IN THE FAMILY COURT OF NOVA SCOTIA
Citation: D.C. v. M.C., 2006 NSFC 25

Date: 20060809
Docket: FLBISOS-040885
Registry: Bridgewater

Between:

D. A. C.

Applicant

v.

M. A. C.

Respondent

Revised Decision: The text of the decision has been revised to protect the identity of certain parties. This revised version is released on January 11, 2010.

Judge: The Honourable Judge William J. Dyer

Heard: March 7, 2006, at Lunenburg, Nova Scotia

Counsel: Shawn M. O'Hara, for the Respondent

By the Court:

[1] For decision is the question of whether the biological father of a child should be ordered to pay “retroactive child support”, about 15 years after the birth of his son, in circumstances where he was determined only recently to be the father.

Background

[2] The question arises from an application dated June 17, 2005 by D. A. C. (“DC”) [also known as A.C.C.; also known as A. C.K. C.] of Edmonton, Alberta under the **Interjurisdictional Support Orders Act** (**ISO**) against M. A. C. (“MC”) in relation to the child, B. T. G. C. (“the child”), born December 8, 1990.

[3] MC was represented by local counsel (Shawn M. O’Hara) and DC engaged counsel in Edmonton (Elaine Hancheruk) in or about June, 2005. Ms. Hancheruk was in communication with Mr. O’Hara; and she submitted affidavit evidence on behalf of DC for use at the hearing. In mid-October, 2005, I was informed that the parties had agreed to share the costs of genetic testing. An order authorizing the same was approved under the **ISO**. By the end of January, 2006, it was known that the test results had confirmed MC as the child’s father and that negotiations in aid of settlement had proven unsuccessful. I therefore conducted a hearing.

Preliminary Issues

[4] At the hearing, Mr. O’Hara asked the court to make a preliminary ruling on whether the application should be treated as a “new application” or

an “application to vary” a provisional Alberta order that was never confirmed in Nova Scotia. I ruled this is a new application under the **ISO** with a retroactive component.

[5] Mr. O’Hara also questioned the late filing and admissibility of DC’s affidavit (Exhibit 5), as submitted by his colleague. Upon referring to section 11(1) of the **ISO**, I decided I could and should receive all relevant evidence so that the case could be concluded, sooner rather than later. I was concerned about further delay and expense to the parties. And, I took from Ms. Hancheruk’s involvement that her client’s affidavit evidence plus the documents from the Alberta authority constituted the entire case that DC intended to place before the court, in any event. Certainly Ms. Hancheruk did not articulate any different expectations. I exercised my discretion in favour of completing the hearing. I considered the affidavit, but directed myself to rule, as need be, on the admissibility of specific content and the weight to be attached to anything that was admitted into evidence. In doing so, I was frankly mindful that MC’s affidavits arguably suffered from many of the same hearsay afflictions that Mr. O’Hara objected to and in regard to which I similarly directed myself.

[6] Lastly, in Exhibit 5 at paragraph 28 DC asked “to be reimbursed for my share of the DNA testing”. With respect, through counsel, the parties agreed to equally share the expense; and I so ordered. I do not propose to revisit the subject.

The Interim Order

[7] At the conclusion of the hearing, I made an interim order under section 14(1)(b) of the **ISO** confirming MC as the father of the child and ordering him to pay $155 monthly, starting effective January 1, 2006, as periodic child support under the **Nova Scotia Child Maintenance Guidelines** (**CMG**) and related Tables, based on a finding that MC's 2005 calendar year income from all sources was about $19,600 and that his 2006 income would likely be in the same range. However, I reserved my decision on the issue of whether there should be a retroactive child support award in what I have decided is an originating application because I was alert to the fact that there was a quartet of appeals pending before the Supreme Court of Canada on this subject - as it happens, all out of the Province of Alberta.

Nova Scotia Law

[8] In her documents, DC asked the court to "rely on the law of the jurisdiction hearing the case". There was no change in this request after she retained counsel or before commencement of the hearing. I proceeded on the basis that DC's counsel was aware of the prevailing laws in this Province when she submitted her client's affidavit; and that she was familiar with the appeals before the Supreme Court of Canada. (Mr. O'Hara submitted a Pre-Hearing Memorandum; none was received from DC's counsel.) At the hearing stage, the leading cases in Nova Scotia included **Conrad v. Rafuse** (2002), 205 N.S.R. (2d) 46 (C.A.), **MacPhail v. MacPhail** (2002), 210 N.S.R. (2d) 269 (C.A.), and **MacLean v. Walsh**, 2003 NSCA 127.

The Evidence

Support Application

[9] Submitted at the outset on behalf of DC was a Support Application, consisting of a series of completed forms. Form A requests current and retroactive support (starting October 1, 1991); and contains assertions that the parties started to cohabit in October, 1989 and separated around mid-April, 1990.

[10] Appended to Form A is a copy of a Provisional Order dated October 10, 1991. It was approved by a Justice of the Court of Queen's Bench of Alberta, Judicial District of Edmonton. "For the purpose only of maintenance proceedings herein", the Justice determined MC to be the child's father and ordered him to pay $350 monthly as child support, starting October 1, 1991, "commencing on confirmation". The final words of the order are, "This Order is a Provisional Order, and shall have no force or effect until confirmed by a Court of competent jurisdiction in Nova Scotia". MC was not present at the hearing in which DC was the only witness.

[11] Most of Form D addresses the parentage issue which has been resolved. Form E includes a request that the amount of child support be set using the support guidelines where the respondent (MC) lives. (I did this at the time of my interim order.) DC checked off the following: "I ask for only the child support guidelines table amount for one or more children". She did not claim any amount for a contribution to special and/or extraordinary expenses on Forms E or F. As a result, and as is readily apparent from Mr. O'Hara's memorandum, no **CMG** section 7 or other claims were anticipated.

[12] Form K includes DC's basic financial information. DC attached a handwritten household expense budget demonstrating monthly expenses of about $3,961 for her and her son. Included in that figure is $125 monthly she is paying under a court order for the benefit of two children from

another relationship or marriage. Also noted are “RRSP - $150" savings, monthly but the value of her RRSP deposits is unstated. She disclosed a motor vehicle ($500) and a bank account ($1,400), but no other significant assets. DC’s Line 150 income in 2002 was $15,454; in 2003 it was $36,029 (by Assessment Notice); and in 2004 it was $30,290.

