S.C.C. File No.: 38498

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

DANELLE MICHEL

Appellant
(Appellant)

AND:

SEAN GRAYDON

Respondent
(Respondent)

FACTUM OF THE APPELLANT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Counsel for the Appellant:

Peter Mennie
Westside Family Law
504-1367 W Broadway
Vancouver, BC V6H 4A7
Tel.: (604) 734-7911
Fax: (604) 734-6366
pmennie@westsidefamilylaw.ca

Ottawa Agent for the Appellant:

Michael J. Sobkin
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel.: (613) 282-1712
Fax.: (613) 288-2896
msobkin@sympatico.ca

Counsel for the Respondent:

Karen Tiwana
Centra Lawyers LLP
102-20110 Lougheed Highway
Maple Ridge, BC V2X 2P7
Tel.: (604) 463 8890
Fax: (604) 463 6760
ktiwana@centralawyers.ca

Ottawa Agent for the Respondent:

D. Lynne Watt
Gowlings WLG (Canada) LLP
2600-160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509
lynne.watt@gowlingwlg.com

Table of Contents

PART I – STATEMENT OF FACTS

A. Overview

1. The issue on this appeal is whether a British Columbia court has jurisdiction under section 152 of British Columbia's *Family Law Act* to vary a child support order retroactively after the child for whom support is sought has ceased to be a "child" as defined in the *Family Law Act*.[1]

2. The Appellant, Danelle Michel, obtained an order for retroactive child support from the Provincial Court of British Columbia. On appeal, the Supreme Court of British Columbia reversed the decision for lack of jurisdiction, citing this Court's decision in *DBS v SRG*[2] for the proposition that an application for retroactive child support must be brought while the child is still a "child" within the meaning of the *Family Law Act*.

3. Ms. Michel appealed to the Court of Appeal for British Columbia. While Ms. Michel's appeal was under reserve, a five-judge panel of the Court of Appeal released judgment on this issue in *Dring v. Gheyle*.[3] A three-judge majority relied on *DBS* and held that British Columbia courts do not have jurisdiction to retroactively vary a child support award once the child has ceased to be a "child" as defined in the *Family Law Act*. Two judges held that *DBS* was not determinative of the jurisdictional question under British Columbia's statute. In their view, British Columbia's *Family Law Act*, properly interpreted, did not prohibit a court from making a retroactive order in respect of a person who is no longer a child under the statutory definition. The status of the child is a factor to consider in deciding whether to make a retroactive award, but is not an absolute jurisdictional bar. In brief reasons issued the following week, the Court of Appeal cited *Dring* and dismissed Ms. Michel's appeal.

4. The Appellant's position is that the courts below erred in holding that *DBS* was dispositive of this issue. Justice Bastarache's comments in *DBS* on jurisdiction relate to an application for an original support order under section 15.1 of the federal *Divorce Act*.[4] Justice Bastarache made no determination of a court's jurisdiction to vary a child support order under section 17(1) of the *Divorce Act*, which does not contain the same jurisdictional limitations found in section 15.1.

---

[1] SBC 2011, c. 25 ("*Family Law Act*").
[2] 2006 SCC 37 ("*DBS*").
[3] 2018 BCCA 435 ("*Dring*").
[4] RSC, 1985, c. 3 (2nd Supp.) ("*Divorce Act*").

Justice Bastarache also made no reference to British Columbia's legislation. In fact, British Columbia's *Family Law Act* was not in force at the time *DBS* was decided.

5. As *DBS* did not decide the central issue in this case, this appeal falls to be determined by interpreting section 152 of the *Family Law Act*. This section confers explicit statutory authority on courts to change, suspend, or terminate an order respecting child support prospectively or retroactively. Unlike other provisions in the *Family Law Act*, the wording of section 152 contains no restrictions on who may make an application and when an application may be brought.

6. The object of section 152 is to discourage payors from hiding income and ensure they do not financially benefit from doing so at the expense of their children. However, under the current state of the law in British Columbia, based on the *Dring* decision and the case at bar, payors who are deficient in their child support obligations are protected from retroactive awards the moment their child becomes independent. The consequence of this decision is that payors in British Columbia now have every incentive to ignore the *Federal Child Support Guidelines*[5] and underpay child support with the hope that their wrongdoing will go undiscovered until courts no longer have jurisdiction to order a retroactive payment.

7. The Appellant submits that the Court of Appeal erred in its interpretation of section 152 of the *Family Law Act*. She respectfully asks this Honourable Court to allow this appeal and reinstate the judgment of the Provincial Court of British Columbia.

B. Background

8. Ms. Michel began living with Mr. Graydon in 1990. She was 15 and he was 21. Their child, Alyssa Graydon, was born on December 27, 1991. The relationship ended in April 1994. Following separation, Alyssa lived fulltime with Ms. Michel.[6]

9. A Consent Order, entered March 29, 2001, and signed by both parties, states that Mr. Graydon must pay $341 per month to Ms. Michel. This amount was based on Mr. Graydon having an annual income of $39,852 per year.[7]

---

[5] SOR/97-175 ("*Guidelines*").
[6] *Michel v. Graydon*, (26 September 2016), Port Coquitlam F3319 (B.C.P.C.) ("*BCPC Reasons*"), Appellant's Record ("AR"), Tab 1, p. 5, para. 13.

10. In most years, Mr. Graydon's income was considerably higher than $39,852.[8]

Year	Respondent's Income	Guideline Table Monthly Amount	Respondent's Support Payment	Difference in Support Payment
2001	$45,580	$416	$341	$75
2002	$48,202	$441	$341	$100
2003	$48,582	$444	$341	$103
2004	$17,218	$137	$341	($204)
2005	$39,905	$363	$341	$22
2006	$79,440	$743	$341	$402
2007	$71,994	$672	$341	$331
2008	$60,960	$565	$341	$224
2009	$68,249	$636	$341	$295
2010	$63,293	$587	$341	$246
2011	$65,959	$614	$341	$273
2012	$58,692	$543	$341	$202
Total Underpayment (April 1, 2001 to April 30, 2012):				$22,987

11. On March 8, 2012, when Alyssa was close to finishing her post-secondary education, Mr. Graydon applied to terminate his child support obligations. Ms. Michel contested this application on the basis that Mr. Graydon had underpaid child support. The parties appeared before PCJ Woods on May 15, 2012, and agreed to an interim consent order which terminated Mr. Graydon's child support obligations on a without prejudice basis to Ms. Michel's right to claim retroactive child support.[9]

---

[7] Child Support Order, AR, Tab 12, p. 55.
[8] *BCPC Reasons*, AR, Tab 1, pp. 11-12, paras. 45-46; Financial Disclosure of Sean Graydon, AR, Tab 21, pp. 67-90.
[9] Order of Judge Woods, AR, Tab 16, pp. 61-62.

