NOVA SCOTIA COURT OF APPEAL
Citation: *MacNeil v. Yeadon*, 2022 NSCA 79

Date: 20221215
Docket: CA 512634
Registry: Halifax

Between:

JAMES DOMINIC MACNEIL

Appellant

v.

JULIE KAREEN YEADON

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: September 29, 2022, in Halifax, Nova Scotia

Subject: *Federal Child Support Guidelines*, ss. 9, 17 and 18

Summary: The parties were married in 2002 and separated three years later. They were divorced in 2011. The couple have two sons who were born in 2001 and 2004 respectively.

In October 2019, the appellant filed a Notice of Variation Application seeking to decrease his child support payments due to the older son attending university and residing, for the most part, independently of his parents. In September 2020, the respondent filed a Response in which she opposed a decrease in the amount of support being paid by the appellant. She further requested a retroactive increase in the child support payable.

After several pre-hearing conferences, the matter was heard in the Nova Scotia Supreme Court (Family Division). The judge dismissed the appellant's request to reduce the quantum of child support being paid. She determined the appellant had

experienced a substantial increase in income in past years, which he had not disclosed to the respondent.

The judge determined the appellant's income for 2017, 2018, 2019, 2020, 2021 and 2022 and awarded a total of $193,607 to the respondent in retroactive child support. Given his present income, the judge ordered the appellant to pay ongoing monthly child support for both sons to the respondent in the amount of $7,061.

On appeal the appellant asserted the judge made significant errors in her assessment of his past and current income. He said this impacted on the quantum of retroactive and prospective support awarded. He also asserted the judge did not properly apply the correct legal principles when determining if a retroactive award was warranted in the circumstances, or if warranted, the commencement date. The appellant further argued the judge made a number of findings in the absence of evidence which called her conclusions, and in particular the exercise of her discretion, into question.

The appellant asked this Court, using fresh evidence offered as to his past and present income, to allow the appeal and grant a reduction of support, and set aside the retroactive award.

The respondent conceded the judge's determination of the appellant's income was inaccurate but said this was due to a data input error, as opposed to an error in principle. She said the appeal ought to be allowed, but only to the extent of returning the matter to the judge to re-calculate the prospective and retroactive child support based upon the appellant's corrected income. In all other respects, the respondent submitted the judge's findings were appropriate and disclosed no other error justifying appellate intervention.

Issues:

(1) Should the appellant's proposed fresh evidence be accepted?

(2) Did the judge err in her calculation of the appellant's income?

(3) Did the judge err in her assessment of the retroactive arrears?
(4) Should the matter be returned to the judge for recalculation, this Court substitute its own decision, or a new trial ordered?

Result: The appeal is allowed with costs and the judge's order issued February 14, 2022 is set aside in its entirety.

The appellant's fresh evidence could have, with due diligence, been admitted at trial. The motion is dismissed.

The judge made several errors in her calculation of the appellant's income, which impacted upon both the prospective and retroactive support awarded.

The judge failed to follow the analysis set out in *Colucci v. Colucci* regarding the assessment of retroactive support.

The matter shall be returned for a new trial, before a different judge.

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James Dominic MacNeil

Appellant

v.

Julie Kareen Yeadon

Respondent

Judges:	Farrar, Bryson, Bourgeois, JJ.A.
Appeal Heard:	September 29, 2022, in Halifax, Nova Scotia
Written Release:	December 15, 2022
Held:	Appeal allowed with costs, per reasons for judgment of Bourgeois, J.A.; Farrar and Bryson, JJ.A. concurring
Counsel:	Jessica D. Chapman and Vanja Mitrovic, for the appellant Christopher I. Robinson, for the respondent

Reasons for judgment:

[1] The appellant, James Dominic MacNeil, and the respondent, Julie Kareen Yeadon, were married in 2002, and separated three years later. They were divorced in 2011. The parties share two sons who were born in 2001 and 2004, respectively.

