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A Gender-Based Approach to Historical Child Support: Comment on *Colucci v Colucci*

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A GENDER-BASED APPROACH TO HISTORICAL CHILD SUPPORT: COMMENT ON *COLUCCI V COLUCCI*

Jodi Lazare[*] & Kelsey Warr[*] [**]

In June 2021 the Supreme Court of Canada (the "Court") released Colucci v Colucci*, its second decision in twelve months dealing with the complex subject of historical (commonly referred to as retroactive) child support. The case worked a significant shift in the law, arguably the first major revision to the law since the Court's initial consideration of historical child support in* DBS*, in 2006. This comment suggests that* Colucci *represents a new understanding of the way that claims for historical child support should be considered in Canadian family law. The comment argues that in changing the applicable framework, the Court has endorsed a gendered approach to historical child support law that responds to many of the concerns that flowed from* DBS*. Drawing on the text of the decision, as well as relevant case law and scholarship, we outline the theoretical foundations for the changes brought by Colucci, as well as their practical implications. We suggest that in clarifying child support as the right of the child, decreasing the emphasis on certainty for payors, and*

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stressing the necessity of financial disclosure, the Court has feminized the law of historical child support. We explain how, using that feminist lens, Colucci *modifies the framework for adjudicating historical child support claims, by creating a presumption in favour of an award in the presence of a change of income, softening the three-year time limit of so-called retroactivity, and repositioning and reconceptualizing the* DBS *factors which now inform how far back a historical child support award should go. In fleshing out and analyzing these changes, we consider the ways in which* Colucci *may better serve to promote substantive gender equality in historical child support law by responding to women and children's lived realities.*

INTRODUCTION

It has been more than a decade since the Supreme Court of Canada ["the Court"] first addressed the issue of retroactive, or historical, child support.[1] Nevertheless, historical child support has remained an unsettled issue in Canada, despite the Court's guiding decision on the matter in *DBS*, 16 years ago.[2] Indeed, *DBS* has been one of the most judicially considered family law cases in existence,[3] which is not surprising considering the enormous amounts of unpaid child support in this country and the impacts of non-payment, on women and children in particular.[4] In short, a clear and consistent approach to

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[1] It should be noted from the outset that although courts refer to past child support obligations as "retroactive," the Supreme Court explained, in *DBS v SRG,* 2006 SCC 37, [2006] 2 SCR 231 [*DBS*], that that terminology is not quite accurate, given that the claims in question simply ask a court to enforce obligations that existed at the relevant (historical) time. See also Lucinda Ferguson, "Retroactivity, Social Obligation and Child Support" (2006) 43 Alta L Rev 1049 at 1049-1050. Accordingly, for the sake of accuracy, we use the term "historical child support" throughout this comment. While the Supreme Court eventually changed course, using the language of historical support in *Michel v Graydon,* 2020 SCC 24 [*Michel*] to refer to support owed to now-adult children, we believe it is the better term for any support owed in the past, but not paid when due.

[2] *DBS, supra* note 1.

[3] Five and a half years following the decision, it had been judicially considered 932 times. See Marie L. Gordon, "An Update on Retroactive Child and Spousal Support: Five Years after S.(D.B.) V. G.(S.R.)" (2012) 31:1 Can Fam LQ 71 at 71.

[4] See *House of Commons Debates*, 42-1, Vol 148, No 326 (26 September 2018) at 21867 (Hon Jody Wilson-Raybould).

claims for historical child support has been difficult to come by… until now.

In *DBS*, the Court confirmed a claimant's ability to ask for child support owed in the past but never agreed to, ordered, or paid. In other words, the law of historical child support recognizes that the absence of an agreement or order to pay child support commensurate with the non-custodial parent's income does not absolve the payor of their obligation to pay. Child support, then, is a standalone obligation, irrespective of the terms of a separation agreement, or an order granting a divorce, or any other agreement between a child's parents.[5] In consequence, and as confirmed in *DBS* in 2006, a court may order unacknowledged and unpaid support years after the obligation was first due.

More recently, in 2019 and 2020, the Court heard two separate appeals addressing different aspects of historical child support. In brief, *Michel v Graydon* dealt with questions around the statement in *DBS* that historical support could not be ordered once a beneficiary of child support is no longer a "child of the marriage," i.e., a minor or otherwise dependent child.[6] *Colucci v Colucci,* the subject of this comment, addressed issues related to the

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[5] See *DBS*, *supra* note 1 ("This parental obligation [to support their children in a way that is commensurate with their income], like the children's concomitant right to support, exists independently of any statute or court order" at para 54).

[6] *Michel, supra* note 1. The phrase "child of the marriage," referring to a dependent child eligible for child support, comes from the *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 15.1(1) [*Divorce Act*] and the *Federal Child Support Guidelines* SOR/97-175, s 2(1) [*Child Support Guidelines*].

applicability of the reasoning in *DBS* to cases involving claims for a retroactive reduction of support or the reduction or recission of unpaid child support arrears.[7] Both decisions examined—and, to differing degrees, modified—the factors first set out in *DBS* that judges should weigh in adjudicating a contested claim for historical child support. While both decisions make important contributions to the law of historical child support, this comment relates primarily to the more recent decision in *Colucci*, which engaged in a deeper analysis and modification of the substantive legal principles and formal mechanisms first set out in *DBS*.[8]

As the case law and literature on historical child support make clear, there is no universal consensus or overarching theory of child support.[9] However, this comment suggests that the subtle but significant changes made by the Court in *Colucci* to the *DBS* framework illustrate the judicial endorsement of a feminist theory of child support as a means of pursuing substantive gender equality—an approach that is responsive to the documented gender disparities that typically result from

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[7] *Colucci v Colucci,* 2021 SCC 24 [*Colucci*].

[8] The majority reasons in *Michel*, for their part, were limited to answering the technical question of whether support can be varied historically once the beneficiary has reached the age of majority. See Aaron Franks & Michael Zalev, "Franks & Zalev's This Week in Family Law", *Family Law Newsletter* (7 June 2021), online: < https://nextcanada.westlaw.com/Document/Ide44dea68f1e47f8e0540010e03eefe0/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0>.

[9] See Scott Altman, "A Theory of Child Support" (2003) 17:2 Int'l JL Pol'y & Fam 173 at 174.

family breakdown.[10] Of course, feminism is a loaded term, with many meanings.[11] This comment uses the term to mean a feminist, or women's perspective, that recognizes the gendered dimensions of family law and strives for genuine gender equality, in family law and beyond. Moreover, the feminist approach employed here is grounded in the pursuit of substantive gender equality and the recognition that differently situated groups—here, women and mothers—might merit different treatment in order to obtain similar outcomes.[12] Indeed, to promote this understanding, courts must be "concerned with ensuring that laws or policies do not impose subordinating treatment on groups already suffering social, political, or economic disadvantage in Canadian society."[13] Thus, *Colucci*

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[10] Women with sole custody of their children are almost twice as likely to live below the poverty line compared to fathers with sole custody, 42% versus 25.5%. See Statistics Canada, *Census in Brief: Children living in low-income households*, Catalogue No 98-200-X2016012 (Ottawa: Statistics Canada, 13 September 2017), online: <www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016012/98-200-x2016012-eng.cfm> [*Children in Low-Income Households*]. This likely flows from the fact that women still tend to work less hours, are over-represented in part-time work, and are paid less on average compared to men. See Statistics Canada, *Women and Paid Work*, by Melissa Moyser, in *Women in Canada: A Gender-based Statistical Report,* 7th ed, Catalogue No 89-503-X (Ottawa: Statistics Canada, 8 March 2017) online (pdf): <www150.statcan.gc.ca/n1/en/pub/89-503-x/2015001/article/14694-eng.pdf?st=1O4F3l9Z>.

[11] See Katharine T Bartlett, "Feminist Legal Methods" (1990) 103:4 Harv L Rev 829.

[12] See Claire L'Heureux-Dube, "Making Equality Work in Family Law" (1997) 14:2 Can J Fam L 103.

