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— Franks & Zalev - This Week in Family Law

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Is It All Just A *Conspiracy*? Or are We No Longer "*Framed*"?

***Kennedy v. Kennedy*, 2025 CarswellBC 1848 (S.C.) — B. Smith J.**

Issues: British Columbia — Conspiracy

This case considers whether, given the admonition in *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.) — but with the support of *Leitch v. Novac* (2020), 38 R.F.L. (8th) 1 (Ont. C.A.), there is any role for conspiracy claims in family law proceedings in Bountiful British Columbia.

The parties were married. Litigation involving support and division of property ensued, as it often does.

In her claim, the Wife included a claim against the Husband and others (the "conspiracy parties") for conspiracy. The gist of the conspiracy claim was that the conspiracy parties were holding/hiding money and assets (that constituted family property or income for support purposes) for the Husband. The Husband and the conspiracy parties moved to strike the conspiracy claims as disclosing no reasonable claim.

In B.C., Rule 11-2 of the *Supreme Court Family Rules*, B.C. Reg. 169/2009 provides that, at any stage of a family law case, the court may strike any part of a pleading on the ground that it discloses no reasonable claim.

The tried and true test on an application to strike is set out in *Hunt v. Carey Canada Inc.*, 1990 CarswellBC 216 (S.C.C.) at p. 36: a claim may be struck only if, assuming the facts as pled to be true, it is "plain and obvious" that the claim discloses no reasonable cause of action and is bound to fail.

The conspiracy parties (along with the Husband) "*Frame*"d (get it?) the issue as whether the Wife's pleading alleging that they conspired together to frustrate the proper calculation of child support and spousal support discloses a reasonable claim. According to the conspiracy parties, the Wife's conspiracy claim was barred based on the Supreme Court of Canada decision in *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.) ("*Frame*") and the decision of the British Columbia Court of Appeal in *Waters v. Mitchie* (2011), 3 R.F.L. (7th) 273 (B.C. C.A.) ("*Waters*").

In *Waters*, Justice Levine for the B.C. Court of Appeal summarized *Frame* as follows:

> [22] In *Frame v. Smith*, the Supreme Court of Canada considered whether a parent had a cause of action against his former spouse and her present husband for interfering with his right of access to the children of the marriage. The chambers judge struck the claim as disclosing no reasonable claim, a decision affirmed by the Ontario Court of Appeal. Justice La Forest, writing for the majority of the Court, dismissed the appeal. While he considered there were good policy reasons why no

> cause of action should lie in such circumstances, **La Forest J. ultimately disposed of the appeal on the basis that the legislative scheme governing custody and access was comprehensive. By providing remedies to enforce custody and access obligations and failing to include recourse by civil action to the courts, the legislation precluded a civil action for damages for breach of access rights.** Justice Wilson, dissenting, would have permitted a claim for breach of fiduciary duty to proceed to trial. [**emphasis** added]

In *Waters*, the wife alleged that the husband and his new partner engaged in transfers of assets and property with the specific intention of frustrating her claim for child support. The B.C. Court of Appeal dismissed the wife's claim for conspiracy. Tracking the above-emphasized reasoning of the Supreme Court of Canada in *Frame*, the Court of Appeal concluded that the comprehensive child support legislation in place — *the Child Support Guidelines* — allowed the wife to pursue her claim for proper child support without resorting to the tort of conspiracy:

> [41] The appellant's claim in conspiracy seeks damages in respect of two kinds of injury: the frustration of the proper calculation of child support, and her inability to enforce monetary judgments against Mr. Michie (at para. 36.19).
>
> [42] The appellant rightly does not dispute that her conspiracy claim to recover losses for injury caused by the frustration of the proper calculation of child support adds nothing to the statutory scheme under the *Divorce Act*, R.S.B.C. 1985, c. 3 (2d Supp.) and the *Federal Child Support Guidelines*. That legislation empowers the court to impute income to a parent and make an order in respect of a parent's retroactive and prospective child support liability. **As in *Frame v. Smith*, no claim for damages for the frustration of the proper calculation of child support can proceed in the face of the comprehensive statutory scheme.** [**emphasis** added]

The Ontario Court of Appeal took a slightly different approach (or, as suggested below, distinguished *Frame*) in the recent decision of *Leitch v. Novac* (2020), 38 R.F.L. (8th) 1 (Ont. C.A.) ("*Leitch*"). When it was released, *Leitch* was quite ground-breaking given its seeming departure from the strictures of *Frame*.

