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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Estopped in Their Tracks: Why *Klassen* Wasn't *McCann*

***Klassen v. Epp*, 2025 CarswellBC 1672 (S.C.) — Wolfe J.**

Issues: British Columba — Interplay of Family Law and Tort Claims

In the July 1, 2024 (2024-25) edition of *TWFL* — "What Does 'All Claims Are Dismissed' Mean to You?" — we discussed *McCann v. Barens*, 2023 CarswellBC 3399 (S.C.), where the parties had settled their family law dispute after the wife alleged the husband had been abusive during the marriage. As part of their settlement, they consented to an order dismissing "[a]ny other claims . . . arising from their marriage or their cohabitation" as if there had been a trial on the merits.

Despite that broad and sweeping language, several years later, the wife started a separate civil action in tort against the husband based on the same allegations of abuse she had raised in the family case. The husband argued the new claim was *res judicata*. The court disagreed, finding that the abuse allegations had been raised only tangentially in the family litigation, that the tort claim could not be said to have been adjudicated or intended to be resolved in that proceeding, and that there was no evidence the settlement was meant to preclude it.

While we did not agree with the outcome in *McCann*, the decision provides an interesting contrast with *Klassen v. Epp*, a case involving similar facts but a very different result.

The parties in *Klassen* started living together in 1992 and married in 1999. They had no children together, but they each had children from prior relationships. They separated in December 2019, when the husband was 68 years old and the wife was 61.

In mid-2020, the wife reported to the police that the husband had sexually assaulted her during the marriage. Criminal charges followed, and while the husband initially pled guilty, he later withdrew that plea, and Justice Wolfe's reasons do not make the ultimate result of the criminal process entirely clear.

In the meantime, in August 2020 the husband commenced a family law case against the wife. The wife's counterclaim sought divorce for physical or mental cruelty, referenced the police investigation, and claimed unequal property division on that basis.

Over the next two years, the sexual assault allegation became embedded in the family file: the wife sought to amend her pleadings to add a tort claim for family violence and sexual assault, served an expert report linking her psychological injuries to the alleged assault, swore an affidavit acknowledging "significant overlap" between the tort and family claims, and examined the husband about the abuse allegations.

Shortly after her motion to amend her pleadings was heard, but before it was decided, the wife made an offer to settle that provided, among other things, that the "claims and counterclaims of the within proceeding are dismissed as if adjudicated on their merits." Familiar wording.

The husband accepted the wife's offer. When the wife's lawyer later asserted that the offer did not cover her tort claims, the husband's lawyer disagreed and insisted it did, and advised that the husband would sue for judgment if the wife did not complete the settlement. The wife's lawyer did not respond, no further carve-out was negotiated, and the parties proceeded to implement the settlement, including the broadly worded consent dismissal order.

In January 2024, the wife commenced a civil action against the husband seeking damages for the alleged sexual assault. The husband, relying on cause of action estoppel, issue estoppel, and abuse of process, applied to strike the claim under Rule 9-5(1)(d) of the British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which provides that "[a]t any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that . . . it is otherwise an abuse of the process of the court[.]"

Justice Wolfe began her analysis by clarifying that her role was not to assess the truth of the wife's allegations against the husband or to make credibility findings. Her sole task was to determine whether the wife was trying to re-litigate claims that had already been settled and decided, or that *could have* been decided in the earlier proceeding through the exercise of reasonable diligence.

As we discussed in our comment on *McCann*, three legal doctrines can operate to bar a second proceeding in circumstances like these:

> 1. **Issue estoppel (*res judicata*)**, which applies where: (a) the same question has already been decided; (b) the prior judicial decision was final; and (c) the parties to the prior judicial decision or their privies were the same: *Danyluk v. Ainsworth Technologies Inc.*, 2001 CarswellOnt 2434 (S.C.C.) at para. 25 and *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 CarswellOnt 6611 (C.A.), leave to appeal refused, 2019 CarswellOnt 18743 (S.C.C.).
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> 2. **Cause of action estoppel (*res judicata*)**, which applies where: (a) there has been a final decision of a court of competent jurisdiction in a prior proceeding; (b) the parties to the prior proceeding or their privies were the same; (c) the cause of action in the prior proceeding must not have been "separate and distinct"; and (d) the basis of the cause of action raised in the current proceeding was argued or *could have* been argued in the prior proceeding with the exercise of reasonable diligence: *Re Cliffs Over Maple Bay Investments Ltd.*,, 2011 CarswellBC 883 (C.A.) at para. 13; *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 CarswellOnt 6611 (C.A.), leave to appeal refused, 2019 CarswellOnt 18743 (S.C.C.); *Winter v. Sherman Estate*, 2018 CarswellOnt 14073 (C.A.); *Williams v. Kameka*, 2009 CarswellNS 553 (C.A.); *Hill v. Hill*, 2016 CarswellAlta 229 (C.A.); and *Berthin v. Berthin*, 2018 CarswellBC 1085 (C.A.).
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> 3. **Abuse of Process**, which is "a flexible doctrine unencumbered by the specific requirements of concepts such as issue estopel" that allows the court to prevent relitigations of claims that have already been determined: *Toronto (City) v. C.U.P.E., Local 79*, 2003 CarswellOnt 4328 (S.C.C.) at 35-43.