[2] In October 2019, the appellant filed a Notice of Variation Application seeking to decrease his child support payments due to the older son attending university and residing, for the most part, independently of his parents. In September 2020, the respondent filed a Response in which she opposed a decrease in the amount of support being paid by the appellant. She further requested a retroactive increase in the child support payable.

[3] After a number of pre-hearing conferences, the matter was heard by Justice Cindy G. Cormier of the Nova Scotia Supreme Court (Family Division). The judge dismissed the appellant's request to reduce the quantum of child support being paid. She determined the appellant had experienced a substantial increase in income in past years, which he had not disclosed to the respondent.

[4] The judge determined the appellant's income for 2017, 2018, 2019, 2020, 2021 and 2022, and awarded the respondent a total of $193,607 in retroactive child support. Given his present income, the judge ordered the appellant to pay ongoing monthly child support for both sons to the respondent in the amount of $7,061.

[5] On appeal, the appellant asserts the judge made significant errors in her assessment of his past and current income. He says this impacts on the quantum of retroactive and prospective support awarded. He also asserts the judge did not properly apply the correct legal principles when determining if a retroactive award was warranted in the circumstances, or if warranted, the commencement date. The appellant further submits the judge made a number of findings in the absence of evidence which calls her conclusions, and in particular the exercise of her discretion, into question.

[6] The appellant asks this Court, using fresh evidence offered as to his past and present income, to allow the appeal and grant a reduction of support, and set aside the retroactive award.

[7] The respondent concedes the judge's determination of the appellant's income was inaccurate, but says this was due to a data input error, as opposed to an error in principle. She says the appeal ought to be allowed, but only to the extent of returning the matter to the judge to recalculate the prospective and retroactive child support based upon the appellant's corrected income. In all other respects, the respondent submits the judge's findings were appropriate and disclose no other error justifying appellate intervention.

[8] At the end of the hearing, the Court advised the parties the appeal was allowed, with reasons to follow. These are our reasons.

Background

[9] Given the Court's ultimate disposition in this matter. I will provide only that background sufficient to put our reasons in context.

[10] The parties were married on September 21, 2002 and separated on January 3, 2005. Their sons were born in September 2001 and February 2004. The parties entered into Minutes of Settlement in March 2010 which were incorporated in a Corollary Relief Order issued March 15, 2011. A Divorce Order was issued the same day.

[11] From 2011 onwards, the parties had a shared parenting arrangement in relation to their sons where they were in the physical care of the appellant at least 40% of the time. Pursuant to the Corollary Relief Order, the appellant paid the respondent $2,100 per month from April 1, 2010 until December 1, 2012, after which time child support increased to $2,300 monthly on January 1, 2013.

[12] In 2015, the parties engaged in email correspondence which resulted in a new arrangement – the appellant would pay the respondent $2,600 monthly in 2015, $2,700 monthly in 2016, and $2,750 monthly as of January 2017. Neither party sought a formal variation in relation to this agreement.

[13] In 2016, the respondent requested the payment arrangement be put in writing in order to facilitate her obtaining a mortgage. The appellant agreed. The subsequent agreement confirmed the amounts noted above for 2016 and 2017, and further stipulated the appellant would commence paying $2,800 monthly in January 2018. There was no exchange of financial information between the parties at that time.

[14] Both parties have re-partnered. The appellant was married in 2013. The respondent began a relationship in 2011, and had a daughter with her partner in May 2016.

[15] The appellant is a partner in a Dartmouth law firm. He has incorporated a professional corporation which holds his partnership interest in the law firm. The corporation pays him and his wife salaries which are reported on their personal income tax returns. The appellant is the sole shareholder of the corporation. Financial records of the corporation show the existence of retained earnings. In recent years the appellant has purchased a rental property, and as such, has income from that source as well. In addition to the salary she is paid from the corporation, the appellant's spouse earns income by virtue of her employment.

[16] The respondent has worked at various jobs in retail management, banking and medical clinic management. Her earnings have always been significantly lower than that of the appellant.