A. Provincial Court of British Columbia

12. The parties appeared before PCJ Smith at the Provincial Court of British Columbia on September 26, 2016.

13. Ms. Michel put into evidence a draft agreement on custody and child support which she had asked Mr. Graydon to sign in July 2001. Mr. Graydon refused to sign and wrote "this is why I pay child support" on the agreement.[10] PCJ Smith found that Mr. Graydon's handwritten notation meant that Mr. Graydon was aware of the *Guidelines* and the need to vary child support according to his income.[11]

14. Ms. Michel gave oral evidence at the hearing. She stated that she did her best as a single mother who, at times, required disability income assistance. She spoke to the difficulties she faced providing for Alyssa without receiving adequate child support:

> …but when he was lacking in supporting and not contributing the -- in accordance to his income, I was the one who paid and supported and found ways to entertain our child and, you know, whether it was calling people and purchasing items from Value Village or whatever, it is me who provided.[12]

15. Mr. Graydon also gave oral evidence at the hearing. He admitted that he was aware that Ms. Michel and Alyssa were living in poverty when he was underpaying child support. When dropping Alyssa off at Ms. Michel's house, Mr. Graydon would refer to Ms. Michel's home as a "ghetto."[13]

16. While Alyssa did not testify, PCJ Smith considered a letter written by Alyssa, dated March 31, 2016, in which she wrote:

> I was a confident, bright and enthusiastically ambitious child. I am a bright and ambitious adult. Somewhere along the line confidence and enthusiasm fell to the wayside. I wanted to learn everything from dance to flashcards. As a child, when I expressed interest in activities to my Dad, he responded "I pay child support for that".

---

[10] Unsigned Agreement, AR, Tab 13, pp. 56-57.
[11] *BCPC Reasons*, AR, Tab 1, p. 5, paras. 16-17.
[12] Transcript of proceedings before Judge Smith, AR, Tab 23, p. 157, ll. 27-35.
[13] *Ibid*, AR, Tab 23, p. 131, ll. 1-16.

> When a young woman is below the poverty line and is being under supported by her co-parent, where is she going to find money for daycare to go out and work a '9-5' job? Where is she going to find the money to put her child in extra activities? How could she possibly be expected to provide any more than her child's basic needs? I grew up thinking that I did not deserve 'extra'. My Dad would drop me off and refer to my childhood neighbourhood as the "ghetto".
>
> Eventually my dad and step-Mom started a family of their own in a nice house, white picket fence and all. I still lived in 'the ghetto'. I listened to stories about how, unlike me, my future siblings would play sports, learn to swim, learn whatever they wanted. It is not that I was not interested, I just did not deserve 'extra'.[14]

17. PCJ Smith considered the four factors in *DBS* for determining whether to make a retroactive award and found that:

a. Ms. Michel had not unreasonably delayed her application. In that regard, he referred to Ms. Michel's testimony that she had not applied earlier because she had signed her rights over to the Ministry in terms of collecting child support, she had suffered a severe injury in 2009, and she had experienced abuse during her relationship with Mr. Graydon.[15]

b. Mr. Graydon's conduct had been blameworthy, but only to a small degree, because he preferred other creditors over the extra child support he should have been paying.[16]

c. Alyssa had suffered hardship as a result of Mr. Graydon's wrongdoing, and that "Alyssa lived in poverty for many years and may not have had to if Mr. Graydon had paid child support in accordance with his annual income as it fluctuated."[17]

d. Mr. Graydon would not suffer hardship if he was ordered to pay retroactive child support.[18]

18. After reviewing the law in *DBS*, PCJ Smith ordered Mr. Graydon to pay $23,000 in retroactive child support.[19]

---

[14] Letter from Alyssa Graydon, AR, Tab 22, p. 91.
[15] *BCPC Reasons*, AR, Tab 1, p. 6, paras. 19, 21.
[16] *Ibid* at p. 8, para. 26.
[17] *Ibid* at pp. 9-10, para. 37.
[18] *Ibid* at p. 10, para. 41.

B. Supreme Court of British Columbia

19. Mr. Graydon appealed the decision of PCJ Smith to the Supreme Court of British Columbia. The parties appeared before Justice Young on February 16, 2017.

20. Justice Young reversed the decision of PCJ Smith, relying on *DBS* for the proposition that the child for whom support is being sought must still be a "child" as defined in the *Family Law Act* at the time of the application.[20] Ms. Michel was denied retroactive child support on the basis that Alyssa was not a "child" as defined in the *Family Law Act* in 2015 when she brought her application.

C. Court of Appeal for British Columbia

21. Ms. Michel appealed the decision to the Court of Appeal. The parties appeared before Justices Willcock, Savage, and Hunter on January 3, 2018. On November 30, 2018, the Court of Appeal pronounced judgment. In the interim, a five-judge panel heard and decided *Dring.* In brief reasons, the Court referred to *Dring* and dismissed Ms. Michel's appeal.[21]

22. *Dring* concerned a similar application for a retroactive variation of a child support order. The Court of Appeal unanimously held that a retroactive award would not have been appropriate on the facts of that case. However, the Court of Appeal split on the question of whether a court could have made a retroactive award given that the application was brought when the child was no longer a "child" as defined in the *Family Law Act*.

