

## Family

## SCC's Colucci ruling applied in recent Alberta judgment calling for government policy initiatives

By **Barb Cotton and Christine Silverberg**



Barb Cotton



Christine Silverberg

(August 9, 2021, 12:06 PM EDT) -- In the recent Alberta judgment of *TM v. ZK* 2021 ABQB 588, Justice Bonnie L. Bokenfohr applied *Colucci v. Colucci* 2021 SCC 24, and in doing so observed and underscored two fundamental principles — first that lawyers have an obligation to put all material facts to the presiding justice; and secondly that the dichotomy that results from conjoined cases demands government intervention to address. In this case, the connection between the family law and criminal justice systems had tragic implications for the family.

In *TM v. ZK*, the mother and father began living together in 2001 and married in 2006. They had three children. The mother also brought three stepchildren into the marriage, including a then 6-year-old girl. When his stepdaughter was 15 years old the father began sexually abusing her, and this abuse continued for over three years. The stepfather also supplied his stepdaughter with crack cocaine.

The stepdaughter became pregnant and gave the child up for adoption. The father was callous to his stepdaughter regarding the pregnancy and adoption and continued to sexually abuse her after the birth of the child.

The mother and father separated in 2012 and in 2013 the stepdaughter disclosed her years of sexual abuse. The father was charged with and pleaded guilty to sexual exploitation and was sentenced to seven years incarceration. He began his incarceration on Feb. 18, 2016. Three months later, the mother made an application to the court for child and spousal support, identifying the father's guideline income as being his pre-incarceration income.

Without disclosing to the court the criminal charges against and resulting incarceration of the father, the mother received a Divorce Judgment and Corollary Relief Order with child and spousal support based on his former income as a carpenter of \$83,229.11.

Justice Bokenfohr noted that at the very least the mother was aware of the criminal charges against the father and his guilty plea. She referenced the Law Society of Alberta *Code of Conduct* which creates an obligation on a lawyer to prevent a manifestly unjust result by disclosing all material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision (*Code of Conduct* Commentary 5:1-1 at para. 8).

While the father was incarcerated arrears of \$146,420 accumulated. Upon his release from prison the father applied to reduce these arrears, relying on the recent Supreme Court of Canada case of *Colucci v. Colucci*. In the result, Justice Bokenfohr retroactively reduced the arrears owing to his date of incarceration.

In view of the lack of disclosure of the mother, Justice Bokenfohr found it fair in the circumstances to extend the date of retroactivity beyond three years to the date of incarceration of the father. As the mother was aware of the circumstances of the impending loss of income of the father due to his incarceration, Justice Bokenfohr found that she was able to plan for the reduction in support.

At the outset, Justice Bokenfohr specifically rejected the argument of the mother and the director of maintenance enforcement that a payor who is incarcerated is the author of their own misfortune and the accumulation of arrears is a natural consequence of their criminal conduct. Justice Bokenfohr stated:

Where a payor has established a material change in circumstances through a reduction in income due to incarceration the *Colucci* framework presumptively results in a retroactive reduction of arrears based on the payor's *Guideline* income. The only determination for the court after the change in circumstances has been established is the date of effective notice and whether the presumption of three years is appropriate. There is no overriding discretion for a court, in my opinion, to decide that for public policy reasons the retroactive reduction should be denied because the payor was incarcerated or because of the nature of the crime that resulted in incarceration (para. 58).

Justice Bokenfohr emphasized that the boundaries between the criminal justice system and the family law child support regime must remain clear. The income-based child support regime is not punitive or retributive. It is the purpose of the criminal justice system to determine guilt and the appropriate punishment. "Respect for the role of a sentencing judge and their responsibility to impose a fit sentence demands that the public's reprobation of a particular offence not extend to blurring the lines between a payor's sentence and child support obligations" (para. 61).

Further, if a sentencing judge determines that a sentence is proportionate, that sentence plus significant arrears may be too harsh and not be proportionate. Substantial child support arrears may also create a significant barrier to the payor's re-entry to society and increase the risk of recidivism. Excessive arrears may also discourage voluntary support payments and could drive the payor from legitimate employment "into the underground economy" (para. 71).

Justice Bokenfohr underscored the dilemma for the sexually abused child. Child victims of abuse may be reluctant to come forward if doing so will be financially devastating for the family. This was true for this mother and her children, who were forced to rely on government aid and food banks after the incarceration of the father. Thus, in the view of the authors, the dilemma in *TM v. ZK* is based on a tragedy in search of a just solution.

The implications of inaction in public policy, whether as a result of apathy or indecision, often has profound effects. The facts in *TM v. ZK* revealed horrific child abuse — to which the criminal justice system responded by conviction and incarceration, but out of which evolved a social policy crisis for the family left behind. As Justice Bokenfohr said:

This case highlights a significant public policy issue. Child victims of abuse, whether it be sexual, physical, or otherwise, may be reluctant to come forward if doing so will be financially devastating for their family. Children should not be placed in a position of having to choose between their safety and their financial wellbeing and that of their family. Children should not have to worry about the financial consequences of reporting abuse. This is an issue that demands government attention and action (para. 5).

*Barb Cotton is the principal of Bottom Line Research and assists solo, small and specialized lawyers with their research and writing needs. She can be reached at (403) 240-3142, cell (403) 852-3462 or e-mail barbc@bottomlineresearch.ca. Christine Silverberg is a Calgary-based lawyer with a diverse advocacy, regulatory and litigation practice. She can be reached at (403) 648-3011, christine@silverberglegal.com or through www.christinesilverberg.com.*

*Photo credit / Jack\_Aloya ISTOCKPHOTO.COM*

*Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Yvette Trancoso-Barrett at Yvette.Trancoso-barrett@lexisnexis.ca or call 905-415-5811.*