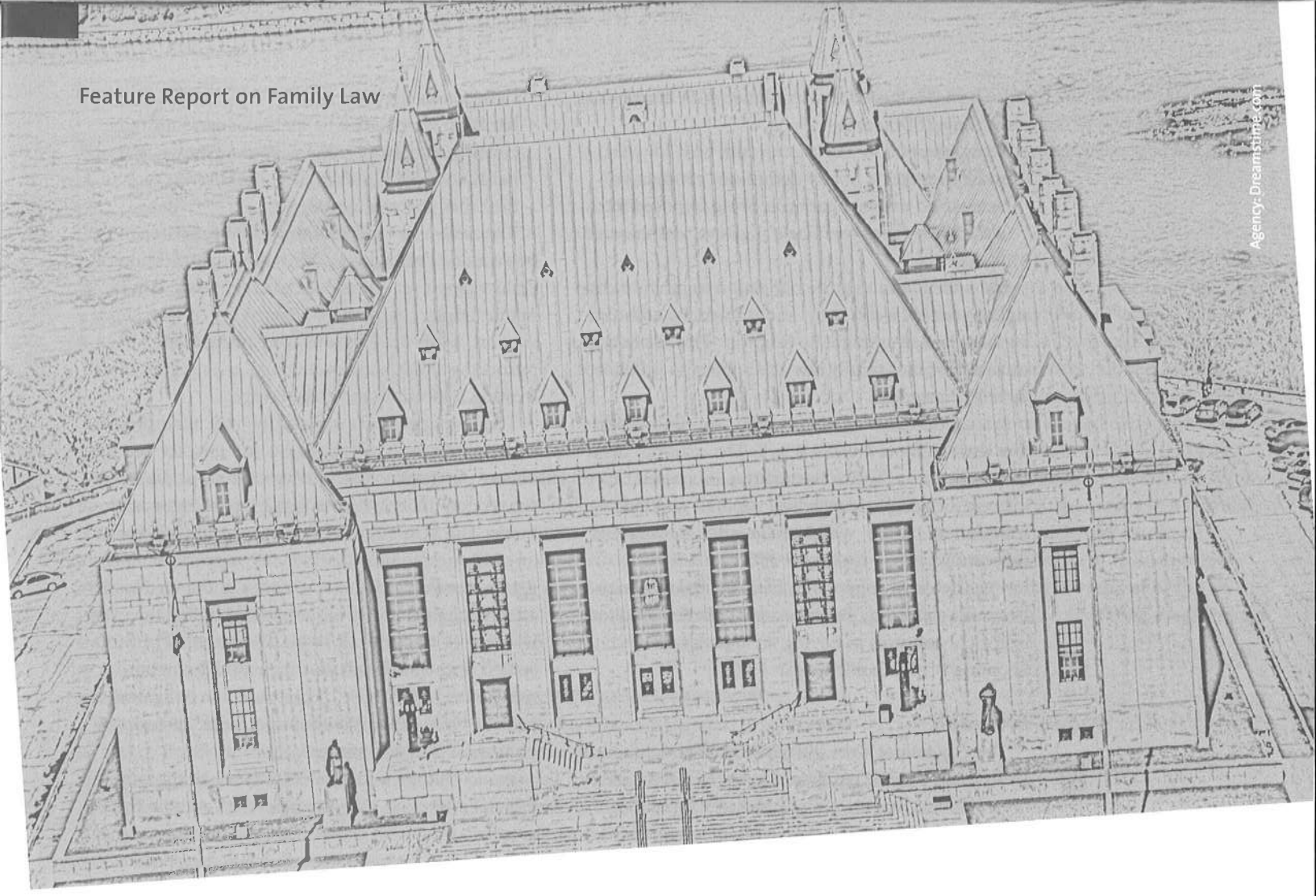

The Supreme Court of Canada
Gets a 'Retro' Look

Gordon Andreiuk

The topic of retroactive child support has been in the media more than usual for the past year since the Supreme Court of Canada (SCC) granted leave to hear four appeals directly on the point. The four cases were *D.B.S.*, *T.A.R.*, *Henry*, and *Hiemstra*. The decision was released on July 31, 2006.

