IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jones v. Bank of Nova Scotia,* 2025 BCSC 1425

Date: 20250724
Docket: S15419
Registry: Rossland

2025 BCSC 1425 (CanLII)

Between:

Russell Jones

Plaintiff

And

Bank of Nova Scotia

Defendant

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Appearing in person:	R. Jones
Counsel for the Defendant:	A.K. Laverdure
Place and Date of Hearing:	Nelson, B.C. December 5, 2024 and January 14, 2025
Place and Date of Judgment:	Rossland, B.C. July 24, 2025

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Introduction

[1] The Bank of Nova Scotia (the “Bank”) applies, pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, to have Russell Jones’ claim struck, without leave to amend. It also seeks an order declaring Mr. Jones to be a vexatious litigant, and an order pursuant to s. 8 of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 [*Act*] that Mr. Jones not be permitted to institute any legal proceedings without leave of the court. Finally, it seeks special costs of this action and application.

[2] Mr. Jones opposes all orders sought. He also applies for partial summary trial, “adjudicating the defendant’s response to civil claim on the issues of res judicata and statute of limitation.”

[3] Underlying both applications is the fact that Mr. Jones brought an earlier action against the Bank that was dismissed by Mr. Justice McEwan in oral reasons rendered on December 5, 2016 (the “First Action”). The Court of Appeal dismissed Mr. Jones’ appeal of that decision in reasons indexed as 2018 BCCA 381 on September 7, 2018.

[4] Mr. Jones filed the present action on October 18, 2022 (the “Second Action”). The Bank’s position is that the present action is duplicative of the previous action, and should be dismissed as *res judicata* and an abuse of process. Mr. Jones’ position is that his previous action was not dismissed on the merits, and that *res*

judicata therefore does not apply. He denies that his present action is an abuse of process or should otherwise be dismissed.

[5] Both actions relate to a bank draft that Mr. Jones deposited in a trust account maintained by a law firm, Eichler Caldwell, at the Bank's Nelson Branch. He made the deposit in December 2022. The bank draft was in American dollars. The account was denominated in Canadian dollars. Mr. Jones' basic complaint is that the Bank wrongfully converted the American dollars into Canadian dollars, without his knowledge or consent, causing him to suffer damages. The Bank denies that its actions were unlawful, relying on, amongst other things, the fact that it had no contractual relationship with Mr. Jones, and the terms of its account agreements with the account holder, Eichler Caldwell.

[6] For the reasons that follow, I have concluded that, because the First Action was dismissed on the basis that the pleadings disclosed no reasonable cause of action, the doctrine of *res judicata* does not apply, and I decline to dismiss the Second Action on that basis. Despite that conclusion, I find that the Second Action is an abuse of process, and I dismiss it on that basis. I have also concluded that the Bank has not established that a vexatious litigant order should be made against Mr. Jones. Nor is an order for special costs warranted, but the Bank is entitled to its costs of this action and application at Scale B.

Chronology of Events

[7] On September 23, 2014, Mr. Jones filed a notice of civil claim against the Bank (Action No. 18376). He sought mutual restitution of personal property for breach of contract, rescission of contract based on mutual mistake, and conversion.

[8] On March 13, 2015, Mr. Jones filed an amended notice of civil claim in the First Action to amend the statement of facts and to add allegations of unjust enrichment, and deceptive business practices.

[9] On October 27, 2016, the Bank applied to strike the First Action pursuant to Rule 9-5(1)(a). The Bank's application was heard and decided by Mr. Justice

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McEwan on December 5, 2016. He dismissed the First Action with costs to the Bank (the "Dismissal Order").

[10] On January 3, 2017, Mr. Jones filed a notice of appeal. On September 7, 2018, the Court of Appeal heard and dismissed the appeal with costs to the Bank.

[11] On October 18, 2022, Mr. Jones filed a notice of civil claim initiating the Second Action against the Bank .

[12] On March 18, 2024, Mr. Jones filed his notice of application for partial summary trial. On May 14, 2024, the Bank filed its notice of application seeking the dismissal of the Second Action.