[13] In a June 30, 2005 letter to Edmonton court officials, Ms. Hancheruk advised that her client had not provided information about her employer “as she wishes to keep this information confidential”. But, Form K does include what appear to be copies of two pay stubs. For the period “Ending 05/31/05" gross income from an automobile sales company was already about $17,000 which suggests potentially higher income for 2005 than in 2004.

DC’s Affidavit

[14] In her affidavit (Exhibit 5) which was not received until just before the hearing, DC purported to modify her claim. There was no formal request to amend the application; and no advance notice was given to MC’s counsel of the changes. DC wrote:

> 30. I believe that a fair settlement would be 5 years of retroactive child support at $164.00 per month. I also feel that MC should be responsible for a portion of the child’s Alberta Health Care and health benefits commencing immediately and a share of the child’s post-secondary education costs. I pay $64.00 per month for Alberta Health Care for a family. I also pay $53.00 per month for family medical and dental benefits. I believe 5 years of retroactive support at $164.00 per month is not unreasonable as my son has not had a father for the last 15 years. I have had to support him on my sole income. (My emphasis.)

[15] As mentioned, DC's Support Application asked for a retroactive award "starting October 1, 1991". However, I construed her subsequent affidavit request for "5 years of retroactive support" as evidencing an intended effective date of June 17, 2000 — five years before she signed her application [June 17, 2005]. (The first and fifth sentences of DC's affidavit are tantamount to argument or legal submission, and were received as such.)

[16] Exhibit 5 includes DC's version of her relationship with MC starting in 1989, the pregnancy, the child's birth and subsequent events. I have disregarded a photocopy of a letter attached as Exhibit A to the affidavit. The author, DC's mother, did not file an affidavit or testify. Her writings are inadmissible hearsay and are ripe with inflammatory personal commentary and opinions.

[17] According to DC, MC deserted her in mid-April, 1990, well before their son's birth. Thereafter, she asserts MC was effectively incommunicado. DC referred to the legal proceedings in Alberta and wrote:

> 20. When the child was few months old, I attempted to obtain child support from MC. I was on social assistance at the time and I received help from the government in obtaining assistance. The court ruled that he should pay $350.00 per month. However, before the ruling was finalized, I stopped receiving social assistance. The file was closed and I was left with no one to help me.
>
> 21. I did have an address for MC from one of the court documents. I wrote him a letter asking him to help me support our son. I told him that I wasn't angry that he ran away and that I understood he was scared, but I just

> wanted to talk to him. I enclosed some pictures of the child. The letter was returned to me. However, it had been opened and one of the pictures was missing.
>
> 22. I then wrote Mrs. C [his mother] a letter. I received a letter from Mrs. C stating that I should leave her alone, that MC was not the child's father and, until it was proving (sic) that the child was, in fact, a part of her family, she wanted nothing to do with either of us. After this, I simply gave up, as I did not have the financial means to chase MC for child support. (My emphasis.)

[18] In paragraph 20, DC did not specify any time frame in connection with her benefits or her file. This is not without significance because there was other evidence suggesting episodic termination and resumption of benefits, and that government officials tried to advance her case as best they could. DC also did not state when she wrote to MC; and the returned letter she mentioned is not in evidence. At some stage, she had an address she gleaned from "court documents" but she did not specify which documents, which court, or which address she utilized. (MC denied receiving any such mail.)

[19] In the same vein, references by DC to her lack of financial means and legal resources must be considered against evidence suggesting otherwise. For example, she was assisted by a government lawyer (Jeanette Fedorak) at the Provisional Hearing in Edmonton. The lawyer was later unable to pursue the case because DC reportedly "left the province of Alberta" and did not return until about May, 1994 when the lawyer then advised that the application would be pursued on DC's behalf, with legal assistance. [Exhibit 1, Tab T, page 3.] DC has not disclosed where she and the child were, or their circumstances, while her application was in abeyance.

[20] Allowing that the following excerpts are laden with hearsay evidence, DC continued to write, in general terms:

> 23. Over the years, I would try to attempt to find MC. I tried the internet. I requested phone books from Nova Scotia, which was the last known place that MC was living. I proceeded to make person to person calls to every listing with the last name of MC. My parents continued to ask Mrs. C where MC was but she would not advise us of his address. At one point, Mrs. C asked her co-worker, whom she knew was a friend of my mother's, if she had a picture of the child. The co-worker had one and showed it to her. Mrs. C asked if she could keep it and the co-worker declined.
>
> 24. In April 1995, I was on social assistance for 2 months and my file with Maintenance Enforcement was reopened. However, when a letter to set the DNA testing was sent out, it was sent to the wrong address. I did not receive this letter. I was no longer on assistance by that time. I never received the letter.
>
> 25. Mrs. C remarried and her new daughter-in-law attempted to find MC's whereabouts for us. However, she told us that Mrs. C keeps the information a secret and would not tell anyone where MC was.
>
> 26. In 2005, I was able to save some money to pay for legal counsel. I called the case worker on my file and the only thing she could tell me was that MC had worked in a lumbar (sic) yard years ago. I called a private investigator in Edmonton but he put me in touch with a private investigator in Nova Scotia. However, once he explained his fee to me, then I knew there was no way I could afford his fee. I advised him I could not afford it but I needed to find this person as I was wanting to obtain child support. He did assist me by providing me with an old employer of MC's. I called a number of lumberyards until I called the one where he was presently working. I received his telephone number and his address from his place of business. I called the number even though it wasn't listed in MC's name. A man answered the

> phone and when I asked to speak with MC, the response was “speaking”. I became scared and I hung up the phone.

[21] “Mrs. C” is a reference to the Respondent’s mother, (now) L. P. MC has written (Exhibit 1) that his mother has lived in Grande Cache, Alberta, since 1980 and that she still lives there. DC and MC both lived in that community in 1989.