[13] *Colucci v Colucci,* 2021 SCC 24 (Factum of the Intervenor, West Coast Legal Education and Action Fund Association And The

functions to recognize and respond to the gendered context of historical child support.

This is not the first time the Court has endorsed an equality-based approach to gendered family law issues; it has been nearly three decades since the Court expressly recognized the importance of such a response to a gendered phenomenon when it instructed trial judges to take judicial notice of the feminization of poverty that results from unequal childcare burdens in the context of both spousal support and child support.[14] Despite those advances, the same reasoning was not extended to historical child support—a fact that led to criticism in the past.[15]

This comment proceeds as follows: First, we outline the law of historical child support, in theory and in terms of judge-made rules, prior to *Colucci.* Here, we look at the rationale for the introduction of the *Child Support Guidelines* in 1997,[16] and provide an overview of the framework set out in *DBS* and later clarified in *Michel*. We then turn to a close read of *Colucci*, starting with a brief

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Women's Legal Education And Action Fund Inc at para 12 [LEAF *Colucci* Factum]), citing Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const Stud 191 at 194-195.

[14] See *Moge v Moge*, [1992] 3 SCR 813, 99 DLR (4th) 456 [*Moge*]; *Willick v Willick,* [1994] 3 SCR 670, 119 DLR (4th) 405.

[15] Note that both *DBS* and *Michel* contained minority judgements addressing some of these questions. For a feminist critique of *DBS* see e.g. *Gordon*, *supra* note 3; *Ferguson*, *supra* note 1; Natasha Bakht et al, "D.B.S. v. S.G.R.: Promoting Women's Equality through the Automatic Recalculation of Child Support" (2006) 18:2 CJWL 535.

[16] *Child Support Guidelines, supra* note 6.

history of the case, followed by an analysis of the Court's gendered approach to modifying the *DBS* framework. This approach includes an emphasis on child support as the right of the child, a decreased importance placed on certainty for payor parents, and, significantly, an acknowledgment of the necessity of income disclosure on the part of payors. Flowing from this approach, the specific changes include a new presumption in favour of an award of historical support, the erosion of the controversial "three-year rule",[17] and a repositioning of the *DBS* factors. Last, we discuss how *Colucci* fits within the broader context of Canadian family law and whether it adequately responds to the issues that plagued family law following the release of *DBS*.

1. HISTORICAL CHILD SUPPORT BEFORE *COLUCCI*

Historical child support has long been a significant issue in family law. Based on the amount of litigation and discussion around the topic,[18] it is not surprising that the Court saw fit to revisit the subject. In this part, we outline the history of the law of historical child support, and the legislative and judicial background that led to the Court's decision in *Colucci.* We begin with a brief discussion of the *Child Support Guidelines*, and then outline the reasoning in both *DBS* and *Michel*.

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[17] See discussion of the "three-year rule" *infra* note 32.

[18] As seen above, *DBS* was judicially considered almost 1,000 times in the first five years after the decision and has been the subject of much scholarship. See *Gordon*, *supra* note 3; *Ferguson*, *supra* note 1; *Bakht et al*, *supra* note 15.

1.1 STREAMLINING CHILD SUPPORT THROUGH THE *FEDERAL CHILD SUPPORT GUIDELINES*

It is impossible to meaningfully discuss any element of child support law in Canada without reference to the *Child Support Guidelines*.[19] The *Child Support Guidelines* came into force in 1997 and drastically altered the landscape of child support throughout the country. Prior to their adoption, child support was determined on the basis of need and ability to pay, taking into account the income of both parents as well as the estimated costs of raising the child.[20] Significantly, the pre-*Child Support Guidelines* approach endowed trial judges with nearly unfettered discretion in making a child support award, guided almost exclusively by the amorphous principle of the best interests of the child.[21] Although the *Child Support Guidelines* maintained some of that discretion in the rules governing special expenses and support in cases of shared parenting,

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[19] *Child Support Guidelines*, *supra* note 6.

[20] See *Paras v Paras* (1970), [1971] 1 OR 130, 14 DLR (3d) 546 [*Paras*], an early Court of Appeal decision addressing the child support provisions of the *Divorce Act*, RSC 1967-68 (Can.), c. 24 and set out the basic, fundamental principles of child support law that remained in place until the creation of the *Child Support Guidelines*.

[21] The discretionary approach has been criticized for creating child support awards which were too low, inconsistent, and unpredictable. See Courtney Palmer, "Child Support and Shared Parenting in Canada: A 'Reality Cheque'" (2013) 22 Dal J Leg Stud 101 at 102, citing *Children Come First: A Report to Parliament on the Provisions and Operation of the Federal Child Support Guidelines, Volume 1* (2002) at 1, online (pdf): Department of Justice Canada <https://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/rp/pdf/v1.pdf> at 1 [*Children Come First*]; Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5:1 Can J Fam L 15 at 22–23.

for example,[22] the primary determination of child support became instead a straightforward number based on the payor parent's income and the number of children.[23]

The *Child Support Guidelines* apply only to married spouses under the federal *Divorce Act*,[24] but all of the provinces have adopted similar rules to govern child support obligations outside the context of a divorce.[25] The effect of the *Child Support Guidelines* has been increased certainty in support amounts as well as a larger push towards out-of-court settlement, as both parties have a clearer understanding of their financial obligations.[26] However, where historical child support was concerned, the transition to the *Child Support Guidelines* presented difficulties, as judges continued to exercise broad

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[22] See *Child Support Guidelines, supra* note 6, ss 7, 9.

[23] Quebec is the exception to this. In that province, child support awards take into account the income of both payor and recipient parents. See *Regulation respecting the determination of child support payments*, CQLR c C-25.01, r 0.4; *Droit de la famille* — 139, 2013 QCCA 15.

[24] The *Guidelines* having been established by the Governor General pursuant to the *Divorce Act, supra* note 6, s 26.1.

[25] See e.g. *Family Law Act Regulation,* BC Reg 347/2012, s 8; *Provincial Child Support Guidelines*, NS Reg 83/2017, s 2(1).

[26] As per their objective. See *Child Support Guidelines, supra* note 6, s 1(b)–(d). Scholars have found the *Guidelines* for the most part to be "remarkably successful." See Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000) 18 Can Fam LQ 25 at 28 [Thompson, "Rules and Rulelessness"]. Further, discussions with legal professionals have shown an increase in settlements following the implementation of the *Child Support Guidelines*. See *Children Come First*, *supra* note 21 at 11.

discretion in adjudicating these kind of claims.[27] It was against that background that the Court decided *DBS* and created a framework for the awarding of historical child support.

1.2 STRUCTURING HISTORICAL SUPPORT: *DBS V SRG*

DBS involved four separate appeals from the Court of Appeal of Alberta, all dealing with claims by primary parents (mothers, in all four cases) for historical child support.[28] The Court set out to determine whether a court can order historical child support and, if so, the circumstances in which such orders are appropriate. On the first question, the Court found that orders for historical child support were statutorily available and should not be considered exceptional. Indeed, historical support orders only seek to enforce the payment of support already owed at the time in question.[29] With regard to eligibility for an award, the Court determined that to receive an order for historical support, the child in question must still be a child

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[27] See Christine Davies, "Retroactive Child Support: the Alberta Trilogy" (2005) 24 Can Fam LQ 1 at 9–10, observing that while the Alberta Court of Appeal had embodied a "broad and generous" approach to retroactive support, other provinces had not followed suit. For example, Ontario had generally found that retroactive support should be ordered sparingly and that courts did not have jurisdiction to order retroactive support based on non-disclosed income changes. See *Marinangeli v Marinangeli*, [2003] CarswellOnt 2691, 228 DLR (4th) 376 (ONCA); *Walsh v Walsh*, [2004] CarswellOnt 356, 69 OR (3d) 577 (ONCA).

[28] *Hiemstra v Hiemstra*, 2005 ABCA 16; *DBS v SRG*, 2005 ABCA 2; *LJW v TAR*, 2005 ABCA 3; *Henry v Henry*, 2005 ABCA 5.