23. Justice Goepel, concurred in by Justice Saunders and Justice Fenlon, held that *DBS* had already decided this point of law. Justice Goepel relied on other appellate decision in Canada which considered the *Divorce Act*,[22] Manitoba's *Family Maintenance Act*,[23] and Saskatchewan's *Family Maintenance Act*,[24] and concluded that a court's jurisdiction to order retroactive child

---

[19] *Ibid* at p. 12, para. 47.
[20] *Graydon v Michel*, 2017 BCSC 887, AR, Tab 3, pp. 28-30, paras. 56-63.
[21] *Graydon v. Michel*, 2018 BCCA 449, AR, Tab 5, p. 45, para. 2.
[22] *Selig v. Smith*, 2008 NSCA 54; *Calver v Calver*, 2014 ABCA 63.
[23] *Daoust v Alberg*, 2016 MBCA 24.
[24] *Hnidy v Hnidy*, 2017 SKCA 44.

support is dependent on a parent making the application while the child is still a "child" as defined in the Act.[25]

24. Justice Hunter, concurred in by Justice Willcock, started from the premise that the jurisdiction to make a retroactive child support award depends on the wording of the enabling statute. As *DBS* concerned original child support orders made under the *Divorce Act*, this Court had made no determination on jurisdiction to vary an existing order under the *Family Law Act*.[26] After a purposive and textual analysis of the enabling statute, Justice Hunter concluded that there was no restriction on when courts may retroactively vary an existing child support order.

PART II – QUESTIONS IN ISSUE

25. This appeal raises the following question: does a BC court have jurisdiction to retroactively vary a child support order where the application is made after the child has ceased to be a "child" as defined in the *Family Law Act*.

26. This question gives rise to the following sub-questions:

a. Does this Court's decision in *DBS* foreclose an application under section 152 of BC's *Family Law Act* to vary an existing child support order once the child has ceased to be a "child" as defined in that Act?

b. On an application of the principles of statutory interpretation, does section 152 of the *Family Law Act* allow a court to vary a child support order retroactively when the subject of the order has ceased to be a "child" as defined in that Act?

---

[25] *Dring* at para. 97.
[26] *Ibid* at paras. 179-183.

PART III – STATEMENT OF ARGUMENT

A. Standard of Review

27. The issue on appeal is one of statutory interpretation and is properly characterized as a question of law. The standard of review is correctness.[27]

B. The *DBS* Decision

28. The majority of the Court of Appeal for British Columbia in *Dring* relied on this Court's decision in *DBS* to hold that British Columbia courts do not have jurisdiction to retroactively vary an existing order where the child is no longer a "child" as defined in the *Family Law Act* at the time of the application.[28] This was an error in two respects.

29. First, it was an error to treat *DBS* as having decided a court's jurisdiction to vary existing child support orders. Justice Bastarache's reasons in *DBS* analyze the wording of section 15.1 of the *Divorce Act* which governs original child support orders. The wording of section 17, which governs variations of existing child support orders, is materially different. Despite confusion in the lower courts arising from Justice Bastarache's remarks in relation to *Henry v. Henry*, a companion case to *DBS*, this Court did not pronounce on the scope of a court's jurisdiction under section 17 of the *Divorce Act* in *DBS*.

30. Second, regardless of whether the ruling in *DBS* is limited to original orders or extended to variation of existing orders, it was an error to hold that this Court's interpretation of the *Divorce Act* was determinative of the interpretation of British Columbia's *Family Law Act*. A statement in *DBS* in relation to the federal *Divorce Act* cannot be controlling on a separate and differently-worded provincial statute. Indeed, Justice Bastarache was clear in *DBS* that provinces are free to create their own statutory schemes which need not conform to the *Divorce Act*. The question of jurisdiction under British Columbia's *Family Law Act* requires an application of the principles of statutory interpretation to the relevant provision.

31. The majority of the Court of Appeal in *Dring* did not engage in the full statutory interpretation exercise required given its finding that *DBS* was controlling. Only Justice Hunter,

---

[27] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 30.
[28] *Dring* at paras. 86-87.

concurring in result, conducted a full statutory analysis. The Appellant respectfully submits that the Justice Hunter's interpretation of section 152 is correct.

i. Original Orders vs. Variations of an Existing Order

32. This Court in *DBS* did not rule on a court's jurisdiction to entertain an application for retroactive child support in all situations. Rather, the Court dealt with the legislation that was before it: Alberta's now-repealed *Parentage and Maintenance Act*[29] and the federal *Divorce Act*. More specifically, it dealt with the jurisdiction of Alberta courts to make an original support order containing a retroactive award.

33. In this regard, the Court referred to section 16(3) of the *Parentage and Maintenance Act* and section 15.1 of the *Divorce Act*. Section 16(3) read as follows:

> (3) No order may be made under this section
>
> (a) in respect of an expense referred to in subsection (2)(b) or (c) unless the application for the order is commenced before the child in respect of whom the application is made reaches the age of 18 years, or
>
> (b) in respect of an expense referred to in subsection (2)(a) or (d) unless the application for the order is commenced within 2 years after the expense was incurred.

Subsection 2(b) refers to "reasonable expenses for the maintenance of the child before the date of the order" while subsection 2(c) refers to "monthly or periodic payments for the maintenance of the child until the child reaches the age of 18 years." Subsection 2(a) refers to maintenance of the mother while 2(d) refers to "expenses of the burial of the child if the child dies before the date of the order."

34. Section 15.1(1) of the *Divorce Act* states:

> (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

Subsection 2(1) defines "child of the marriage" as follows:

---

[29] RSA, 2000, c. P-1.

> a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who as not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge to obtain the necessaries of life.