In *Leitch*, the Ontario Court of Appeal discussed the problem of "invisible litigants" — family members or friends of a litigant who insert themselves into the litigation process in ways that go beyond providing emotional support, perhaps going as far as deliberately hiding and concealing assets or income for one of the parties.

Leitch was very recently discussed in British Columbia by Justice Hardwick in *Barnes-Morrison v. Kolias*, 2025 CarswellBC 1163 (S.C.) ("*Kolias*"):

> [38] In *Leitch*, the spouses, who are referred to as the "husband" and the "wife" in the reasons for judgment, were both sophisticated. The wife was a former litigation lawyer and the husband a successful entrepreneur in the casino/gaming industry. After separation, the husband's father incorporated a management company to manage a casino in Alberta. There was an informal agreement that the husband would act as project manager and receive 40% of the management fees payable to the company. Approximately two years later, the owner of the casino bought out the management contract, with all the proceeds being paid to the husband's father. The wife amended her divorce application to seek damages based upon the tort of conspiracy from the husband, his parents, certain family trusts and a related corporation. The conspiracy allegations included temporarily diverting a portion of the sale proceeds and concealing management fees to reduce the husband's support obligation to the wife.
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> [39] Upon an application for partial summary judgment, the motions judge concluded that there was no unlawful conspiracy and that the wife did not establish damages, but did order that the wife could still pursue her claim to impute additional income to the husband for the purpose of determining support at trial.
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> [40] The appeal was allowed by the ONCA on the basis that it was not an appropriate case for partial summary judgment. The ONCA also concluded that the motions judge erred in her analysis of the tort of conspiracy.
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> [41] Writing for the court, Justice Hourigan addressed what he referred to as the problem with "invisible litigants" in family law proceedings. Specifically, Hourigan J.A. commented as follows:

> [45] . . . The problem is what I will call "invisible litigants". These are family members or friends of a family law litigant who insert themselves into the litigation process. They go beyond providing emotional support during a difficult time to become active participants in the litigation. Usually, their intentions are good, and their interference makes no difference in the ultimate result. However, sometimes they introduce or reinforce a win-at-all-costs litigation mentality. These invisible litigants are willing to break both the spirit and letter of the family law legislation to achieve their desired result, including by facilitating the deliberate hiding of assets or income.

[42] In *Leitch*, the ONCA concluded that the wife should be permitted the opportunity to pursue her claims for damages based on the tort of conspiracy on their merits for two reasons: deterrence and enforceability. In this regard, Hourigan J.A. stated as follows:

> [46] If we were to accept the analysis of the motion judge, co-conspirators who engage in such behaviour could do so with impunity. Contrary to the observation of the motion judge, [page 599] conspiracy is not a "blunt instrument" to respond to this misconduct. It is a valuable tool in the judicial toolbox to ensure fairness in the process and achieve justice. If the tort of conspiracy is not available, then co-conspirators have no skin in the game. Their participation in hiding income or assets is a no-risk proposition. If their conduct is exposed, all that happens is that the payor will be forced to pay what is appropriately owing. If there is to be deterrence, there must be consequences for co-conspirators who are prepared to facilitate nondisclosure.
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> [47] There is a further practical reason for permitting the use of the tort of conspiracy in family law claims. Where income or assets have been hidden with the assistance of a co-conspirator, often the family law litigant will be effectively judgment-proof. That, after all, is the whole purpose of the conspiracy. In those circumstances, the imputation of income or the inclusion of hidden assets into the net family property calculation will be a futile exercise, as the recipient cannot collect on what is owing. A judgment against a co-conspirator will often be the only means by which a recipient will be able to satisfy a judgment.

