

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *Hilchey v. Boutilier*, 2024 NSSC 198

**Date:** 2024-06-25

**Docket:** *SFH* No. 1201-070074

**Registry:** Halifax

**Between:**

Amanda Hilchey

Petitioner

v.

Paul Boutilier

Respondent

**Judge:** The Honourable Justice Theresa M Forgeron

**Heard:** June 24 and 25, 2024, in Halifax, Nova Scotia

**Oral Decision:** June 25, 2024

**Written Release:** July 18, 2024

**Counsel:** Amanda Hilchey, self-represented  
Paul Boutilier, self-represented

**By the Court:**

**Introduction**

[1] Amanda Hilchey and Paul Boutilier are former spouses and the parents of four children – Mya who is 16; Joshua who is 14; Alexa who is 11; and Mason who is 9. Each party seeks to change the maintenance provisions of their last court order.

[2] For her part, Ms. Hilchey initially asked to enforce the order because Mr. Boutilier refused to provide copies of his income tax returns as ordered. Ms. Hilchey required his tax returns so she could assess whether an increase in child support was warranted. Now that she received his tax information, Ms. Hilchey wants to retroactively adjust child support in keeping with Mr. Boutilier's income. Further, she wants to ensure the payment of the children's s. 7 medical, dental, and activity expenses.

[3] In addition, Ms. Hilchey seeks enforcement of the health coverage provisions of the last order. Mr. Boutilier removed her from his health plan. Ms. Hilchey seeks reimbursement for health expenses that she incurred because she no longer has coverage. She also wants to be added back on his plan.

[4] In response, Mr. Boutilier wants to reduce the amount of child support that he pays for two reasons. First, he says that he should pay less than the table amount because of undue hardship. Second, he wants s. 7 expenses reduced because Ms. Hilchey no longer incurs childcare expenses as stipulated in the last court order.

[5] Further, Mr. Boutilier objects to the payment of a retroactive order. He says that he simply cannot afford to pay any more maintenance. He notes that his take home pay is already precariously low and that a further reduction will lead to his financial ruin.

**Issues**

[6] In this decision, I will answer the following questions:

- Has a material change been proven?
- Did Mr. Boutilier prove undue hardship?
- What prospective child support should be paid?

- What, if any, retroactive child support should be paid?
- What award flows from Mr. Boutilier's unilateral decision to remove Ms. Hilchey from his health plan?

[7] Before addressing these issues, I will review some background facts to provide context.

### **Background Information**

[8] In April 2018, the parties were divorced. An amended Corollary Relief Order issued on June 7, 2018. The CRO outlined the parties' legal obligations for parenting, support, property division, and ongoing disclosure.

[9] The CRO provided Ms. Hilchey with primary care and decision making. Although the CRO also provided Mr. Boutilier with parenting time, he unfortunately has no relationship with the children. Mr. Boutilier does not spend time with the children. Because all parenting responsibilities are managed exclusively by Ms. Hilchey, she adjusted her career plans to ensure that the children's needs are met. Parenting responsibilities have negatively impacted Ms. Hilchey's employment options and earned income.

[10] Since the CRO issued, the parties have experienced four material changes in their financial circumstances – income; household size; s. 7 expenses; and health coverage.

#### *A. Income*

[11] When the 2018 CRO issued, the parties' incomes were stipulated for support purposes. Ms. Hilchey was found to have an annual income of \$13,000 while Mr. Boutilier's income was found to be \$50,700. Each of the parties' incomes have increased since the order issued.

[12] Since the CRO issued, Ms. Hilchey's income increased from \$13,000 as follows:

2018	\$17,021
2019	\$22,429
2020	\$38,203
2021	\$28,140

2022	\$27,165
2023	\$27,875

Ms. Hilchey's average income for the past six years is \$26,806.