[17] In September 2019, the oldest son started university. The younger son was anticipated to commence university, likely out of province, in September 2022. The appellant has paid almost all of the older son's university and living expenses, and indicates his intention to do the same for the other son.

[18] In October 2019, the appellant filed a Notice of Variation Application seeking to vary, effective September 1, 2019, the quantum of child support being paid to the respondent, in light of the older son moving to attend university. The respondent filed a Response in September 2020 in which she sought increased prospective child support for both sons, and a retroactive recalculation of child support effective January 1, 2017.

[19] The matter was eventually heard in May 2021, with the judge rendering a written decision on January 17, 2022 (*MacNeil v. Yeadon*, 2022 NSSC 17). A Variation Order was issued on February 14, 2022.

[20] The judge was cognizant the appellant's income had to be established pursuant to the *Federal Child Support Guidelines* (the "*Guidelines*"), including a consideration of the corporate income in accordance with s. 18. Taking into account a number of sources, she determined his total income for support purposes to be:

2017	$527,336
2018	$541,189
2019	$593,297
2020	$888,025
2021	$898,795

[21] Given the existence of a shared parenting arrangement, the respondent's income was also relevant. The judge imputed the *Guidelines* income to her in the following amounts:

2017	$35,000
2018	$35,000
2019	$54,200
2020	$54,200
2021	$54,200

[22] The judge acknowledged s. 9 of the *Guidelines* applied in relation to quantifying retroactive and prospective child support. It states:

> **9** If each spouse exercises not less than 40% of parenting time with a child over the course of a year, the amount of the child support order must be determined by taking into account
>
> **(a)** the amounts set out in the applicable tables for each of the spouses;
> **(b)** the increased costs of shared parenting time arrangements; and
> **(c)** the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[23] The judge concluded the appellant owed the respondent retroactive support totalling $193,607 accrued from January 1, 2017 to February 1, 2022 as follows:

2017	$19,272
2018	$40,908
2019	$36,623
2020	$30,150
2021	$57,132
2022	$9,522

[24] The judge further ordered the appellant to pay the respondent $7,061 in monthly support for their two sons, commencing on March 1, 2022. This amount is payable whether the sons are residing at university or with one of their parents.

[25] The appellant filed his Notice of Appeal on February 15, 2022. He sought a stay pending the outcome of the appeal, which, notwithstanding being vigorously opposed by the respondent, was granted by Justice Derrick on April 27, 2022 (*MacNeil v. Yeadon*, 2022 NSCA 32). The chambers judge determined costs of the motion were to be set by the panel hearing the appeal.

Issues

[26] In his Notice of Appeal, the appellant set out 31 grounds of appeal. Considering the grounds pled, the submissions of the parties and the record before this Court, I would reformulate the issues to be resolved as follows:

1. Should the appellant's proposed fresh evidence be accepted?
2. Did the judge err in her calculation of the appellant's income?
3. Did the judge err in her assessment of the retroactive arrears?
4. Should the matter be returned to the judge for recalculation, this Court substitute its own decision, or a new trial ordered?

Standard of Review

[27] The standard of review to be applied is not in dispute. In *Laframboise v. Millington*, 2019 NSCA 43, Justice Saunders explained:

> **Standard of Review**
>
> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just

> described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 ff.; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[28] Given the discretionary nature of support orders, this Court applies a deferential standard of review. In *Hickey v. Hickey*, [1999] 2 SCR 518, an appeal court's ability to intervene was described as follows:

> 11 **Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong.** These principles were stated by Morden J.A. of the Ontario Court of Appeal in *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, *per* Wilson J.; in *Moge v. Moge*, [1992] 3 S.C.R. 813, *per* L'Heureux-Dubé J.; and in *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 691, *per* Sopinka J., and at pp. 743-44, *per* L'Heureux-Dubé J.
>
> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. **Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.**
>
> (Emphasis added)

[29] I will apply the above principles in the analysis to follow.

Analysis

Should the appellant's proposed fresh evidence be accepted?