All seven justices were united on two principles:

- Parents have an obligation to provide financial support to children at an amount determined by income level, pursuant to federal or provincial child support guidelines. Providing only subsistence or very basic needs is not enough. The amount of child

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support is adjusted in accordance with increases or decreases of income.
- Being required to pay a lump sum now for past underpayment is not by definition "retroactive" because no new obligation is being imposed retroactively on the payor. The obligation was there all along.

But understand that the obligation to provide child support is only a soft debt, and it might be enforced by the court, or it might be forgiven. This is not commercial law; it is family law and subject to unfettered judicial discretion.

It is on this issue of enforcement and forgiveness that the SCC was divided 4 to 3. The majority decision, written by Justice Bastarache, was based on historical concepts like laches, windfall and redistribution of capital, which predate the *Federal Child Support Guidelines*, making it difficult to obtain retroactive child support. In contrast, the minority decision, written by Justice Abella, challenged those historical concepts as having no application since the adoption of the Guidelines in 1997.

Evolution

The Guidelines were introduced under the federal *Divorce Act*. Similar guidelines apply to the children of unmarried parents under provincial legislation. There is no dispute that the Guidelines were introduced to impose predictability, consistency and objectivity into the law of child support. Prior to the Guidelines, unfettered judicial discretion was resulting in an unacceptably wide variation of awards for children in similar circumstances.

The Guidelines list four objectives, or guiding principles:

"(*a*) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

(*b*) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

(*c*) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(*d*) to ensure consistent treatment of spouses and children who are in similar circumstances."

Under the Guidelines, judges are required to award the table amount of child support. Judicial discretion is permitted in only five specifically delineated situations:

- children over the age of 18;
- payor income over $150,000;
- payor is step-parent;
- shared custody; and
- hardship which must be undue or extreme, to be considered only after the payor has shown that his/her household standard of living is lower than in the other parent's household.

The *Divorce Act* specifies that child support can be awarded retroactively. With the quantification of child support set out under the Guidelines, it became much simpler to calculate deficiencies of past child support. More applications were being made for retroactive awards to cover deficiencies, rather than treating it as water under the bridge.

The four appellants stressed the rule against retroactive application of legislation and the fact that the *Divorce Act* does not use the word "retroactive" in the section under which initial support orders are made. The SCC stated that because parents have an obligation to provide financial support for children according to income, courts are able to award child support retroactively notwithstanding the exact wording of the sections in the *Divorce Act*. The SCC settled once and for all that such awards are not retroactive in the sense of that rule: the obligation to provide child support was always there, and no new obligation is being imposed.

Based on the Guideline objectives and the way judicial discretion was circumscribed into the five specific areas listed above, it seems only logical that child support would be awarded both prospectively and retroactively according to the Guideline tables. But the case law did not develop in that manner. A long line of cases established the policy that retroactive child support would be determined entirely by judicial discretion. In exercising their discretion, judges consider this list of factors:

- need and corresponding ability to pay;
- blameworthy conduct on the part of the non-custodial parent;
- incomplete or misleading financial disclosure;
- encroachment on capital or incurring debt;
- excuse for delay where the delay is significant;
- evidence of ongoing negotiations;
- creation of an unreasonable burden for the non-custodial parent;
- redistribution of capital or awarding disguised spousal support;
- significant and unexplained delay.

However, the provinces interpreted these factors differently. While the Alberta Court of Appeal was dealing with the issue of retroactive child support, so was the Ontario Court of Appeal. In Ontario, there was a power struggle over what direction to take. In May 2005, after several contradictory decisions, the Ontario Appeal Court released the *Park v. Thompson* decision. It insisted on the most conserva-

tive of approaches to the factors, and disparaged the approach of the Alberta Court of Appeal. Justice Rosenberg wrote,

> "... the Alberta Court of Appeal has taken a very different approach to retroactive child support and, for example, has presumed need and an ability to pay on the part of the payor and has not required any demonstration of blameworthy conduct on the part of the payor or encroachment on capital by the custodial parent ... I have not been persuaded that this is an appropriate time to reconsider the issue, notwithstanding the thoughtful discussion in the Alberta trilogy."