[22] Leaving aside the involvement of Alberta social assistance officials and government lawyers, DC did not explain (if she was intent on continuing legal action and did not know where MC was living) why she did not at any material time seek an order for substituted service of documents upon MC’s relatives whose whereabouts were known and whom she believed to be in regular contact with MC. As will appear, the explanation which emerges from other evidence is that MC’s whereabouts were always known.

[23] In any event, after many years (in 2005), DC advanced the claim which is now before the Court.

MC’s Case

[24] MC’s evidence is in stark contrast to DC’s.

[25] At the beginning of the current application, MC denied paternity [Exhibit 6]. He admitted to a brief relationship (six to seven months) with DC which ended in or about April, 1990. MC’s evidence was that in September, 1991 he was served in Nova Scotia with notice of the Alberta Provisional Order. But, he contested the application when proceedings began

in the Family Court.

Family Court File 91FLB-188

[26] The Family Court file discloses that MC was summoned to appear before the Family Court on December 17, 1991. I find that the package which accompanied the 1991 reciprocal application included a transcript of the provisional proceedings in Alberta and a “Statement Of Identification Of The Respondent” which included precise reference to MC’s civic address; and that he was believed to be employed as a Department Manager with a specified retail corporation.

[27] Further, a report to the Family Court from the Sheriff’s Office dated November 29, 1991 confirmed service of MC at the address which had been provided by the reciprocating Province. The same letter purported to provide current information regarding MC’s employment circumstances, relatives in the area, the employer’s telephone number, and a full mailing address. (It was even noted that MC was related to a member of a local police service.)

[28] A hearing was scheduled for February 25, 1992. MC attended as directed and testified to his belief that he was not the father of the child. He also gave evidence regarding his employment situation and income. The matter was adjourned without date pending blood grouping tests which were authorized by the court. I find that the reciprocating Province (Alberta) was kept informed of developments and that there was a request that Alberta officials provide particulars regarding DC’s legal representation so that the court-sanctioned tests could be arranged.

[29] I find there were no developments thereafter in Nova Scotia until late March, 1993 when the Family Court received a memorandum from the Alberta Maintenance Enforcement Program which read:

> **We have been advised that the applicant no longer resides in our province, nor are we able to contact her. Please close your file**.

[30] The foregoing is consistent with the correspondence from Jeanette Fedorak, discussed above [para. 19] Accordingly, I find that in March 1993 MC was justified at the time in believing, as he did, that the case was at an end.

[31] After a reported return by DC to Alberta in 1994, Ms. Fedorak (who was succeeded by another government lawyer, Richard W. Reid) invited renewed arrangements to have paternity testing completed. One follow-up letter [August 23, 1994] included reference to MC's civic address, his employer and marital status.

[32] I find MC's whereabouts were no secret to Alberta officials, despite the passage of time. But, to be clear, I took the "client" reference to mean Alberta Family and Social Services for whom the Department of Justice, Family Law Section acted.

[33] The file appears to have languished until March, 1995 when there was a change in MC's legal representation. A court appearance was slated for MC on May 23, 1995. By then, MC was represented by new legal counsel. A close review of the court record also discloses that DC, although not personally present, was represented on that occasion by an experienced Legal Aid solicitor (Johnette Royer).

[34] Adjournments thereafter were consensual. And, by early August, 1995 a British Columbia laboratory confirmed that arrangements were in place for a DNA Paternity Test. In early September, 1995, upon a Family Court judge being satisfied that testing arrangements were in place, the matter was adjourned without day. Ms. Royer's involvement appeared to end. Whereupon history repeated itself.

[35] In mid-November, 1995 Mr. Reid (Alberta Justice, Family Law) informed MC's lawyer that he had learned from Family and Social Services that "they cannot locate the mother of the child and have no address whatsoever for her". Mr. Reid therefore confirmed that the DNA testing could not be completed and he asked that the matter be adjourned, again without date. [Exhibit 1, Tab T, page 18.]

[36] MC's solicitor appeared before the court in January, 1996. On the record, it was confirmed that MC had secured funds with the British Columbia laboratory for DNA testing. The court was also informed that MC had already submitted testing samples locally and that the samples had gone forward to the laboratory. Based on these representations, the court adjourned the case without day, as agreed between counsel.

[37] I note the Alberta solicitor (Mr. Reid) did inform MC's lawyer by telephone in early February, 1996 that <u>if</u> DC was located, a "fresh" application would be started. However, Mr. Reid also advised he would <u>not</u> seek to enforce the Provisional Order. By that point, almost 4 ½ years had passed since the order was provisionally approved. Mr. Reid finally confirmed these understandings by letter in mid-November, 1996. Mr. Reid was careful to state that he was representing his Department's position, "but

it does not in any way encroach on the potential creditor's (Ms. DC's) rights as to any application that she might bring at any time in the future, if she so deemed". MC was apprised of the outcome and cautioned that a fresh application was possible.

[38] The Family Court file discloses no further activity until the current **ISO** application by DC in June, 2005 – over 9 ½ years after Mr Reid alerted MC's lawyer, for the final time, that Alberta officials could not locate DC and had no address for her.

[39] I find the Family Court record is consistent with MC's evidence that he lived locally in September, 1991; that he received notice of the reciprocal proceedings and Provisional Order without difficulty; that he contested the matter, that there were delays in bringing the matter to hearing; that he agreed to and underwent DNA sampling; that DC (for reasons best known to her) did not attend her appointments for DNA testing; that DC's whereabouts were episodically unknown to those assisting with her file; that the proceedings in Nova Scotia were adjourned several times without date; and that he had no notice of any potential claim after mid-November, 1995 until late July, 2005.

[40] Exhibit 4 is a supplemental affidavit filed by MC in response to DC's affidavit, sworn February 24, 2006. He reiterated his own recollections of the factual background and circumstances as set forth in Exhibit 6. From his mother, MC was aware that DC contacted her after his departure. The contacts were characterized as threatening, hateful and derogatory. According to MC, his sister, D.F., had similar distasteful encounters with DC. (D.F. currently lives at Grande Cache.) MC admitted to ongoing contact with family members in Alberta over the years, and that they knew of his

whereabouts at all times. He stopped short of saying whether he did or did not instruct family members regarding disclosure of his residence, if asked by DC or others on her behalf. As it happens, MC did not secure any affidavit evidence from his mother or sister to corroborate his version of what his family members did or did not know, or do, at all material times; but, the same may be said for DC.