[29] See *DBS, supra* note 1 at para 97.

of the marriage,[30] or the equivalent under the applicable provincial legislation.[31]

The Court went on to outline four factors that should inform the determination of whether a court should order historical support: the presence of a reasonable excuse on the part of the recipient parent for not seeking support earlier; any blameworthy conduct by the payor parent; the circumstances of the child; and the hardship occasioned by a historical award. If these factors indicate that an award is appropriate, support should generally only be ordered retroactive to the date of effective notice—that is, the date that the claimant expressed her intention to claim historical support—or up to three years prior to the date of effective notice.[32] A judge might depart from this general rule, however, and award historical support for more than three years preceding the claim, where a payor

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[30] See *Divorce Act, supra* note 6, s 2(1).

[31] See *DBS, supra* note 1 at paras 86–90. As the case involved relationships covered by both the *Divorce Act, supra* note 6 and the *Parentage and Maintenance Act*, RSA 2000, c P-1 (repealed and replaced by *Family Law Act*, SA 2003, c F-4.5), both were considered when discussing support eligibility.

[32] See *DBS, supra* note 1 at paras 120–123. This has become known as the "three-year rule." In concrete terms, the rule means that in the absence of "blameworthy conduct"—a narrow category following *DBS*—a father who owes 12 years of support would only be required to pay a maximum of three years' worth of support. Predictably, the rule created an avenue for payors to escape their obligations simply by waiting out the clock. Note that Justice Abella firmly dissented on this point, reasoning that since children are entitled to support, the date of retroactivity should be the date on which the payor's income increased. See *DBS, supra* note 1 at paras 162–164.

is found to have engaged in blameworthy conduct that put their interests above that of the beneficiary child.[33]

1.2.1 Critiques of *DBS*

While the Court's detailed examination and treatment of historical child support went a long way in clarifying what had been a particularly confusing area of family law, several aspects of the decision were the target of significant critique. Most of the criticism seemed to flow from the fact that instead of embracing the existence of the *Child Support Guidelines*, *DBS* seemed to represent a compromise between the pre- and post-*Child Support Guidelines* eras.[34] Specifically, the *DBS* Court seemed particularly focussed on the goal of certainty for payors—a relic from earlier times and a stark departure from the reasoning, in the *DBS* appeals, of the Court of Appeal of Alberta, which had set out a much more child-centered approach, emphasizing the need to fully embrace the *Child Support Guidelines* and move away from the significant judicial discretion that had previously characterized the law.[35] Indeed, it is difficult to read *DBS* without being struck by the Court's intense preoccupation with the right of payors to be certain of their obligations, often seemingly

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[33] *Ibid* at para 124.

[34] See e.g. *Henderson v Micetich*, 2021 ABCA 103 at para 31 [*Henderson*]; *Colucci*, *supra* note 7 at para 44; Bakht et al, *supra* note 15 at 561–562.

[35] See *DBS v SRG,* 2005 ABCA 2 at para 153 for an overview of the Court of Appeal's framework. Further, following the case (and before the SCC released its decision) scholarship observed the positive impacts on children's lives that resulted from the ABCA's approach. See Davies, *supra* note 27.

above all else—logic that is hard to justify when the *Child Support Guidelines* are clear that support obligations are directly connected to payor income and will fluctuate accordingly.[36]

That focus on payor certainty gave rise to a number of critiques and issues in application. First, as a result of some of the more confusing and restrictive aspects of the *DBS* framework, trial judges were required to find creative workarounds to avoid unjust results. Moreover, the apparent privileging of payor interests provoked intense responses anchored in feminist legal theory and the connection between women's poverty and the issue of historical child support.

Turning first to the creative navigation around the limits of *DBS*, several aspects of the *DBS* framework required trial judges to create a workaround in order to come to what they deemed a fair result. One regular example was the statement, in *DBS*, that historical awards can only be granted while the beneficiary remains a child of the marriage, or dependent. While many cases adhered directly to the Court's requirement that a child be eligible for support at the time of the application,[37] another line of cases relied on section 17, the variation provision of the

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[36] This is especially true given that when *DBS* was decided by the Supreme Court, the *Child Support Guidelines* had been in force for nine years (six years at the initial trial levels) and that the parties (DBS and SRG) had separated after the adoption of the *Child Support Guidelines* (although the other three couples had separated/divorced earlier).

[37] See e.g. *Roose v Roose*, 2010 NSSC 180; *Warwoda v Warwoda,* 2009 ABQB 582 at paras 17–24; *de Rooy v Bergstrom*, 2010 BCCA 5 at paras 63–66. See also Gordon, *supra* note 3 at 81.

Divorce Act,[38] to circumvent this rule and award historical child support in cases where it may have otherwise been barred because the child in question was no longer a dependent.[39]

This was just one of the many issues encountered by trial judges applying the *DBS* framework. Others included misunderstandings around what constitutes blameworthy conduct,[40] as well as the broader issue of retroactive decreases and whether the reasoning in *DBS* should apply to these kind of claims.[41] The details of many of those issues are beyond the scope of this comment, but others have discussed them to suggest that the *DBS*

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[38] *Divorce Act*, *supra* note 6, s 17.

[39] See e.g. *Buckingham v Buckingham*, 2013 ABQB 155; *Charron v Dumais,* 2016 ONSC 7491; *Catena v Catena*, 2015 ONSC 3186. Importantly, this was the main issue addressed in *Colucci v Colucci*, 2017 ONCA 892 [*Colucci Appeal 1*] (the first dispute between the same parties to go to the Ontario Court of Appeal) as well as *Michel*, *supra* note 1.

[40] Although the Court, in *DBS, supra* note 1 at para 106, stated that blameworthy conduct was "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support," this has not been fully accepted by courts. See Gordon, *supra* note 3 at 74. Specifically, there has been disagreement around whether non-disclosure of income constitute blameworthy conduct. For cases that it does not, see e.g. *Tochor v Kerr*, 2011 SKQB 42; *Peterson v Peterson*, 2011 SKQB 365; *Patton-Casse v Casse,* 2011 ONSC 4424. For cases saying that non-disclosure does constitute blameworthy conduct, see e.g. *Hartshorne v Hartshorne*, 2009 BCSC 698; *Carlaw v Carlaw*, 2009 NSSC 428; *ERH v BWH*, 2009 BCCA 573.

[41] This was the key issue in *Colucci, supra* note 7, with *Gray v Rizzi*, 2016 ONCA 152 [*Gray*] being relied on to support the idea that the *DBS* factors do apply to claims for "retroactive" decreases, and *PMB v MLB*, 2010 NBCA 5 being relied on for the opposite approach.

framework was not the solution to the issue of historical child support that family law stakeholders might have hoped for.[42]

Turning now to the feminist critique, concerns about the connections between historical child support and women's poverty were being expressed even before the Court decided *DBS*.[43] That critique resulted in large part from the fact that the Women's Legal Education and Action Fund ("LEAF") was not able to intervene in the hearing at the Court.[44] Instead of appearing in Court, LEAF published its arguments, as well as a post-script critique of the decision, outlining the various issues around the feminization of poverty and the systemic inequality faced by women who care for children post-separation—issues that were simply not considered by the Court.[45] To be clear, the concept of the feminization of poverty and its connection with family breakdown and child-rearing was not foreign to the Court; it had previously—and explicitly—addressed similar issues 13 years earlier in

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[42] This disappointment was aptly expressed by the Alberta Court of Appeal in *Henderson, supra* note 34 at para 29, referring to *Michel, supra* note 1 as aligning "more comfortably with the purpose and intent of the *Guidelines* when conceived and enacted." See also Bakht et al, *supra* note 15 for a negative reaction to the SCC's decision in *DBS* compared to the reasoning of Alberta Court of Appeal.

[43] See e.g. Bakht et al, *supra* note 15 (published subsequent, but written prior to the Supreme Court's decision).

[44] A procedural change at the Supreme Court of Canada meant that no interveners were able to appear, including the Defence for Children International-Canada and the Canadian Foundation for Children, Youth and the Law. See Bakht et al, *supra* note 15.

[45] See *ibid*.