[13] Since the CRO issued, Mr. Boutilier's income increased from \$50,700 as follows:

2018	\$66,843 less union due of about \$800 = \$66,043
2019	\$67,195 less union due of about \$800 = \$66,395
2020	\$74,255 less union due of about \$800 = \$73,455
2021	\$67,566 less union due of about \$800 = \$66,766
2022	\$76,958 less union due of about \$800 = \$76,158
2023	\$69,955 less union due of about \$800 = \$69,155

Mr. Boutilier's average income for the past six years is \$70,462 and after deducting union dues, it is \$69,662.

#### *B. Household Size*

[14] Since the CRO issued, Mr. Boutilier formed a new relationship. He now lives with Ms. Henneberry and her 11-year-old son. Mr. Boutilier says that Ms. Henneberry owns a cleaning company which employs her and on occasion, Mr. Boutilier, although Mr. Boutilier says that he does not get paid for his work. Ms. Henneberry's personal income was said to be \$45,192 in 2021; and \$22,211.65 in 2022. No corporate information was provided. No breakdown of gross business income, business expenses, or net business income was provided. No 2023 income information was provided. Mr. Boutilier said that Ms. Henneberry does not receive child support from her child's father.

#### *C. Section 7 Expenses*

[15] The last court order held that Mr. Boutilier is to pay \$420 for special expenses, and to continue to maintain the children on his health plan. Further, the order said that any of the children's health expenses, that exceeded insurance reimbursement, were to be shared proportionately.

[16] Since the order issued, three significant changes have occurred. First in June 2019, childcare expenses were reduced from the stated \$6,300 per year to about \$40 per week during the school year, plus the costs of summer camps. Second, the children are now involved in reasonable and necessary extracurricular activities

which are costly given Ms. Hilchey's income and circumstances. Third, the children have incurred uninsured dental expenses.

[17] Medical, dental, and activity expenses for each of the children were identified as follows:

- Expenses for Mya's braces, dental work, contacts, prescriptions, and activities totalled \$13,485 from 2019 to 2023 for a yearly average of \$3,371.24. In 2024, Mya's s. 7 expenses, including driver's education, are expected to be \$2,837, plus uninsured health expenses and copay charges.
- Expenses for Joshua's dental work and activities totalled \$5,124 from 2020 to 2023 for a yearly average of \$1,708. In 2024, Joshua's s. 7 expenses are expected to be \$1,786, plus uninsured health expenses and copay charges.
- Expenses for Alexa's braces, dental work, and activities totalled \$8,081.15 from 2018 to 2023 for a yearly average of \$1,616. In 2024, Alexa's s. 7 expenses are expected to be \$1,610, plus uninsured health expenses and copay charges.

#### *D. Health Coverage*

[18] In addition, Mr. Boutilier effected unilateral changes to the CRO. The CRO directed Mr. Boutilier to maintain Ms. Hilchey and the children on his employment health plan. Mr. Boutilier removed Ms. Hilchey because he wanted to add Ms. Henneberry to the plan in her stead. As a result, Ms. Hilchey no longer has health coverage leading her to incur significant expenses.

[19] Because the parties were not able to resolve the outstanding issues, a hearing was held on June 24 and 25, 2024. Each party testified and provided submissions. My oral decision was rendered on June 25, 2024.

#### **Analysis**

#### **Has a material change been proven?**

[20] The parties appear to agree that a material change has occurred in that each party's income has increased since the last court order; childcare costs have decreased; and other s. 7 expenses have increased. As such, I can proceed with the

variation requests because had these material facts been known at the time, a different child support order would have been crafted and issued.

**Did Mr. Boutilier prove undue hardship?**

[21] Mr. Boutilier seeks to pay less than the table amount of child support based on a claim of undue hardship. He states that he cannot pay the table amount because his current financial situation is desperate and that he is supporting his stepson, Ms. Henneberry, and his dog. Mr. Boutilier also discussed his debt obligations and the financial pressure that he is experiencing. He asked me to make a finding of undue hardship pursuant to s. 10 of the *Child Support Guidelines*.

