COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sky v. Toronto-Dominion Bank,* 2026 BCCA 158

Date: 20260417
Docket: CA50605

Between:

Thomas Sky

Appellant
(Plaintiff)

And

The Toronto-Dominion Bank

Respondent
(Defendant)

Before: The Honourable Justice Iyer
The Honourable Justice Gomery
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated March 19, 2025 (*Sky v. The Toronto-Dominion Bank*, 2025 BCSC 494, New Westminster Docket S252590).

Counsel for the Appellant:	J. Wang
Counsel for the Respondent:	K. Hanowski L.N. Frame
Place and Date of Hearing:	Vancouver, British Columbia March 19, 2026
Place and Date of Judgment:	Vancouver, British Columbia April 17, 2026

Written Reasons by:
The Honourable Justice Gomery

Concurred in by:
The Honourable Justice Iyer
The Honourable Justice MacNaughton

Summary:

This appeal arises from an application for leave to amend, wherein a chambers judge allowed some amendments, refused others, and struck a paragraph of the notice of civil claim. The judge was of the view that the relevant portions were a collateral attack on an order nisi and an abuse of process. The appellant says the judge erred in that conclusion. Held: Appeal allowed. It is not plain and obvious that the relevant portions of the claim constitute a collateral attack or abuse of process. It is not duplicative, and permitting the claim will not result in manifest unfairness to the respondent or bring the administration of justice into disrepute.

Reasons for Judgment of the Honourable Justice Gomery:

Overview

[1] Thomas Sky was a customer of the Toronto-Dominion Bank. In the fall of 2018, the Bank decided to terminate its banking relationship with Mr. Sky. It took steps to close his bank and credit card accounts. Mr. Sky owed the Bank money on a home equity line of credit (the "HELOC") secured by a mortgage on his home. The Bank called the loan. Mr. Sky failed to satisfy the demand. In February 2019, the Bank commenced a foreclosure proceeding.

[2] On May 1, 2019, the Bank applied for and obtained an order *nisi* of foreclosure with a six-month redemption period. Mr. Sky listed and sold his home to pay off the HELOC loan within the redemption period.

[3] In June 2019, Mr. Sky commenced an action against the Bank for terminating their banking relationship. He drafted the notice of civil claim himself. He subsequently retained counsel who amended the notice of civil claim. In May 2022, he retained his current counsel and the claim was amended again, by consent. In May 2024, his current counsel proposed further amendments. This time the Bank opposed.

[4] The application for leave to amend was heard by a chambers judge who allowed some amendments and refused others. The judge also struck a paragraph of the existing notice of civil claim. In the judge's view, the paragraphs in issue constitute an impermissible collateral attack on the order *nisi* and an abuse of

process. The main issue on appeal is whether the judge erred in coming to this conclusion.

[5] In my view, the judge erred in law, the appeal should be allowed, and Mr. Sky should be permitted to amend his claim and pursue it, subject to such defences as the Bank may raise. It is not plain and obvious that the claims advanced in the paragraphs in issue constitute a collateral attack or an abuse of process, as contended by the Bank.

The pleading

[6] In unchallenged paragraphs of the notice of civil claim, Mr. Sky pleads that he contracted with the Bank for the provision of financial services. There were various components to the services to be provided by the Bank, including the HELOC. The contract reserved to the Bank a discretionary power to cancel the contract and withdraw its services. Mr. Sky pleads that the Bank was limited to exercising its contractual discretion in good faith. He further pleads that the Bank breached its duty of good faith by exercising its discretion for reasons that are not rationally connected to any of the purposes for which the discretion was conferred.

[7] In the paragraphs in issue, Mr. Sky pleads as follows. It should be noted that he affirmatively pleads his inability to satisfy the Bank's demand for payment of the HELOC and that the Bank obtained the order *nisi*:

> 110b. TD's breach resulted in the Plaintiff's defaulting under the Agreement for the Home Equity Line of Credit as he could not repay the whole balance by November 20, 2018 as demanded by the Discontinuing Financial Services Letter.
>
> 110c. In late February 2018, TD started foreclosure proceedings against the Plaintiff's house at 404 Victoria Road, Nanaimo, BC, and obtained an order nisi on May 1, 2019.
>
> 110d. After the order nisi was granted, and to avoid the risk of losing large amounts of equity in the house through a court ordered sale and paying the associated legal fees, the Plaintiff sold his house for $380,000.00 approximately $40,000.00 less than the fair market value in January 2020.
>
> 110e. The Plaintiff's loss was not limited to the reduced sale price. As a result of the sale of his house, he missed an opportunity to gain increased equity from the rising value of residential properties since the sale. Based on