Moge, interpreting the spousal support provisions of the *Divorce Act*.[46] Nevertheless, those fundamental considerations were simply absent from the majority reasoning in *DBS*. By ignoring the social context of child support, *DBS* thus failed to account for some significant issues bound up with claims for historical child support awards, especially those related to family violence and gender inequality.[47]

The clearest and perhaps most glaring omission in *DBS* was the Court's failure to explicitly require payor parents to disclose their income on a regular basis, thus placing the burden of inquiring into income changes on the recipient parent. While the majority seemed to recognize the informational inequality that exists between parties,[48] an automatic or regular disclosure requirement was characterized as an unnecessary burden on payor parents.[49] This is an interesting, and problematic, position to take based on the documented negative impact that non-disclosure has upon recipient parents, most of whom are women.[50] The reality of the application-based system outlined by the Court is that unless recipient parents know payors' incomes, they cannot request appropriate amounts

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[46] See *Moge*, *supra* note 14.

[47] See Bakht et al, *supra* note 15 at 561–562.

[48] See *DBS, supra* note 1 at para 124.

[49] See *ibid* at para 58.

[50] Based on cases enrolled in maintenance enforcement programs, 96% involved a father paying support. See Mary Bess Kelly, "Payment patterns of child and spousal support" (24 April 2013) at 5, online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11780-eng.pdf?st=VL0k5OPP>.

of support.[51] As a result of the informational inequality caused by this structure, women often lack the ability to access the support their children are entitled to, requiring them to make up for this gap as best that they can.[52] By overlooking this reality, and placing the burden on recipient mothers, *DBS* effectively ignored the gendered dimensions of historical child support and its uneven impacts on women, further exacerbating the feminization of poverty.[53]

Through its efforts to not unnecessarily burden payors, the Court inadvertently enabled them to use their informational advantage to avoid their support obligations without consequence. That reasoning created a gap that needed to be filled by judges and lawyers' incorporation of specific language around disclosure obligations in support orders and agreements, respectively.[54] In consequence, legislatures intervened, with several provinces creating programs or legislation requiring annual disclosure by payor parents.[55] However, these programs vary greatly; while some provinces maintain robust mandatory recalculation programs, where income is deemed to have

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[51] See *DBS, supra* note 1 at para 56.

[52] See Bakht et al, *supra* note 15 ("When payors fail to pay or underpay support, women are impoverished. Since financial resources are linked to social and political power, women's disentitlement to guideline child support under the restrictive approach denies them substantive equality" at 557).

[53] See *ibid*.

[54] See *ibid* at 563.

[55] See Gordon, *supra* note 3 at 91–94.

increased in the absence of disclosure,[56] others instead employ optional, fee-based, recalculation services,[57] where parties must opt-in and pay for administrative disclosure requirements and any resulting recalculation. The inconsistency in these programs drives home the idea that *DBS* represented a missed opportunity for the Court to recognise the necessity of disclosure and to promote substantive gender equality by reducing the frequency of non-disclosure by payors and mitigating its disproportionate impacts on Canadian women and children.

1.3 ANSWERING LINGERING QUESTIONS: *MICHEL V GRAYDON*

Almost 15 years and much spilled ink later, the Court revisited the question of historical child support and the complex impacts of *DBS*. In late 2019, the Court heard *Michel v Graydon*, an appeal involving a simple (and all too common) set of facts where a father underpaid support for years based on misrepresented income. The central question in *Michel* was whether the *DBS* rule that a beneficiary of child support must still be a "child of the

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[56] These provinces include Newfoundland & Labrador and Prince Edward Island. See Government of Newfoundland and Labrador, "Child Support Recalculation Program", online (pdf): *Government of Newfoundland and Labrador* <www.gov.nl.ca/jps/files/childsupport-recalculation-information-pamphlet.pdf>; *Administrative Recalculation of Child Support Regulations*, PEI Reg EC465/03.

[57] These provinces include Alberta and Quebec. See *Child Support Recalculation Program Regulation*, Alta Reg 287/2009; "SARPA", online: *Commission des Services Juridiques* <www.csj.qc.ca/commission-des-services-juridiques/autres-services/Sarpa/en>.

marriage" at the time of an application for historical child support applied to requests for variations under section 17 of the *Divorce Act* (as opposed to initial orders under section 15). As mentioned above, this was one issue that led to judicial workarounds and creative reasoning in the wake of *DBS*. In *Michel*, the Court brought some much-needed clarity to the question.

Michel was not a unanimous decision, although the whole Court agreed on the result: the beneficiary of a claim for historical variation of child support need not be a dependent child at the time of the application. Justice Brown wrote for a five-judge majority, dealing with the technical issues of eligibility for support and jurisdiction to order historical variation. In a much longer concurring judgement, Justice Martin, writing for two, examined the same issues, but with a much heavier focus on policy considerations.[58] Justice Martin also suggested the *DBS* framework was ripe for further revision in the right case. It is too early to properly evaluate the impact of *Michel*, but it is nevertheless noteworthy that both scholars[59] and trial judges[60] have seemingly chosen to treat both sets of

[58] There were also a third set of reasons delivered Justices Abella and Karakatsanis, which consist of a single sentence agreeing with both Justice Brown's "excellent reasons" and Justice Martin's "important policy considerations". See *Michel*, *supra* note 1 at para 136.

[59] See Rollie Thompson, "The Supreme Court Begins to Rewrite DBS in *Michel v Graydon*" (2020) 39:3 Can Fam LQ 309 [Thompson, "Rewrite"]. In his summary of the decision, Thompson did little to separate the two sets of reasons and emphasised the ways in which Martin J's policy reasons built upon Brown J's framework.

[60] See e.g. *KH v AH*, 2020 NLSC 143 [*KH*]; *Cavanagh v Wagner*, 2020 ONSC 7444 [*Cavanagh*]; *CC v RT*, 2021 PESC 2 [*CC*]; and *MML v JKS*, 2021 BCPC 18 [*MML*]. Further the only reported appellate case

reasons as a comprehensive decision—a perspective that the Court seems to have later embraced completely in *Colucci.*

While *Michel* is not the subject of this comment, it is worth briefly reviewing, as the reasoning there formed the groundwork for *Colucci*. As explained by Rollie Thompson, the case can be boiled down to four key findings: a child's dependency is not relevant when addressing claims for variation of child support; the bar of a child being "of the marriage" in originating claims should be re-evaluated; blameworthy conduct should be read expansively and includes a duty of disclosure; and a recipient parent's reasons for delay can include issues related to access to justice.[61] Further, the three-year rule is now a less certain requirement, with Justice Martin referring to it as a "soft limit or rough guideline,"[62] rather than the stricter rule articulated in *DBS*.

Compared to *DBS*, *Michel* employed a much more child-centred view of historical child support and considered deeper policy issues around access to justice and gender inequality that were absent in *DBS*.[63] Thus, *Michel* represents the genesis of a gendered approach to historical child support law, a perspective that the Court then expanded and solidified nine months later in *Colucci.*

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to discuss *Michel* also avoided making any real distinction between the two sets of reasons. See *Henderson, supra* note 34.

[61] See Thompson, "Rewrite", *supra* note 59 at 309.

[62] *Michel, supra* note 1 at para 127.

[63] This might be attributable in some part to the fact a chapter of LEAF was able to intervene in the hearing of *Michel*.

2. *COLUCCI*: AN EQUALITY-BASED APPROACH

If *DBS* worked to set out the law of historical child support and *Michel* worked to modify and clarify that law, *Colucci* might be read as restructuring the understanding of not only historical support, but also the theoretical basis for child support in Canada more generally. As we suggest in this part, *Colucci* saw the Court explicitly endorse an approach to child support generally, and to the analysis triggered by claims for historical child support, anchored in the pursuit of substantive gender equality—one that accounts for and responds to the different experiences of men and women following family breakdown.[64] For example, *Colucci* recognizes and responds to the fact that women are much more likely to be primary parents and to have to adjust their lives accordingly.[65] As a result, the majority of custodial mothers experience reduced income and standards of living following family breakdown, whereas men tend to fare better following a divorce.[66] Non-payment of child support only exacerbates these documented disparities. In this part, we first set out the background to the case. We then unpack the Court's gender-based analysis and explain how the law may now function to remedy the situation of mothers as primary parents by creating a presumption in favour of an award

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[64] See *Moge*, *supra* note 14.