35. The wording of section 17 of the *Divorce Act*, which governs variations of existing child support orders, does not contain the phrase "child of the marriage." Instead, section 17(1)(a) specifically contemplates a retroactive variation of an existing child support order without any reference to the status of the child at the time of the application:

> (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses;

36. The reasons of Justice Bastarache make it clear that his analysis was concerned with the meaning of the phrase "at the material time" in the context of section 15.1 of the *Divorce Act*:

> [87] The *Parentage and Maintenance Act* is clear in this regard, giving courts the power to order support only for children under the age of 18 or, for certain expenses, within the two years after they were incurred: see s. 16(3)…where support (including retroactive support) is only requested pursuant to the *Parentage and Maintenance Act*, a court will not have the jurisdiction to order support if the child in question was over 18 at the time the application was made, or if certain expenses occurred more than two years in the past.
>
> [88] The situation under the *Divorce Act* is more complex. **Under s. 15.1(1)**, an order may be made that requires a parent to pay **"for the support of any or all children of the marriage".** The term **"child of the marriage"** is defined in s. 2(1) as
>
> > a child of two spouses or former spouses who, **at the material time**,
> >
> > (a) is under the age of majority and who has not withdrawn from their charge, or
> >
> > (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

> **The question then arises when the "material time" is for retroactive child support awards. If the "material time" is the time of the application, a retroactive child support award will only be available so long as the child in question is a "child of the marriage" when the application is made.** On the other hand, if the "material time" is the time to which the support order would correspond, a court would be able to make a retroactive award so long as the child in question was a "child of the marriage" when increased support should have been due.
>
> [89] In their analysis of the Guidelines, J. D. Payne and M. A. Payne conclude that **the "material time" is the time of the application**: *Child Support Guidelines in Canada* (2004), at p. 44. I would agree. While the determination of whether persons stand "in the place of . . . parent[s]" is to be examined with regard to a past time, i.e., the time when the family functioned as a unit, this is because **a textual and purposive analysis of the *Divorce Act* leads to this conclusion; but the same cannot be said about the "material time" for child support applications**: see *Chartier v. Chartier*, 1999 CanLII 707 (SCC), [1999] 1 S.C.R. 242, at paras. 33-37. An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made**.** This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status.
>
> [emphasis added]

37. While Justice Bastarache's analysis relates to original child support orders under section 15.1, there has been confusion in lower courts as to whether this was meant to apply to variations of existing orders under section 17 of the *Divorce Act* as well. In this Court's disposition in *Henry*, Justice Bastarache stated:

> [150] I would add that the eldest child affected by Rowbotham J.'s order was no longer a child of the marriage when the Notice of Motion for retroactive support was filed. In the circumstances of this appeal, however, this fact has no effect on the jurisdiction of the court to make a retroactive child support order under the *Divorce Act*. Because Mr. Henry did not disclose his income increases to Ms. Henry earlier, she was compelled to serve him with a Notice to Disclose/Notice of Motion in order to ascertain his income for the years relevant to this appeal. This formal legal procedure, contemplated in the *Guidelines* and a necessary antecedent to the present appeal, sufficed to trigger the jurisdiction of the court under the *Divorce Act*. Because it was completed prior to the time the eldest child ceased being a child of the marriage, the court was able to make a retroactive order for this daughter.[30]

[30] *DBS* at para. 150.

38. The reference in the last sentence to "a child of the marriage" establishes that Justice Bastarache was analyzing a court's jurisdiction under section 15.1 of the *Divorce Act*. This is because section 15.1 refers to "children of the marriage" while section 17 does not. Earlier in the judgment, Justice Bastarache stated clearly that the decision in *DBS* did not make a full determination on the ambit of section 17, and was limited to what was necessary to decide those appeals:

> [71] …Section 17 unambiguously states that an award may be varied "prospectively or retroactively". Whether the reference to retroactivity merely contemplates the situations brought forth in the present appeals, or whether it might even go further and allow courts to make truly retroactive orders (i.e., orders that enforce obligations that payor parents did not have at the relevant time), is not a matter to be settled in these reasons. It suffices to hold that a court hearing a child support dispute pursuant to the *Divorce Act* will be able to exercise its discretion, in appropriate circumstances, and vary the original award retroactively in the sense contemplated in these appeals.

39. If Justice Bastarache had intended to impose a jurisdictional restriction on a court's ability to retroactively vary a child support order, he would have stated this explicitly and engaged in an exercise of statutory interpretation of section 17 of the *Divorce Act*. It should be noted as well that Justice Bastarache did not address the interpretation of section 18 of Alberta's *Parentage and Maintenance Act* which provides for variation of an existing order.

40. The better interpretation of this Court's disposition of the *Henry* appeal is the one adopted by Justice Sharpe in *Colucci v. Colucci*,[31] Justice Hunter dissenting in *Dring*,[32] and Justice Strekaf in *Buckingham v. Buckingham*:[33] because the applicant's formal motion for disclosure prior to the child having ceased to be a "child of the marriage" sufficed to establish jurisdiction, this Court did not need to consider whether the absence of that motion would otherwise have resulted in the dismissal of her application for want of jurisdiction. It was not necessary for this Court to determine the scope of jurisdiction under section 17 of the *Divorce Act*, and this Court did not do so.

---

[31] *Colucci v. Colucci*, 2017 ONCA 892 at paras. 10-19 ("*Colucci*").
[32] *Dring* at paras. 179-201.
[33] *Buckingham v Buckingham*, 2013 ABQB 155 ("*Buckingham*") at paras. 31-57.

41. It follows that this Court's ruling on jurisdiction in *DBS* is limited to original child support orders. Nothing in *DBS* would control the question of jurisdiction under federal or provincial legislation to vary an existing child support order. Whether jurisdiction under section 17 of the *Divorce Act* permits a court to entertain an application to vary a child support order once the subject is no longer a "child of the marriage" therefore remains an open question.

ii. Federal *Divorce Act* vs. British Columbia's *Family Law Act*

42. Even if this Court finds that Justice Bastarache's remarks in *DBS* apply to both original and variation orders under the *Divorce Act*, it remains the case that *DBS* is not binding with respect to the interpretation of British Columbia's *Family Law Act*.

43. The *Divorce Act* and the *Family Law Act* are separate statutes with distinct child support regimes. Under the *Family Law Act*, a child or a person acting on behalf of the child may apply for an original child support order. Under the *Divorce Act*, only a spouse may apply.[34] The two statutes also impose different tests for establishing child support obligations for step-parents.[35] Despite these differences, there is no operational incompatibility between the *Divorce Act* and the *Family Law Act* because both statutes operate harmoniously to ensure that a remedy for child support is available.[36]

44. The provinces have the independent constitutional power to legislate on matters concerning child support.[37] Courts should not assume that provincial legislation is applied in the same way as the *Divorce Act*. As this Court stated in *DBS*, interpreting provincial family law legislation in this way would "offend principles of statutory interpretation as well as the division of powers enshrined in the Constitution."[38]

45. This Court confirmed in *DBS* that a person's entitlement to retroactive support depends upon the language of the applicable statutory regime:

---

[34] *Family Law Act* at s. 149(2); *Divorce Act* at s. 15.1.
[35] *Family Law Act* at s. 147(4); *Divorce Act* at s. 2(2)(b); *N.P. v. I.V.*, 2013 BCSC 1323 at paras. 37-43.
[36] *Cheng v. Liu*, 2017 ONCA 104 at paras. 46-52.
[37] *DBS* at paras. 50, 52, & 54.
[38] *Ibid* at para. 51.

