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

APPLICANT
(Appellant)

AND:

SEAN GRAYDON

RESPONDENT
(Respondent)

AND:

WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION

INTERVENER

RESPONDENT'S FACTUM
SEAN GRAYDON, RESPONDENT (REDACTED)

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The parties began living together in a common-law relationship on August 1, 1990. Their child, Alyssa April Graydon ("Alyssa"), was born December 27, 1991, and the parties separated shortly after on April 14, 1994.

2. On March 29, 2001, the parties entered into a consent variation order to adjust the Respondent's child support payments based on his income at the time, which was $39,832.00. The support order included a term that it would terminate automatically once Alyssa lost her status as a child of the marriage.

3. Two months later, the Appellant sent the Respondent a proposal for parenting time which included a clause that the parties review child support on a yearly basis. The Respondent disagreed with the s. 7 expenses included in the proposal, and the Appellant abandoned the proposal.

4. Sometime thereafter, the Appellant assigned her right to receive child support for Alyssa to the BC Government under the *Employment and Assistance Act*, SBC 2002, c. 40 ("*EA Act*"). During this period, the Ministry of Child and Family Development (the "Ministry") would support the Appellant and Alyssa pursuant to the *Employment and Assistance for Persons with Disabilities Act, SBC 2002, c. 41* and in return, the Appellant's child support rights were assigned to the Ministry.

5. In 2009, Alyssa turned 19 and commenced post-secondary studies. She stopped being a "child" for the purposes of Part 7 of the *Family Law Act*, SBC 2001, c. 25 (the "*FLA*") on or about April 2012, when she completed her post-secondary program.

6. On May 15, 2012, the Ministry, the Respondent and the Appellant entered into a consent order confirming that as of April 30, 2012, the Respondent's obligation to pay child support for Alyssa was terminated. At the Appellant's request, the order included a term that the May 15, 2012 order would be without prejudice to any claims for retroactive child support that may be pursued by the Appellant.

7. On January 23, 2015, approximately 32 months after Alyssa lost her status of a child of the marriage and after the support order terminated, the Appellant brought an application to vary the order to seek retroactive support from the Respondent.

8. Neither the Appellant, the Respondent nor the Ministry discussed support variation, or took any steps to vary the amount of child support from 2001 to 2015, other than as mentioned.

9. The Order of Judge Smith did not purport to vary the spent 2001 order, did not consider the fact that Alyssa was no longer a child of the marriage, and did not consider the effect of there not being an extant order to vary in his Judgment, despite this being brought to his attention by the Respondent.

10. This Appeal is not of a variation order, as there was no extant order to vary. The Appellant has framed it as a variation appeal, to carve out a potential exemption to allow her to claim support for an adult that no longer has the status of child. It bears the effect of being a re-distribution of capital, as a result of a past support shortfall the Appellant conceded she was aware of during the relevant time but chose not to pursue.

11. It also demonstrates some of the multitude of issues, legal and factual disputes that may be raised as a result of carving out an exception for variation applications, including defining what constitutes a variation, how far a variation may go in changing the terms of an existing order before it loses the character of a mere variation, whether a spent order and when, and how long thereafter a spent order could be varied.

12. The interpretation sought by the Appellant would open the floodgates of the court system to new litigants seeking to perpetually pursue further orders for support, past the time when said support would benefit the child of the marriage, with no tangible benefits for said child. It would re-define such support as the right of the recipient parent rather than the right of the child and remove the recipient parent's incentive to pursue support for the benefit of the child.

Statement of Facts

13. The parties began living together in a common-law relationship on August 1, 1990. At the time, the Appellant was 15 years old, and the Respondent was 21 years old. Their child, Alyssa,

was born December 27, 1991. The parties ended their common-law relationship 23 years ago, on April 14, 1994.