[22] Ms. Hilchey objects. She states that she is supporting the parties' four children and requires child support to make ends meet. She states that her financial circumstances are challenging given the children's needs and her income.

[23] In addition, Ms. Hilchey states that her annual income is negatively impacted because of her parenting responsibilities. She has limited ability to increase her employment income because she has sole responsibility for the children. Mr. Boutilier has no relationship with the children. Ms. Hilchey is exclusively responsible for meeting the children's many needs. As a result, she is limited to her current employment which provides much needed flexibility.

[24] In *Reid v Faubert*, 2019 NSCA 42, Bourgeois JA reviewed the two-part process applicable to undue hardship claims:

[45] Applying s. 10 engages a two-step process. Firstly, a payor seeking to rely on the provision must establish that the payment of support as otherwise directed by the Guidelines (ss. 3 to 5, 8 or 9) would create an undue hardship as a result of one of the non-exhaustive factors in s. 10(2). Only if the court is satisfied that an undue hardship exists, does it proceed to the second step, namely, a consideration of whether the payor's household standard of living is lower than the recipient's (s. 10(3)).

[25] In describing the second stage of the undue hardship test, Bourgeois JA stated:

[49] The second step engages s. 10(3) which directs a court to consider the respective standards of living of the payor's and payee's households. If the payor enjoys a higher standard of living, then the claim of undue hardship must be denied. Section 10(4) indicates that a court "may" use the Comparison of Household Standards of Living Test in Schedule II. Although the permissive wording allows a court to use an alternative approach, the Schedule is most commonly used (*Stoddard v. Atwood*, 2001 NSCA 69 at para. 12).

[26] Bourgeois JA also reaffirmed the heavy burden on the parent who seeks an undue hardship finding, including proof of excessively hard living conditions

arising from the payment of the *Guideline* amount: para 47, quoting *Ellis v Ellis*, 1999 NSCA 31; or proof that the claimant's difficulty, suffering or pain will be excessive or disproportionate as a result of paying the *Guideline* amount: para 48, quoting *Barrie v Barrie*, [1998] AJ No 460 (QB); or proof that the hardship is "exceptional", "excessive" or "disproportionate" in all of the circumstances: para 48, quoting *Van Gool v Van Gool* (1998), 166 DLR (4th) 528 (BCCA). Further, Bourgeois JA confirmed that the claimant must lead cogent evidence to "establish why the table amount would cause undue hardship": para 48, quoting *Van Gool v Van Gool*, *supra*.

[27] I find that Mr. Boutilier did not meet the burden of proving either part of the two-stage test for the following reasons:

- Mr. Boutilier's obligation to his children existed prior to his cohabitation with Ms. Henneberry and her son. Mr. Boutilier assumed a new relationship with knowledge of his pre-existing legal obligations.
- Mr. Boutilier should make lifestyle adjustments rather than seeking to reduce the payment of much needed child support. For example, Mr. Boutilier may wish to apply for debt relief because child support assumes priority over other debt obligations. In addition, Ms. Henneberry can seek child support from her child's father. Further, Ms. Henneberry can seek alternate employment if she is unable to earn an appropriate income in her business.
- Mr. Boutilier did not produce cogent evidence of his spouse's income. He did not produce all necessary tax returns, including Ms. Henneberry's 2023 personal return or any corporate returns, nor a statement of business income and expenses.
- Mr. Boutilier did not produce a household standard of living calculation. It is likely that such a calculation would show that Ms. Hilchey's standard of living is less than Mr. Boutilier's. If child support of \$23,496<sup>i</sup> is paid, Ms. Hilchey's household income, inclusive of CCB, is \$80,404<sup>ii</sup>, which supports a family of five. In contrast, Mr. Boutilier's adjusted annual income is \$45,659<sup>iii</sup>, together with Ms. Henneberry's income of at least \$30,000 and her CCB of \$6,275, for a total household income of \$81,934, which supports a family of three.

[28] Given the above, I deny Mr. Boutilier's application for undue hardship.