> [87] …a person for whom support is being requested is obviously able to apply under any applicable statutory regime that provides for such an award. It then becomes a matter of statutory interpretation to determine whether retroactive support is contemplated by that statutory regime, keeping in mind that the provinces are never bound to mirror the statutory regime enacted by Parliament.

46. While the parties in *DBS* were governed by the federal *Divorce Act* and Alberta's *Parentage and Maintenance Act*,[39] this appeal turns on the statutory interpretation of section 152 of British Columbia's *Family Law Act*.

C. Interpretation of Section 152 of the *Family Law Act*

47. Ms. Michel applied for retroactive child support under section 152 of the *Family Law Act*. This section grants courts the authority to vary an existing child support order.[40] The question on appeal is whether courts have jurisdiction to retroactively vary a child support order if the application is made after the child is no longer a "child" under the *Family Law Act*.

48. Under section 1 of the *Family Law Act* "child" is defined as follows:

> **"child"**, except in Parts 3 *[Parentage]* and 7 *[Child and Spousal Support]* and section 247 *[regulations respecting child support]*, means a person who is under 19 years of age;

In Part 7, which governs child and spousal support, "child" is defined as follows:

> **"child"** includes a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of his or her parents or guardians;

49. To interpret a statute, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[41]

50. The Appellant submits that (i) the ordinary meaning of section 152 of the *Family Law Act*, (ii) the object of the *Family Law Act*, (iii) the scheme of the *Family Law Act*, and (iv) other indicia of the intent of the Legislature all point to the following conclusion: on a proper

---

[39] *Ibid* at paras. 71-74.
[40] *KPB. v. ASR*, 2016 BCCA 382 at para. 19; *Tarbujaru v. Tarbujaru*, 2016 BCCA 214 at para. 27; *Steward v. Ferguson*, 2018 BCCA 158 at para. 20.
[41] *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

interpretation of section 152 of the *Family Law Act*, there is no requirement that the child for whom a retroactive variation of child support is sought must be a "child" as defined in the *Family Law Act* at the time of the application.

i. Ordinary Meaning of Section 152

51. The plain and ordinary meaning of section 152 of the *Family Law Act* does not impose a requirement that the child for whom a retroactive variation of child support is being sought must be a "child" at the time of the application. Section 152 states:

> (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.
>
> (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
>
> (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
>
> (b) evidence of a substantial nature that was not available during the previous hearing has become available;
>
> (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

52. Section 152 states explicitly that a child support order can be changed "retroactively." Subsection (2) lists three preconditions, any one of which will suffice to authorize a retroactive variation of an order respecting child support. None of these preconditions relate to the current status of the person for whose benefit the order respecting child support was made.

53. There is no ambiguity in this provision. Ambiguity only arises where there are two or more plausible readings, and does not arise by the fact that several courts have come to different conclusions on the interpretation of a given provision.[42] Where the wording of a provision is clear and unequivocal, the ordinary meaning plays a dominant role in the interpretative process.[43] Reading words into a provision is tantamount to amending legislation.[44]

---

[42] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 29-30.
[43] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at para. 88.
[44] *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para. 27.

ii. Object of Section 152

54. This Court in *DBS* set out the core principles underlying child support: child support is the right of the child; the right to support survives the breakdown of the relationship; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and, the specific amounts of child support owed will vary based upon the income of the payor parent.[45]

55. Part 7 of the *Family Law Act* is consistent with these principles, and section 150 imposes an obligation on parents to support their children. The Legislature chose to adopt the *Guidelines*, meaning the amount of child support will fluctuate over time according to the payor's income. The *Guidelines* have the force of law, and are not intended to be optional or advisory.

56. The decision of the Court of Appeal is contrary to the Legislature's objective of ensuring that child support is paid according to the *Guidelines*. Mr. Graydon was aware of his obligation to pay child support according to his income and failed to do so. He has profited from his wrongdoing at the expense of his daughter without consequence. Ms. Michel and Alyssa have been left without a remedy.

57. This precedent encourages other payors to ignore the *Guidelines* and underpay child support in the hope that their increased income will remain undetected until their child becomes independent. Justice Sharpe, writing for the Ontario Court of Appeal in *Colucci*, expressed this concern:

> [26] …a regime that gave payor parents immunity after the children ceased to be children of the marriage would create a perverse incentive. If the payor parent is to be absolved from responsibility once the children cease to be "children of the marriage", the payor whose income increases might be encouraged not to respond to his or her increased obligations in the hope that the reciprocal spouse will delay making an application for a variation increasing support until the children lose their status to avoid opening the door to an increased obligation…

58. Justice Hunter, concurring in the result in *Dring*, made a similar point: an interpretation that prevents a court from assuming jurisdiction to correct inadequate child support would run

---

[45] *DBS* at para. 38.

counter to the policy objective of ensuring children receive the amount of child support to which they are entitled.[46]

59. In *DBS,* Justice Bastarache repeatedly emphasized the need to ensure that children receive the proper amount of child support:

> [4] …Whatever the outcome of these individual cases, the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it. Any incentives for payor parents to be deficient in meeting their obligations should be eliminated…
>
> [60] …No child support analysis should ever lose sight of the fact that support is the right of the child…Where one or both parents fail to vigilantly monitor child support payment amounts, the child should not be left to suffer without a remedy...
>
> [97] …Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due...
>
> [107] …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…
>
> [124] …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…A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments…
>
> [147] …Especially when a payor parent is acutely aware of the needs of his/her children living with the recipient parent, it is no excuse to shrug off one's obligations by saying the recipient parent never asked for disclosure…