Unfortunately, as noted by Justice Hardwick, the Ontario Court of Appeal did not consider *Waters* in the decision in *Leitch*. Further, to date, *Leitch* has not been followed in B.C. But it *was* recently followed in Alberta in *Lavoie v. Lavoie* (2025), 11 R.F.L. (9th) 1 (Alta. K.B.) ("*Lavoie*").

Lavoie also does not consider *Waters* or, as noted by Justice Hardwick:

> [48] . . . attempt to wrestle with what appears to be at least some degree of conflict between the ratios in *Leitch* and *Waters*, both of which constitute persuasive appellate authority on the issue.

In *Kolias*, Justice Hardwick also commented on what appeared to be distinguishing features of the cases that allow a conspiracy claim to proceed. Her Honour concluded that the cases are,

> [78] . . . distinguishable on the basis that the amendment primarily centers upon allegations of fraud and conspiracy **to shield the respondent husband from a claim for an interest in family property as opposed to a conspiracy to fraudulently swear false affidavits to support a fictional *Guideline* income for interim support purposes. [emphasis** added]

The observation of this distinguishing feature is certainly correct.

Here, the Wife's amended claim alleged:

> a. The [conspiracy parties] hold money and assets in trust which constitute family property for the purposes of calculating child support and spousal support.
>
> b. The [conspiracy parties] conspired together to hide money, income and assets from the [Wife] in the course of these proceedings, so as to shield the [Husband] from the claims for property division, child support and spousal support and in doing so, intended to deceive the [Wife] and commit fraud.

c. The income of [the corporate conspiracy party] is solely attributable to the [Husband].

The Wife argued that this was a novel case, distinguishable from *Frame* and *Waters* on the basis that it included conspiracy claims with respect to trust and property and not just support. The conspiracy parties disagreed, arguing that *Frame* and *Waters* governed.

What's a well-meaning judge to do?

Well, a *smart* judge does exactly what Justice Smith did — he went to the source. Justice Smith noted that, in *Waters*, the B.C. Court of Appeal said this about the holding in *Frame*:

> [28] . . . While both the majority and Wilson J. (in dissent) **questioned** whether the tort of conspiracy ought to be permitted in the family law context for policy reasons, **the case was not decided on that point. [emphasis** added]

In *Waters*, Justice Levine (for the B.C. Court of Appeal) continued:

> [31] In light of these comments, *Frame v. Smith* **does not stand for the proposition that a conspiracy claim pleaded in the family law context must be struck, as a matter of policy**, as disclosing no reasonable claim. If, as the appellant argued, the chambers judge struck the appellant's claim on that basis, I would disagree.
>
> [32] Having said that, it is my view that the obiter comments of both the majority and Wilson J. concerning the policy reasons for not extending the tort of conspiracy to family law disputes, which were echoed by the chambers judge (at paras. 37-38), were intended for guidance and should be accepted as authoritative.
>
> [33] Thus, in considering whether the appellant's claim of conspiracy discloses a reasonable claim, the Court must give authoritative weight to the policy implications that would preclude such a claim from proceeding. That is what the chambers judge did in this case. [**emphasis** added]

Therefore, Justice Smith noted that what is actually *binding* from *Frame* and *Waters* is that, "when considering whether to strike a claim of conspiracy in family law proceedings, a judge must give authoritative weight to the policy implications that would preclude such a claim from proceeding."

In *Waters*, the Court of Appeal held that a claim of conspiracy to recover losses caused by the frustration of proper calculation of child support added nothing to the statutory scheme under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and the *Child Support Guidelines*, SOR/97-175. By extension, this reasoning would also apply to a claim for spousal support.

Therefore, *Waters* was binding authority to support the idea that the portion of the Wife's claim alleging conspiracy to shield the Husband from child support had to be struck. And struck it was.

