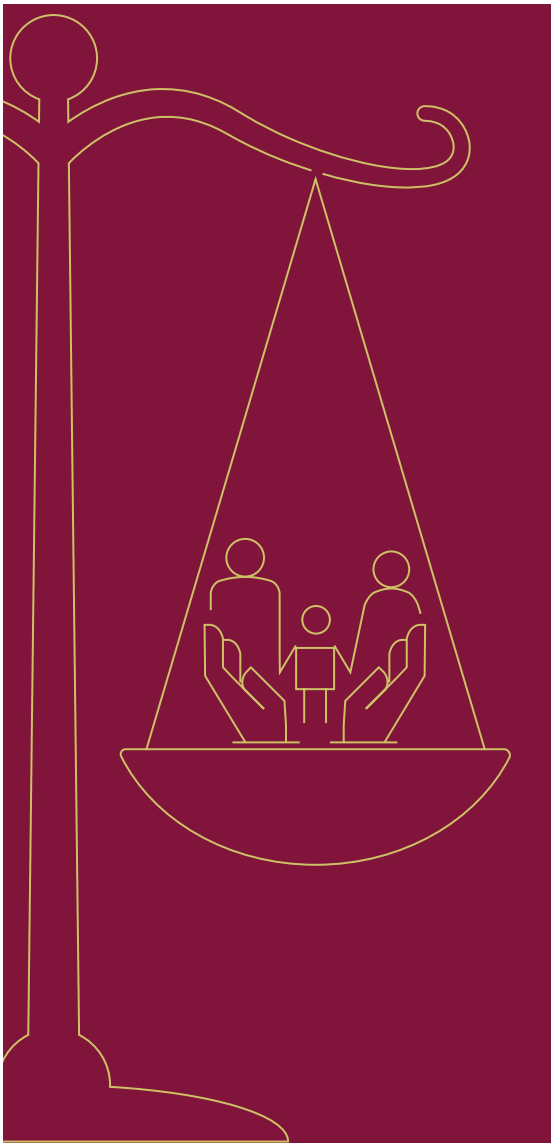
CASE BULLETIN

Part 1: *Michel v. Graydon*, September 2020 SCC 24 (CanLii): Financial abuse issue



Three family law cases from the Supreme Court of Canada:

Michel v. Graydon, September 2020 SCC 24 (CanLii);
Colucci v. Colucci, June 2021 SCC 24 (CanLii); and
Barendregt v. Grebliunas, December 2, 2021 (CanLii) and May 19, 2022

Introduction

The three recent Supreme Court cases discussed below were selected because they profile issues 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 they align 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 these Summaries

For the first two cases, 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. The third case also has the link to the actual case (December 21, 2021), the link to the LEAF summary, and the Case in Brief with the link to the final reasons for judgement (May 19, 2022), but no Martinson/Jackson commentary available; the latter absence resulting from the fact that the third case came out after our Learning Brief case discussion was written. If you are wanting to focus upon a more abbreviated summary/commentary, it is suggested that for the first two cases you read the Case in Brief (#3) and the M & J Learning Brief commentary (#4) parts, and for the third case, only the Case in Brief – reasons for the decision one.

*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

Michel v. Graydon, September 2020 SCC 24 (CanLii): Financial abuse issue

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

2. West Coast LEAF (Interveners) Summary:

https://www.westcoastleaf.org/our-work/michel-v-graydon-2019/

3. Michel v. Graydon 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.)

British Columbia law says courts can order back child support even after the child is grown up, the Supreme Court has ruled.

Ms. Michel and Mr. Graydon were "common-law" spouses. This meant the law considered them married, even if they didn't have a marriage certificate. They lived in British Columbia. They had a child, AG. A few years later, the relationship ended. AG went to live with Ms. Michel. Mr. Graydon said his income was about $40,000 a year. He agreed to pay about $340 a month in child support based on that.

While AG was growing up, Ms. Michel lived on social assistance. Because of this, she had to sign over her rights to child support to the government. The government would collect the child support and pay her social assistance. The government never tried to ask for more support for AG.