14. The parties filed a consent variation order dated March 29, 2001 which states, *inter alia*:

[redacted][1]

[Emphasis Added]

15. Between 2001 and 2012, as disclosed by the Appellant at trial, the Appellant had signed over her child support rights to the Family Maintenance Program (the "FM Program") as required by legislation at the time.[2] A reading of the relevant legislation confirms that pursuant to the *EA Act*, and in particular section 18 of the *Employment and Assistance for Persons with Disabilities Regulation*, BC Reg 265/2002 confirms that the Appellant, as a party receiving income assistance, must have assigned her maintenance rights to the Minister:

> The following categories of maintenance rights must be assigned to the minister:
>
> a) the right to receive payment under
>
> i) a maintenance agreement or maintenance order
>
> [Repealed – BC Reg 62/2015, Sch. 2, s. 2]

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[1] Order, March 29, 2001 [Appellant's Record ("AR") tab 12]

[2] Transcript of proceedings before Judge Smith ("Transcript"), p. 21, lines 1-12 [AR tab 23]; Reply, April 11, 2012 [AR tab 15]; Order of Judge Woods, May 15, 2012 [AR tab 16]

16. A consent order was entered into on May 15, 2012 between the Respondent, the FM Program and the Appellant terminating the Respondent's obligation to pay child support as of April 30, 2012. The Order was made on a without prejudice basis to any claims for retroactive child support that may be pursued by the Appellant as against the Respondent. The Consent Order states as follows:

[redacted][3]

17. Ms. Alyssa Graydon ceased to be a child of the marriage as of April 30, 2012.

18. On January 23, 2015, 32 months later, the Appellant brought an application for retroactive child support, requesting:

[redacted][4]

19. On February 16, 2015, the Respondent filed a response to the Appellant's application stating that "Alyssa Graydon for some time has not been a child of the marriage. Proper amount has been paid".[5]

20. On November 17, 2015, the Honourable Judge De Couto ordered, *inter alia*, that the Appellant's application be amended to seek retroactive support from April 2001 to April 2012.[6]

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[3] Order of Judge Woods, May 15, 2012 [AR tab 16]
[4] Application, January 23, 2015 [AR tab 8]
[5] Reply, February 16, 2015 [AR tab 9]
[6] Order of Judge De Couto, November 17, 2015 [AR tab 20]

21. On September 26, 2016, the matter was heard before Judge Smith at the Provincial Court of British Columbia. Judge Smith considered *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231, 2006 SCC ("*D.B.S.*") and the four factors for ordering retroactive support.

22. Contrary to the Appellant's implications, the Honourable Judge Smith did not find any facts concerning the Appellant's allegations against the Respondent's conduct, other than to find the Respondent was generally "blameworthy, but only to a small degree.", and specifically to paying creditors over increasing his child support based on rising income.[7]

23. Judge Smith ordered 15 years retroactive support as follows:

1. [redacted]

2. [redacted].[8]

24. The Respondent appealed the decision to the Supreme Court of British Columbia. The matter was heard before the Honorable Madam Justice Young on February 16, 2017 and Reasons for Judgment were delivered on May 30, 2017.[9]

25. Madam Justice Young allowed the appeal and set aside the order of the Trial Judge. Madam Justice Young held that the court had no jurisdiction to grant an application for retroactive support for a person who is no longer a child of the marriage at the date of application, and that the learned trial judge erred in law in ordering retroactive child support, correctly interpreting the Order to be an originating order:

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[7] Reasons for Judgement of Judge Smith, September 26, 2016 ("BCPC Reasons"), p. 7, para. 26 [AR tab 1]
[8] Order of Judge Smith, September 26, 2016 [AR tab 2]
[9] Order of Justice Young, May 30, 2017 [AR tab 4]

> [62] Although s. 150 of the *FLA* [*Family Law Act*, SBC 2001, c. 25] does not restrict the date for which the court may order child support and s. 152 permits the court to make retroactive orders, this passage does not address the restriction that the child for whom support is being sought must still be a "child" at the time of the application in order to have standing.
>
> [63] With all due respect to the learned trial judge, I find that this is an error in law. Section 150 of the FLA does not provide grounds for ordering support for a person who is not a child of the marriage.[10]

PART II – STATEMENT OF ISSUES

26. The Appellant has framed the issue to be determined by the Court on the Appeal as follows:

a. 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*? – *The Respondent's position is that a BC court does not 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, if the Henry*[11] *exception does not apply.*

b. Does the court's decision in *D.B.S.* foreclose an application under s. 152 of *Family Law Act* to vary an existing child support order once the child has ceased to be a "child" as defined in that Act? – *The Respondent's position is that s. 152 does not apply to this appeal as there was no extant order to be varied at the time of the Appellant's application for retroactive support.*

c. On an application of the principles of statutory interpretation, does s. 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? – *The*

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[10] *Graydon v. Michel*, 2017 BCSC 887, Reasons for Judgement of Justice Young, May 30, 2017 ("SCBC Reasons") p.14, paras. 62-63 [AR tab 3]
[11] *Henry v. Henry*, 2005 ABCA 5 ("*Henry*")

Respondent's position is that s. 152 of the Family Law Act does not 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.