[41] As noted elsewhere, MC denied receiving any correspondence from DC, or DC's mother. He insisted that at all material times the Family Court had his address and particulars of his legal representatives; and that Alberta officials also had his address, and full particulars of the Family Court action and his legal representation. According to him, all of this information would have been readily available to DC since 1991. I accept his testimony in his regard. Indeed, to state the obvious, as a party to the proceedings, DC would be entitled to access to the Family Court file and court records, personally and through legal counsel. With that in mind, I have carefully reviewed the file and can find no written record of any direct contact by DC, or any representative on her behalf, with court officials for disclosure of file contents or MC's whereabouts.

[42] MC drew attention to inconsistencies and differences between DC's testimony before the Alberta Court on September 25, 1991 and some of her affidavit evidence and in her Support Application. He denied that he and DC resided together for any significant period of time; and refuted other particulars asserted by her about the relationship's demise.

[43] I reviewed the transcript of the proceedings before the Court of Queen's Bench of Alberta on September 25, 1991 which is appended to Exhibit 4 (and which was also filed with the Family Court many years ago). I

observe from the transcript that DC testified that she started going out with MC in September, 1989, that they “moved in together” in October, and “then at the end of January, beginning of February” she moved out and “got her own place”. She added that “we broke up for February”. Asked directly if she was living with MC at the time that she got pregnant, she testified that she was “living on my own”. She alleged that the child was conceived on or about March 19, 1990 after the parties broke up, were living separately, but still seeing each other and having sexual activity. Asked directly for a second time how long the parties lived together, DC answered, “about the beginning of October to the 29th day of January”. It will be recalled that in Form A DC declared the parties started living together in “Oct 1989" and separated “April 17, 1990 (apx)”. Where her evidence conflicts with MC’s in this regard, I accept his in preference to hers.

[44] In testimony before the Justice, DC adopted the Statement of Description, previously referred to by me, which includes reference to MC’s address, employment, and the like. Asked directly if she knew where MC lived, she specified two local communities. This suggests DC’s knowledge of MC’s whereabouts in 1991 was much better than she more recently admits. And, in any event, MC was personally served without difficulty.

[45] Mr. O’Hara also referred me to the copy of the live birth certificate for the child appended to the Alberta transcript. I observe that although MC’s name can be seen, handwritten, on the document, a line is drawn through his name and other particulars — just above DC’s signature. The inference is that DC was responsible for crossing out his name; and that she (not just MC) believed he was not the father; or, at least, there was uncertainty. Without determining who is responsible for the alteration, I agree this is one

of many factors to be weighed when assessing the competing positions of the parties, many years later.

[46] Referring to Form B, which accompanied the July, 2005 application, Mr. O'Hara also referred me to section 3 wherein MC's social insurance number (S.I.N.) is disclosed along with his birth date and other personal information. Mr. O'Hara later submitted that if DC or her representatives had managed to secure MC's confidential S.I.N., DC's claims that she tried, but was unable, to locate him are even more suspect.

[47] Exhibit 1 is the affidavit first submitted by MC in response to DC's claim. Beginning at paragraph 15, MC provides his version of the background circumstances going back to September, 1989. I find it unnecessary to summarize his version in great detail. Although he admitted to having a sexual relationship with DC, he denied that the parties resided together in a common-law relationship or otherwise. In explanation for his original opposition to DC's claims, he addressed the issues of birth control and DC's alleged sexual involvement with other individuals at the time. MC admittedly had a limited education, he was unemployed and abusing alcohol. He said he resisted DC's entreaties to cohabit.

[48] MC alleged that DC had a difficult upbringing and that in March, 1990 she attempted suicide and was hospitalized. He explained in considerable detail his departure from the Grande Cache area of Alberta and his relocation to his brother's home in the Winnipeg, Manitoba area where he stayed briefly before moving to Nova Scotia in or about June, 1990.

[49] As set forth in DC's Support Application, MC agreed that he obtained a job in the local area when he moved to Nova Scotia. He worked there for

about four months. Thereafter, he was unemployed and then sought entry to a community college. By the summer of 1991, he had been accepted at Vocational School and had a student loan approved. He was able to maintain employment at a local lumber store. Faced with notice of the Alberta legal proceedings, MC decided that he would abandon his plans to return to school. Instead he continued with his employment.

[50] MC stated that he has lived in Lunenburg County, Nova Scotia for about 15 years, the last nine of which have been at the same address. I accept this evidence.

[51] In light of his difficult relationship with DC, and his belief as to her lifestyle, MC took the position that there had to be a determination as to whether he was or was not the biological father of the child. Commencing at paragraph 56 of his affidavit, MC recounts how he responded to the provisional court proceedings. His factual recitations are entirely consistent with the court file and records. On the evidence before me, I find that MC was generally cooperative with the Nova Scotia Family Court process and that he retained legal counsel as need be to assist him. I find that he attended on a timely basis for all paternity testing appointments that had been scheduled and that he paid the required costs.

[52] MC wrote that he was advised by his mother and his sister, and that he believes, DC married at some point and that she had two children from that relationship. He also believes that the marriage ended and that custody of those children is likely with the father because DC, based on her own financial documents, is paying child support.

MC's Present Circumstances

[53] As far as MC's present situation is concerned, he is seasonally employed by a local company in the construction industry as a carpenter's helper. In the off-season, he receives employment insurance benefits. MC is approximately 37 years old; he has a grade 11 education and no special training or education.

[54] Based on MC's financial disclosure, I previously determined that his approximate 2005 income was $19,600, consisting of $15,800 of employment earnings and the balance by way of employment insurance benefits. MC has fully disclosed his income; a summary follows: **1991** - $11,611.02; **1992** - $15,820.66; **1993** - $16,717.55; **1994** - $18,349.47; **1995** - $19,285.54; **1996** - $19,645.86; **1997** - $19,753.87; **1998** - $22,859.90; **1999** - $26,948.20; **2000** - $18,146.00; **2001** - $18,250.43; **2002** - $19,447.07; **2003** - $21,002.80; **2004** - $20,147.20; **2005** - $19,600.00.

