



Article

Family Law

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Father still on the hook for unpaid support, even though child now an adult, top court rules

Father who underpaid on child support for more than 10 years forced to pay \$23,000

By Adam N. Black

In its first family law decision of the year, the Supreme Court of Canada recently dealt with the issue of retroactive child support. Given the relative infrequency with which a family law case makes its way to the highest court in the land, the decision is unquestionably an important one. All nine judges of the Supreme Court reached a unanimous decision in *Michel v Graydon* which clears the way for a parent's claim for child support that should have been paid in years gone by.

The facts of the case are fairly straightforward. The B.C. couple was in a common-law relationship. They are the parents of one child, born in December 1991. They separated in 1994 following which the child lived with the mother and the father agreed to pay child support of \$341 per month, based on his declared annual income of just under \$40,000.

When the child support agreement was reached, the father's income was, in fact, approximately \$6,000 higher than his declared income. As years went by, the father's income continued to exceed his declared income, yet he continued to pay only \$341 per month to the mother. At the high-water mark, the father's annual income reached \$80,000, or double the income on which the support order was based. In April 2012, child support was terminated when the child completed post-secondary studies.

Three years later, the mother commenced court proceedings against the father in which she sought \$23,000 on account of the father's underpayment of child support since 2001.

Not surprisingly, the father resisted the mother's claim. He took the position that the court lacked jurisdiction to make such an order since the child was no longer a "child" under the applicable legislation. In other words, the father said the ship had sailed on the mother's opportunity to make such a claim since it was made too late.

The father's refusal to correct his underpayment of child support was made despite his awareness and acknowledgement that the mother and child were living in poverty when he was underpaying child support.

In September 2016, Judge Garth Smith of the British Columbia Provincial Court heard the mother's claim for increased child support. Judge Smith ordered the father to pay \$23,000 on account of his underpayment of child support. In making the order, Judge Smith found the child "lived in poverty for many years and may not have had to if (the father) had paid child support in accordance with his annual income as it fluctuated."

In accordance with the Judge's order, the \$23,000 payment was to be divided equally between the mother and the adult child.

The father successfully appealed from the trial judge's decision. Thereafter, the mother unsuccessfully appealed to the Court of Appeal for British Columbia followed by her successful appeal to the Supreme Court, which resulted in Judge Smith's decision being restored.

The Supreme Court noted that the fact the child was no longer a "child" under the applicable B.C. legislation at the time the mother commenced court proceedings was not a bar to her claim for retroactive child support.

Writing for the majority of the Court, Justice Russell Brown was critical of the father's conduct, noting that "failure to disclose material changes in income undermines the child-support regime imposed by the (*Child Support*) *Guidelines*. The record here also indicates that (the father) knew about his daughter's financial circumstances and made disparaging remarks about her standard of living instead of modifying his child-support payments to assist her."

In her concurring reasons, Justice Sheilah L. Martin noted that child-support obligations "arise upon a child's birth or the separation of their parents. Retroactive awards are a recognized way to enforce such pre-existing, free-standing obligations and to recover monies owed but yet unpaid. Such a debt is a continuing obligation which does not evaporate or fade into history upon a child's 18th or 19th birthday or their graduation from university."

Justice Martin continued by underscoring the purpose and importance of permitting retroactive child support, noting that such an order "enhances access to justice, reinforces that child support is the right of the child and the responsibility of the parents, encourages the payment of child support, acknowledges that there are many reasons why a parent may delay making an application, and recognizes how the underpayment of child support leads to hardship and contributes to the feminization of poverty. In short, allowing recipient parents to make claims for historical child support is in the best interests of children and promotes equality and access to justice for all."

In what will likely become a compass for future claims for retroactive child support, Justice Martin noted that the "courtroom doors should not be closed because certain categories of debts owed to children are classified as coming too late."

The message from the Supreme Court is loud and clear: proper child support, which is the right of a child, must be paid. Failure to do so will not be condoned by the court and will likely be corrected by a retroactive award for support.

This article originally appeared in the Financial Post.

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