[65] See *ibid*, citing *Brockie v Brockie* (1987), 5 RFL (3d) 440 (Man QB) ("To be a custodial parent involves adoption of a lifestyle which, in ensuring the welfare and development of the child, places many limitations and burdens upon that parent" at 868).

[66] See Dr Anne-Marie Ambert, *Divorce: Facts, Causes and Consequences*, 3rd ed (Ottawa: The Vanier Institute of the Family, 2005) at 15.

and, given the emphasis on disclosure, alleviating some of the burden on claimants of historical child support.

2.1 BACKGROUND

The background leading up to *Colucci* is both a complex and simple set of facts. On one hand, the case was drawn out over several years and involved two trips to the Court of Appeal for Ontario before reaching the Supreme Court. On the other hand, the factual background of a payor father doing everything in his power to avoid paying child support is all too common.

The parties were married in 1983 and divorced in 1996.[67] They had two daughters (aged 6 and 8 at the time of the divorce) and as a part of the divorce order, Mr. Colucci was required to pay child support in the amount of $115 per week per child. Due to a claimed change of circumstances, in 1998 Mr. Colucci asked to decrease the support amount, but no agreement was made, and he took no further action on the issue. For 18 years, beginning in 1998, Mr. Colucci made no voluntary support payments, had no relationship with his children, and concealed his whereabouts from both his ex-wife and the Family Responsibility Office. By the time the children ceased being eligible for support in 2012, their father owed approximately $170,000 in arrears.

Mr. Colucci first brought a claim to reduce or rescind (i.e., cancel) his arrears in 2016, four years after the end of his obligations. The claim was originally dismissed

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[67] See *Colucci*, *supra* note 7 at para 11. The facts of the case are set out at paras 10–16.

based on a lack of jurisdiction, as his daughters were no longer children of the marriage.[68] That reasoning was reversed on appeal in 2017.[69] On the merits of the subsequent claim—the one that eventually formed the basis for the Court's reasoning—the trial judge found that the coming into force of the *Child Support Guidelines* in 1997 constituted a change of circumstances entitling Mr. Colucci to a retroactive decrease.[70] The trial judge relied on Mr. Colucci's actual and imputed income to reduce the arrears owing by more than $100,000.[71]

The Court of Appeal allowed Ms. Colucci's appeal,[72] reasoning that the trial judge had erred in failing to apply the *DBS* factors, which, pursuant to the same court's earlier decision in *Gray v Rizzi*,[73] apply to claims for retroactive increases as well as decreases. Applying the factors themselves, the Court of Appeal found that Mr. Colucci was responsible for all of his arrears. That result was based predominately on the three-year rule from *DBS*—that is, the statement, in *DBS*, that historical child support should not date back more than three years prior to

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[68] Based upon the statement in *DBS*, recently nuanced in *Michel*, that beneficiaries of child support must still be dependent at the time of a claim for historical support.

[69] *Colucci Appeal 1, supra* note 39.

[70] A "change in circumstances" is the threshold requirement to trigger a variation of support under s 17(4) of the *Divorce Act*, *supra* note 6.

[71] See *Colucci v Colucci*, 2019 ONCA 561 at paras 9–12 [*Colucci Appeal 2*].

[72] *Ibid*.

[73] *Supra* note 41.

the claim—[74] as Mr. Colucci only brought his motion to vary four years after his support obligations ended.[75] Further, due to his failure to fully and accurately disclose his finances, the Court could not find hardship in ordering Mr. Colucci to pay.[76] Mr. Colucci's blameworthy conduct also worked against him: he had left the country several times without informing the Family Responsibility Office, failed to make payments from both within and outside of the country, and failed to provide evidence of his inability to pay.[77] Finally, his failure to pay caused significant hardship for his children[78] and he did not explain why he waited so long to attempt to vary the support order.[79]

The Court heard Mr. Colucci's appeal in November 2020. The case was an opportunity for the Court to explicitly address the framework applicable in cases involving claims for retroactive decreases of support based on earlier income levels—that is, income at the time support was due—and to modify the considerations set out in *DBS* to better reflect social realities.[80]

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[74] See *DBS, supra* note 1 at para 120–123.

[75] See *Colucci Appeal 2, supra* note 71 at paras 27 and 33–35.

[76] *Ibid* at para 28.

[77] *Ibid* at paras 28–32.

[78] *Ibid* at para 30.

[79] *Ibid* at para 31.

[80] It is worth noting that *Colucci* also enabled the Court to articulate a framework for the recission, or cancelation, of arrears based on current inability to pay, a straightforward analysis that does not significantly alter the law of historical child support, and therefore will not be

2.2 ENDORSING A GENDERED APPROACH TO CHILD SUPPORT

As mentioned above, Justice Martin's concurring reasons in *Michel* represent an understanding of child support grounded in the pursuit of gender equality. In *Colucci*, that move crystallized, with Justice Martin reiterating many of the same points, this time on behalf of a unanimous Court. Moreover, the *Colucci* Court goes even further, directly articulating concerns around the relationship between unpaid child support and the feminization of poverty, and indirectly recognising that the proper enforcement of child support, including historical support, functions as a mechanism for achieving substantive equality for both women and children.[81] Thus, *Colucci* represents a long overdue acknowledgement, on the part of the Court, of the realities of the feminization of poverty in the context of child support,[82] and the connection between women's economic situations and those of their children.[83] Indeed,

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addressed in this comment. See *Colucci, supra* note 7 at paras 133–141.

[81] While the Court is not explicit about this recognition, Justice Martin cites scholarship articulating the connections between child support enforcement and substantive gender equality. See *Colucci*, *supra* note 7 at paras 69 and 112, citing Donna Martinson and Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30:1 Can J Fam L 11; Bakht et al, *supra* note 15.

[82] As discussed earlier, these realities were first recognised by the Court in the context of spousal support in *Moge, supra* note 14.

[83] As discussed earlier, compared to fathers with sole custody, women with sole custody or parenting time are almost twice as likely to live below the poverty line. Further, young children are more likely to live in poverty due to their mothers' earnings being lower for several years

Colucci draws heavily on the submissions of two interveners, LEAF and Canada Without Poverty, thereby incorporating perspectives that were noticeably absent from *DBS*. In recognising these elements and considering the importance of socio-legal realities, the Court focused on three key areas: the fact that child support is the right of the child, the decreasing importance of certainty for payors, and, most significantly, the necessity of full, consistent disclosure by payor parents. Importantly, also absent in *DBS* and worth acknowledging here, was Justice Martin, whose professional background would have predisposed her to a consideration of the gendered impacts of family law.[84]

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following childbirth. See *Children in Low-Income Households, supra* note 10.

[84] Prior to her initial appointment to the judiciary, Justice Martin acted on behalf of the Women's Legal Education Action Fund. As a professor and scholar, she devoted much of her work to the situation of women in the legal system and as victims and survivors of sexual assault. See Office of the Commissioner for Federal Judicial Affairs Canada, "The Honourable Sheilah Martin's Questionnaire" (last modified 21 December 2017), online: *Government of Canada* <www.fja.gc.ca/scc-csc/2017-SheilahMartin/nominee-candidat-eng.html>. As a doctoral candidate at the University of Toronto, Justice Martin studied "legal controls" on reproduction and subsequently published several articles on the legal dimensions of abortion in Canada and women's right to control their bodies. See e.g. Sheilah L Martin, "Canada's Abortion Law and the Canadian Charter of Rights and Freedoms" (1986) 1:2 Can J Women & L 339; Sheilah L Martin, "The New Abortion Legislation" (1990) 1:2 Const F 5; Sheilah Martin & Murray Coleman, "Judicial Intervention in Pregnancy" (1995) 40:4 McGill LJ 947. Further evidence of Justice Martin's demonstrated commitment to gender equality can be found in her questionnaire responses when applying to sit on the Supreme Court of Canada as referenced above.