60. A child support regime that rewards deliberate underpayment of child support is not fair to children, recipient parents, or other payors contributing the proper amount of child support. Section 152 grants courts the authority to order retroactive support, where appropriate, to ensure that the *Guidelines* are followed and that justice is done between the parties. Interpreting section 152 to allow courts to make retroactive variations at any point ensures that payors are not

[46] *Dring* at para. 154. And see Justice Hunter's discussion of *George v. Gayed*, 2014 ONSC 5360 which illustrates how parents who fail in their obligations to their children will be rewarded if jurisdiction to vary a child support order ceases when a child turns the age of majority. *Dring* at para. 155.

incentivized to underpay child support. This is consistent with the Legislature's objective of ensuring that child support is paid according to the *Guidelines*.

iii. Scheme of the *Family Law Act*

Implied Exclusion

61. The requirement to read the legislative text "harmoniously with the scheme of the Act" reinforces a broad interpretation of section 152. The *Family Law Act* grants courts the jurisdiction to make various types of orders. Specific provisions of the *Family Law Act* use express language to delineate when courts may assume jurisdiction and what factors they must consider when making orders.

62. Once a particular phrase has been devised to express a particular purpose or meaning, that phrase is presumed to be used for this purpose or meaning each time the occasion arises.[47] Where a particular phrase is expected but absent, this forms the basis of an implied exclusion argument. This principle has been applied on many occasions by this Court.[48] In *R. v. Ulybel Enterprises Ltd.*,[49] this Court stated:

> [42] Indeed, had Parliament intended the phrase "any proceeds realized from its disposition" to be limited to proceeds of perishables in ss. 71(1) and 72(1), it could have done so expressly, as it did in s. 70(3), as well as ss. 72(2) and 72(3). Instead, a pattern in the use of the phrase at issue is evident whereby in some sections it is expressly limited to the proceeds of perishables and in other sections it refers more generally to all forms of property seized under the Act and proceeds thereof.

63. Section 152 begins with the phrase "On application." This may be contrasted with the many provisions in the *Family Law Act* that expressly limit who may bring a particular application, including:

---

[47] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014), Respondent's Book of Authorities ("RBOA"), Tab 1, pp. 248-257.
[48] See, for example: *R. v. Summers*, 2014 SCC 26 at paras. 38-41; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 81; *Németh v. Canada (Justice)*, 2010 SCC 56 at para 29; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 45; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at para. 116.
[49] *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56.

a. Section 19, which states that an order respecting parenting coordinators may be made "On application by a party to a determination made by a parenting coordinator";

b. Sections 45, which states that orders respecting parenting arrangements may be made "On application by a guardian";

c. Section 69, which states that a relocation order may be made "On application by a guardian";

d. Sections 91, 93, 94, and 109, which state that various orders respecting the division of family property may be made "On application by a spouse";

e. Sections 130 and 131, which state that an order for the division of pension benefits may be made "on application by a member or spouse"; and

f. Section 165, which limits an application for an original spousal support order to either spouse, on behalf of a spouse through a designated agency under the *Adult Guardianship Act*, or to the Ministry under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act*.

64. Similarly, section 152 is silent as to when an application must be made. This may be contrasted with other provisions of the *Family Law Act* that state expressly when an application must be made, including:

a. Section 61, which states that an application regarding denial of parenting time may only be made by a person with an agreement or court order respecting parenting time or contact, and may only be made within 12 months of the denial of parenting time;

b. Section 147(4), which states that a proceeding against a stepparent for child support must be started within one year after the date the stepparent last contributed to the support of the child; and

c. Section 183, which states that an application for a protection order may only be made by an at-risk family member, as well as section 187 which specifies that an application to vary a protection order must be made before the expiry of that order.

65. The fact that section 152 does not provide any restrictions as to who may bring an application and when they must bring it, while other provisions of the statute do contain such restrictions, provides a strong indication that the intention of the Legislature was not to prohibit a retroactive award from being made in relation to a person who is no longer a child as defined in the *Family Law Act*.

66. Two features of the scheme of the *Family Law Act* are of particular importance to deciding whether section 152 is limited to applications brought while the subject of the child support order is still a "child": section 149 which deals with original child support orders and section 167 which deals with variation of an existing spousal support order.

67. Section 149 confers the authority to make an original child support order, however subsection (2) expressly limits who may bring an application under section 149:

> (2) An application may be made by
>
> (a) a child's parent or guardian,
>
> (b) the child or a person acting on behalf of the child, or
>
> (c) if the right to apply for an order under this section is assigned to a minister under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act*, the minister to whom the right is assigned in the name of the government or the name of the person who made the assignment.

68. The court's ability to entertain an application under section 149 is expressly limited by this section. Section 152 contains no corresponding limitation as to who may apply. It is presumed that the Legislature does not speak in vain, and that no legislative provision should be interpreted so as to render it mere surplusage.[50] Reading in implicit restrictions on when child support applications must be made would make section 149(2) redundant and violate the presumption against tautology.

69. With respect to the variation of spousal support orders, the structure and wording of section 167 begins by largely mirroring section 152. This is followed by notable a difference: section

---

[50] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014), RBOA, Tab 1, pp. 211-216; *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 32.

167(3) imposes a limitation on when an application can be made following the expiry of the prescribed period of spousal support:

Section 152	Section 167
(1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.	(1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.
(2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:	(2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
(a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;	(a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
(b) evidence of a substantial nature that was not available during the previous hearing has become available;	(b) evidence of a substantial nature that was not available during the previous hearing has become available;
(c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.	(c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.
	(3) Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that
	(a) the order is necessary to relieve economic hardship that
	(i) arises from a change described in subsection (2) (a), and
	(ii) is related to the relationship between the spouses, and
	(b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

70. When the Legislature intended to limit jurisdiction under the *Family Law Act*, it did so with an express direction. Had the Legislature intended to similarly limit applications to vary a child support order under section 152, it would have been a simple matter to do so expressly as was done in these other sections. This supports the logical inference that the Legislature did not intend to tether jurisdiction under section 152 to whether the subject of the order remains a "child" at the time of the application.

