deceit by the TD Bank and any such claim is dismissed. Under issue #2, I found that the TD Bank did not commit the tort of deceit in any of its dealings with 163 concerning the CSBFA loan.

Issue #4: Are the defendants, or any of them, entitled to punitive or exemplary damages?

[125] In *Whitten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 74 stated that punitive damages were to be awarded in "exceptional cases involving malicious, oppressive, high-handed misconduct that is an affront to the court's sense of decency". I find that the conduct of the employees of the TD Bank do not justify imposing punitive or exemplary damages as I find they acted honestly and did not knowingly make any misrepresentations to any of the defendants but did their best to assist the Rooneys in their unfortunate situation following the fire that destroyed Tosh Steakhouse.

[126] *Royal Bank of Canada v. W. Got Associates Electric Ltd.*, 1999 CanLII 714 (SCC) set out the factors to be considered in order to award exemplary damages. Exemplary damages may be awarded to address the following 5 concerns: 1) that the court will not condone a clear violation of the rule of law that requires a debenture holder to give reasonable notice; 2) the court will not condone an abuse of its process for commercial advantage; 3) that because no crime has been committed, no other form of punishment was available; 4) that the bank's conduct caused grave and irrevocable consequences to the business of its client; and 5) the courts are entitled to expect honest behaviour from the major chartered banks.

Disposition Issue #4

[127] I am satisfied that none of the above 5 factors identified in *Royal Bank of Canada v. W. Got Associates Electric Ltd.* are applicable to TD's dealings with 163 and as such, I dismiss the claim for exemplary damages against the TD Bank. I also dismiss any claim for punitive damages as TD's conduct towards 163 or any of the defendants was not malicious, oppressive, or so high-handed that constitutes an affront to the court's sense of decency.

Issue #5: What rate of interest and post-judgement interest should apply to the amounts owed by the Defendants to TD Bank on the CSBFA loan, the HELOC, Haley Rooney's TD Visa card and Matthew Rooney's two TD Visa cards?

[128] I have found that TD did not engage in any dishonest or deceitful conduct towards any of the defendants or plaintiffs by counterclaim. As a result, the interest rates agreed upon in the various contracts or agreements for the CSBFA loan, the HELOC, including tax arrears charged to the HELOC of \$67,086.76 and other expenses charged to the HELOC of \$2,598.20, Haley Rooney's TD Visa card ending in (0149) as well as Matthew Rooney's TD Visa cards ending in (4825) and (6802) shall be charged at the rates provided for in the agreements between the parties.

Disposition of Issue #5

[129] Neither party made any submissions on the post judgement interest rates and so, the loans shall continue to bear interest at the rate prescribed in the various agreements between the parties after judgement.

Issue #6: To what extent should damages on the claim and counterclaim be set off against one another?

[130] I have found that the plaintiffs by counterclaim are not entitled to any award of damages and so there is no amount to be set-off against the amounts owing to the TD Bank.

Additional issues raised by the plaintiffs by counterclaim:

Issue #7: Did TD Bank fail in its duties to 236, Matthew Rooney, or Haley Rooney in failing to fund the project, in renegotiating terms of interest, or in enforcing their security? If so, what remedy and damages flow from these breaches?

[131] I find that TD Bank did not breach any duty of care to 236, Matthew Rooney, or Haley Rooney based on the terms the guarantees signed by these parties. The plaintiffs by counterclaim agreed in the guarantee that they signed that no duty of care owed to them. I further find that any claim for damages by the guarantors was too remote to be recoverable in any event.

[132] I also find that the plaintiff's by counterclaim cannot claim for damages for renegotiating the interest rate on Haley Rooney's HELOC by reducing the interest rate from prime +1% to prime +0.5% because this issue was finally dealt with by the summary motion judge's decision regarding the HELOC, which was upheld by the Ontario Court of Appeal and is final and binding. In addition, I find that there was no deceit or dishonest conduct by the bank and they reduced the interest rate on Haley's HELOC to prime +0.5% in any event.

