

## RETROACTIVE CHILD SUPPORT AT THE SUPREME COURT OF CANADA

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 (i) *D.B.S.*, (ii) *T.A.R.*, (iii) *Henry* and (iv) *Hiemstra*. Leave had been granted in August 2005.

One very unfortunate part of the whole appeal process at the SCC level is that two very important organizations were refused leave to intervene on the case. The two organizations who applied for leave to intervene were the Women's Legal Education and Action Fund, and the Canadian Foundation of Children, Youth and the Law. Each organization would have provided socioeconomic evidence about how retroactive child support affects women and children as two segments of Canadian society. The lawyer for the four appellants strongly argued against the leave application. Input from these two organizations would have given the SCC decision more legitimacy, and may well have affected the outcome.

Oral argument on *D.B.S.*, *T.A.R.*, *Henry* and *Hiemstra* was heard in Ottawa on February 13, 2006 and the written decision of the court was released on July 31, 2006 in the dead of summer. August 1, 2006 marked the day every major Canadian newspaper printed an article about the SCC decision. The newspaper articles were able to scratch only the surface of what the decision meant.

All seven justices hearing the SCC appeal were united on the following two principles, that is:

- (i) Parents do indeed have an obligation to provide financial support to children at an amount determined by income level, that is, pursuant to federal or provincial child support Guidelines (hereafter Guidelines). Providing only subsistence or very basic needs is not enough. The amount of child support is supposed to be adjusted in accordance with increases or decreases of income.
- (ii) 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 almost absolute judicial discretion.

It is on the 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 child support Guidelines by decades, to make 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.

I had represented two of the child support recipients in *D.B.S.* and *T.A.R.* at the chambers and Alberta Court of Appeal level, but needed to refer my clients to another lawyer, Carole Curtis from Toronto, after it was clear that SCC appeal was proceeding. The four payors who appealed to the SCC were all represented by Ms. Diedre Smith, also from Toronto. The recipients in *Henry* and *Hiemstra* were represented at the SCC by the Edmonton and Calgary lawyers who had represented them at the original chambers application.

In this article, I will briefly go over how the courts' treatment of retroactive child support had evolved differently between Alberta and Ontario, compare the two approaches of the SCC majority and minority, relate these approaches to the facts of the four cases which were appealed, and in the course of this share with you some background information about the SCC appeal.

## EVOLUTION

The Guidelines were introduced in 1997 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 SCC majority's

review of the history of the Guidelines noted that they were implemented to take the mystery out of child support awards, and in response to the old system “whereby costly – and unpredictable – litigation was often necessary to define what amount of support was due.”

Section 3 of the Guidelines lists the following 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, that is,

- (i) children over the age of 18, sub-section 3(2);
- (ii) payor income over \$150,000, section 4;
- (iii) payor is stepparent, section 5;
- (iv) shared custody, section 9; and
- (v) 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, section 10.

The Divorce Act specifies that child support can be awarded retroactively. With the quantification of child support reasonably straight forward under the Guidelines, it became much simpler to calculate the deficiency, if any, of past child support. With the passage of time since 1997, more applications were being made for retroactive awards to cover the deficiency in past child support, rather than treating it as water under the bridge.

Ms. D. Smith, the lawyer for the four appellants at the SCC, had argued at length about the rule against retroactive application of legislation, legislative interpretation 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 merely stated at paragraph 83 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. About the rule against retroactive application of legislation, the SCC settled once and for all that such awards 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 5 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. Instead, the judiciary in each of the provinces, through a long line of cases, established the policy that retroactive child support would be determined entirely by judicial discretion, that is, subjectively, not objectively. The big topic of debate in these cases became the factors to be considered by the judge in exercising his or her discretion. The factors written about were based on concepts decades older than the stated goals of the Guidelines. The following is the usual list of factors first established by the British Columbia Court of Appeal in the 1999 case of *L.S. v. E.P.*:

1. Need and corresponding ability to pay.
2. Blameworthy conduct on the part of the non-custodial parent
3. Incomplete or misleading financial disclosure
4. Encroaching on capital or incurring debt.
5. Excuse for delay where the delay is significant
6. Evidence of ongoing negotiations
7. Creating an unreasonable burden for the non-custodial parent
8. Redistributing capital or awarding disguised spousal support
9. Significant and unexplained delay.

The interpretation of these factors, and in turn the likelihood of getting a retroactive award, went in different directions between the provinces. I am best acquainted with the directions taken in Alberta and Ontario.