27. The Respondent raises the following issues on appeal:

a. Was the Appellant's application for retroactive support an original application or a variation application?

b. Was the original child support order "spent" at the time the Appellant made her application for retroactive support?

c. Does the Appellant's application for retroactive support fall within the *Henry* exception as set out in *D.B.S.?*

PART III – STATEMENT OF ARGUMENT

Introduction

28. On March 18, 2013, the *Family Relations Act*, R.S.B.C. 1996, c. 128 was repealed and replaced by the *FLA*. The Applicant's application for retroactive support was brought on December 8, 2014 under the *FLA*.

29. Both the provincial *FLA* and the federal *Divorce Act*, RSC 1985, c. 3 (2nd Supp) (the "*Divorce Act*") govern claims for child support. Recently, the *Divorce Act* has been significantly reformed by the enactment of Bill C-78, which was introduced to parliament in May 2018 and received Royal Assent on June 21, 2019. Many of the statutory revisions mirror British Columbia's *FLA* through incorporation of the terminology and standards found in the *FLA.*[12]

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[12] Department of Justice, "Legislative Background: *an Act to ament the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act* (Bill C-678 and

D.B.S.

30. This Court's ruling in *D.B.S.* is the landmark case on retroactivity of child support. Since the *D.B.S.* decision, it has been recognized that courts have no power to order retroactive child support upon an original application when the child is no longer a child of the marriage at the time of the original application, subject to the *Henry* exception. The Appellant argues that the ruling in *D.B.S.* only applies to original child support orders made under the *Divorce Act*, and that the jurisdictional issue of whether a court can retroactively vary a child support order where the application is made after the child has ceased to be a "child" remains an open question.

31. At paragraph 60 of *D.B.S.*, Justice Bastarache confirmed that the court must have proper jurisdiction before granting a retroactive child support award. Child support under the *Divorce Act* is an application-based regime – the filing of an application is a requirement for the court to make an order for retroactive child support. Similarly, the *FLA* in British Columbia is an application-based regime and the court's jurisdiction to make such an order will only arise upon application to the court for original child support orders (s. 149) and variation of existing child support orders (s. 152).

32. In *D.B.S.,* the Court considered when the "material time" is to bring an application for a retroactive child support award under s. 15.1(1) of the *Divorce Act.* Justice Bastarache, writing for the majority, reasoned as follows:

> [88] … 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.

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the 42nd Parliament)." online: (29 August 2019) Government of Canada Department of Justice <https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/03.html>

> [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. [13]

33. Having established that the "material time" for bringing an application is when the application is made, the Court in *D.B.S.* considered whether it could make a retroactive award for child support in *Henry,* which was the only matter of the four considered by the Supreme Court of Canada which involved a child who was no longer a child by statutory definition when the application for retroactive support was filed. In *Henry,* there was an existing child support order in place, and this Court properly considered it as such, stating at paragraph 27: "This appeal arises out of Ms. Henry's motion to vary child support". The payor parent had been served with a notice to disclose while the subject child was still a "child of the marriage" but had lost that status at the time the application for retroactive support was made. In analyzing the court's jurisdiction to make a retroactive award, Justice Bastarche explained at follows at paragraph 150 of *D.B.S.*:

> I would add that the eldest child … was no longer a child of the marriage when the Notice of Motion for retroactive support was filed… 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. <u>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</u>

[13] *D.B.S.*, paras. 88-89

> the eldest child ceased being a child of the marriage, the court was able to make a retroactive order for this daughter.
>
> [Emphasis added]

34. As the Court properly recognized that *Henry* was a variation application and not an application for an original order, it is appropriately inferred that the Court considered the same analysis with respect the court's jurisdiction to grant a retroactive award for a child who is no longer a child of the marriage at the time the application is brought for both original orders and variation orders under the *Divorce Act.*

35. In summary, the court's jurisdiction to make a retroactive child support exists where:

a. the payor parent is served with an application for retroactive support while the child is still a child of the marriage (*D.B.S.*); or

b. the payor parent is served with an application an application to disclose income while the child is still a child of the marriage (*Henry* exception).