But the claim for conspiracy concerning the trust and property claims were different. The question was whether, like the claim for child and spousal support, these claims are "comprehensively covered" by the property division scheme in the *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*"). This begs two questions:

1. Does the *FLA* provide a comprehensive scheme for property division; and if not,

2. Do policy implications justify preventing the claim of conspiracy to frustrate property division from proceeding?

The first question was helpfully answered by the British Columbia Court of Appeal in *V.J.F. v. S.K.W.* (2016), 77 R.F.L. (7th) 1 (B.C. C.A.), leave to appeal ref'd, 2016 CarswellBC 2855 (S.C.C.), where the court specifically held that the *FLA* is **not** a complete code with respect to property division. The property division scheme in the *FLA* builds on common law an equitable concepts; it is not a complete code. [See also *Namdarpour v. Vahman* (2019), 23 R.F.L. (8th) 259 (B.C. C.A.)]

Even though it has been criticized, the tort of conspiracy remains part of the common law of Canada. Therefore, given that the property division scheme in the *FLA* builds on common law and equitable concepts, the *FLA* does not provide a comprehensive scheme of property division, so as to preclude a claim of conspiracy to frustrate property division.

With the first question answered, the next question was whether any policy would (or should) prevent the claim of conspiracy to frustrate property division.

To answer this question, Justice Smith again turned to the precise words used by the Court of Appeal in *Waters*. And with reference to paras. 31-33 of *Waters* (cited above) is that there *may* be some circumstances in which the tort of conspiracy could extend to family law cases, but they must be considered giving "authoritative weight" to the policy implications that would preclude such a claim. That is, Justice Smith had to consider the question of whether to allow the claim of conspiracy with respect to property division giving "authoritative weight" to the policy implications that would preclude such a claim.

In *Frame*, the majority of the Supreme Court of Canada (along with Justice Wilson in the minority) set out the policy implications favouring restricting the extension of the tort of conspiracy in family law proceedings:

> a) the tort rests on rests on shaky doctrinal underpinnings;
>
> b) the tort is an anachronism that has outlived its usefulness;
>
> c) the essence of the tort is that it can result in a party's conduct *in combination* with others being actionable, when the same conduct, if done alone, would not be actionable; and
>
> d) of paramount importance, it is contrary to the best interests of children, for various reasons which are aggravated by the fact that if it were introduced in the family law context, it would be difficult to restrict to issues involving children.

On the flip side, policy implications favouring allowing conspiracy claims relating to property division to proceed include deterrence, and enforceability against the *Leitch* "invisible litigants" who may conspire to conceal assets to benefit one of the parties. (Notably, in *Leitch*, the Ontario Court of Appeal allowed the conspiracy claim to proceed even in the context of a claim for support.)

The result? Justice Smith found there to be sufficiently compelling policy arguments on both sides of the issue, such that in the circumstances of the case before him, the conspiracy claim *relating to property division* should not be struck. The claim for conspiracy relating to child and spousal support, however, were struck.

So, at least in B.C., we now see a claim for conspiracy with respect to property surviving a "no cause of action" motion. What next? We're conspiring to not tell you.

It's (Not) *Aroma* All Over Again

***Dhaliwal v. Richter International Ltd.*, 2025 CarswellOnt 11346 (C.A.) — Copeland, Wilson and Rahman JJ.A.**

Issues: Ontario — Arbitration — Bias

We trust (hope?) you will recall our discussion of *Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al.*, 2024 CarswellOnt 17813 (C.A.) in the January 13, 2025 (2025-01) edition of *TWFL*. In *Aroma* the Ontario Court of Appeal determined that an arbitrator should not be discharged for bias solely because one of the counsel before him retained him on another arbitration before the then-current arbitration was over.

While not a family law case, given the frequency with which family cases (or portions of them) are arbitrated, *Dhaliwal* offers some important points about arbitration and bias, or more specifically, what is not a reasonable apprehension of bias.

The appellant moved to dismiss an arbitrator for bias. He lost. He appealed.

The parties were in a commercial dispute, and they agreed to arbitrate the issues. While the parties entered into the arbitration agreement in October 2020, almost five years later, the arbitration still has not been heard on the merits. According to the Court of Appeal, the delay was almost entirely due to a series of procedural issues raised by the appellant.