In 2000, the Alberta Court of Appeal released its decision *Ennis v. Ennis*, in which the court stated that child support orders should generally be backdated to the date of filing of the court application, and retroactive child support beyond that time should only be made in exceptional circumstances. In 2001, Alberta Court of Appeal with a different panel of judges released its decision *Whitton v. Shippelt*, in which it changed the test from “exceptional” to “appropriate” circumstances, and also changed the list of factors somewhat. In May 2004, the Alberta Court of Appeal heard my two appeals in *D.B.S.* and *T.A.R. (L.J.W.)*. The following month it heard the appeal in the *Henry* case. In January 2005, the Alberta Court of appeal released its decisions in those three cases (the D.B.S. trilogy). It essentially reanalyzed the list of factors to give them an analysis much more in keeping with the guiding principles of the Guidelines, and which would lead to retroactive orders more often. The Hiemstra appeal, which is the fourth case, was heard and decided by the Alberta Court of Appeal after the D.B.S. trilogy had been released.

There was a fifth Alberta case which Ms. D. Smith had tried to add to her collection going to the SCC. The name of that case is *S.C. v. D.C.D.*, and it was released on June 23, 2005. The Alberta Court of Appeal had increased the amount of the retroactive award from that awarded by the justice who heard the chambers application. However, Ms. D. Smith missed the appeal deadline, and that decision of the Alberta Court of Appeal will stand.

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 an obvious power struggle within the appeal court over what direction analysis of the factors would take in that province. Mr. Justice Laskin authored the 2004 decision of *Walsh v. Walsh* in which the test for retroactive support is (i) the children needed more support, and (ii) the payor was able to pay more during the relevant time period, (need and corresponding ability to pay). Justice Laskin reproduced the list of factors from *L.S. v. E.P.* with no analysis of those factors pursuant to the guiding principles of the Guidelines. Within months, a different Court of Appeal panel released a contradictory decision, *Horner*.

Justice Weiler authored the *Horner* decision, and went through the list of factors and analysed them according to the guiding principles of the Guidelines in much the same way as would do the Alberta Court of Appeal three months later in the D.B.S. trilogy. Justice Weiler distinguished *Walsh* on the basis that it dealt with an interim variation. Under Justice Weiler's analysis, awards of retroactive child support would be much more common. Finally, in May 2005, a totally different panel of appeal justices released the *Park v. Thompson* decision. That panel of justices insisted on the most conservative of approaches to the factors, and disparaged both the approach of Justice Weiler in *Horner*, and the Alberta Court of Appeal in the DBS trilogy. In the *Park v. Thompson* decision, Justice Rosenberg had to the following to say about the DBS trilogy:

In his submissions, Mr. Beamish on behalf of the mother asks this court to adopt a different approach in line with the so-called Alberta trilogy: *S.(D.B.) v. G.(S.R.)* (2005), 7 R.F.L. (6th) 373 (Alta. C.A.); *L.J.W. v. T.A.R.* (2005), 9 R.F.L. (6th) 232 (Alta. C.A.); and *Henry v. Henry* (2005), 7 R.F.L. (6th) 275 (Alta. C.A.). In the trilogy, 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. Given the recent extended discussion of retroactive support in *Walsh* and *Marinangeli*, I have not been persuaded that this is an appropriate time to reconsider the issue, notwithstanding the thoughtful discussion in the Alberta trilogy.

*Horner* and the D.B.S. trilogy had the law developing in the same direction, *Horner* was actually referred to by the Alberta Court of Appeal. But *Park v. Thompson* made it clear that Ontario would not go down that road, and basically threw down the gauntlet. Ms. D. Smith had filed her application for leave to appeal to the SCC on March 7, 2005, *Park v. Thompson* was released on May 2, 2005, and on August 18, 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 managed to garner from Justice Bastarache's majority decision.

Thesis Statement 1: Child support is absolutely periodic, that is, 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, and it is better not to revisit the past. Justice Bastarache made the following statements:

- “Whatever the outcome of these individual cases, the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it.” [para 4].
- “From a child’s perspective, a retroactive award is a poor substitute for past obligations not met.” [para. 103]

Thesis statement two: The court must not compensate the individual who, through personal financial sacrifices, made up the past deficiency of past child support, whether it was the custodial parent, his or her 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 made the following statements:

- “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.” [para. 113.]
- “Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award.”[para. 95]
- “A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time.” [para. 110]

It is intellectually dishonest for Justice Bastarache to turn his back so completely on the financial hardship of the recipient parent, stepparent or grandparent who contributed financially when it turns out they would not have had to do so if the appropriate amount of child support had been paid all along, but then to embrace so completely in his analysis the financial hardship a retroactive award of child support would have on the payor. If you take hardship into account for

one adult, you should take it into account for the other. Then, in keeping with his thesis, Justice Bastarache defined the competing interests over retroactive support as exclusively between the payor and the child, thereby enabling him to turn his back completely on the interests of the other adult whose personal sacrifices for the child later turn out to have been for the benefit of the delinquent payor.