Post-*D.B.S.*

36. At first glance, it would appear that two lines of authority have emerged since the *D.B.S.* decision as to the power of courts to order retroactive support on a variation application where the child is no longer a child of the marriage at the time the variation application is brought. However, the British Columbia Court of Appeal's decision in this case merely represents another in a series of appellate decisions, save for the Ontario Court of Appeal in *Colucci v. Colucci*, 2017 ONCA 892 ("*Colucci"*), in which each province has consistently applied the principles established in *D.B.S.* in interpreting the federal *Divorce Act*, as well as applying the principles set out in *D.B.S.* to interpret their respective provincial legislation in finding that courts do not have jurisdiction to make a retroactive support order for a child who is no longer a child under the appropriate legislation at the time the application is brought.

37. The appellate decisions in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, and Newfoundland and Labrador establish that the courts in those provinces have jurisdiction to make an order for a retroactive child support only when the child for whom support is sought is "a child of the marriage" when the application is commenced.

However, the Ontario Court of Appeal in *Colucci* determined that this principle does not apply in the context of variation proceedings under the *Divorce Act*, and held that the court has jurisdiction to entertain claims for retroactive increases in support by recipients, as well as claims by payors for retroactive reductions, regardless of whether the child remains entitled to support when the proceedings are initiated. At paragraph 27 of *Colucci*, Justice Sharpe, reasons:

> [27] While the argument for allowing post-"child of the marriage" applications to decrease support is perhaps less compelling, 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. Moreover, as I will point out, while the question of jurisdiction is one thing, the question of whether such applications should be allowed is quite another.

38. Appellate courts in the other provinces, however, have drawn a distinction between cases where there is a retroactive increase to child support – thereby creating a *fresh obligation* on the payor – and between those where an *existing obligation* is retroactively reduced through variation order.

Ontario Court of Appeal

39. The Ontario Court of Appeal in *Colucci* considered whether the Superior Court has jurisdiction under the *Divorce Act*, s. 17(1) to vary or discharge child support arrears where the application is brought after children are no longer "children of the marriage". The father had accumulated child support arrears exceeding $175,000 when he brought his application to vary the support order retroactively and to have the arrears rescinded. The Ontario Court of Appeal concluded that the criteria set out in *D.B.S.* apply to original applications for support pursuant to s. 15, and not to variation motions pursuant to s. 17.1 of the *Divorce Act*.

40. An important distinction from the case at bar is that the Ontario Court of Appeal's comments in *Colucci* were in the context of a request to cancel arrears, not a request to *increase* child support. The analysis involved in applications to vary arrears is different from the analysis in applications to increase child support retroactively, solely because a retroactive increase in child

support creates a fresh obligation on the payor that did not previously exist. It appears that this Court was alive to this issue as the first paragraph of *D.B.S.* states that:

> These appeals do not concern the non-payment of arrears; they concern the enforceability and quantification of support that was neither paid nor claimed when it was supposedly due.

41. The Respondent submits that jurisprudence of British Columbia, and other provinces, does not accord with Justice Sharpe's conclusion in *Colucci.* Importantly, the decision of Justice Strekaf in *Buckingham v. Buckingham*, 2013 ABQB 155 ("Buckingham") was the foundation of Justice Sharpe's decision in *Colucci;* however, *Buckingham* not only pre-dated the Alberta Court of Appeal's decision in *Calver v. Calver,* 2014 ABCA 63 ("*Calver*"), but was also a lower court decision. Justice Goepel addresses this point at paragraph 90, writing:

> [90] While *Colucci* cites numerous trial decisions in Ontario and elsewhere, it makes no reference to any of the appellate decisions discussed in these reasons, which have come to a contrary conclusion on when the court has jurisdiction to entertain an application for retroactive support. I prefer the reasoning in those appellate cases, and the reasoning of Justice Joyce in *C.L.L.*

42. It is the Respondent's position the Ontario Court of Appeal's reasoning in *Colucci* cannot be reconciled with *D.B.S.* as it effectively nullifies the *Henry* exception by allowing a variation after the child became an adult without any prior formal step.

British Columbia

43. In *Dring v. Gheyle,* 2018 BCCA 435 ("*Dring*"), the Appellant argued that there was no jurisdiction for the judge to hear the Respondent's application, because a person seeking a retroactive order of child support must first establish that the child remained a child at the time the application was brought. The British Columbia Court of Appeal ruled that where there is no order in place that governs child support or the application is to vary an existing order, the court only has jurisdiction to order retroactive support if the application is made while the child is a child of the marriage.