[55] DC did not submit comparable income tax information for all of the years relevant to her retroactive claim. Nor did she submit any evidence as to the child's unmet financial needs (if any) for those years.

[56] As discussed elsewhere, DNA testing was conducted incidental to the current application, by consent. MC accepts the result of the testing and has been paying child support at the rate of $164 monthly since January, 2006. However, MC opposes any further award of retroactive child support. His position is that his obligation should only commence from the date that paternity was finally established. He submits that DC delayed paternity determination and the underlying proceedings without adequate explanation and that she has not pursued the matter on a timely and reasonable basis.

Discussion / Decision

[57] Assuming a modified "five year" claim, I determine the approximate Nova Scotia Table amounts for child support based on MC's annual income, and therefore the potential claim, to be: **2000:** $142 x 12 = $1,704; **2001**: $143 x 12 = $1,716; **2002**: $153 x 12 = $1,836; **2003**: $167 x 12 = $2,004; **2004**: $160 x 12 = $1,920; **2005**: $155 x 12 = $1,860. The grand total is $11,040.

[58] On July 31, 2006 the Supreme Court of Canada released a decision (**D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, 2006 SCC 37**) which sets the stage for the future treatment of so-called retroactive child maintenance claims. Unless the context otherwise requires, I will refer to it as the SCC Decision.

[59] As noted in the Introduction to the SCC Decision, the four Alberta appeals collectively address the issues of enforceability and quantification of child support in situations where it was neither paid nor claimed when it was supposedly due. Two of the appeals were under the **Divorce Act**; and two were under former Alberta legislation. Two of the appeals involved claims for retroactive awards where no support payments had ever been paid by the other parent.

[60] Bastarache J., writing for the majority, stated that the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it and that any incentives for payor parents to be deficient in meeting their obligations should be eliminated. At paragraph 5 of the SCC Decision, the following appears:

> ....A modern approach compels consideration of all relevant factors in order to determine whether a retroactive award is appropriate in the circumstances. Thus, while the propriety of a retroactive award should not be presumed, it will not only be found in rare cases either. Unreasonable delay by the recipient parent in seeking an increase in support will militate against a retroactive award, while blameworthy conduct by the payor parent will have the opposite effect....

[61] At paragraph 38 of the SCC Decision, there is the following:

> The contemporary approach to child support was delineated by Kelly J.A. in *Paras v. Paras*, [1971] 1 O.R. 130. In that case, the Ontario Court of Appeal established a set of core principles that has been endorsed by this Court in the past and continues to apply to the child support regime today: see *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Willick v. Willick*, [1994] 3 S.C.R. 670. These core principles animate the support obligations that parents have towards their children. They include: child support is the right of the child; the right to support survives the breakdown of a child's parents' marriage; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and finally, the specific amounts of child support owed will vary based upon the income of the payor parent.

[62] The SCC Decision notes that with the introduction of the **Federal Child Support Guidelines,** which came into force on May 1, 1997, that Parliament announced important changes to the law which provided a simplified way for parents and for courts to quantify child support obligations. The SCC Decision canvasses federal and provincial powers in regard to the regulation of child support matters, but I need not review this aspect of the decision for our purposes.

[63] Under the heading Application-based Regimes, it was written that a parent's child support obligation will only be *enforceable* once an application to a court has been made. And it was noted that this policy choice means that the responsibility of ensuring that the proper amount of support is being paid, in practice, does not lie uniquely with the payor parent.

[64] At paragraph 59 of the SCC Decision, it was stressed that the fact that the current child care regime is application-based does not preclude courts from considering retroactive award; and that no child support analysis should ever lose sight of the fact that support is the right of the child.

[65] The SCC Decision discusses situations where retroactive awards may be ordered. They include circumstances in which there has already been a court order for child support to be paid, situations where there has been a previous agreement between the parents, and situations where there has not already been a court order for child support to be paid. It is the latter scenario that is relevant for the purposes of the current decision.

[66] Bastarache J. discussed the relevant sections of the **Divorce Act** and the Alberta legislation (as it then was).

[67] I am mindful that in Nova Scotia, under section 8 of the **Maintenance and Custody Act** (**MCA**), everyone who is a parent of a child that is under the age of majority is under a "legal duty to provide reasonable needs for the child except where there is a lawful excuse for not providing the same". Under section 9 of the **MCA**, upon application, a court may make an order, including an interim order, requiring a parent to pay maintenance for a dependent child. Under section 10 (1), when determining the amount of maintenance to be paid for a dependent child, the court must do so in

accordance with the **Child Maintenance Guidelines** (**CMG**). The stated objectives of the **CMG** mirror the Federal objectives and also reflect those broadly stated in the SCC Decision.

[68] Under section 37 of the **MCA**, the court has precise authority to make an order varying, rescinding or suspending, prospectively or retroactively, an existing child maintenance order where there has been a change in circumstances since the making of the last order or the last variation order. But, importantly, Bastarache J. wrote the following at paragraph 82 of the SCC Decision:

> In my view, the legislatures left it open for courts to enforce obligations that predate the order itself. This interpretation is consistent with the *Guidelines*, which are meant 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" (s. 1(*a*)). So long as the court is only enforcing an obligation that existed at the relevant time, and is therefore not making a retroactive order in the true sense, I see no reason why courts should be denied the option of making this sort of award.

[69] And the following appears at paragraph 84:

> As is the case for awards varying existing court orders and awards altering previous child support agreements between the parents, courts will have the power to order original retroactive child support awards in appropriate circumstances.

[70] The Supreme Court addressed the specific issues which affect retroactive child support awards starting at paragraph 85. In the present case the status of the child is not in issue.