A consent order can, in appropriate circumstances, found *res judicata*. As Justice Lander explained in *Spender (Guardian ad litem of) v. Spender*, 1999 CarswellBC 881 (S.C.) at paras. 18-22, the court must examine not only the order itself, but the agreements, correspondence, or releases leading to it, to objectively determine whether the parties intended it to finally dispose of all issues that were raised or that could have been raised by way of a consent Order.

Here, there was no dispute that the parties were identical and that the Final Order in the family case was a final decision, and that the real questions the court had to decide were: (a) whether the alleged November 2018 sexual assault and its impacts could have been, and in fact were, raised in that proceeding; and (b) whether the Final Order resolved them.

On the first question, the court found it "not credible" to suggest that the assault allegations were not raised in the family law case. They were pleaded in both the original and amended counterclaim, explored in discoveries, backed by expert and documentary

evidence, and treated as a central pillar of the wife's case. This made the situation very different from *McCann v. Barens*, 2023 CarswellBC 3399 (S.C.), where the violence allegations were raised only in interlocutory protection order materials, never pleaded in the main action, and not supported by discovery or expert evidence.

On the second question, the court held that the Final Order in the family law case had resolved the claims the wife was now looking to advance. By the time the wife made her November 2022 settlement offer, all indications were that the sexual assault-based damages claim was part of the family proceeding. The wife had filed expert evidence, sworn affidavits, exchanged disclosure, undergone and conducted discoveries regarding the tort claim, and sought to amend her pleadings accordingly. In this context, the court concluded the broad language dismissing "all claims and counterclaims" was intended to encompass every claim in the family case, including the tort claim.

Accordingly, cause of action estoppel was made out. The same parties were litigating the same underlying factual matrix that had already been decided (or could have been decided with the exercise of reasonable diligence) by a final order intended to dispose of all such claims. *Res judicata* focuses on the facts, not on the legal label attached to them. Those facts had been squarely put in play in the family case, and the Final Order, which dismissed "all claims and counterclaims . . . as if adjudicated on their merits", reflected the parties' shared intention to resolve everything.

Here, issue estoppel applied as well. The parties in both cases were identical, and the factual and legal issues arising from the alleged assault were necessarily bound up with the final order that resolved the family law proceeding.

Furthermore, even if cause of action and issue estoppel had not applied, Justice Wolfe found the new claim would still be barred as an abuse of process, because it sought to re-litigate core issues that were already resolved in the earlier proceeding. Allowing it to proceed would undermine the finality of the family litigation, waste judicial resources, and force the husband to re-litigate a matter he reasonably believed was resolved. This was exactly the kind of impermissible re-litigation and "litigation by instalment" that abuse of process is intended to prevent.

In short, this was not a *McCann* scenario, where the abuse allegations were only tangential to the family case, and raised only to support interim relief. Furthermore, the tort was never pleaded, no expert evidence was offered, and there was no clear indication the consent order was meant to cover it. In *Klassen*, the opposite was true. The allegations were central, formally pleaded (even if improperly), supported by expert and lay evidence, and acknowledged by the wife as overlapping with the family claims. The offer's "all claims and counterclaims" language, in the context of that record, was, in Justice Wolfe's view, intended to encompass the tort.

That said, we still do not agree with *McCann*. The fact of the matter is that the previous assaults could have been litigated as part of the family action. They were not. And that is the essence of "litigation by instalment."

However, the contrast between *McCann* and *Klassen* drives home the same message we gave last July: if there is any live tort claim in the air, you should deal with it explicitly in your settlement instruments. Either plead it and resolve it in the family file, or carve it out clearly before entering into a final settlement. If you fail to do so, you run the risk — as Ms. Klassen learned — that "all claims are dismissed" will mean just that, and that any further attempt to pursue such a claim will be precluded.

And Just Where do You Think YOU'RE Going???

***Comeau v. Fox*, 2025 CarswellOnt 11986 (S.C.J.) — Pazaratz J.**

Issues: Ontario — Notices of Change in Representation

So this is quite the opening, certainly signalling a good read:

> [1] "If you sign this piece of paper, it means that any time I choose I can dump you as a client — even on the eve of trial. Suddenly you'll be on your own in the courtroom."
>
> [2] Lawyers are not allowed to say that.