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<u>The Dismissal of the First Action</u>

[13] Justice McEwan heard the Bank's application to dismiss the First Action on December 5, 2016. After the following interchange, McEwan J. provided the following brief oral reasons for judgment dismissing the First Action:

> RUSSELL JONES: That it was – that the –
>
> THE COURT: That –
>
> RUSSELL JONES: -- mistake was made –
>
> THE COURT: Well, he said they inadvertently deposited the cheque as if it were a Canadian dollar cheque, and then about an hour later they caught the fact that it was U.S. dollars, and that that required conversion into Canadian funds, and I guess implied a fee as between Eichler Caldwell and the bank pursuant to their contract.
>
> RUSSELL JONES: I know that in – in the *Trustco* case there was no foreign exchange that happened. So that the transaction went smoothly from one account to the other. Here there was an intervening – or there – there had to be an intervening foreign exchange for the money to be – before the money could be credited to Eichler Caldwell, there had to be a foreign exchange because now I know that the Eichler Caldwell account, the number they gave me, was a Canadian – was denominated in Canadian dollars. And it could not be deposited – it could not be credited to that Canadian account – Canadian dollar account until the foreign exchange had occurred.
>
> THE COURT: Right.
>
> RUSSELL JONES: So unlike *Trustco,* the money had not moved from – from me to Eichler Caldwell. The – the whole of – of *Trustco*

THE COURT: I don't think that – well, that's not what Mr. Parsons is saying, he's saying the money did move, it's just it had to be adjusted for –

RUSSELL JONES: I know.

THE COURT: -- for Canadian dollars.

RUSSELL JONES: That's what he says. Maybe Your Honour would accept an additional brief on this question.

THE COURT: No.

RUSSELL JONES: When – when was the money credited? Because I really don't have –

THE COURT: Sir, listen, I've got to shut this down.

RUSSELL JONES: Yes, I know.

THE COURT: You know, I've got a full room of people. I'm not going to give reasons off the bench that are – are fulsome, if there's an issue about my reasoning, it will have to come out of the colloquially we've had in the course of my hearing of this case.

But I am satisfied on the basis of what I have been advised by both of you that this case, which is cast as a contractual relationship between you and the bank, is ill-founded. There is no contract between you and the bank in this context. You deposited a U.S. dollar cheque by endorsing it over into a Canadian bank account on – that was in favour of the legal firm of Eichler Caldwell, and every relationship that is described in the course of this case is a relationship between people other than you. There's the Bank of Nova Scotia's relationship with the – with the lawyers, but there's no relationship of contract between you and the bank.

You just showed up and – and deposited a U.S. dollar cheque into their account, and they dealt with it as a Canadian bank will deal with a U.S. dollar denominated deposit, and the – even the cost of that is really a cost that's between the law firm and the bank in relation to their contractual relationship. And not anything to do with you.

And again, I mean, what you've told me suggests that you had a set of expectations that weren't met by the bank, but that there was no basis for those expectations, if you understood how the banking system worked, and your attempt in this litigation is to blame the bank for not advising you or notifying you or letting you know, or taking care of you, and I just don't see that there's any relationship that gives rise to those obligations.

So the case is dismissed.

[14] On appeal, Mr. Jones argued, as set out at para. 11 of the Court of Appeal's decision, that McEwan J. erred in finding there was no plea of contract between him and the Bank, and that his pleadings adequately identified consideration flowing

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between the parties, the material terms of the agreement, its breach, and damages. As set out at para. 12, he identified a number of alternative legal bases upon which a claim might be made out and, as set out at para. 13, argued that McEwan J. failed to consider whether the pleadings were capable of amendment.

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[15] At para. 15, the Court noted that the application was brought pursuant to Rule 9-5(1)(a). At para. 16, the Court commented that:

> [16] The reasons appear to address the merits of the claim but it is clear that the chambers judge considered the manner in which the case was "cast". He addressed the way in which the relationships between the parties were "described" by the plaintiff and concluded that the claim was "ill-founded".

[16] At para. 20, the Court held that McEwan J. was correct in finding that Mr. Jones' allegation:

> …that he offered to deposit a US dollar bank draft in a Bank of Nova Scotia account and the bank accepted the offer – could not support a claim in contract or restitution arising out of the conversion of the deposit into Canadian funds.

[17] Mr. Jones argued that there were "reciprocal promises of performance" between him and the Bank. But the Court held at para. 22 that he failed to plead that the Bank had promised, or represented to him, that the account into which he deposited the bank draft was a US dollar account, that the funds would not be converted into Canadian dollars, or that the account holder would not be charged a fee. The Court held that "this is not a mere technical deficiency, it goes to the heart of the claim".

[18] At para. 25, the Court held that there was no claim founded upon the doctrine of mutual mistake, as there was no pleading that the Bank was under a mistaken belief that US funds could be deposited without being converted into Canadian funds.