### **What prospective child support should be paid?**

[29] I find that the child support provisions of the 2018 CRO should be varied given the changes in income and s. 7 expenses. The varied child support amount is payable effective July 2024 and continuing every month thereafter.

[30] The table amount of child support is based on Mr. Boutilier's 2023 annual income less union dues which is \$69,155 which produces the table amount of \$1,538. This amount is to be adjusted each year under the provincial recalculation program.

[31] In addition, Mr. Boutilier is required to pay his proportionate share of the children's s.7 expenses which I set at \$7,158, inclusive of uninsured medical and dental expenses. As Mr. Boutilier earns about 71% of the parties' combined income, he is responsible for \$5,082 of the children's s. 7 expenses or an additional \$423 per month. For the purposes of the order, s. 7 expenses will continue to be paid at a rate of \$420 per month.

### **What, if any, retroactive child support be paid?**

[32] The Supreme Court of Canada reviewed foundational legal principles applicable to retroactive variation requests in *DBS v SRG*, 2006 SCC 37; *Michel v Graydon*, 2020 SCC 24; and *Colucci v. Colucci*, 2021 SCC 24:

- In *DBS*, supra, Bastarache J. confirmed that parents who do not increase their child support payments to correspond with their income do not fulfill their obligation to their children, at para 54.
- In *Michel v Graydon*, supra, Brown J. held that a parent should not profit from knowingly paying inadequate support or from making inadequate or delayed disclosure, at paras 32 and 33.
- In *Michel v Graydon*, supra, Martin J. held that because a disproportionate number of single mothers and their children live in poverty, and poverty negatively affects access to justice, a holistic response is required, at paras 94, 96 and 100.
- In *Colucci v. Colucci*, supra, Martin J. noted that information asymmetry is both connected to the determination of effective notice and the presumptive period of retroactivity at para 7. Martin J. further stated that information asymmetry results in two distinct burdens. For



payee parents, effective notice only requires the broaching of an increase. In contrast, a payor parent seeking a decrease must provide reasonable proof of income at paras 86 to 88.

[33] In *Colucci v. Colucci, supra, Martin J.* confirmed the test to be applied where the payee seeks a retroactive increase in child support:

[114] It is also helpful to summarize the principles which now apply to cases in which the recipient applies under s. 17 to retroactively increase child support:

- a) The recipient must meet the threshold of establishing a past material change in circumstances. While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.
- b) Once a material change in circumstances is established, a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor.
- c) Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.
- d) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S. factors continue to guide this exercise of discretion, as described in *Michel*. If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct, and the date of retroactivity will generally be the date of the increase in income.

[34] I will now apply this legal test to this case by addressing each of the steps. First, as previously noted, I find that Ms. Hilchey proved a material change in circumstances given the substantial increases in Mr. Boutilier's income.

[35] Second, Ms. Hilchey did not broach the subject of an increase in child support because she did not receive Mr. Boutilier's tax returns as was ordered in the CRO.

There is no date of effective notice. Formal notice occurred in 2023 which is the presumptive date of retroactivity.

[36] Third, the presumptive date of retroactivity would be unfair after balancing the four modified *DBS* factors:

- Ms. Hilchey had an understandable explanation for not filing earlier. She was unaware of Mr. Boutilier's increase in income because Mr. Boutilier did not provide her with his income tax returns as was ordered.
- Mr. Boutilier engaged in blameworthy conduct by failing to disclose his tax returns and by failing to increase the amount of child support he paid to conform with his income. In so failing, Mr. Boutilier prioritized his own needs over those of the children.
- The children have need of the retroactive child support. Ms. Hilchey did without as she attempted to meet the children's needs. Further, Ms. Hilchey will use the retroactive award to meet the children's needs.
- Concerns surrounding potential hardship are mitigated for two reasons. First, Mr. Boutilier is largely responsible for the hardship because he kept his income hidden in an effort to evade the proper payment of child support. Second, a payment schedule will be adopted to reduce the potential for hardship.