Marie Gordon, a lawyer from Edmonton, had written an excellent article about the historical concepts I referred to above. The article is called “Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era” (2005), 23 CFLQ 244, and was reproduced in the SCC appeal books, so the SCC justices did have the opportunity to read it. Ms. Gordon made the following interesting observations about delay and the analogous historical concept of hoarding:

The rule against hoarding is especially curious when applied to a failure to enforce arrears of a valid Court order. The reason behind the “rule” was described by Wilson, C.J.S.C. in the 1972 decision of *Patton v. Read*

... this rule, extraordinary to the law, is based on consideration of public policy, principally the policy of the Court to refuse to impose on the delinquent husband a crippling burden to meet a purpose (the maintenance of a wife or child) which has already been met by other means.

Such reasoning, derived as it was from ecclesiastical Courts, became grafted onto public policy by the Courts and was used, it seems, to prevent perceived “unfairness” to one party. Such unfairness seemed to be the fault of the payee demonstrated in passages such as the following:

“Permitting recovery of arrears in excess of one year often *serves no useful purpose and is simply a means of punishing a delinquent spouse*” [emphasis added]. [*Holt v. Thomas* (1987) 7 R.F.L. (3<sup>rd</sup>) 396 at 403 (Alta. Q.B., O’Leary J.)]

Thesis statement three: It is the recipient’s own fault if he or she let other responsibilities and financial constraints get in the way of immediately pursuing the payor who tells you to get lost every time the topic of appropriate child support is broached. Put all your other troubles away, and pull yourself up by your bootstraps to get into court to force through the support variation. I refer to this as the bootstrap thesis. Justice Bastarache had the following to say:

- “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.” [para. 103]

- “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.” [para. 123]

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.” [para. 161]
- “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. As Rowles J.A. stated in *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254, 1999 BCCA 393, at para. 58: As the right belongs to the child it cannot be waived or bargained away by the custodial parent or lost due to that parent’s neglect, delay, or lack of diligence in enforcing the right. [Emphasis added.]” [para. 172].

Both the majority and minority of the SCC had referred to the 1994 Alberta Court of Appeal case *Haisman*. Somehow, the SCC majority saw fit to completely ignore the following proposition made in *Haisman* about the practical financial and psychological realities of the recipient parent:

Is delay by the custodial parent in attempting to collect arrears of child support otherwise relevant on an application for a variation of the child support order? In my view it is not. Very often all of the custodial parent’s resources, – financial, physical and emotional, – are used up in caring for the child. I do not think that either parent or child should be penalized because for a period of time no attempt is made to enforce a maintenance order, even if it is a long period of time. Nor do I think that the noncustodial parent can reasonably infer from that failure to enforce that the custodial

parent has waived his or her rights under the order. A failure to enforce a child support order without more is not evidence of waiver.

## SCC ANALYSIS OF THE FACTORS

Justice Bastarache recombined the usual factors into the following four headings, which I take up below in detail:

- (i) Reasonable excuse for why support was not sought earlier;
- (ii) Conduct of the payor parent;
- (iii) Circumstances of the child; and
- (iv) Hardship occasioned by a retroactive award.

### (i) REASONABLE EXCUSE FOR WHY SUPPORT WAS NOT SOUGHT EARLIER

This is about the recipient, and his or her delay in not forcing the issue of child support earlier. At one point in this part of his decision, 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." Then he proceeds to review the gamut of cases, each of which depend on the subjective views of the individual justice. In summary, the recipient's delay could be excused or faulted depending on the leanings of the individual judge, and how the evidence was presented.

Compare the facts in *Henry*, where the recipient's delay was completely excused, with the situation in *T.A.R.* where the recipient's delay was not. Both recipients had for years been asking for greater child support. Both payors said that they could not afford to pay more, and told the recipients to get lost. There was serious underpayment of child support in each case. Both recipients could not hire lawyers for the longest time because of financial constraints. In *T.A.R.*, the recipient finally borrowed the money from her father in order to hire a lawyer. Not much difference between the two situations.