Park v. Thompson made it clear that Ontario would not go down the Alberta road. In August 2005, the SCC granted leave to hear the four Alberta appeals.

SCC Thesis Statements

Both the majority and minority of the SCC went through an analysis of the factors to be considered in deciding whether to award retroactive child support. Before setting out how each side analyzed the factors, I want to set out the three thesis statements I garnered from Justice Bastarache's majority decision.

Thesis Statement 1

Child support is absolutely periodic: the money must be used up in the month or other payment cycle for which it is intended. If child support is inadequate for a certain period, it is water under the bridge. Justice Bastarache wrote,

- "... the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it."
- "From a child's perspective, a retroactive award is a poor substitute for past obligations not met."

Thesis Statement 2

The court must *not* compensate an individual who made up the deficiency of past child support, whether it was the custodial parent, the custodial parent's new spouse, grandparents, etc. I refer to this tongue-in-cheek as the *cuckoo-bird* public policy, that is, it is socially acceptable for one bird to lay its egg in the nest of another to be raised. This thesis is based on the historical fear of a windfall or "redistribution of capital in the guise of support". Justice Bastarache wrote,

- "Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child."

In Justice Bastarache's analysis, blameworthiness is to be weighed against the two concepts of hardship and certainty.

Thesis Statement 3

It is the recipient's fault if other responsibilities and financial constraints get in the way of immediately pursuing the payor who says "get lost" every time the topic of appropriate child support is broached. Justice Bastarache wrote,

- "Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of *both* parents to fulfill their obligations to their children."
- "Once the recipient parent raises the issue of child support, his/her responsibility is not automatically fulfilled. Discussions should move forward. If they do not, legal action should be contemplated. While the date of effective notice will usually signal an effort on the part of the recipient parent to alter the child support situation, a prolonged period of inactivity after effective notice may indicate that the payor parent's reasonable interest in certainty has returned."

Meanwhile, Justice Abella had the following to say about the same issue, and in quite cutting language:

- "Only the payor parent knows when there has been a change in income that would warrant an adjustment to child support. That, therefore, is the parent with the major responsibility for ensuring that a child benefits from the change as soon as reasonably possible. A system of support that depends on when and how often the recipient parent takes the payor parent's financial temperature is impractical and unrealistic."
- "... caution should be exercised before penalizing a child for a recipient parent's delay in attempting to recover support to which a child was entitled. There may be practical financial and psychological realities inhibiting a recipient parent's ability to respond to learning of a change in circumstances ..."

SCC Analysis of the Factors

Justice Bastarache recombined the usual factors into the following four headings:

- reasonable excuse for why support was not sought earlier;
- conduct of the payor parent;

- circumstances of the child; and
- hardship occasioned by a retroactive award.

Reasonable excuse for why support was not sought earlier

This is about the recipient's delay in not forcing the issue of child support earlier. Justice Bastarache wrote that circumstances surrounding the recipient's choice "not to apply for support earlier will be crucial in determining whether a retroactive award is justified." The recipient's delay could be excused or faulted depending on the evidence and judicial discretion.

Conduct of the payor parent

In Justice Bastarache's analysis, blameworthiness is to be weighed against the two concepts of hardship and certainty. Apparently if the payor is sufficiently blameworthy, no amount of hardship and financial suffering will save the payor from an order for retroactive child support: "hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct". Likewise, the payor's interest in the certainty of an existing order will not be protected if the payor engages in what the judge hearing the application considers blameworthy:

"Where the payor parent does not [disclose a material change in circumstances], and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing."

Circumstances of the child

It is under this heading that Justice Bastarache made three huge changes to the law of retroactive child support, at least to the law as it existed in Alberta:

- he established a policy that the court is not allowed to compensate the individual who made financial sacrifices for the child while there was underpayment of child support;
- he defined the competing interests over retroactive support as exclusively between the payor and the child;
- he established that the child's past and present circumstances, including need, are relevant.