When AG became an adult, the child support ended. But Ms. Michel found out that Mr. Graydon's income had been higher than he said. She asked for back (retroactive) child support based on his real income.
Mr. Graydon said it was too late to ask for this. He said the court didn't have the power to make him pay now, because AG wasn't a child anymore.

When parents are formally married and decide to get divorced, the *Divorce Act* applies. The *Divorce Act* is a federal law. But before someone files for divorce, or when parents are de facto spouses (in Quebec) or common-law spouses (in other provinces), provincial laws apply. Under the federal *Divorce Act*, if the child is now grown up, parents don't have to pay back child support even if they should have paid it earlier. Mr. Graydon said British Columbia's Family Law Act should be read the same way. The trial judge said Mr. Graydon hid his real income, and this hurt AG. He was to blame for the situation. The trial judge ordered Mr. Graydon to pay $23,000 in back child support, split between Ms. Michel and AG. But the appeal judges agreed with Mr. Graydon that it was too late to order back child support.

All the judges at the Supreme Court of Canada said Mr. Graydon had to pay. They said that courts could change past child support orders under the *Family Law Act*. They could do this even if the child was now grown up. Child support is a right that belongs to the child. The parents can't negotiate it away. It should give the child the same standard of living they had when their parents were together. All the judges agreed that back payments are fair. Parents are always responsible for paying according to their income. Back payment orders just hold them to that.

All the judges said courts need to consider the entire situation in deciding whether to make a parent pay retroactive child support. This includes why a parent waited to ask for the support, the behaviour of the parent who was supposed to pay, the child's situation, and whether it would cause hardship. The majority said the reason Ms. Michel waited to ask for back payments was that she had been badly hurt and the government took over her right to support. Mr. Graydon knew his income was higher than he was saying, so it wouldn't have been a surprise to him that he had to pay more. He also knew how bad AG's living situation was because of

lack of money, and instead of helping her, made hurtful comments about it. He could afford to pay it now. All of this meant that he had to pay.

All the judges agreed that preventing retroactive child support hurt women most. They said that support should be limited only where the law clearly says so. They said that although an older version of the law might have prevented child support for the past, the current one didn't. In any case, it would be wrong to encourage people to avoid paying in case the other parent might wait too long to ask for it. People shouldn't be able to profit from acting badly.

This case was decided "from the bench" at the end of the hearing on November 14, 2019. When a case is decided from the bench, it means the judges tell the parties the outcome right away. In this case, the judges gave written reasons later to explain.

4. 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

In *Michel v. Graydon*, the Honourable Judge Smith of the B.C. Provincial Court ordered a retroactive variation of child support under s. 152 of the FLA though the child was not a "child of the marriage" – no longer under the age of 19 - when the application was made. He did this based on clear evidence that the father had deliberately hidden income relevant to child support at the time when the child did meet the definition of child of the marriage. In doing so, Judge Smith considered the overall purpose of the child support provisions of the B.C. Act – ensuring that children have the child support to which they are entitled from both of their parents. That decision was overturned by the British Columbia Supreme Court; the Court of Appeal agreed with the Supreme Court. The Supreme Court of Canada set aside the decisions of the BC Supreme Court and Court of Appeal and restored Judge Smith's decision. The *Divorce Act*'s family violence provisions are, overall, focused on ensuring a common understanding of the depth and breadth of the nature of family violence, including direct and indirect exposure of children to it, as well as the harmful impact it can have on the safety, security and well-being of women (as family members) and children. They specify that the views and preferences of the child are relevant in all cases, with no exceptions for cases involving violence and/or parental alienation. There are no presumptions about what is in a child's best interests, no presumption of equal parenting and there is no general maximum parenting time/contact principle: a child shall have only as much time with a parent as is consistent with the best interests of the child, which in turn gives primary consideration to the child's physical, emotional and psychological safety, security and well-being.

This Bulletin was prepared by Dr. Margaret Jackson Director of the FREDA Centre, and Professor Emerita School of Criminology, Simon Fraser University on behalf of the Alliance of Canadian Research Centres on Gender-Based Violence.

ALLIANCE OF CANADIAN RESEARCH CENTRES ON GENDER-BASED VIOLENCE

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The FREDA Centre for Research on Violence Against Women and Children