At some point in the process, the appellant learned that the arbitrator was involved in another arbitration with the respondent's lawyer. The appellant claimed that this previously undisclosed fact gave rise to a reasonable apprehension of bias pursuant to s. 13(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "*Act*"). A motion for recusal soon followed.

The arbitrator dismissed the appellants' motion. The arbitrator ruled that the appellants brought the challenge too late, and that there was no reasonable apprehension of bias in any case. The arbitrator concluded that the appellants knew about the other arbitration at the time of his appointment, or, at the latest, by December 2020. Therefore, the appellant had filed his motion for recusal well outside of the 15-day time limit prescribed by s. 13(3) of the *Act*.

The arbitrator also noted that there was nothing about his involvement in the other arbitration that could give rise to a reasonable apprehension of bias. In dismissing the motion, the arbitrator also commented that the appellant's affidavit for the motion contained "false statements".

Not to be deterred, the appellant brought an application in the Superior Court of Justice to challenge the arbitrator for bias — this time adding a claim of *actual* bias (and not just a reasonable apprehension of bias).

The court at first instance dismissed the appellants' application. The court agreed that the appellants' bias motion was time-barred under s. 13(3) of the *Arbitration Act*.

[For those that may be thinking: "Why didn't the court refer to the fact that the period in which to claim bias could be extended?" Well, no. That is one important thing to remember about arbitration: while the *Rules of Civil Procedure* allow a court to extend time periods prescribed in the *Rules* — **the time periods in the *Act* cannot be extended** — and this generally applies to arbitration acts across the country: *Thomson v. Thomson* (2024), 5 R.F.L. (9th) 257 (Alta. C.A.); *Allen v. Renouf*, 2019 CarswellAlta 1194 (C.A.) at para. 6; *Draper Farms v. 1758691 Ontario Inc.*, 2013 CarswellOnt 13513 (S.C.J.) at paras. 55-60, aff'd 2014 CarswellOnt 4370 (C.A.) at paras. 16-20; *Math4Me Learning Inc. v. 1099615 B.C. Ltd.*, 2024 CarswellBC 3268 (C.A.).]

The court also concluded that there was neither reasonable apprehension of bias, nor actual bias. There was no reasonable apprehension of bias because the two arbitration proceedings were unrelated. There was nothing about the arbitrator's involvement in the other arbitration that would raise a concern that he would approach the appellants' arbitration with a closed mind. As for the claim of actual bias, the court emphasized that arbitrators "are, and should remain, free to make such findings."

Still undeterred, the appellant appealed to the Ontario Court of Appeal, where things did not go well for the appellant; things never go well when the Court of Appeal says to the respondent, "we do not need to hear from you." The Court of Appeal agreed there was neither actual bias, nor a reasonable apprehension of bias.

Importantly, the Court of Appeal wholly rejected the idea that the terms of the arbitration required the arbitrator to disclose that he and the respondents' counsel were involved in another arbitration. An arbitrator is only required to disclose circumstances that could give rise to a reasonable apprehension of bias, and (absent a specific agreement to the contrary) just being involved in a separate arbitration with one party's lawyer is not, on its own, such a circumstance.

This is an important statement in jurisdictions and areas of law where there is a small arbitration bar — such as family law. If disclosure had to be made every time an arbitrator was involved with one of the counsel before him/her on another matter, the arbitration system would grind to a halt.

Here, there was no agreement between the parties that they could only select an arbitrator that neither lawyer had worked with before. Nor did the terms of the Arbitration Agreement require the arbitrator to disclose any previous involvement with the

parties' lawyers. In fact, the Court of Appeal observed, it is not uncommon for lawyers to select arbitrators for the very reason that they have worked with those arbitrators before.

The allegation of actual bias was held to be equally without merit. An arbitrator is entitled to find that statements were false. This was not a finding of "perjury", as the appellant had suggested. And even had the arbitrator found that the appellant had committed perjury, that would not be a basis to find actual bias. Adverse finding of credibility do not make bias.

Appeal dismissed — and $20,000 for the pleasure of seeing the inside of Osgoode Hall.

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