> the value assessed by BC Assessment, the house is worth about $544,000.00 as of July 1, 2023. Based on the assessment, the Plaintiff lost an opportunity to gain approximately $164,000.00 in equity as a result of the sale of his house.
>
> 110f. Further, TD's breach took away the Plaintiff's opportunity to retire early. In August 2018, the Plaintiff had almost paid off the mortgage on his house and was planning early retirement.
>
> 110g. TD's breach ruined the Plaintiff's credit rating. Between mid-August and early October 2018, the Plaintiff was unaware of the fact that TD cancelled its services to him and put a hold on his accounts and lines of credits. As a result, many of his preauthorized payments through his TD accounts were not processed, and TD reported these incidents to the Canadian Credit Bureaus, which in turn brought his credit rating down to near that of a bankruptcy. This poor credit rating prevented the Plaintiff from receiving credit services from all other banks and credit unions to get a replacement loan to pay off the balance of the Home Equity Line of Credit.
>
> …
>
> 114b. As a result of TD's discontinuance of the HELOC, the Plaintiff was unable to maintain and upkeep his rental property in Sault Ste. Marie, Ontario and had to sell it at a loss, missing out on a business opportunity.
>
> …
>
> 115. TD's breach of duty to exercise discretion in good faith in de-marketing the Plaintiff resulted in loss and damage to him, the particulars of which are as follows.
>
> a. Loss of equity through the sale of his house.
>
> b. Loss of opportunity for early retirement.
>
> c. Lowered credit rating.
>
> d. …
>
> e. Loss of business opportunity.

I will refer to these paragraphs collectively as the disputed pleading.

The judge's reasons

[8] The judge reasoned that the order *nisi* entails "ancillary findings" that the Bank was entitled to demand payment for the HELOC loan, the notice given was reasonable, and the foreclosure proceeding was properly commenced. He considered that the underlying premise of the claim advanced in the disputed pleading contradicts these ancillary findings. He held that "Mr. Sky is purporting to plead that there are in fact triable issues" that could have been raised in opposition to the order *nisi*: at para. 29. He cited *HSBC Bank Canada v. Ba-Oose, Inc.*, 2011

BCSC 4, aff'd 2011 BCCA 511 [*Ba-Oose*] and *Hoessmann Estate v. Aldergrove Credit Union*, 2018 BCSC 256, for the proposition that "[t]he courts have consistently found that pleadings of this nature are an impermissible collateral attack on the validity of an order *nisi* and therefore amount to an abuse of process": at para. 30.

[9] The judge rejected Mr. Sky's argument that his claim in the disputed pleading was directed at a breach of the contract for financial services and not at the order *nisi* itself. He held that a judicial determination cannot be characterized as a mere consequence of earlier wrongful conduct. He stated:

> [37] The logical flaw with this argument, as I see it, is that it appears to inaccurately characterize the Order *Nisi* and foreclosure proceedings as natural events (analogous, for example, to falling dominoes) which are part of an ongoing causal chain, rather than what they really are which is the active enforcement by TD of its legal rights by recourse to the courts and a final determination being made by a judge on those rights. A final order of a judge is not a mere "causal effect" in an ongoing chain into the future; to the contrary, a final order by a judge in effect brings the prior causal chain of events in the dispute to an end by determining the legal implications of those prior events with respect to the matters addressed in the order. As noted by Justice Willcock in [*Ba-Oose SC*], a final order brings an end to controversy, enables parties to order their practical affairs (such as borrowing or lending money or buying property) and protects them from repetitive litigation. If parties could commence new actions claiming damages for the financial consequences of earlier adverse court orders (in effect treating court orders as compensable "causes" of future losses) there would be no end to litigation.
>
> [Emphasis added.]