[37] Fourth, I will adjust child support effective July 1, 2019. In so doing, I note that the 2018 order is presumed to be correct. Neither party appealed the order. Further, Mr. Boutilier's obligation to disclose his tax return commenced on June 1, 2019. Had Ms. Hilchey received the tax return, she likely would have filed an application to increase child support. As a result, Mr. Boutilier owes \$24,666 in retroactive child support based on the following calculation:

Year	Income	Due		Paid	Outstanding
2019	\$66,395.00	\$1,481.00 x 6 months	\$ 8,886.00	\$6,948.00	\$ 1,938.00
2020	\$73,455.00	\$1,627.00 x 12 months	\$19,524.00	\$13,896.00	\$ 5,628.00
2021	\$66,766.00	\$1,489.00 x 12 months	\$17,868.00	\$13,896.00	\$ 3,972.00
2022	\$76,158.00	\$1,682.00 x 12 months	\$20,184.00	\$13,896.00	\$ 6,288.00

2023	\$69,155.00	\$1,538.00 x 12 months	\$18,456.00	\$13,896.00	\$ 4,560.00
2024	\$69,155.00	\$1,538.00 x 6 months	\$ 9,228.00	\$6,948.00	\$ 2,280.00
				<b>TOTAL</b>	<b>\$24,666.00</b>

[38] Mr. Boutilier will pay the retroactive award of \$24,666 at a rate of \$150 per month which payment will be adjusted as each child ceases to be dependent and Mr. Boutilier's child support obligation decreases. Payments begin in July 2024 and will continue on the 1<sup>st</sup> day of every month thereafter.

**What award flows from Mr. Boutilier's decision to remove Ms. Hilchey from his health plan?**

[39] The CRO provides as follows:

In addition to the abovementioned expenses, Paul Boutilier shall maintain health insurance for all four children and Amanda Boutilier (Hilchey) so long as the plan permits. He shall forthwith provide a copy of the policy and policy card to Amanada Boutilier (Hilchey) and any replacement thereof. Any costs exceeding or not covered by the said insurance plan shall be borne by the parties based on the section 7 percentages above.

[40] Mr. Boutilier states that the health plan no longer permits Ms. Hilchey to benefit because he named his current common law partner as beneficiary. The plan only allows one spouse to be accommodated. Unfortunately, I do not know if Mr. Boutilier is permitted to remove his current partner and rename Ms. Hilchey. I do not have sufficient evidence to determine this issue. Mr. Boutilier is directed to provide Ms. Hilchey with authorization to speak with the health plan administrator to determine the status of her enrolment. I will schedule a pretrial conference in eight weeks to determine the status of the issue.

**Conclusion**

[41] In my decision, I made the following orders:

- The child support provisions of the CRO were varied retroactively and prospectively.
- Mr. Boutilier was ordered to pay child support to Ms. Hilchey for the children based on his 2023 income, less union dues, of \$69,155 which produces the monthly table amount of \$1,538 plus s. 7 expenses of

\$420 for a total monthly child support payment of \$1,958. Child support will be payable in two equal monthly installments of \$979 due on the 1st and 15th of each month, commencing July 1, 2024.

- Mr. Boutilier owes Ms. Hilchey retroactive child support of \$24,666, payable at a rate of \$150 per month which payment will be adjusted as each child ceases to be dependent and Mr. Boutilier's child support obligation decreases. Retroactive child support is payable in two equal monthly installments of \$75 due on the 1st and 15th of each month, commencing July 1, 2024.
- A pretrial conference will be scheduled to determine additional information needed to resolve the health plan issue.

[42] The court will prepare the variation order.

Forgeron, J.

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<sup>i</sup> Child support is based on Mr. Boutilier paying the monthly table amount of \$1,538 and \$420 for s. 7 expenses.

<sup>ii</sup> Ms. Hilchey earns about \$28,000 and receives the CCB of about \$28,912.

<sup>iii</sup> This calculation is the sum derived by deducting the annual child support payment from Mr. Boutilier's annual income.