Consistent Expression

71. The presumption of consistent expression further supports a broad interpretation of section 152. This Court has stated that "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."[51] Like section 152, section 174 of the *Family Law Act*, which concerns cancellation of arrears, also begins with the phrase "on application," and does not have any express limitation as to who may bring the application. Section 174(1) states:

> (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

72. Both section 152 and section 174 may be used to reduce the amount of child support a payor owes. Section 152 allows a payor to reduce child support arrears where the child support amount was set incorrectly.[52] Section 174 allows a payor to reduce arrears if the table amount is set correctly, however it would be "grossly unfair" not to reduce arrears.

73. The three-judge majority of the Court of Appeal in *Dring* acknowledged that there was no jurisdictional impediment to cancelling arears under section 174, but did not think this translated to a similar finding with respect to variation of support orders under section 152. Justice Goepel stated:

> [95] Pursuant to s. 174 of the *FLA* a court may reduce or cancel arrears owing under an agreement or order respecting child support if satisfied that it would be grossly unfair not to reduce or cancel the arrears. Section 96(2) of the *FRA* was to a similar effect. The legislation imposes no limits on the court's jurisdiction to cancel arrears and no British Columbia case has been referred to us where such a

[51] *R. v. Zeolkowski*, [1989] 1 SCR 1378, at 1387; See also *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66 at paras. 41-42.
[52] See, for example: *N.M. v. G.M.*, 2015 BCSC 1732.

> limitation was imposed. While I agree with the results in *Colucci* and *Buckingham* that there is no jurisdictional restriction on applications to cancel arrears, I do not agree with the reasoning to the extent it impacts on the court's jurisdiction to make orders for retroactive support.

74. With the greatest respect, this statement cannot be correct. A majority of the Court of Appeal in *Dring* would apply a jurisdictional bar to retroactive increases to child support under section 152, but not to retroactive reductions of arrears under sections 152 or 174; yet neither section contains any restriction on who may apply for the variation and when.

75. Justice Goepel justified this differential treatment by saying there are "very real differences between the two types of orders," one being for the "immediate payment of money with respect to a past obligation" while the other is for "an order reducing the amount owing with respect to a debt never paid."[53] With respect, this difference does not warrant differential treatment in terms of the jurisdictional issue at play in this case. In both situations, the payor has not met his or her obligations in the past and the applicant seeks to remedy that situation. Why should the person seeking to cancel arrears be the only one permitted to do when the child is no longer a child as defined under the *Family Law Act*?

76. Indeed, as noted by Justice Strekaf, a legislative scheme would be unfair if it treated parents differently depending on their status as a custodial parent or a payor parent.[54] This point was also made in *Colucci*, where Justice Sharpe stated

> [27] …if there is to be jurisdiction to entertain applications to increase, I agree with *Buckingham* that the law should adopt an even-handed approach and, from a jurisdictional perspective, treat payor and recipient parents the same way. If a court has jurisdiction to consider a recipient parent's request for a retroactive increase in child support where the payor's income increased, there should also be jurisdiction to consider a payor parent's request for a reduction where his or her income declined...

77. Sections 152 and 174 both begin with the phrase, "On application," and should be interpreted in the same way. Courts have not imposed any jurisdictional limit on section 174.

---

[53] *Ibid* at para. 92.
[54] *Buckingham* at paras. 49-52.

Section 152 should be interpreted broadly as well so that the expression "on application" is consistently applied and given the same meaning throughout the *Family Law Act*.[55]

iv. Other Indicia Indicating the Legislature's Intention

78. Prior enactments provide evidence on the intention of the Legislature in repealing, amending, or replacing certain provisions.[56] Prior to the *Family Law Act* coming into force, the *Family Relations Act*[57] governed child support orders. Section 91(3) of the *Family Relations Act* provided:

> Any person may apply for an order under this Part on behalf of a child.

79. Courts in British Columbia interpreted the phrase "on behalf of a child" to mean that an application for child support must be brought when the child still fits within the statutory definition of a "child."[58]

80. The Legislature is presumed to have knowledge of the law.[59] The drafters of the *Family Law Act* ultimately chose not to retain the phrase "on behalf of a child" from the *Family Relations Act* for the purpose of varying a child support order under section 152. By this omission, the Legislature must be taken to have intended variation of child support under section 152 of the *Family Law Act* to operate differently than under the former *Family Relations Act*.

---

[55] In *Dring* at para. 92, Goepel J.A. stated that in para. 98 of *DBS* this Court "made clear that its reasoning did not apply to circumstances where arrears have accumulated." With respect, this is not what the Court said. Instead, the Court noted that the "factors" relevant to deciding whether to make a retroactive award are not meant to apply to situations where arrears have accumulated. The jurisdictional question is a preliminary question that arises before the factors can ever be considered. The Court did not address jurisdiction to cancel arrears.

[56] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014), RBOA, Tab 1, pp. 660-679.

[57] RSBC 1996, c. 128, s. 91(3).

[58] *McDonald v. McDonald*, 2008 BCSC 1203 at para. 34; *de Rooy v. Bergstrom*, 2010 BCCA 5 at para. 65.

[59] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 78.

81. The Legislature's *White Paper on Family Relations Act Reform* provides additional evidence that the Legislature intended to modify a court's ability to vary an existing order. The White Paper states that the draft legislation "expands on the circumstances under which a court may vary a child support order."[60] While section 96 of the *Family Relations Act* allowed for variation of an order if there was a change in circumstances, the *Family Law Act* in section 152 expanded this to include variation if there was financial non-disclosure or new evidence of a substantial nature, and also removed the requirement that the application be made "on behalf of a child."