Issues

[10] I would state the issues as follows:

1. Is the claim advanced in the disputed pleading a collateral attack on the order *nisi* or an abuse of process?

2. If so, should the court exercise its residual discretion to permit Mr. Sky to plead this claim?

Collateral attack and abuse of process

Standard of review

[11] An amendment may be refused on the ground that it is an abuse of the process of the court, but only where the abuse of process is plain and obvious: *W.O.M. Mastercraft Construction Ltd. v. TFN Meadows Development Limited Partnership*, 2020 BCSC 1345 at para. 8; *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665 at paras. 12–13.

[12] The determination of whether a pleading constitutes an abuse of process is a question of law: *Anoroc Holdings Ltd. v. 585582 B.C. Ltd.*, 2026 BCCA 76 at paras. 60–62. This Court must determine whether the judge came to the correct conclusion. It makes no difference whether the question is framed as one of collateral attack or abuse of process. As will be seen, in this context, the doctrines of collateral attack and abuse of process overlap and serve common purposes.

Legal framework

[13] The doctrine of collateral attack stipulates that an order made by a superior court may not be set aside in any proceeding other than one whose specific object is its reversal, variation or nullification: *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599, 1983 CanLII 35. It may be directly challenged on appeal or in an action seeking to set it aside, for example, on proof that it was obtained by fraud. Absent a direct attack, the order is to be treated "as an absolute verity": *Wilson* at 599. It is important that what is protected in this formulation is the order, not the cause of action. However, the doctrine serves a broad purpose. In *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, Justice Abella spoke for a majority and explained that the objective is "to protect the fairness and integrity of the justice system by preventing duplicative proceedings": at para. 28.

[14] Abuse of process is a term used to characterize misuse of court procedures to an end which, though technically permitted, would result in manifest unfairness to a litigant and bring the administration of justice into disrepute: *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.) at 536; *Behn v.*

Moulton Contracting Ltd., 2013 SCC 26 at para. 40. A collateral attack is an abuse of process because the attacker's objective is avoidance of a court order by indirect means. In *Figliola*, at para. 31, Abella J. said that, as with collateral attack, abuse of process "has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings".

[15] The Supreme Court has emphasized that abuse of process is a flexible doctrine that bars relitigation where it would undermine the integrity of the administration of justice while permitting relitigation that "is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole". In particular, relitigation may be appropriate "when fairness dictates that the original result should not be binding in the new context": *Toronto (City) v. C.U.P.E.*, *Local 79*, 2003 SCC 63 at para. 52.

[16] In *Samos Investments Inc. v. Pattison et al*, 2000 BCCA 412, aff'g 2000 BCSC 210, an argument that a plaintiff's claim amounted to a collateral attack on an earlier court order failed. The plaintiff pleaded that a complex series of corporate machinations led to massive dilution of shareholdings in a public company by the issuance of new shares at less than fair market value. The dealings complained of culminated in a plan of arrangement approved by the British Columbia Supreme Court pursuant to s. 252 of the former *Company Act*, R.S.B.C. 1996, c. 62 (since replaced by s. 291(2) of the *Business Corporations Act*, S.B.C. 2002, c. 57). This Court rejected the defendants' argument that the plaintiff's claim was a collateral attack on the order approving the plan of arrangement.

[17] At first instance, Justice Bauman (as he then was) held that the claim was not a collateral attack, and Justices Rowles and Mackenzie gave concurring reasons dismissing the defendants' appeal. Justice Hall dissented.

[18] Justice Rowles distinguished the fairness inquiry giving rise to the approval order from the question of how the persons who got to the point of putting forward the plan of arrangement were able to do so. The order did not resolve the present complaint of "independent actionable wrongs": at paras. 51–54. The earlier

transactions which were the subject of the plaintiff's action did not require, nor did they receive, court approval: at paras. 65–66.

[19] Justice Mackenzie made the same point, noting that, while the order approving the arrangement was opposed, counsel for the petitioners seeking approval of the plan of arrangement took the position that the objections were outside the scope of the arrangement hearing, a position he viewed as correct: at paras. 83–84. He stated:

> [87] … The plaintiff's complaints could not have been addressed in any meaningful manner on the arrangement petition. In that light, it would be illogical and unfair to treat the arrangement order as a bar against raising the complaints in other litigation that would provide an opportunity for a full adversarial trial of the issues.
>
> [88] I do not think that refusing a stay would lead to greater uncertainty in corporate affairs. The arrangement order remains valid and Samos does not seek to unwind any part of the reorganization leading up to the arrangement including the compulsory taking of the minority shares.
>
> [89] The action is one for damages in tort for losses in share value allegedly caused by the conspiracy and unlawful acts of the defendants as pleaded. For the purpose of these reasons on the issue of collateral attack I assume that the reorganization itself will remain intact and undisturbed.