One last thing about the *T.A.R.* case and the problem of judicial subjectivity, the judge hearing the application made a finding of fact that the payor had high access costs. However there was no evidence on which to base that finding. Rather the evidence showed that in the ten years prior to the chambers hearing in 2003, the father incurred expense once in February 1995 by coming to Rycroft to see the children, and two more times in the summers of 1998 and 2000 by driving the children to Innisfail. In all the other years, it was the mother who transported the children to Innisfail at her own expense. The SCC hung its hat in part on that “subjective” finding, notwithstanding the absence of any supporting evidence.

Justice Bastarache wrote in this part of his decision that this factor will encourage recipient parents to promptly seek the appropriate amount of child support. Writing for the majority, Justice Bastarache has the authority to establish what is the social policy on retroactive child support, but his policy completely fails to take into account the practical financial and psychological realities that often inhibit the recipient from being able to act promptly. I referred to this earlier as the bootstrap policy.

Along these same lines of blaming and faulting the recipient parent for not being in court earlier, Ms. D. Smith put a fantastical spin on the facts in each of her SCC factums. It was all about putting some kind of blameworthy behaviour on the recipient. The spin she put on the facts made my jaw drop. Expect to see much more of that spin-doctor misrepresentation in chambers, now that the SCC majority has established the importance of blameworthiness.

(ii) CONDUCT OF THE PAYOR PARENT.

This all about whether the payor is blameworthy, and whether he or she should be “punished” by being required to retroactively pay the deficiency in child support. Blame, punishment, forgiveness – sounds more like a novel by Dostoevsky, than setting policy for child support under the Guidelines. How subjective is the concept of blameworthiness? Very. I had thought the Guidelines were introduced to give us objectivity, and I agree with Justice Abella of the SCC

minority, that blameworthiness and punishment have no place in a discussion about child support.

In Justice Bastarache's analysis, blameworthiness is to be weighed against the two concepts of hardship and the 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", [para. 116]. 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", [para. 125].

About the concept of certainty and reliance on an existing order, Justice Abella had the following to say: "To suggest, therefore, that the principle of certainty is impaired by the possibility of claims for child support being made in the future, is to suggest that the rights of children to the support to which they are entitled, should defer to the rights of payor parents not to have to worry that the amount they are paying may be found to be inadequate. Child support is inherently variable because parental incomes are."

Justice Bastarache's discussion about the concept of blameworthiness is convoluted and contradictory. Blameworthiness has been found to range from an honest mistake to active deceit, and according to Justice Bastarache's analysis, what constitutes blameworthiness is literally at the absolute discretion of the judge hearing the court application.

I take this opportunity to point out that in the *Henry* case, Justice Rowbotham, who had heard the initial application, did not make a finding of blameworthiness, obviously because she felt the concept was not relevant to her decision. Justice Bastarache acknowledged that Justice Rowbotham had "stopped just shy of finding that the father engaged in blameworthy conduct,

but nevertheless ordered that he pay a retroactive award.” [para 27] It was actually Justice Bastarache who, at his own initiative, made a finding of fact that the payor had been blameworthy. At paragraph 147 he wrote: “there should be no dispute that the father in the present appeal acted in a blameworthy manner.”

### (iii) 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:

- (i) 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,
- (ii) he defined the competing interests over retroactive support as exclusively between the payor and the child;
- (iii) 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 *Haisman*, Justice Heatherington had written:

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 of whatever body has fulfilled his financial obligation to his child.

*Haisman* is a case about canceling accumulated child support arrears, but the reasoning was picked up by many justices in dealing with retroactive child support after the Guidelines were made law.

In the transcripts of the *Hiemstra* chambers application, Justice Belzil stated during argument by the husband’s counsel:

But all of the case law in this are focuses on the issue as to whether or not the party with whom the children was residing bore a disproportionate share of the expenses, and we have here of course a disparity of income that is quite substantial and the argument in a nutshell is that the lower income person ended up with a disproportionate economic burden for the children for whom they are both responsible. [...]

But how is it equitable to say to this lady under these circumstances wherein she earns significantly less than he does. That she has borne a burden for raising the children that is disproportionate and therefore we say what, too bad?

Too bad? Yes, that is what we are supposed to say according to Justice Bastarache's majority decision. The argument made by Mr. Hiemstra's lawyer at the chamber's hearing was in fact the policy chosen by the SCC majority, his argument was that:

There's no evidence anywhere to suggest how this money is going to be used.

[...] retroactive child support should not be so – should not solely operate to redistribute capital between the parties.