Enforcement by TD

[133] The plaintiffs by counterclaim argue that the loan on the HELOC was not in default when TD commenced enforcement proceedings against the defendants based on the default on various loan agreements. TD submits a proper notice of default and demand for payment were made. The credit cards were and have been in default for a lengthy period of time as well as the car loan. The vehicle was repossessed due to default.

[134] In any event TD has not repossessed or taken any action to repossess Haley Rooney's house, even though no payments of monthly interest have been made since 2016, a lengthy period of time of approximately 10 years.

[135] After the Rooneys through their counsel's letter, demanded that TD advance the full amount of the CSBFA loan and pay them an additional sum of \$300,000 for damages TD advised the defendants of its intention to enforce its security. It was obvious to both parties at this point in time that the balance of the CSBFA loan was not going to be advanced. 163 admits to owing the principal sum of \$48,459.82 advanced on the CSBFA loan plus interest at prime +3% from May 17, 2016. Demand for payment has been made and notice has been given.

[136] Similarly, the principal amount owing on the HELOC as of August 31, 2016 was \$752,571.50 plus interest at the prime +0.5% rate. Haley Rooney admitted that this amount was owing on her HELOC. Haley Rooney was required to make interest payments on the HELOC on the 20th day of each month and she stopped making payments in February 2016. On July 29, 2016 TD sent her a demand letter for the full balance of the HELOC loan. The HELOC has been in default since February 2016.

[137] Haley Rooney owes \$23,108.27 on her TD Visa card and Matthew Rooney owes \$22,940.71 and \$5,685.51 on his TD Visa cards. These amounts have been in default for a lengthy period of time and are not contested. The credit cards bear interest at the rate of 21% per annum.

Disposition of Issue #7

[138] For the above reasons, I find that the TD Bank did not fail or breach its duties to 236, Matthew Rooney, or Hailey Rooney. As a result, the TD Bank does not owe any damages resulting from its breach of its loan with 163 to 236, Matthew Rooney, or Haley Rooney.

Final Disposition

[139] For the above reasons the TD Bank is a granted judgement as follows:

- a. against 163, 236, Haley Rooney, and Matthew Rooney jointly and severally the amount of \$48,459.82 plus interest at the TD prime rate +3% per annum from May 17, 2016 to the date of payment;
- b. against Haley Rooney for the principal sum of \$752,511.50 owing on the HELOC plus all fees charged to the HELOC, together with interest at the rate of the TD prime +0.5% per annum from August 31, 2016 to the date of payment;
- c. TD Bank shall be granted exclusive possession of the Pine Ridge property, with the right to proceed with sale of the property under power of sale to enforce the judgement there for the full amount owing under the HELOC;
- d. Haley Rooney is ordered to pay TD Bank the principal sum of \$23,108.27 owing on her TD Visa card (ending in 0149) with interest at 21% per annum from March 23, 2026 to the date of payment;
- e. Matthew Rooney is ordered to pay TD Bank the principal sum of \$22,940.71 owing on his TD Visa card (ending in 4825), with interest at 21% per annum from January 23, 2016 to the date of payment, and the principal sum of \$5,658.51 owing on his TD

Visa card (ending in 6802), with interest at 21% per annum from February 23, 2026 to the date of payment; and,

- f. The counterclaim against the TD Bank is dismissed.

Costs

[140] The plaintiff, TD Bank shall have 15 days to make submissions on costs not exceeding 20 pages; the defendants and plaintiffs by counterclaim shall have 15 days to respond not exceeding 20 pages; and, TD Bank shall have 10 days to make a brief reply.

The Honourable Justice Robert Smith

Date: August 12, 2026

CITATION: TD Bank v. 1633092 Ontario Ltd., 2026 ONSC 4620
COURT FILE NO.: CV-16-69905
DATE: 2026/08/12

ONTARIO

SUPERIOR COURT OF JUSTICE

THE TORONTO-DOMINION BANK

Plaintiff/Defendant by Counterclaim

– and –

1633092 ONTARIO LTD., 2362378 ONTARIO INC.,
MATTHEW ROONEY, and HALEY ROONEY

Defendants/Plaintiffs by Counterclaim

REASONS FOR DECISION

R. Smith J.

Released: August 12, 2026