[20] *Samos Investments* was not drawn to the judge's attention. It substantially undermines the judge's reasoning that approval of the order *nisi* must be viewed as having ratified whatever independently wrongful conduct may have preceded it. Approval of the plan of arrangement in *Samos Investments* did not prevent the plaintiff from pleading that he was the victim of prior independent actionable wrongs. The court had regard to whether the procedure leading to approval of the plan of arrangement would have permitted the present complaint to have been addressed "in any meaningful manner": at para. 87.

[21] In my view, the cases relied upon by the judge do not establish the proposition he took from them, that a claim equivalent to that advanced by Mr. Sky in the disputed pleading is an impermissible collateral attack on the validity of an order *nisi* and therefore an abuse of process.

[22] In *Ba-Oose*, the intended claim for the most part attacked the mortgage rather than asserting independent actionable wrongs. The appellant was a doctor from California who owned residential property in Whistler. He mortgaged the Whistler property to a bank and fell behind on his payments. The bank foreclosed, took order *nisi*, and eventually order absolute. Afterwards, the appellant sued the bank alleging that it had engaged in unconscionable and deceptive practices contrary to a federal consumer protection statute. Among other allegations, he contended that the bank led him to believe it would be willing to renew the mortgage, and then refused. The bank succeeded in an application for judgment on a summary trial.

[23] On appeal, Justice Groberman held that the action was almost entirely an abuse of process in that it challenged the legality and enforceability of the mortgage which had been affirmed by the order *nisi*: at paras. 21–23. The only claim that did not go directly to the propriety of the order *nisi* was the claim that the appellant was induced to reject an offer to sell the property by the bank's representation that it was prepared to renew the mortgage. Justice Groberman viewed it as possible that this claim was one that was barred by cause of action estoppel as an issue that could and should have been raised in the foreclosure proceedings, even though it was not. However, he did not come to a final conclusion on this point because the evidence made it clear that the claim could not succeed in any event: at paras. 26–27.

[24] In *Hoessmann Estate*, Justice Ball was satisfied that the intended claims went "to the root of the mortgage claim", were "all derived from the mortgage on the [p]roperty, and the plaintiff's related interactions with [the lender]" and "should have been argued in the foreclosure proceedings": at para. 89. He did not consider *Samos Investments* or whether the claims at hand could be characterized as independent actionable wrongs.

Assessment

[25] The fundamental question is whether it is plain and obvious that permitting the disputed pleading would undermine the fairness and integrity of the administration of justice. If fairness dictates that Mr. Sky should not be barred from

advancing this claim—if permitting the amendments would enhance the credibility and effectiveness of the adjudicative process as a whole—then the disputed pleading should be permitted. In addressing this broad question, the cases direct consideration of the following questions:

- Does the pleading contradict the order *nisi*? If so, it should not be permitted.
- Does the pleading allege an independent actionable wrong?
- Is the complaint one that was or could have been addressed in a meaningful manner at the hearing of Bank's application for an order *nisi*?

Does the pleading contradict the order nisi?

[26] The order *nisi* granted the Bank judgment against Mr. Sky for the balance owing on the HELOC. Accordingly, Mr. Sky cannot dispute: (1) the balance owing; (2) that the Bank demanded payment of the balance owing; and (3) in consequence of the demand, that the debt was due and owing.

[27] The disputed pleading does not contest any of this. In para. 110b, Mr. Sky acknowledges his default in payment pursuant to the Bank's demand. In para. 110c, he admits that the Bank obtained the order *nisi.*

[28] The judge did not identify a direct contradiction. He considered that a contradiction is to be implied by comparing "ancillary findings" to "the underlying premise" of the allegations: at paras. 26–27. In my view, this reasoning is flawed. It focuses on a defence that might have been raised by counterclaim or set-off, rather than a direct denial of the Bank's claim to recover the HELOC loan. I return to this reasoning below. To the extent that it is cogent, the argument is not grounded in the logic of contradiction.