> [3] Or do that.
>
> [4] A "Notice of Change of Representation" is not the same as a "Get Out of Jail Free" card in the board game Monopoly. It's not an escape hatch, to be kept in a back pocket until the lawyer tires of the client (or the money runs out).

In *Comeau v. Fox*, Justice Pazaratz uses a sharply worded endorsement to confront a growing issue in family law: the tactical misuse of a Notice of Change of Representation. The decision explores the challenges created by unclear or inconsistent representation, and how those challenges can undermine timely and effective resolution, here in the case of a parenting dispute.

The parties cohabited and had a child together. They were not married. They separated in November 2022. Shortly afterward, the mother retained counsel (the "Lawyer") and commenced an application to address the issues arising from the end of the relationship. Over the following months, the matter proceeded through multiple motions and court attendances focused on decision-making and parenting time. Temporary orders were ultimately made providing for the child to reside primarily with the mother, with the father's parenting time to be supervised.

In December 2024, a six-day trial was scheduled for the July 2025 sittings. At the Trial Scheduling Conference, the Lawyer remained on the record for the mother and gave no indication that she would not be representing the mother at trial. The father was self-represented at the time, and the court encouraged him to retain counsel as soon as possible.

However, in April 2025, the Lawyer served the father and the mother with a Notice of Change of Representation — one that had been signed by the mother more than a year earlier, on March 26, 2024 — indicating that the mother would now be representing herself. Until that point, the existence of the Notice had not been disclosed to the court or to the father, and the Lawyer had continued to appear as counsel of record throughout the intervening proceedings.

In July 2025, the mother scheduled an attendance in Purge Court to request an adjournment of the then imminent trial. She cited the recent change in representation, difficulty accessing and obtaining her file from the Lawyer, challenges in retaining new counsel, and concerns about her ability to conduct the trial on her own. The father opposed the request, and maintained that the trial should proceed as scheduled.

At the July 21, 2025 Purge Court appearance, the presiding judge, Justice Pazaratz, invited the Lawyer to appear via Zoom to clarify the timing and implications of the Notice of Change of Representation. A candid discussion followed, during which His Honour questioned whether the Lawyer was in fact "off the record", given that she had continued to appear at multiple court attendances as counsel of record — including at the Trial Scheduling Conference — well after the Notice had been signed. Justice Pazaratz also advised the parties that if the trial were to be adjourned, the earliest available rescheduling would be March 2026, and he expressed concern about the potential impact of such a delay on the child.

Following these exchanges, Justice Pazaratz stood the matter down to allow the Lawyer to consult with the mother. When the matter resumed, the Lawyer confirmed that she would continue to act for the mother at trial and that the adjournment request was being withdrawn.

With the immediate issue resolved, Justice Pazaratz turned to a broader concern: the increasing lack of clarity in family proceedings regarding counsel's role in contested family law proceedings. As His Honour explained in his reasons:

> a. **The Law Society now permits "unbundled services".** Rule 4(1.2) of the *Family Law Rules* allows for limited scope retainers. Rule 4(1.3) clarifies that a party who is represented by a lawyer acting under a limited scope retainer is considered to be acting in person, unless the lawyer is acting as the party's lawyer of record.
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> b. **Usually, clients hire lawyers on a limited scope basis in order to limit legal fees.** And sometimes it's better to have a lawyer present — even as an "agent" — rather than have a litigant appear in court on their own.
>
> c. **But appearing as "agent only" seems to be a new business model in the legal world. Some notable law firms never seem to go on record. They just have a roster of young, less experienced lawyers who only appear as agents.**

> Sometimes you get the same agent twice in a row. Sometimes you get a different agent who doesn't know much about what happened during the last court attendance. Sometimes an agent will make promises about things they're going to do — and then they disappear from the file. Sometimes the agent will insist on a particular return date — and then the agent won't show up on their requested date because they're not on record.
>
> d. **From the client's perspective, repetitive use of "agents" for individual court events tends to promote a piecemeal approach** to the issues, rather than the preferred holistic approach which counsel of record can better address.
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> e. **For the opposing party — and for the court — it's difficult to organize or advance the matter, when the agent-of-the-day makes it clear that they assume no responsibility for either past or future developments** on the file. [emphasis added]

That being said, while what His Honour described as "perpetual agents" poses a challenge — primarily because such agents lack continuity and accountability for the overall conduct of a file — Justice Pazaratz was of the view that the misuse of Notices of Change of Representation by counsel of record presented an even greater concern. As he explained, these notices are sometimes used as tactical tools, akin to a "Get Out of Jail (Trial) Free" card. To address this issue and provide guidance, His Honour outlined several key principles governing the proper use of a Notice of Change:

> 4. **Timeliness is essential:** A Notice of Change has a temporal quality and is tied to the date it is signed. If it is not immediately acted upon by being served and filed, it has no legal effect.
>
> 5. **Retroactive use is impermissible:** A Notice of Change cannot be used retrospectively or strategically by counsel of record as a means to preserve a future ability to unilaterally withdraw from the file and avoid obligations to the client or the court.
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> 6. **It is the client's document:** A Notice of Change belongs to the client, who has the exclusive authority to decide if and when it should take effect.
>
> 7. **Fiduciary duties must be upheld:** Lawyers cannot rely on a stale Notice of Change to circumvent their obligations — particularly where the client expects them to continue acting and an important court date is approaching.
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> 8. **Proper procedure must be followed:** If the client wishes to end the retainer, or both parties agree to do so, the client may sign and file a Notice of Change. However, if the lawyer alone seeks to withdraw and the client does not consent, the lawyer must bring a motion and seek the court's permission to be removed from the record.

In other words: if you are counsel of record, best to act like it. If you intend to come off the record, do so properly, transparently, and promptly. Before bringing a motion to be removed, ensure you are familiar with the applicable rules; that you understand the information that must be included in the materials; that you know what must (and must not) be served on the opposing party; and that you are familiar with the applicable legal tests and principles that guide the court's discretion in these situations. Those principles include:

> 1. **Timely withdrawal should be allowed without inquiry:**If a lawyer seeks to withdraw far enough in advance of trial that an adjournment will not be required, the request should generally be granted without further scrutiny by the court: *Cunningham v. Lilles*, 2010 CarswellYukon 21 (S.C.C.) at para. 47; *Froom v. Lafontaine*, 2020 CarswellOnt 14325 (S.C.J.) at paras. 20-21; *Marchetti v. Lane*, 2023 CarswellBC 3783 (S.C.) at para. 10.
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> 2. **Timing can justify judicial inquiry:** Where timing is an issue — particularly if the withdrawal may jeopardize the scheduled hearing — the court may inquire further into the reasons for the request: *Cunningham*, at para. 48; *Froom*, at paras. 20-21; *Marchetti*, at para. 10.
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> 3. **Ethical withdrawals must be accepted at face value:** If the request is based on an ethical obligation, such as a breakdown in the solicitor-client relationship that makes continued representation impossible, the court must accept

counsel's assertion without probing further, to avoid infringing solicitor-client privilege: *Cunningham*, at paras. 48-49; *Froom*, at paras. 20-21; *Marchetti*, at para. 10.

4. **Non-payment of fees is a discretionary ground:** Where the basis for the withdrawal is non-payment of fees, the court has discretion to grant or deny the request, considering a range of factors: the feasibility of self-representation, availability of alternate counsel, potential delay, timing of the request, impact on other parties and witnesses, and any pattern of prior counsel changes: *Cunningham*, at para. 50; *Froom*, at paras. 20-21; *Marchetti*, at para. 10.

That said, Justice Pazaratz's comments about the proper use of a Notice of Change and the obligations attendant with going on the record raise an important question: given the potential risks involved, particularly the possibility of being forced to conduct a lengthy trial or complex hearing without compensation — why would a lawyer agree to go on the record at all?

The concern is not just theoretical. For example, in *Jewish Family and Child Service of Greater Toronto v. Z. (J.)*, 2013 CarswellOnt 11787 (C.J.), the court declined to remove a sole practitioner from the record, forcing her to conduct a *five-week* trial without any realistic prospect of being paid, despite her motion to withdraw being brought nearly three months before trial.

In light of such cases, and in a system where limited scope retainers and agent appearances are increasingly common, the professional and financial risks associated with going on the record may discourage counsel from doing so, particularly in protracted, high-conflict parenting disputes. This raises the need for a broader discussion about how to ensure both continuity of representation for litigants and fair treatment for the lawyers who take on that responsibility. While we completely agree that counsel should not be able to use or abuse a Notice of Change solely for the purpose of avoiding a trial — it benefits all parties in the system when parties are represented — one way that counsel can control their otherwise uncontrollable client is having a signed Notice of Change in hand. It is a complicated balancing act.

Some legal representation is generally better than none, and the benefit of *some* legal representation will often serve to help settle a matter and avoid a trial. Therefore, while abuse must be properly and effectively curtailed, it is critical that courts do not act to discourage counsel from going on the record or from providing unbundled or agent services in all cases.

We must be careful to not toss the baby with the bathwater.

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