82. Statements in the *Family Law Act Transition Guide*, which have been used by British Columbia courts as evidence of legislative intent,[61] provide further evidence in this regard. With respect to section 152, the Ministry stated:

> Section 152 describes the circumstances under which a court may change, suspend or terminate an order respecting child support.
>
> It expressly provides for retroactive variation of child support orders, if appropriate. Often arrears accrue as a result of blameworthy conduct, in which case arrears are not easily reduced. However, under the *Family Relations Act*, payors sometimes experienced hardship where their income was reduced but they could not get their order changed in a timely manner and, therefore, were in arrears of child support through no fault of their own. Retroactive variation will allow for these situations to be appropriately remedied.
>
> The section expands on and clarifies the circumstances under which a court may vary a child support order. In addition to a change in circumstances, as provided for in the *Child Support Guidelines*, a court may also change an order if there is evidence of a substantial nature that was not available previously or evidence of a lack of financial disclosure. This will discourage payors from hiding income and ensure they do not financially benefit from doing so at the expense of their children.
>
> Section 152 carries over and adds to s. 96 of the *Family Relations Act*.[62]

83. The Legislature intended for section 152 to allow payors to retroactively reduce child support arrears. Imposing a time restriction on when payors must apply would defeat that

---

[60] British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act*, (2010) at p. 117.
[61] See, for example: *Jiang v. Shi*, 2017 BCCA 276 at para. 21.
[62] Laura Selby, ed, *Family Law Act Transition Guide* (Vancouver: Continuing Legal Education Society of British Columbia, 2014), RBOA, Tab 2.

purpose by punishing those who "could not get their order changed in a timely manner..." No court in British Columbia has imposed a time restriction on when a person may apply for a reduction or cancellation of arrears.[63]

84. The Legislature also intended section 152 to address variations of child support if there was a lack of financial disclosure from the payor. In the words of Justice Newbury, financial non-disclosure is the "cancer" of family law litigation and "s. 152 is obviously intended by the Legislature to provide an expeditious remedy where such non-disclosure is alleged to have occurred."[64] Justice Newbury's reference to "cancer" is taken from *Cunha v. Cunha*,[65] where Justice Fraser stated:

> [9] Non‑disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably‑based suspicion that justice was not done. Non‑disclosure also has a tendency to deprive children of proper support.

85. Restricting a court's ability to address non-disclosure would defeat the Legislature's intention of ensuring that courts have the tools and ability to effectively deal with the "cancer" of financial non-disclosure.

86. British Columbia's *Interpretation Act*[66] states that a provision "must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Narrowly interpreting section 152 and limiting jurisdiction for courts to retroactively vary child support orders would be contrary to the Legislature's stated objectives for section 152 of the *Family Law Act*.

---

[63] *Dring* at para. 95.
[64] *Smith v. Smith*, 2017 BCCA 319 at para. 24.
[65] *Cunha v. Cunha*, 1994 CanLII 3195 (BC SC).
[66] RSBC 1996, c. 238.

D. Conclusion

87. In *DBS*, this Court stated early in its reasons that "Any incentives for payor parents to be deficient in meeting their obligations should be eliminated."[67] The majority of the Court of Appeal's approach to the jurisdictional question in *Dring* creates just such an incentive, as it rewards payor parents who are able to shield their increase in income from the custodial parent. The majority's approach was not based on a full statutory interpretation analysis. When that analysis is done, the only conclusion that can be drawn is that under section 152 of British Columbia's *Family Law Act* the legislature did not impose a jurisdictional impediment to who may bring an application for a retroactive variation of a child support order and when they may bring it.

88. If the applicant delays in bringing an application without justification until such time as the child is no longer under the age of majority, that is a factor that may be considered in deciding whether to make an award. But as this Court stated in *DBS* "A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award."[68] This speaks strongly to permitting claims from children in that position who are now above the age of majority when a court is satisfied that there is a good explanation for why the application was not brought earlier.

PART IV – SUBMISSION ON COSTS

89. This Court granted leave to appeal with costs in the cause. If the appeal is allowed, the Appellant submits that costs of the appeal to this Court should follow the event. The Appellant also seeks costs of the proceedings in the courts below, pursuant to section 47 of the *Supreme Court Act*.

90. Despite being successful on appeal, the Respondent was denied costs at both the Supreme Court of British Columbia and the Court of Appeal for British Columbia due to his failure to pay proper child support. Should this appeal be dismissed, the Appellant asks that this Court deny the Respondent costs of this appeal.

---

[67] *DBS* at para. 4.
[68] *Ibid* at para. 113.

PART V – ORDER REQUESTED

91. The Appellant respectfully asks this Honourable Court to allow this appeal, reinstate PCJ Smith's retroactive child support award, and award the Appellant costs in this court and the courts below.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

92. The Provincial Court of British Columbia, the Supreme Court of British Columbia, and the Court of Appeal for British Columbia all restrict public access to family law files.[69] The Appellant's Record contains documents from the file of the Provincial Court for British Columbia to which access to the public would be restricted. However, the facts of this case are available in the publicly available judgments of the British Columbia Supreme Court and the British Columbia Court of Appeal. The restrictions on public access will therefore not affect this Court's reasons if they draw upon those two judgments.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, this 12th day of August, 2019.

_____

Peter M. Mennie
Counsel for the Appellant

[69] *Provincial Court (Family) Rules*, BC Reg 417/98, Rule 20(10); *Supreme Court Family Rules*, BC Reg 99/2018, Rule 22-8(1); *Court of Appeal for British Columbia – Record and Court Room Access Policy*, page 7, s. 1.8.

PART VII - TABLE OF AUTHORITIES

Cases	**Paragraph #**
Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36	62
Amaratunga v. Northwest Atlantic Fisheries Organization, 2013 SCC 66	71
Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42	53
Buckingham v Buckingham, 2013 ABQB 155	40, 76
Calver v Calver, 2014 ABCA 63	23
Canada (National Revenue) v. Thompson, 2016 SCC 21	
Century Services Inc. v. Canada (Attorney General), 2010 SCC 60	62
Cheng v. Liu, 2017 ONCA 104	43
Colucci v. Colucci, 2017 ONCA 892	40, 57, 76
Cunha v. Cunha, 1994 CanLII 3195 (BC SC)	84
Daoust v Alberg, 2016 MBCA 24	23
DBS v. SRG, 2006 SCC 37	2-5, 17, 18, 20, 23, 24, 26, 28-32, 38, 41-46, 54, 59, 87, 88, 92, 93
de Rooy v. Bergstrom, 2010 BCCA 5	79
Dring v. Gheyle 2018 BCCA 435	3, 6, 21, 22, 28, 31, 40, 58,

Federal Child Support Guidelines, SOR/97-175	6, 13, 55-57, 60
Interpretation Act, RSBC 1996, c. 238	86
Parentage and Maintenance Act, RSA 2000, c. P-1	32, 33, 36, 39, 46
Provincial Court (Family) Rules, BC Reg 417/98	92
Supreme Court Family Rules, BC Reg 99/2018	92