[71] Under the heading Factors to Determine Whether Retroactive Child Support Should Be Ordered, Bastarache J. wrote:

> 94 The foregoing analysis only confirms that courts ordering child support will generally have the power to order it retroactively. But having determined that a court may order a retroactive child support award, it becomes necessary to discuss when it should exercise that discretion.
>
> 95 It will not always be appropriate for a retroactive award to be ordered. 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. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.
>
> 96 Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable *status quo*; retroactive awards serve to supplant it.
>
> ....
>
> 99 I will now proceed to discuss the factors that a court should consider before awarding retroactive child support. None of these factors is decisive. For instance, it is entirely conceivable that retroactive support could be ordered where a payor parent engages in no blameworthy conduct. Thus, the British Columbia Court of Appeal has ordered retroactive support where an interim support award was based on incorrect financial information, even though the initial underestimate was honestly made: see *Tedham v. Tedham* (2003), 20 B.C.L.R. (4th) 56, 2003 BCCA 600. At all times, a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix.

100 The defining feature linking the present appeals is that an application for child support – either as an original order or a variation – could have been made earlier, but was not. The circumstances that surround the recipient's choice (if it was indeed a voluntary and informed one) not to apply for support earlier will be crucial in determining whether a retroactive award is justified.

101 Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: see *Chrintz v. Chrintz* (1998), 41 R.F.L. (4th) 219 (Ont. Ct. (Gen. Div.)), at p. 245. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.

102 Not awarding retroactive child support where there has been unreasonable delay by the recipient parent responds to two important concerns. The first is the payor parent's interest in certainty. Generally, where the delay is attributable to unreasonableness on the part of the recipient parent, and not blameworthy conduct on the part of the payor parent, this interest in certainty will be compelling. Notably, the difference between a reasonable and unreasonable delay often is determined by the conduct of the *payor* parent. A payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate him/her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable: compare *C. (S.E.) v. G. (D.C.).* In this context, a recipient parent who accepts child support payments without raising any problem invites the payor parent to feel that his/her obligations have been met.

103 The second important concern is that recipient parents not be encouraged to delay in seeking the appropriate amount of support for their children. From a child's perspective, a retroactive award is a poor substitute

for past obligations not met. Recipient parents must act promptly and responsibly in monitoring the amount of child support paid: see *Passero v. Passero*, [1991] O.J. No. 406 (QL) (Gen. Div.). 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.

104 In deciding that unreasonable delay militates against a retroactive child support award, I am keeping in mind this Court's jurisprudence that child support is the right of the child and cannot be waived by the recipient parent: *Richardson*, at p. 869. In fact, I am not suggesting that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation. Rather, unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award. This factor gives judges the opportunity to examine the balance between the payor parent's interest in certainty and fairness to his/her children, and to determine the most appropriate course of action on the facts.

105 This factor approaches the same concerns as the last one from the opposite perspective. Just as the payor parent's interest in certainty is most compelling where the recipient parent delayed unreasonably in seeking an award, the payor parent's interest in certainty is least compelling where (s)he engaged in blameworthy conduct. Put differently, this factor combined with the last establish that each parent's behaviour should be considered in determining the appropriate balance between certainty and flexibility in a given case.

106 Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" – rather than their "right to an appropriate amount of support" – were said to require precedence;

however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.)); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; S. (L.). A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.

107 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see *A. (J.) v. A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; *Chrintz*.

108 On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following. Because the order (and, usually, the agreement) is presumed valid, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption may be rebutted where a change in circumstances is shown to be sufficiently

pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay.

109 Finally, I should also mention that the conduct of the payor parent could militate against a retroactive award. A court should thus consider whether conduct by the payor parent has had the effect of fulfilling his/her support obligation. For instance, a payor parent who contributes for expenses beyond his/her statutory obligations may have met his/her increased support obligation indirectly. I am not suggesting that the payor parent has the right to choose how the money that should be going to child support is to be spent; it is not for the payor parent to decide that his/her support obligation can be acquitted by buying his/her child a new bicycle: see *Haisman v. Haisman* (1994), 22 Alta. L.R. (3d) 56 (C.A.), at paras. 79-80. But having regard to all the circumstances, where it appears to a court that the payor parent has contributed to his/her child's support in a way that satisfied his/her obligation, no retroactive support award should be ordered.

5.3.3 Circumstances of the Child

110 A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time. Parents must endeavour to ensure that their children receive the support they deserve when they need it most. But because this will not always be the case with a retroactive award, courts should consider the present circumstances of the child – as well as the past circumstances of the child – in deciding whether such an award is justified.

111 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. As I mentioned earlier, it is a core principle of child support that, after separation, a child's standard of living should approximate as much as possible the standard (s)he enjoyed while his/her parents were together. Yet, this kind of entitlement is impossible to bestow retroactively. Accordingly, it becomes necessary to consider other factors in order to assess the propriety of a retroactive award. 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.

112 Consideration of the child's present circumstances remains consistent with the statutory scheme. While Parliament has moved away from a

need-based perspective in child support, it has still generally retained need as a relevant consideration in circumstances where a court's discretion is being exercised: see ss. 3(2)(b), 4(b)(ii) and 9© of the *Guidelines*. Some provinces, like Quebec, even provide courts with discretion to alter default child support arrangements, within defined limits, on the basis of need: see art. 587.1 of the *Civil Code of Québec*, S.Q. 1991, c. 64. Unless the applicable regime eliminates need as a consideration in discretionary child support awards altogether, I believe it remains useful to retain this factor when courts consider retroactive awards.

113 Because the awards contemplated are retroactive, it is also 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. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her: see *S. (L.)*. This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. 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. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit.

5.3.4 Hardship Occasioned by a Retroactive Award

114 While the *Guidelines* already detail the role of undue hardship in determining the quantum of a child support award, a broad consideration of hardship is also appropriate in determining whether a retroactive award is justified.

115 There are various reasons why retroactive awards could lead to hardship in circumstances where a prospective award would not. For instance, the quantum of retroactive awards is usually based on past income rather than present income; in other words, unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor

> parent can currently afford. As well, payor parents may have new families, along with new family obligations to meet. On this point, courts should recognize that hardship considerations in this context are not limited to the payor parent: it is difficult to justify a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children. In short, retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.
>
> 116 I agree with Paperny J.A., who stated in *D.B.S.* that courts should attempt to craft the retroactive award in a way that minimizes hardship (paras. 104 and 106). Statutory regimes may provide judges with the option of ordering the retroactive award as a lump sum, a series of periodic payments, or a combination of the two: see, e.g., s. 11 of the *Guidelines*. But I also recognize that it will not always be possible to avoid hardship. While hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct, it remains a strong one where this is not the case.