2.2.1 Child Support as the Child's Right

The idea of child support as the right of the child is by no means new to Canadian law; it was articulated as early as 1970, in one of the first appellate court interpretations of the child support provisions of the *Divorce Act*.[85] However, this right has often been tempered by a focus on the rights of payors, as seen in the emphasis on payor certainty in *DBS*.[86] *Colucci* suggests that the right of the child to receive support will no longer be diluted, or subordinate, to the rights of parents. [87] As mentioned, the *Child Support Guidelines* have long made clear that their principal objective is protecting a child's right to a "fair standard of support."[88] By rejecting rules or principles that create incentives for payors to ignore their obligations,[89] *Colucci* confirms that legal standards and interpretations should be based, above all, on promoting the wellbeing of children. Indeed, a child's right to support is the "core interest to which all rules and principles must yield."[90] This focus represents a significant shift that makes clear, in no uncertain terms, that children are the focal point of child support discussions and that following *Colucci*, children's interest in a fair amount of support will no longer yield to the interests of payor parents.

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[85] See *Paras*, *supra* note 20.

[86] See *DBS*, *supra* note 1.

[87] See *Colucci*, *supra* note 7.

[88] *Child Support Guidelines*, *supra* note 6, s 1.

[89] See *Colucci*, *supra* note 7 at para 4.

[90] *Ibid* at para 46.

2.2.2 The Decreasing Importance of Payor Certainty

Moving to the Court's discussion of certainty, *Colucci* ensures that the *DBS*-era primacy of payor certainty is now a thing of the past. While certainty for payors is not irrelevant,[91] the creation of the *Child Support Guidelines* represented a "paradigm shift" that makes clear that payors' obligations always relate to their income.[92] Thus, absent exceptional circumstances,[93] the *Child Support Guidelines* create the necessary certainty that preoccupied the *DBS* Court. Indeed, Justice Martin acknowledges that *DBS* was a compromise of sorts between the pre- and post-*Child Support Guidelines* eras but also that, in the intervening years, "expectations of and for payors have evolved."[94] Based on that evolution, the Court finds that certainty is most important as it relates to children's (and, implicitly, custodial parents') certainty in receiving support,[95] thus shifting the focus to the rights of children rather than those of payors. In practical terms, certainty for children and custodial parents that they will receive the support owed to them prevails over certainty for payors,

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[91] See *Colucci*, *supra* note 7 where Justice Martin outlines the three interests to balance in historical support case (citing *DBS*, *supra* note 1 at paras 2, 74, and 96), the second being "… the interest of the parties and the child in certainty and predictability" at para 42.

[92] *Colucci*, *supra* note 7 at para 34.

[93] See *ibid* at para 77. This of course can be more complex in situations of shared or split parenting or regarding extraordinary expenses.

[94] *Ibid* at para 44.

[95] See *ibid* at para 46.

which, in any case, is built into the *Child Support Guidelines*.

2.2.3 The Necessity of Disclosure

The most significant shift in the Court's understanding of child support law is arguably its revised outlook on the issue of disclosure. As mentioned above, *DBS* garnered significant criticism for its view that disclosure was important but too burdensome to make mandatory.[96] In the years since *DBS*—perhaps upon seeing how many historical child support cases hinge on the issue of non-disclosure—the Court has changed its position. The shift began in *Michel*, with Justice Brown quoting the oft-repeated reference to non-disclosure as the "cancer of family law litigation."[97] And it is even more pronounced in *Colucci*, where the Court is unequivocal that disclosure is required for "a just and effective family law system."[98] Indeed, following *Colucci*, disclosure is now the indisputable "linchpin" of family law.[99]

This new focus on the importance of disclosure aims to address the issue of informational asymmetry between parties; without a way to require disclosure, recipient parents, typically mothers, are left with the entire burden of searching for and requesting income information from payors. In *Colucci*, Justice Martin explains how this

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[96] See e.g. Bakht et al, *supra* note 15 at 563.

[97] *Michel*, *supra* note 1 at para 33, citing *Cunha v Cunha*, 99 BCLR (2d) 93 at para 9, 1994 CanLII 3195.

[98] *Colucci*, *supra* note 7 at para 4.

[99] See *ibid* at paras 4, 32, and 48.

creates an unfair requirement to enforce child support obligations, on top of all the other responsibilities borne by primary parents.[100] The Court's solution is to create the "need for full and frank disclosure of the payor's income."[101] Again, this is not a novel move; prior to *Colucci*, disclosure was regularly required by courts and legislatures.[102] *Colucci* thus functions to endorse regular practice by encouraging trial judges to include mandatory disclosure requirements in their orders, so as to minimize the need for historical support applications.[103]

Disclosure requirements may also impact the negotiation of private agreements. In *Colucci*, the Court recognises that disclosure is a requirement for good faith negotiation as it helps to ensure that parties can make fully informed decisions.[104] Thus, full disclosure promotes the objective, set out in the *Child Support Guidelines*, of reducing conflict and encouraging settlement.[105] Settlement and private ordering are, of course, of utmost importance in family law, given its prospective nature and the damage that adversarial litigation, with its inherent unpredictability, can wreak on families.[106] Much like how the *Child Support Guidelines* enable parties to bargain in

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[100] See *ibid* at para 49.

[101] *Ibid* at para 47.

[102] See *ibid* at paras 52 and 53.

[103] See *ibid* at para 112.

[104] See *ibid* at para 51.

[105] *Child Support Guidelines*, *supra* note 6, s 1.

[106] See *ibid*.

light of the law,[107] mandatory disclosure enables them to negotiate with the full picture in mind.

Importantly, mandatory disclosure is especially significant in situations of family violence. The *Colucci* Court recognises that in situations of violence, reaching out for negotiation is not appropriate.[108] Thus, court-mandated disclosure addresses the reality that child support applications and discussions can be used by abusers as a tool to maintain control over survivors and those vulnerable to further abuse.[109] Moreover, while not explicitly addressed in *Colucci*, the reference to family violence comes on the heels of amendments to the *Divorce Act* that draw an explicit connection between family violence and the best interests of the child.[110] By acknowledging all of these issues and so clearly outlining the necessity of disclosure, the Court has gone a long way toward feminizing child support law and ensuring it coheres with the lived experiences of women and children.

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[107] See Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88:5 Yale LJ 950; Craig Martin, "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998) 56:1 UT Fac L Rev 135. On the connections between limiting discretion in the family law context and the fate of women litigants see Jodi Lazare "The *Spousal Support Advisory Guidelines*, Soft Law, and the Procedural Rule of Law" (2019) 31:2 CJWL 317.

[108] See *Colucci*, *supra* note 7 at para 69.

[109] See LEAF *Colucci* Factum, *supra* note 13 at para 7.

[110] See *Divorce Act*, *supra* note 6, ss 16(3)(j) and 16(4).

2.3 GENDERED CHILD SUPPORT IN PRACTICE

With the endorsement of a gendered approach to child support, it is only natural that the Court would restructure the format of the historical support framework to ensure that its theoretical foundations are concretized in practice. *Colucci* thus modifies three key aspects of historical child support law: (1) it creates a presumption of an award for historical support; (2) it softens the three-year rule relating to the period of so-called retroactivity; and (3) it makes the *DBS* factors relevant to determining the time-period of "retroactivity" instead of eligibility for an award. Moreover, the Court re-examines the *DBS* factors themselves and details precisely how they fit within the revised framework. It is important to note here that although *Colucci* deals specifically with a claim for a retroactive decrease in support (or cancelation of arrears owing), the Court is express that for the sake of consistency, its approach would also apply to claims for retroactive increases.[111] *Colucci* thus creates an overarching approach to historical child support anchored in a theoretical framework aimed at promoting substantive gender equality.