[30] After the release of the judge's reasons, the appellant engaged PricewaterhouseCoopers LLP to prepare an Income Report. The purpose was to

demonstrate how the appellant's *Guideline* income ought to have been calculated in the years 2017 through 2020.

[31] The appellant seeks to introduce the Income Report for two purposes. Firstly, he argues the Report, if accepted, will demonstrate the judge erred in her determination of his income available for child support purposes. Secondly, the appellant argues this Court can utilize the information contained in the Report to undertake a *de novo* analysis of prospective and retroactive child support.

[32] The admission of fresh evidence on appeal is governed by the test set out in *Palmer v. The Queen*, [1980] 1 SCR 759. The necessary criteria to be considered are:

1. whether there was due diligence in the effort to adduce the evidence at trial;
2. the relevance of the proposed evidence to the issue at trial;
3. the credibility of the new evidence; and
4. whether the proposed evidence could reasonably have affected the result.

[33] The above test has recently been re-affirmed in the family law context in *Barendregt v. Grebliunas*, 2022 SCC 22.

[34] The proposed evidence is relevant, credible and could have affected the hearing outcome. However, the appellant's downfall is with respect to the due diligence factor. The information contained in the Income Report existed prior to the hearing, and could have been adduced before the judge. The appellant says he chose not to do so as he was of the view the judge would understand the nature of the simple corporate structure involved and be able to correctly assess his income for *Guideline* purposes without accounting evidence.

[35] With respect, the evidence contained in the Income Report could have, with due diligence, been introduced at the hearing. It should not be permitted to now be introduced on appeal. Further, contrary to the appellant's submissions, this is not an extraordinary situation where, notwithstanding failing to meet the *Palmer* test, the evidence ought to be admitted.

Did the judge err in her calculation of the appellant's income?

[36] The parties are in agreement the income the judge ascribed to the appellant is inaccurate and overstated. There is no agreement, however, as to the proper quantum.

[37] As noted earlier, the respondent submits the judge made a data input error when utilizing the DivorceMate program. The appellant says the judge's reasons are insufficient to explain how she reached her conclusions regarding the appellant's yearly income, but that some errors in principle are clear. I agree.

[38] Counsel for the respondent concedes that in addition to the data input error, the judge appeared to improperly add gross rental income to the appellant's income in two years. He advises the Court that after hours of scouring the DivorceMate calculations prepared by the judge[1], he concluded the appellant's income had been inflated by $96,029 in 2018; $154,955 in 2019 and $303,748 in 2020. The respondent further confirms it appears the judge made similar calculation errors in assessing the appellant's 2021 income, resulting in an overstatement of approximately $314,000.

[39] In short, the respondent acknowledges that from 2018 to 2021, the judge overstated the appellant's income by at least $869,000.

[40] Having reviewed the judge's reasons, I am satisfied, as noted by both parties, the gross rental income obtained from an investment property co-owned by the appellant was erroneously added to his 2020 and 2021 income. In calculating the appellant's *Guideline* income, the judge ought to have only included 50% of the net rental income.

[41] In each year, the judge added the salary paid to the appellant's spouse from the corporation for income-splitting purposes, to his *Guidelines* income. The appellant took no issue with this. However, it would appear that on at least one occasion, the judge also included the wife's own employment income in the appellant's *Guidelines* income. Doing so constitutes an error.

[42] Finally, in each year the judge calculated the appellant's income, she looked to his employment income, but also referenced the "retained earnings" of the

[1] The judge undertook her own DivorceMate calculations. These calculations were not attached as a Schedule to her written reasons, rather sent to counsel by way of correspondence.

corporation. The appellant says the judge's use of the corporation's retained earnings in calculating his income under s. 18 of the *Guidelines* would constitute an error in law (*Reid v. Faubert*, 2019 NSCA 42).

[43] Regardless of the source of her error, it is clear the judge's calculation of the appellant's income is significantly flawed. This obviously impacts upon the judge's prospective award (based on the appellant's 2021 income) as well as her calculation of retroactive support.

Did the judge err in her assessment of the retroactive arrears?