It is our suggestion that's exactly what's happening here, and that – that statement itself recognizes that to be a transfer of money; otherwise people wouldn't bring them. But if the sole effect is to do that, then there should not be a retroactive child support order and that's what's going to happen here, it's going to be a redistribution of capital.

For the SCC majority to allow Justice Belzil's decision to stand, when it was so clearly based on the policy rejected by the SCC majority is again intellectually dishonest. Justice Bastarache stated the following about the Justice Belzil's decision:

Although some remarks seemed to indicate that he saw the retroactive award as compensating the mother, I accept that he rightly ordered the award for the benefit of the children. [para 152]

But, there is no factual or evidential basis in *Hiemstra* on which Justice Bastarache could possibly have satisfied himself of that. This is obviously a case of making things fit. In the *D.B.S.* decision, no obvious benefit to the child was the basis for the decision not to award retroactive child support.

In *T.A.R.*, the mother had deposed that she intended to use whatever retroactive amount might be awarded for one of the daughter's orthodontia. Out of "fairness" to the payor, she did not seek it as an ongoing s.7 expense, or make a claim for any other present s.7 expenses. The daughter had braces at one time, but they had to be taken off because the mother and her new husband could

not afford to continue the orthodontic treatment. Some kind of retroactive award would clearly have benefited the child directly, but that was not mentioned in the decision of Justice Perras who had heard the chambers application.

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. At paragraph 103 of the majority decision, where Justice Bastarache had written, “*from a child’s perspective*, a retroactive award is a poor substitute for past obligations not met”, (emphasis added). Excuse me for asking the obvious, but if child support is a matter that is supposed to be taken care of and enforced by the adults, why did Justice Bastarache start in on the child’s views and perspective. Since when did it stop being a matter between the adults?

Along the same lines, Justice Bastarach had written at paragraph 45:

“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.” [Emphasis by Bastarache J.]

It is fine to create an esoteric distinction between whether it is the recipient parent or the child who loses when there has been underpayment of child support. But what about those section 7 expenses which are supposed to be shared in proportion to the parents’ relative incomes. If for example those expenses were being split 50/50, and it turns out they should have been split 80/20 with the recipient paying the smaller portion, has not the recipient parent lost as a result? Section 7 expenses are not insubstantial, daycare can easily cost a thousand dollars per month. And what about those situations where the recipient parent, a stepparent or grandparent is paying for “luxuries” like college tuition, while it wouldn’t be a luxury and would have been covered by child support if the appropriate amount of support had been paid all along. Justice Bastarache’s distinction about who exactly loses is artificial.

The last big change under the heading Circumstances of the Child is that there will be consideration of the child's past and present circumstances, including need. Justice Bastarache stated at paragraph 111 of his decision that:

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.

In the next paragraph he justified reverting to the pre-Guidelines needs-based approach on the basis that the Guidelines still contain consideration of need in three areas, that is, children over 18, incomes over \$150,000, and shared custody.

Those three areas are specific exceptions to the overall purpose of the Guidelines. Earlier in his decision, Justice Bastarache had acknowledged that: "They [the Guidelines] respond to the desire to "take the mystery out of the process" [...] This desire was a response to the need-based system, whereby costly – and unpredictable – litigation was often necessary to define what amount of support was due", [para. 43]. The purpose of the Guidelines is to move us away from the need-based system they replaced.

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 specified that both past and present need are to be taken into account, and, as noted above, "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", [para. 111]. What could he possibly have meant by "currently in need"? On a go forward basis, 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 stepparent. That runs completely counter to the principle that it is the parents, not other individuals, who are responsible for financially supporting a child. Subsection 26.1(2) of the *Divorce Act* specifically sets out the principle that “spouses have a joint obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.”

#### (iv) HARDSHIP OCCASIONED BY A RETROACTIVE AWARD

The most surprising thing for me 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 first establish that his or her household standard of living is lower, then he or she must show that the hardship is undue or extreme. Caselaw 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 caselaw and the SCC majority have adopted a definition of hardship for retroactive awards which is completely amorphous and 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 test set out in the Guidelines for hardship are not followed when considering retroactive awards, consideration of household standards of living, i.e., the stepparent’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 had written that, “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”, [para. 113].

Meanwhile, Justice Abella of the SCC minority had the following to say about this new concept of a child’s hardship: “In the same way, 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”, [para. 170].

In summary, the policy set by the SCC majority for retroactive child support does not favour retroactive awards. Considering the way that negotiation time prejudiced the recipients in *D.B.S.* and *T.A.R.*, recall that retroactive was not awarded even to the month in which negotiations with lawyers started, the impetus is for recipients to 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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