[19] At para. 26, the Court noted that McEwan J. did not expressly address Mr. Jones' claims of conversion or unjust enrichment. But it held that no such claims

were disclosed in the pleadings. The same was true, as held at para. 27, with respect to the allegation of deceptive business practices.

[20] At para. 31, the Court held that it would not allow the appeal on the basis that McEwan J. erred in failing to consider allowing Mr. Jones to amend his pleadings as an alternative to dismissal. No motion to amend or draft amended pleadings were provided, but the record showed that consideration had been given to amendment as a means of rectifying the deficiencies. At para. 36, the Court held that:

> [36] A party who seeks to amend deficiencies in the pleadings should do so in the trial court, before an order is made striking the pleadings. If a litigant fails to do so we will not have the trial court's considered views on the appropriate exercise of its discretion. In such cases, in my opinion, we should only permit an amendment of the pleadings at this stage where to fail to do so would clearly cause an injustice.

[21] At para. 37, the Court held that it was not clear that, even with an amendment, Mr. Jones would be able to make out a case with any substantial merit:

> [37] …The claim may be limited to the fee charged, $8,000 (although the appellant describes a much more substantial claim based on the moving exchange rate in the many years since his funds were returned to him in January 2013). The claim relates to a transaction that took place five years ago. I would not accede to the appellant's submission that we should set aside the order made to as to permit him to reframe the case.

Analysis

Res judicata

[22] The Bank submits that the Second Action represents an attempt by Mr. Jones to do precisely what the Court of Appeal would not allow him to do in his appeal of the dismissal of the First Action: to reframe his case to try to make a case with any substantial merit (at para. 37). It submits that the Second Action should be dismissed as *res judicata* or an abuse of process, as a collateral attack on the Court of Appeal's decision.

[23] Mr. Jones submits that there was no final decision on the merits of the First Action, leaving him free to file and proceed with the Second Action.

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[24] In support of his position, Mr. Jones relies on *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149. In particular, he relies on para. 10, where the Court stated:

> [10] Rule 9-5 is concerned only with the sufficiency of pleadings. It provides in subrule (1) that the court may strike or amend any pleading, in whole or in part. Subrule (2) prohibits the filing of evidence on an application under subrule 1(a). An order striking a pleading could not be the basis for a *res judicata* defence in subsequent proceedings.
>
> [Emphasis added.]

[25] Mr. Jones' position is that all that occurred with the First Action is that it was dismissed on the basis that his pleadings were insufficient, and that the dismissal of his First Action accordingly cannot form the basis for dismissing the Second Action as *res judicata*.

[26] The Bank responds that Mr. Jones misconstrues what happened both in the chambers hearing before McEwan J. and in the Court of Appeal. It submits that McEwan J. in effect gave Mr. Jones the opportunity to give evidence in the chambers hearing. Further, it submits that before the Court of Appeal Mr. Jones filed further material, and despite the receipt of that material, the Court of Appeal refused to allow Mr. Jones to amend his pleadings and reframe his case.

[27] The Court of Appeal remarked at para. 16 that McEwan J.'s reasons "appear to address the merits of the claim but it is clear that the chambers judge considered the manner in which the case was 'cast'". The Court of Appeal proceeded, as did the parties on appeal, on the basis that McEwan J. struck the pleadings as disclosing no reasonable cause of action (at para. 17).

[28] Applying what was said by the Court of Appeal in *Taoist Church*, I find the doctrine of *res judicata* does not apply in the circumstances of this case, where the First Action was dismissed on the basis of an order striking the pleadings.

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Abuse of process

[29] That is not the end of the analysis. Even where the doctrine of *res judicata* does not apply, an action may be dismissed as an abuse of process where it constitutes a collateral attack on a prior decision of a court. In *Garland v. Consumer Gas Co.*, 2004 SCC 25, the Supreme Court of Canada described the doctrine of collateral attack as follows at para. 71:

> [71] …The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E.*, Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, The Doctrine of Res Judicata in Canada (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:
>
>> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[30] In *Toronto (City) v. C.U.P.E.*, 2003 SCC 63, the Supreme Court of Canada described the doctrine of abuse of process as follows:

> [37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 330)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
>> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. <u>It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.</u> See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

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> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

[31] The First Action and the Second Action deal with exactly the same set of facts. They involve identical parties. The causes of action are essentially identical, although Mr. Jones has made some amendments in the Second Action.

