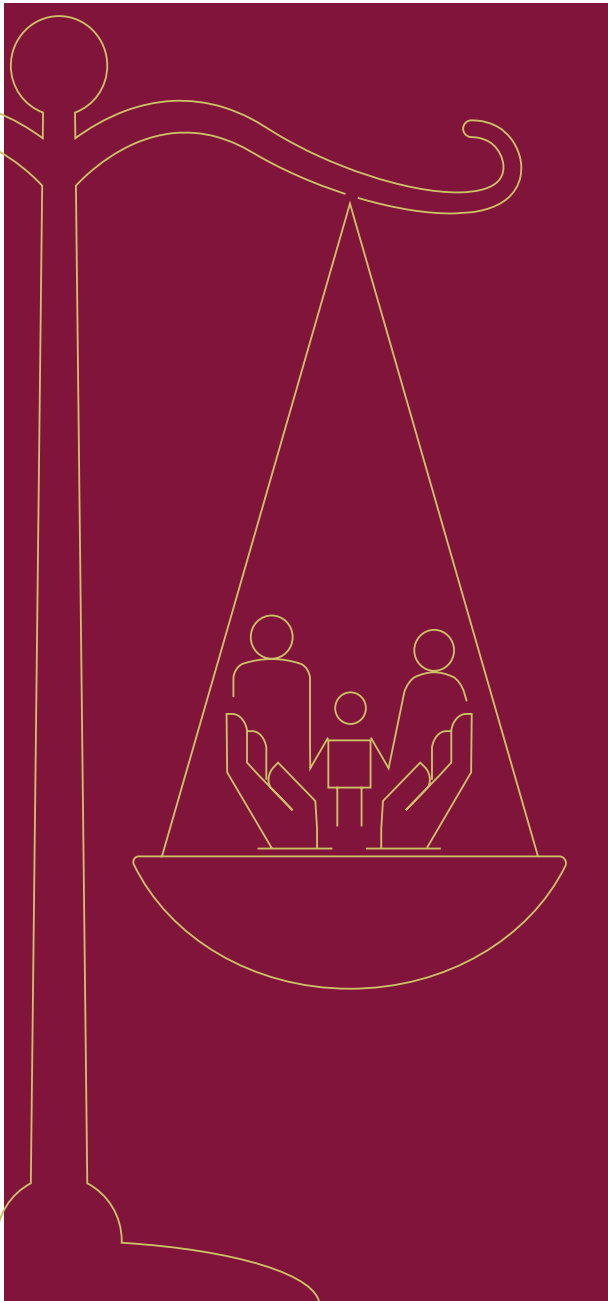

LEGAL BULLETIN

Part 2: *Colucci v. Colucci*, June 2021 SCC 24 (CanLii): Child support issue



Introduction

The recent Supreme Court case discussed below was selected because it profiles an issue in family law since the amended *Divorce Act* (2021) came into force.* The focus is upon the rulings and the basis/rationale for the decisions, and how it aligns with the principles of that amended *Divorce Act* (or not). Each case proceeded through from the lower courts level before being dealt with at the Supreme Court (SC). What is interesting is how the SC did rely upon the statutory interpretation principles of the amended *Divorce Act* to support substantive equality for women and children in the cases, whereas at times in the lower level courts, they appeared not to be considered.*

Suggestions on How to Process This Summary

This case is one of a three-part series. In this case you will find four parts: first, the link to the actual case; then the Case in Brief; then the link to the West Coast LEAF Interveners' summary and last, the Martinson and Jackson relevant Commentary from a PHAC Learning Brief.

*Acknowledgement: Much of the first section of the Introduction is taken from the PHAC Learning Brief entitled:

The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases – The Honourable Donna Martinson and Dr. Margaret Jackson

https://www.fredacentre.com/wp-content/uploads/Martinson_and_Jackson_Divorce_Act_2021_EN.pdf

Colucci v. Colucci, June 2021 SCC 24 (CanLii): Child support issue

<https://www.canlii.org/en/ca/scc/doc/2021/2021scc24/2021scc24.html>

West Coast LEAF (Intervenors) Summary

https://www.leaf.ca/case_summary/colucci-v-colucci/

Case in Brief

Cases in Brief are prepared by communications staff of the Supreme Court of Canada to help the public better understand Court decisions. They do not form part of the Court's reasons for judgment and are not for use in legal proceedings.

The Supreme Court rejects parent's bid to reduce or cancel \$170,000 child support debt.