2.3.1 Presumed Historical Support Awards

In terms of the framework for adjudicating claims for historical child support, *Colucci*'s most substantial impact will likely result from the creation of a new presumption in favour of awarding the change requested (whether that is an increase or decrease), provided there has been a change of circumstances. Justice Martin did not equivocate when

[111] See *Colucci*, *supra* note 7 at para 6.

she wrote: "[I]t is no longer necessary to first ask whether retroactive relief is generally appropriate before moving to the question of how far back [it] should extend."[112] In practical terms, this means that once a change in income has been shown, the only question to be answered is how far back the varied support order should go.[113] This is a clear shift from the *DBS* framework, according to which, the determination of whether to order a historical award was discretionary, and based on a number of factors. Given the critiques of *DBS* discussed above, this change represents a clear endorsement of the gendered approach to historical support. By creating a presumption in favour of an award, the Court has addressed some of the problems that typically result from the broad exercise of judicial discretion by structuring it in a way that safeguards the best interests of children,[114] as well as recipient parents. Indeed, eliminating discretion as to the appropriateness of an award should help mitigate the unpredictability and lack of transparency that typically plague exercises of broad judicial discretion, and the negative ways those issues impact self-represented litigants and hinder settlement.[115]

The drawbacks of judicial discretion in family law are well-known.[116] One of the principal rationales

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[112] *Ibid.*

[113] See *ibid* at para 73.

[114] See *ibid* at para 55.

[115] See *ibid* at paras 68–69. For scholarship examining these ideas, see e.g. Thompson, "Rules and Rulelessness", *supra* note 26; Bala, *supra* note 21; Lazare, *supra* note 107.

[116] See Bala, *supra* note 21; Thompson, "Rules and Rulelessness", *supra* note 26.

underlying the creation of the *Child Support Guidelines* was the reduction of discretion in determining child support awards.[117] Thus, *Colucci* functions to bring the law of historical child support in line with the broader purposes of child support law, and family law more generally, while addressing issues of substantive equality, promoting the rights of the child, and ensuring that parents are treated fairly while being held to their obligations.

2.3.2 Erosion of the Three-Year Rule

Drawing on her concurring comments in *Michel*, Justice Martin, in *Colucci*, subtly modified the language used to refer to the three-year limit for ordering changes to historical support.[118] In *DBS*, the three-year limit was introduced as the time period that would be appropriate for most historical awards; although it was referred to as a "rough guideline," the Court made it clear that, subject to a payor's blameworthy conduct, it would usually be inappropriate to award support further back than that.[119] This move was not without contention; in her concurring reasons,[120] Justice Abella argued that the three-year rule would unnecessarily fetter judicial discretion and that such

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[117] *Child Support Guidelines, supra* note 6, s 1(b) and (d).

[118] As explained above, this refers to three-years prior to the date of effective notice of a claim for historical support. See *DBS, supra* note 1 at paras 120–123.

[119] *Ibid* at para 123.

[120] While Justice Abella agreed with the majority in the results of all four appeals, she took issue with much of the majority's analysis, and especially with the three-year rule and the majority's preoccupation with the conduct of recipient parents. See *ibid* at paras 162–164, 169, and 172–175.

a limitation on a child's entitlement required express statutory language.[121] As a compromise of sorts between those positions, Justice Martin, in *Colucci*, referred to the three-year rule as a "presumption only,"[122] rebuttable based on the impact of the *DBS* factors, which now go toward determining the length of the award. Although this is not an entirely new change (Justice Martin brought a similar nuance in *Michel*), the reasoning in *Colucci* carries the added weight of a unanimous Court.

Further to that nuance, Justice Martin also suggested—as she did in *Michel*—that in the future, it may be desirable for the Court to revisit the three-year rule entirely and make the presumptive start date that of the income increase,[123] thus echoing Justice Abella's view in *DBS*. Although technically *obiter*, that comment nevertheless suggests a willingness on the part of the Court to go even further, given the right set of facts, to promote children's right to support. It also corresponds with the Court's overall focus on disclosure and equality, as such a change would likely address the many issues related to non-disclosure and informational asymmetry,[124] and would thus further promote the pursuit of substantive equality for women and children.[125]

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[121] See *ibid* at para 175.

[122] *Colucci, supra* note 7 at para 39.

[123] See *ibid* at para 45.

[124] See *ibid* at para 47.

[125] It should also be pointed out here that trial courts have already begun addressing these comments by Justice Martin in *Michel*, but they have not yet needed to be applied. This is because *Michel* also expanded the concept of blameworthy conduct to include non-disclosure, and

2.3.3 Repositioning the *DBS* Factors

As a result of the *Colucci* presumption in favour of an award, the *DBS* factors now have a new role to play in the historical child support framework. Where prior to *Colucci*, the factors addressed the question of whether a support order was appropriate, they are now only relevant to one question: "[S]hould the court depart from the presumptive date of retroactivity to achieve a fair result?"[126] With this move, judicial discretion is now only relevant at this second stage,[127] thus eliminating the "layering of discretion" created in *DBS*,[128] ensuring greater predictability for parties, and encouraging settlement.[129] Also, as the three-year presumption is calculated from the date of notice, this change to the role of the factors brings their use more in line with the reality of their impact. Since the factors include things that impact upon notice, such as the reason for delaying notice as well as issues around payor conduct, it is indeed more sensible for them to be used to determine how far back from the date of notice an award should go.

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blameworthy conduct was stated in *DBS* to overcome the three-year rule anyway. As non-disclosure is an issue in most historical child support cases, there is potential for the three-year rule to generally become irrelevant without the Court needing to rule on it. See e.g. *Zevallos v Munoz*, 2021 ONCJ 94 and *RJ v TJ*, 2021 ONCJ 137.

[126] *Colucci, supra* note 7 at para 71.

[127] See *ibid* at para 96.

[128] *Ibid* at para 68.

[129] See *ibid* at paras 69–71.

Thus, the Court took *Colucci* as an opportunity to clarify and expand on the *DBS* factors. That clarification included adapting the factors to apply to claims, by payors, for retroactive decreases, and expanding on the factors themselves to adequately balance all interests at play.[130] It is important to note that several of these adjustments were previously contemplated by Justice Martin in her concurring reasons in *Michel* and thus have already seen some use by lower courts.[131]

The first of those adjustments relates to the reason for delay on the part of the recipient parent in bringing the application (i.e., why is this a question of historical support rather than having been brought immediately upon the change to income?). Whereas in *DBS* the question was framed as whether there was a "reasonable excuse" for the delay,[132] *Colucci* instead instructs judges to ask only whether there was an "understandable reason" for the delay.[133] Justice Martin thus distanced her judgement from the positive duty other courts imposed on recipient parents to request disclosure and take appropriate action. In doing so, the Court took a more nuanced and sensitive approach, accounting for the various social factors, first outlined by Justice Martin in *Michel*, that might impact the decision to seek child support.[134] These social factors include the costs and length of litigation, lack of emotional and material

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[130] See *ibid* at para 96.

[131] See e.g. *KH, supra* note 60; *Cavanagh, supra* note 60; *CC, supra* note 60; *MML, supra* note 60; *Henderson, supra* note 34.

[132] *DBS, supra* note 1 at para 133.

[133] *Colucci*, *supra* note 7 at para 97.

[134] *Michel, supra* note 1 at paras 111–113.

resources, misinformation about the payor's income, and fear of violence or reprisal by payors and of ruining a parent-child relationship.[135] By outlining clear reasons that often explain women's hesitations to bring child support applications, the Court accepts the difficulty inherent in these types of legal battles and acknowledges the ways in which this process further burdens women who already bear a disproportionate weight of childcare duties.

Related to the recipient's reason for delay is the second factor: the conduct of the payor parent. In *Colucci*, the Court appeared to have renamed this factor, removing the "blameworthy" qualifier to recognise that payors' "efforts to disclose and communicate" will likely favour payors in the context of a claim for a retroactive decrease in support.[136]

Further, the definition of blameworthy conduct was expanded to make clear that it includes any action that has the effect of placing the payor's interest above that of their child or children.[137] Moreover, the Court confirmed that the payor's subjective intention will rarely be relevant in evaluating their conduct.[138] Prior to *Colucci*, courts were

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[135] The list of factors is much longer than this and draws on a variety of earlier decisions. See *ibid* at para 85.