[72] The foregoing is crucial in the present context. Arguably, the proposition that "some money would be better than no money" has some appeal; but it hardly reflects the principled and holistic approach called for by the Supreme Court of Canada. In the present cases, I am obliged to consider all of the evidence and to exercise my discretion judicially.

[73] No single factor is determinative, but I highlight the following. For the relevant years, I find no evidence that DC harboured any justifiable fears that MC would vindictively react or respond to the past or current applications. I find that none of the proceedings have been cloaked or tainted with fear of harm or reprisal - in any way, shape or form. The parties have lived hundreds of miles apart for many years. There was no contact

between them in the intervening years; and there has been no contact between father and son.

[74] At law, MC was entitled to challenge parentage. When he did, it was through court processes. He presented himself to the court when summoned. He consistently followed court orders and directions regarding testing. MC's compliance was impeccable. (The same cannot be said for DC.) Once MC was determined to be the child's father, current (interim) child support was unopposed.

[75] I find no credible evidence that DC lacked the emotional means to bring or continue her applications. I find she had the assistance of legal counsel through the Alberta Department of Justice, Family Law Office although not retained by her, strictly speaking. (A large portion of her claims appear to have been subrogated to the Crown.) Recently, she has had the benefit of private counsel, retained by her. I find that finances were not a bar to the original application before a superior court judge in Alberta when her case was presented by a government lawyer. There was no necessity, and no expectation, of her attendance at court in Nova Scotia incidental to reciprocal proceedings. On at least one occasion, she was represented in court in Nova Scotia by Legal Aid counsel. There were no costs attributable to DNA testing for MC because her share was being underwritten by Family & Social Services in Alberta [Exhibit , Tab T, page 18].

[76] I attach little weight to DC's blanket evidence that "over the years" she unsuccessfully resorted to the Internet, telephone books and the like in her efforts to locate MC. As already discussed, his whereabouts have been known to court officials, lawyers, and agencies in both Provinces since 1990. There is absolutely no evidence that MC was evading contact or due legal

process, or otherwise “flying under the radar”. Through his own lawyers he sought to expedite, not delay, matters. He incurred considerable legal and laboratory expenses in the process, which he paid from his own resources. In brief, I find no blameworthy conduct on MC’s part as defined in the SCC Decision [paragraph 106]. And, with respect, there was really no need for DC to hire private investigators when a telephone call to Alberta Justice Department officials or to the Family Court would have elicited the information.

[77] I find there is no helpful evidence about the child’s living circumstances or financial needs for the relevant years (2000 to 2005, inclusive); and really no foundation to measure the benefits, lost or to be gained, for the child. There is no evidence that the child has undergone hardship.

[78] DC broadly stated she “had to support him [the child] on my sole income”. This may not be entirely true because there is evidence suggesting that DC was in at least one other relationship, and likely married at some stage. That one or more other individuals in the past may have assumed financial responsibility, in whole or in part, for the child is relevant; but DC elected not to fully disclose the information.

[79] There are huge unexplained gaps in DC’s story. With respect, she and her counsel had many months after June, 2005 to fill those gaps and to otherwise assist the court in its deliberations. Notable are DC’s unexplained episodic disappearances with her child from, and returns to, Alberta (and perhaps within Alberta) as reported by Alberta authorities; her documented failures to keep Alberta lawyers and other officials apprised of her whereabouts and intentions; and her failure to responsibly and

conscientiously advance proceedings on behalf of her son. Her brief statement [Exhibit 5, paragraph 24] to the effect that she was on social assistance for only two months in early 1995, that her Maintenance Enforcement file was reopened, and that a DNA-related letter went to the wrong address and was not received by her gives no insight into her circumstances during the many other intervening months and years or why she did not pursue, or even follow-up support or other matters, on her own initiative. (Indeed, to this day, no proceedings appear to have been commenced to deal with the issues of custody and access.)

[80] On the question of whether a retroactive award at this time would result in hardship to the payor, MC is a man of very modest means. His Expense Budget [Exhibit 2,] shows monthly expenses of about $2,100, before child support. I find the budget to be in the basic or “bare bones” category. He lives alone; and admittedly has no other support obligations. There are very few discretionary expenses. He has no employer pension or health/medical benefits or coverages. He demonstrated no savings or investments; he owns no realty. Assets are valued at less than $2,200 against debts totalling in excess of $37,431, most of which is being carried on credit cards. His 2004 line 150 income was $20,147; in 2000 it was $18,146; in 1991 it was only $11,611. (DC’s income was $15, 454 in 2002; $36,029 in 2003; and $30,290 in 2004.)

[81] In my opinion, with the advent of current support payments by MC, his ability to respond to an unanticipated retroactive award is negligible, even if “creative” payment strategies are entertained.

[82] I have found that MC is not to blame for the current state of affairs; and that he reasonably believed any outstanding claim had been abandoned

long ago in circumstances where even parentage (and therefore financial responsibility) had not been established by agreement or by court decision.

[83] I am obliged to decide the case on the evidence presented by the parties. The applicant had every opportunity to prepare for and to submit evidence in support of her claims, but her evidence fell short on several fronts. That said, I have not lost sight of the child in this analysis, given the jurisprudence that child support is the child's right, or that unreasonable delay by the mother is only one factor to be weighed. I have strived to balance the competing interests; and to strike a fair and just outcome. I have concluded that this case involves not only unreasonable delay by the applicant, which militates against a retroactive award, but a host of other exceptional factors which also warrant an exceptional result. Weighing all of the evidence and the relevant factors at law, I exercise my discretion and make no retroactive award (that is, predating August 1, 2005).

[84] DC's current application was started in June, 2005 and was received by the Family Court on July 27, 2005. Formal notice and documents went out to MC on August 2, 2005. Upon receipt, he then had both actual and what was described in the SCC Decision as "effective notice". (There was no forewarning.) I determine the effective notice date as August 1, 2005, for ease of reference and calculation.