[32] I agree with the Bank that the Second Action represents a clear attempt by Mr. Jones to get around the decision of the Court of Appeal in the First Action. He has attempted to reframe his case in circumstances where neither McEwan J. nor the Court of Appeal would permit him to do so.

[33] Further, Mr. Jones has done so many years removed from the facts underlying the First and Second Actions. The transaction in issue occurred in December 2012. The First Action was dismissed in December 2016. Mr. Jones' appeal from that decision was dismissed in September 2018. The Second Action was filed in October 2022. This application was heard in December 2024 and January 2025. Over 12 years have passed since Mr. Jones deposited his bank draft.

[34] Accepting Mr. Jones' submission that the elements of *res judicata* are not made out, abuse of process is flexible doctrine that is unencumbered by the specific requirements of concepts such as *res judicata*. In my view, allowing the Second

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Action to proceed would offend the principles of judicial economy, consistency and finality.

[35] Although not necessary to my decision, I would also observe that the Second Action would be unlikely to succeed due to the delay in its being filed. The transaction occurred in December 2012. The Second Action was filed in October 2022, almost ten years later. In an apparent attempt to avoid the Second Action being dismissed as statute-barred, Mr. Jones has reframed the action as seeking restitution of trust property. In the notice of civil claim, he appears to rely on the fact that he deposited the bank draft into a trust account, the trustee being the account holder. He pleads that he has standing to bring the action in the trustee's stead because the trustee has failed to pursue the claim against the Bank, and because the trustee is in a conflict of interest.

[36] This is the same argument Mr. Jones made for the first time before the Court of Appeal (at paras. 32–33).

[37] I agree with the Bank that Mr. Jones is really making a claim for damages, and not a trust claim. The Bank was not in a trust relationship with Mr. Jones. No facts are pleaded that would tend to support Mr. Jones' legal claim that he has standing because the trustee has failed to pursue the claim against the Bank or was in a conflict of interest.

[38] As a claim for damages in respect of injury to property, it is the two-year limitation period established by s. 3(2) of the *Limitation Act*, R.S.B.C. 1996, c. 266 that applies. Mr. Jones obviously discovered this claim many years ago – he argued it in front of the Court of Appeal in September 2018.

[39] For these reasons, I dismiss the Second Action pursuant to Rule 9-5(1)(d).

Vexatious litigant

[40] The Bank applied to have Mr. Jones declared a vexatious litigant pursuant to s. 18 of the *Act*. It relies on the factors referred to in *Tosen v. Gumtree Catering*,

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2023 BCSC 121 at paras. 41–42, which drew on the decision of the Court of Appeal in *Gonzalez v. British Columbia (Attorney General)*, 2018 BCCA 421.

[41] In *Tosen* at para. 43, the court observed that a vexatious litigant declaration is an order that should not be made lightly, as it has serious consequences.

[42] In my view, Mr. Jones' conduct has not reached a level that would justify declaring him to be a vexatious litigant. He has instituted two actions against the Bank. He does not have a history of "habitually, persistently and without reasonable grounds" bringing legal proceedings in this court. I have dismissed the Second Action as an abuse of process, but I am unable to say that Mr. Jones knowingly filed the Second Action for an improper purpose. I am told by the Bank that he paid the costs orders made with respect to the First Action.

[43] I do not find that it is in the public interest to declare Mr. Jones a vexatious litigant or that such an order is necessary to prevent an ongoing abuse of the court's processes. I, therefore, deny the Bank's application to have Mr. Jones declared a vexatious litigant.

Costs

[44] The Bank sought an order for special costs. It relies on *Leger v. Metro Vancouver YWCA*, 2013 BCSC 2021 at para. 73 in support of this request.

[45] In my view, Mr. Jones' conduct in this litigation does not merit an award of special costs. He has not engaged in reprehensible conduct. He has filed the Second Action, which the court has found to constitute an abuse of process. I recognize that, as in *Gonzalez v. Gonzalez*, 2016 BCCA 376 at para. 38, a finding of abuse of process may be a basis for an order for special costs. However, in the case at bar, I find that Mr. Jones' conduct in bringing the Second Action has not been scandalous or outrageous. I decline to order special costs against Mr. Jones.

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[46] The most important issue in this case was whether the Second Action should be dismissed. The Bank was successful on that issue. The Bank is entitled to its costs at Scale B.

“L.M. Lyster J.”

LYSTER J.

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