Compensation for sacrifices has long been a theme in Alberta law dealing with child support. In the 1994 Alberta Court of Appeal case of *Haisman*, Justice Heatherington wrote,

"How can it be in the public interest to allow a father to avoid what a court has found to be his financial responsibility to his child? If the father does not provide this financial support, someone else must do so. Usually it is the mother. Sometimes she uses money which otherwise she would have saved or used to improve her quality of life. Sometimes she gets help from her family or from friends. Sometimes she finds it necessary to go into debt. Sometimes she has to go on welfare. Why would the father not compensate her or the state? In my view, in the absence of any special circumstance, it is in the public interest to require the father to compensate whomever or whatever body has fulfilled his financial obligation to his child."

To justify the total exclusion of interests of the recipient parent, or other adult who made financial sacrifices during the time there was underpayment of child support, Justice Bastarache defined the competing interests over retroactive child support as exclusively between the payor and the child.

Along the same lines, Justice Bastarache wrote,

> "Under a pure need-based regime, when a payor parent does not increase the amount of his/her support when his/her income increases, it is the *recipient parent* who loses: the recipient parent is the one entitled to receive greater help in meeting the child's needs. But under the general *Guidelines* regime, when a payor parent does not increase the amount of his/her support when his/her income increases, it is the *child* who loses: the child is the one who is entitled to a greater quantum of support in absolute terms."

The last big change under the heading "Circumstances of the Child" is the consideration of the child's past and present circumstances, including need. Justice Bastarache stated,

"A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need … Put differently, because the child must always be the focus of a child support analysis, I see no reason to abstract from his/her present situation in determining if a retroactive award is appropriate."

He justified reverting to the pre-Guidelines need-based approach on the basis that the Guidelines still contain consideration of need in three areas: children over 18; incomes over $150,000; and shared custody.

Wouldn't it have been much more logical for the SCC to establish policy for retroactive support based on the overall purpose of the Guidelines, rather than grasping onto three exceptions Parliament had specifically carved out? In contrast to the SCC majority, Justice Paperny of the Alberta Court of Appeal would have abolished the concept of need for both prospective and retroactive child support since "[a] child is entitled to support from his or her parents and the amount of support is dependent on what the payor-parent earns. The obligation is not dependent on

judicial discretion to be ascertainable."

Justice Bastarache stated that both past and present need are to be taken into account, and "a child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need." What did he mean by "currently in need"? The level of child support is established by the Guideline tables; the concept of need is not part of the calculation. Justice Bastarache evidently meant that one should treat children differently depending on each child's household standard of living, almost always determined by the additional income of a step-parent.

Hardship occasioned by a retroactive award

The most surprising thing about the SCC majority decision is that it adopted a definition of hardship completely unrelated to the way hardship is set out in the Guidelines. Under the Guidelines, hardship is a test employed to justify a deviation from paying the Guideline amount. First, the person seeking a deviation from the Guideline amount must establish that his or her household standard of living is lower; then he or she must show that the hardship is undue or extreme. Case law has established that courts should not hand out a deviation unless the hardship is exceptional. Otherwise it would make a mockery of the Guideline principle that support is determined by income.

However, the SCC majority adopted a definition of hardship for retroactive awards which is impossible to pin down. Hardship is entirely in the eye of the beholder. There is no comparison of household standards of living, or a requirement that the hardship must be exceptional.

While the tests set out in the Guidelines for hardship are not followed when considering retroactive awards, consideration of household standards of living, i.e., the step-parent's income, did pop up in other areas of the SCC majority decision when dealing with what I have referred to tongue-in-cheek as the *cuckoo-bird* principle.

Not until this SCC decision has there ever been an issue about hardship for the child resulting from the deficiency in past support. Justice Bastarache wrote,

> "Because the awards contemplated are retroactive, it is worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award."

Meanwhile, Justice Abella of the SCC minority had the following to say about this new concept of a child's hardship:

> "... the recipient parent need not demonstrate that the failure to pay child support has resulted in hardship for the child. The children were deprived of support to which they were entitled. The fact that the recipient parent has or has not been able to attenuate the deprivation through other means has no impact on the fact that a debt was owing."

In summary, the policy set by the SCC majority for retroactive child support does not favour retroactive awards. It suggests that recipients get into court as soon as possible to sort out any child support variation, and be prepared to deal with a lot of mudslinging and spin-doctoring now that blameworthiness is important.

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