The parties were married in 1983 and divorced in 1996. The mother was awarded sole custody of the couple's two daughters, and the father was ordered to pay child support in the amount of \$115 per child on a weekly basis.

For 16 years, the father failed to make any voluntary child support payments, did not disclose his income, and moved to two different countries without notifying the mother. His obligation to pay child support ended in 2012, but by that time, he owed the mother almost \$170,000 in unpaid child support.

In 2016, the father sought to have his child support debt cancelled or substantially reduced. He applied under section 17 of the *Divorce Act*, which allows a payor parent to apply to retroactively decrease an order for child support. He asked the court to retroactively change the child support amount, and to establish it based on the *Federal Child Support Guidelines (Guidelines)*, which came into effect in 1997. The Ontario Superior Court of Justice agreed, and it reduced the amount of unpaid child support the father owed to approximately \$42,000. The mother appealed that decision to the Ontario Court of Appeal, which overturned the lower court decision and ordered the father to pay his

original debt of \$170,000. The father appealed to the Supreme Court of Canada.

Framework for courts to follow

This case gave the Supreme Court the opportunity to establish a framework for courts to follow when a parent tries to retroactively decrease child support to reflect a past reduction in income under section 17 of the *Divorce Act*. The Supreme Court noted that family law matters are diverse and complex and that courts need wide discretion to come to a fair result. It said courts must balance a child's need for regular and appropriate support with the need for flexibility when a parent's ability to pay is affected by changes in income over time.

The framework recognizes two long-established principles of Canadian child support law. First, children have a right to a fair standard of support. That is a core objective of the *Guidelines*. Secondly, parents are obliged to financially support their children starting at birth and continuing after separation. The Supreme Court also explained that since the *Guidelines* came into effect, the payor parent is under a free-standing legal obligation — independent of any court order — to pay child support in line with their income.

The Supreme Court stressed the child support system depends on adequate, accurate and timely financial disclosure. It said, “*frank*

disclosure of income information by the payor lies at the foundation of the child support regime”.

Principle of retroactive decrease applied to this case

In this case, the father tried to seek a retroactive decrease of child support payments back to 1997, claiming that he was automatically entitled to it, even though he never notified the mother about his decreased income at the time.

The Supreme Court noted that a parent who has established a past decrease in income is not automatically entitled to a retroactive decrease of support to the date of the decrease. It emphasized that it is up to the court to make a discretionary decision based on its analysis of the specific circumstances of the given case.

The Court said the father failed to communicate or seek a change of the support order for 18 years. It said *“he made few, if any, voluntary payments during that time and showed no*

willingness to support his children, who suffered hardship as a result of his failure to fulfill his obligations. His conduct shows bad faith efforts to evade the enforcement of a court order”.

In this unanimous decision, all judges of the Supreme Court agreed that the father was not entitled to a reduction in child support based on decreased income. Further, they said his failure to produce adequate evidence of his financial circumstances was fatal to any attempt to cancel his child support debt. The Court concluded that the father had not proved that he could not pay now or in the future, even with a flexible payment plan. In any event, the Court said the cancellation of child support debt would only happen in exceptional cases and as a last resort. The payment and enforcement of a child support debt is the rule.

As a result of the Court’s decision, the father will be required to pay the mother the child support owed, approximately \$170,000.

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In June 2021 in *Colucci v. Colucci*, a unanimous Supreme Court of Canada provided an important example of how the family violence sections of the Divorce Act inform the interpretation of other sections. In commenting on the trend towards a culture of negotiation, the Court referred to s.7.3 requiring parties, when appropriate, to resolve family law disputes through family dispute resolution processes. It then stated that, “Parents should be encouraged - absent family violence or significant power imbalances – to resolve dispute themselves outside the court structure...” (emphasis ours). The words “absent family violence or significant power imbalances” are not in the *Divorce Act* section but, using a purposive approach which takes into account the Act’s

scheme and objects, the Court concluded that it must be interpreted this way.

That statement applies directly to the duty of legal advisors to encourage dispute resolution in s. 7.7(2); legal advisors must only encourage resolution outside the court structure absent family violence or significant power imbalances. Complying with this duty requires an assessment by the legal advisor to determine whether family violence is an issue and if there are any significant power imbalance. *All of the principles of statutory interpretation reviewed by that Court in relation to the interpretation of the child support provisions of the FLA apply equally to the interpretation of the family violence provisions in all Canadian family law legislation including the Divorce Act.*

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The FREDa Centre
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Against Women and Children