[44] In addition to the retroactive award being tainted by the judge's incorrect calculation of the appellant's past income, her reasons were also insufficient to determine whether she applied the correct legal principles. I will explain.

[45] After the matter was heard, but before the judge released her decision, the Supreme Court released its reasons in *Colucci v. Colucci*, 2021 SCC 24 ("*Colucci*"). The judge asked for and received submissions from the parties as to the import of *Colucci* on her assessment of the respondent's claim to retroactive support.

[46] *Colucci* has served to revise the approach to assessing variations relating to retroactive child support for both decreases sought by a payor, and increases sought by a recipient. Writing for the Court, Justice Martin noted the principles applicable to a recipient's claim for a retroactive increase:

> [114] It is also helpful to summarize the principles which now apply to cases in which the recipient applies under s. 17 to retroactively increase child support:
>
> a) The recipient must meet the threshold of establishing a past material change in circumstances. While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.
>
> b) Once a material change in circumstances is established, a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the

> application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor.
>
> c) Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.
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> d) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors continue to guide this exercise of discretion, as described in *Michel*. If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.
>
> e) Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.

[47] In the present matter, the judge determined the respondent was entitled to retroactive support commencing January 1, 2017. However, her reasons do not explain why she determined this date to be appropriate in the circumstances of this case. Pursuant to *Colucci*, the judge should have determined whether the respondent had given effective notice of her intent to seek a retroactive variation. Her reasons are silent in this regard.

[48] It is clear the respondent gave formal notice of her intent to seek retroactive support when she filed her Response to Variation Application on September 8, 2020. If she had not given the appellant earlier effective notice, then this date would presumptively be when a retroactive increase would commence. As *Colucci* makes clear, a court may vary from a presumptive date of retroactivity by considering the factors articulated in *D.B.S. v. S.R.G.*, 2006 SCC 37.

[49] The judge did not establish a presumptive date of retroactivity. She did not explain why she chose January 1, 2017 as the point when the appellant's support obligation retroactively commenced. The judge's reasons are not sufficient to ascertain whether she properly applied the above principles.

Should the matter be returned to the judge for recalculation, this Court to substitute its own decision, or a new trial ordered?

[50] The appellant asks this Court to review the record, make our own calculations for prospective and retroactive support, and to further set a termination date for child support. We decline to do so. In a shared parenting arrangement, the determination of support is based on a multi-factorial approach, imbued with discretion. Appellate courts are generally not well placed to undertake that task.

[51] The respondent argues this Court should simply return the matter to the hearing judge for a proper calculation of the appellant's income. She submits this would be a straightforward and time effective manner of addressing the calculation errors found in the judge's decision. With respect, this is not a situation which is confined to a simple numerical error on the judge's part. As noted above, there are concerns with the judge's application of the relevant legal principles.

[52] Additionally, without delving into the particulars or making a conclusive finding of impartiality, the appellant's concern the judge demonstrated an unjustifiable negative view towards him and his evidence, has a degree of support in the record. Further, a number of the judge's factual conclusions did not have a grounding in the evidentiary record, all of which favoured the respondent and served to cast the appellant in a negative light. In the circumstances, returning the matter to the judge would not be a prudent option.

[53] After considering the submissions of the parties, the judge's reasons and carefully reviewing the record, we are satisfied a new trial is required in these circumstances.

Conclusion

[54] The appeal is allowed and the judge's order issued February 14, 2022 is set aside in its entirety. A new trial is ordered, to be heard by a different judge. During the appeal hearing, the parties advised the judge had made a cost award in favour of the respondent flowing from the hearing decision. For clarity, that order is also set aside.

[55] In terms of the costs on appeal, it is noted that although the respondent conceded the judge had erred in determining the appellant's income, this did not occur until late in the proceedings, and notably after the stay motion and the filing

of the appellant's factum. As such, the concession did not serve to reduce the effort required by the appellant to advance his position before the Court.

[56] The appellant shall be entitled to costs for the appeal and stay motion in the total amount of $5,000, inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.