[85] Generally, in my opinion, the commencement date for current support, if awarded, should be linked to the effective notice date - for the same reasons the Supreme Court has directed that retroactive support be so linked. If a hearing is delayed in any given case for genetic testing, for financial disclosure, for case preparation, for convenience or docket delays, or for a myriad of other reasons, payors should expect that any award can,

and usually will, be effective around the time they were alerted to the pending claim. In that context, any such award is certainly not "retroactive"; it is for current support. The recipient parent and child should not be prejudiced by normal systemic delay, including any that occasioned by testing sought by a potential payor.

[86] In my opinion, current support in the present case should speak as of August 1, 2005; and I will so order. Interim support started January 1, 2006. The intervening time lapse was systemic. In the circumstances, MC's payments shall remain at $155 monthly, but with an effective date of August 1, 2005. Despite his modest means, I find he can satisfy an award of additional five months of support. MEP shall adjust its records accordingly. And, MEP has the authority to reach an agreement for payment. [**Maintenance Enforcement Act**, section 17.]

[87] Although I have dismissed the claim for retroactive support, in deciding upon the effective date for <u>current</u> support, I found the following passages from the SCC Decision helpful:

> 118 Having established that a retroactive award is due, a court will have four choices for the date to which the award should be retroactive: the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of child support should have increased. For the reasons that follow, I would adopt the date of effective notice as a general rule.
>
> ....
>
> 121 Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice

does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the *status quo* is fair, and his/her interest in certainty becomes less compelling.

122 Accordingly, by awarding child support from the date of effective notice, a fair balance between certainty and flexibility is maintained. Awaiting legal action from the recipient parent errs too far on the side of the payor parent's interest in certainty, while awarding retroactive support from the date it could have been claimed originally erodes this interest too much. Knowing support is related to income, the payor parent will generally be reasonable in thinking that his/her child's entitlements are being met where (s)he has honestly disclosed his/her circumstances and the recipient parent has not raised the issue of child support.

123 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. Thus, even if effective notice has already been given, it will usually be inappropriate to delve too far into the past. The federal regime appears to have contemplated this issue by limiting a recipient parent's request for historical income information to a three-year period: see s. 25(1)(a) of the *Guidelines*. In general, I believe the same rough guideline can be followed for retroactive awards: it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.

124 The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he

withholds information. Not disclosing a material change in circumstances – including an increase in income that one would expect to alter the amount of child support payable – is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

125 The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, 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.

126 Finally, a court will need to determine the quantum of the retroactive award. This determination will need to be ascertained consistent with the statutory scheme that applies to the award being ordered.

127 While the *Divorce Act* provides courts with discretion in deciding whether or not a child support award should be ordered, the same cannot be said for the quantum of this award. Both s. 15.1(3) for original orders, and s. 17(6.1) for variation orders, stipulate that a court making an order "shall do so in accordance with the applicable guidelines". Therefore, so long as the date of retroactivity is not prior to May 1, 1997 – i.e., when the *Guidelines* came into force – the *Guidelines* must be followed in determining the quantum of support owed. *The Parentage and Maintenance Act*, on the other hand, does not fetter courts' discretion in determining the quantum of child support awards: see s. 18. Courts awarding retroactive support pursuant to this statute will have greater discretion in tailoring the award to the circumstances.

> 128 That said, courts ordering a retroactive award pursuant to the *Divorce Act* must still ensure that the quantum of the award fits the circumstances. Blind adherence to the amounts set out in the applicable Tables is not required—nor is it recommended. There are two ways that the federal regime allows courts to affect the quantum of retroactive awards.
>
> 129 The first involves exercising the discretion that the *Guidelines* allow. Thus, the presence of undue hardship can yield a lesser award: see s. 10. As stated above, it will generally be easier to show that a retroactive award causes undue hardship than to show that a prospective one does. Further, the categories of undue hardship listed in the Guidelines are not closed: see s. 10(2). And in addition to situations of undue hardship, courts may exercise their discretion with respect to quantum in a variety of other circumstances under the Guidelines: see ss. 3(2), 4 and 9.
>
> 130 A second way courts can affect the quantum of retroactive awards is by altering the time period that the retroactive award captures. While I stated above that the date of effective notice should be chosen as a general rule, this will not always yield a fair result. For instance, where a court finds that there has been an unreasonable delay after effective notice was given, it may be appropriate to exclude this period of unreasonable delay from the calculation of the award. Unless the statutory scheme clearly directs another outcome, a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case.

CMG Section 7 Issues

[88] With the benefit of legal counsel, DC should have given notice of what appear to be claims under **CMG** section 7. To sustain an award, there must be sufficient proof of the expenditures. DC's latest references in her affidavit to the child's share of (total) "Alberta Health Care and health benefits" ($64/month) plus (total) medical and dental benefits ($53/month), contrast with $64 monthly for "Group Plans" plus $32 monthly for "medical care" (but

no other health costs) found in Form K. There was no explanation of the coverages and benefits; and there was no attempt at allocation as between mother and son [which is a prerequisite to applying **CMG** section 7 (1) (b)]. Neither DC nor her counsel provided any tax, subsidy or benefits information etc. under **CMG** section 7 (3) to assist calculations. Assuming I could make a section 7 award in the absence of formal notice, in order to exercise my discretion there still must be sufficient evidence to allow for consideration of the factors set out in the opening words of section 7 (1). With respect, DC's evidence does not meet the threshold and, in the result, I was unable to reconcile the various discrepancies I described or to quantify the demands with any certainty. I make no award at this time.

[89] As far as the request for assistance with post-secondary education costs are concerned [**CMG** section 7 (1) (e)], these are speculative and unquantified. No award can be justified at this time.

[90] Of course, it will be open to DC to advance properly documented section 7 claims on behalf of the child in the future, but all the requirements of the section should be considered beforehand.

Payor's Medical and Dental Insurance

[91] MC has no employer benefits to sustain an award under **CMG** section 6.

Financial Disclosure

[92] MC shall provide DC with true copies of his personal income tax returns, whether filed or not, annually by June 1st, and his Notices of

Assessment/Reassessment from the Canada Revenue Agency when received by him, commencing in 2007.

[93] An order incorporating the results of this decision will follow.

Dyer, J.F.C.