[29] I conclude that the pleading in issue does not contradict the order *nisi*.

Does the pleading allege an independent actionable wrong?

[30] The disputed pleading alleges a contractual breach preceding the Bank's demand for payment of the HELOC loan. This is an allegation of an independent actionable wrong.

Is the complaint one that was or could have been addressed in a meaningful manner at the hearing of the Bank's application for an order nisi?

[31] At the hearing before Associate Justice Dick, Mr. Sky was told that this was not the occasion for him to complain about the Bank's conduct in terminating the banking relationship. This was the position of the Bank's counsel (who was not counsel in this Court), and the judge agreed. Mr. Sky was self-represented. The judge urged him to retain counsel and consider with them whether he might claim against the Bank for its decision to terminate the relationship.

[32] Counsel for the bank made the following submission:

> CNSL K. LOCKE: … I want to make it clear that this -- the termination of relationship is to do with all the things they had the authority to terminate on demand. … So this is simply a foreclosure on the line of credit. …
>
> THE COURT: Because they have the ability to do so because it is an on-demand loan.
>
> CNSL K. LOCKE: Correct. And it's -- and it's a standard six-month order we're seeking. I don't see any need to go any further into all -- he has filed substantial material … [w]ith a lot of information, but I am arguing that, because it's a demand loan, that is not relevant to this hearing.
>
> THE COURT: Right.
>
> CNSL K. LOCKE: If, in fact, he feels he has a claim against the bank, that may be -- that may be possible. I don't know. But that's a separate thing that he would have to do separately. This is dealing simply with the line of credit demand mortgage.

[33] The associate judge accepted this submission. She said to Mr. Sky, during his submissions:

> Let me just say that the issues I have to be concerned with today are to satisfy myself that the demand was made and that you were given a reasonable time to cure the default.

> …
>
> I am not dealing with their … termination of the relationship with you.

[34] Later in the hearing, there was this exchange:

> THE COURT: … And I think what I have to deal with is the -- I'm dealing specifically with your line of credit agreement, the terms under that, the demand, et cetera.
>
> T. SKY: Does it have to be like that?
>
> THE COURT: Well --
>
> CNST K. LOCKE: Yes.
>
> THE COURT: Well, in a petition action --
>
> CNSL K. LOCKE: This action is on the line of credit only, not on the other stuff.
>
> THE COURT: This action is only with respect to your line of credit.

[35] At this stage, to the extent that Mr. Sky was articulating a legal theory of his complaint about the Bank's conduct in terminating its relationship, the theory was not that presently advanced. It was a theory that Mr. Sky was the victim of legal discrimination based on views he had articulated in his interaction with a bank teller. But the position of the Bank's lawyer, accepted by the judge, was that any complaint about the Bank's prior conduct was off-limits at the hearing of the Bank's application for an order *nisi* of foreclosure.

[36] I conclude that the claim Mr. Sky now seeks to advance was not and could not have been advanced at the hearing. Having taken the position it did in the foreclosure proceeding, the Bank should not now be permitted to argue otherwise. If there are circumstances in which a mortgagor facing foreclosure might be obliged to advance its cross-claim based on an independent actionable wrong when order *nisi* is sought, this is not one of them.

Conclusion

[37] Having regard to the considerations canvassed above, in my view, it is not plain and obvious that permitting the disputed pleading undermines the fairness and integrity of the administration of justice. The claim Mr. Sky seeks to advance has not

been considered on its merits. It is not duplicative of a claim addressed in the foreclosure proceeding. Permitting it will not result in manifest unfairness to the Bank or bring the administration of justice into disrepute. In sum, the claim is not a collateral attack on the order *nisi* or an abuse of process. It is in the interests of justice that Mr. Sky be permitted to pursue it. The chambers judge erred in law in concluding otherwise.

[38] Having come to this conclusion, I need not address Mr. Sky's second argument that the Court should exercise its residual discretion to permit him to advance a claim that would constitute a collateral attack on the order *nisi*.

Disposition

[39] For these reasons, I would allow the appeal, reverse the order striking para. 114b from the notice of civil claim, and grant Mr. Sky leave to amend the notice of civil claim to include the other disputed paragraphs.

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Justice MacNaughton"