[136] *Colucci, supra* note 7 at paras 101–102.

[137] See *ibid* at para 101, citing *Goulding v Keck*, 2014 ABCA 138 at para 44 and *DBS, supra* note 1 at para 106.

[138] See *ibid*, at para 101. It is interesting to note the use of the term "rarely relevant" and not "never." As the Court offers no suggestions, it is hard to conceptualise of circumstances in which intention would be relevant when the effect of the payor's actions is, or was, to disadvantage the beneficiary child.

inconsistent in whether they adopted such an expansive definition of blameworthy conduct.[139] Going forward, there should be no uncertainty around the fact that selfish conduct, which puts their own economic interests above those of their children, will result in consequences for payors, in the form of a larger award, spanning a longer time period.

No meaningful change was brought to the consideration of the circumstances of the child, but the Court did make clear that in dealing with claims for a retroactive decrease, the fact that a child is currently living in poverty will work to lessen the period of retroactivity.[140] The importance of this factor illustrates that above all else, the goal of the *Child Support Guidelines*—and of child support generally—is to ensure that children are properly supported, while also recognising the startling reality of child poverty in Canada.[141]

The last factor in the *DBS* framework relates to what hardship will be endured based on the award. In *DBS*, this factor addressed only hardship to the payor.[142] Following *Colucci*, hardship on the part of the recipient parent and child must also be considered.[143] This includes both potential hardship from reduced support in the case of a claim for a decrease, as well as the fact that in the absence

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[139] See Gordon, *supra* note 3 at 74, examples listed in note 37.

[140] See *Colucci, supra* note 7 at para 104.

[141] See *Colucci v Colucci,* 2021 SCC 24 (Factum of the Intervenor, Canada Without Poverty at para 10).

[142] See *DBS, supra* note 1 at paras 115–116.

[143] See *Colucci, supra* note 7 at para 108.

of proper support, recipient parents are often left to shoulder disproportionate burdens, or children are required to go without.[144]

By revisiting and revising the *DBS* factors, modifying their function, and creating a presumption in favour of a historical support award, *Colucci* has simplified the law of historical child support in the interests of efficiency and gender equality. Moreover, as seen, the *Colucci* approach better responds to the connections between mothering, parenting, child support, and women and children's poverty, thus reflecting the lived reality of many Canadian women. After decades of being underserved by the courts, facing issues of under- or non-payment, and being forced to bear the emotional and financial burden of parenting alone, it is possible that mothers may now find relief in the Court recognizing and addressing their struggles, and finally setting out an understanding of child support law that embodies and aims to promote substantive gender equality.[145]

CONCLUSION

The Court's decision in *Colucci* has undoubtedly changed the face of historical child support law in Canada. By removing documented barriers and clearly recognising the societal factors at play, the Court adopted a feminist lens

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[144] See *Michel, supra* note 1 at paras 125–126.

[145] An embodiment which has arguably been required since the inception of the *Child Support Guidelines* based upon *Charter* values of gender equality (*Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11). See Bakht et al, *supra* note 15 at 557-558.

and implemented a gendered approach that could go a long way, not only toward simplifying a complex area of law, but to increasing access to justice and substantive equality for recipients of child support, who remain overwhelmingly women. *Colucci* presented an opportunity for the Court to address many of the problems that resulted from *DBS* and the Court appears to have seized the day, creating a presumption in favour of historical support, modifying the role of the *DBS* factors, and moving away from judicial discretion and its associated pitfalls. Indeed, the creation of a presumption in favour of an award means there is room for optimism that *Colucci* might work to decrease the number of these cases that go to trial. However, despite this clear step forward, *Colucci* nevertheless raises questions about how helpful the decision will be at a more general level.

One of those questions relates to the Court's continued reliance on the *DBS* factors as part of the historical child support analysis. While the factors have indeed been clarified and their function adjusted, they still represent the same general ideas from *DBS*, which, as discussed, were rife with issues related to the Court's preoccupation with payor certainty. Concerns relating to judicial discretion may now be less prevalent due to the *DBS* factors relating to timing of retroactivity rather than entitlement. But only time will tell if the same issues of inconsistency, inadequacy, and unpredictability that tend to come along with discretion will simply be repositioned as well.[146] Further, although the three-year rule has been

[146] As discussed by Bakht et al, *supra* note 15 at 561, the disadvantages faced by women due to discretionary rules has been an issue since before the *Child Support Guidelines*. The same unpredictability and inconsistency were also observable following *DBS* (See Section 2.2.1.,

softened—and, to some extent, seems to be disappearing—it still acts as an artificial barrier lacking any statutory justification.[147] There is accordingly room for caution in imagining the impact *Colucci* may have.

While the Court's consideration of issues of gender inequality and the feminization of poverty may inspire optimism, it is not yet time to celebrate. The Court dealt expressly with these issues in 1992,[148] and yet, lower courts did not consistently apply Justice L'Heureux-Dubé's reasoning about women's poverty where spousal support is concerned,[149] nor did the Court take up the same logic in *DBS*. It remains to be seen whether Justice Martin's gendered approach to historical child support will take hold.

It is also crucial to note the potential importance of these changes in the current context of the COVID-19 pandemic, which has resulted in much higher levels of

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above, for more information on this issue), as courts reasoned differently in different jurisdictions on the issues of eligibility and historic decreases.

[147] This idea was first voiced by Justice Abella in *DBS, supra* note 1 at para 175 and continues to be an area of potential concern going forward.

[148] See *Moge, supra* note 14.

[149] Following *Moge, supra* note 14 in 1992, the Supreme Court considered spousal support again in *Bracklow v Bracklow*, [1999] 1 SCR 420. That decision served to complicate spousal support law and promoted more widespread judicial discretion, leading to outcomes which often avoided focusing on the feminist policy issues set out in *Moge.* See Carol Rogerson, "Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001) 19 Can Fam LQ 185.

unemployment among women and mothers than men.[150] That difference has been attributed to both women's overrepresentation in sectors affected most by the pandemic (i.e., the service sector and small firms) as well as their increased family responsibilities, especially where there are school-aged children at home.[151] This increased economic gender disparity during a time of crisis serves to highlight the necessity of these types of substantive equality-based approaches within the legal system. Decisions like *Colucci* should help to mitigate, if not lessen, such disparities.

Finally, it is fundamental to note that despite our view that the *Colucci* framework represents a step forward in the law of child support, the decision is nevertheless a band-aid for the most pressing issue plaguing the law of intimate relationships: the ongoing privatisation of dependency and support. *Colucci* takes important steps toward holding individual parents accountable for supporting their children. But while this kind of parental accountability is necessary, decisions like *Colucci* can easily work to avoid addressing the connection between systemic poverty and the state's refusal to take

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[150] Despite accounting for 47.3% of employment pre-Covid, women's employment was disproportionality affected by the pandemic, with them making up 53.7% of all job losses between March 2020 and February 2021 (with that number being as high as 62.5% at the onset). See Canada, Statistics Canada, *Gender differences in employment one year into the COVID-19 pandemic: An analysis by industrial sector and firm size*, by Douwere Grekou and Yuqian Lu, Catalogue No 36-28-0001 (Ottawa: Statistics Canada, 26 May 2021).

[151] See *ibid*.

responsibility for children's wellbeing.[152] The Court's embrace of a gendered theory of child support is a significant accomplishment in the pursuit of substantive gender equality. But it does not explain why we still have not found a way to prevent children from being victims of their parents' failure to adequately support them.[153] Until we do, however, *Colucci*, and decisions like it, might help to level the playing field in the context of the economic consequences of family breakdown and childcare.

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[152] See Bakht et al, *supra* note 15 at 559–560; Susan B Boyd, "Can Law Challenge the Public/Private Divide? Women, Work, and Family" (1996) 15 Windsor YB Access Just 161; Judy Fudge & Brenda Cossman, "Introduction: Privatization, Law and the Challenge to Feminism" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).

[153] See Altman, *supra* note 9 at 180.