44. The Appellant argues that the British Columbia Court of Appeal in *Dring* erred in two respects. Firstly, the Appellant argues that *D.B.S.* did not "pronounce on the scope of court's

jurisdiction under section 17 of the *Divorce Act*"[14] and secondly, that 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.*"[15]

45. The Court in *Dring* considered *D.B.S.* and rejected the mother's argument that Justice Bastarache did not directly consider whether a court had jurisdiction to entertain an application to vary a child support order after the children are no longer children of the marriage. Writing for the majority, Justice Goepel considered the *Henry* exception as set out in paragraph 150 of *D.B.S.* and reasoned as follows:

> [86] With respect, I cannot agree that Justice Bastarache did not directly consider or decide the point in *D.B.S.* I set out again para. 150 of *D.B.S.*:
>
> > [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.
>
> [87] This excerpt makes clear that the jurisdiction to make a retroactive award was triggered because of the application that had been brought to compel Mr. Henry to disclose his income while the daughter in question was still a child. It is important to remember that *D.B.S.* was intended to provide guidance to lower courts in dealing with retroactive applications. If the existence of a prior order was all that was necessary to trigger the court's jurisdiction, Justice Bastarache would surely have said so. The court in *Colucci* acknowledges that para. 150 of *D.B.S.* might suggest there would have been no jurisdiction had the proceedings not been initiated while the child was still a child of the marriage. In

[14] Appellant's Factum, para. 29
[15] Appellant's Factum, para. 30

> my respectful opinion, there is no other conclusion that can be drawn from that paragraph. I cannot agree that *D.B.S.* did not directly consider and decide the point.[16]
>
> [Emphasis Added]

46. The British Columbia Court of Appeal also rejected the Ontario Court of Appeal's conclusion in *Colucci* that *D.B.S.* applies only to original applications for support pursuant to s. 15, and not to variation motions pursuant to s. 17.1 of the *Divorce Act*. Justice Goepel states as follows:

> [88] I am also unable to agree that Justice Bastarache was not fully aware of the different wording and purpose of ss. 15 and 17 of the *Divorce Act*. In that regard, I note that at para. 83 of *D.B.S.* he specifically addresses the different wording.
>
> [89] Justice Bastarache was also aware of the "fairness" concerns raised at para. 29 of *Colucci*, observing that as a consequence of the limited enforcement jurisdiction conferred by statute "it will not always be possible for a court to enforce an unfulfilled child support obligation" (at para. 90). He said:
>
> > 89 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]
>
> [90] While *Colucci* cites numerous trial decisions in Ontario and elsewhere, it makes no reference to any of the appellate decisions discussed in these reasons, which have come to a contrary conclusion on when the court has jurisdiction to entertain an application for retroactive support. I prefer the reasoning in those appellate cases, and the reasoning of Justice Joyce in *C.L.L.*[17]

47. The Court in *Dring* considered the important distinction between cases where there is a retroactive increase to child support between those where an existing obligation is retroactively reduced through variation. At paragraphs 91 through 93, the Court states:

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[16] *Dring*, paras. 86-87
[17] *Dring*, paras. 88-90

> [91] I would also note that in *Colucci* the issue before the court did not involve retroactive child support. Its comments on that question are, with respect, *obiter*. *Colucci* concerned child support arrears and whether the court had the jurisdiction to cancel such arrears after a child had become an adult. The court relied on the reasons in *Buckingham v. Buckingham*, 2013 ABQB 155 (CanLII), which was also concerned with the court's jurisdiction to cancel arrears. In both *Buckingham* and *Colucci*, concern was expressed that the law should adopt an even-handed approach and, from a jurisdictional perspective treat payor and recipient parents the same way.
>
> [92] With respect, that reasoning fails to appreciate the very real differences between the two types of orders. As the New Brunswick Court of Appeal noted in *Brown v. Brown*, 2010 NBCA 5 (CanLII) at para. 3, an application for retroactive child support seeks the immediate payment of money with respect to a past obligation, while an application for the cancellation of arrears in child support seeks an order reducing the amount owing with respect to a debt never paid. In *D.B.S.* the Court noted the distinction between the two types of orders and made clear that the Court's reasoning did not apply to circumstances where arrears have accumulated (at para. 98).
>
> [93] In S.(*D.B.)* Justice Bastarache constructed a framework that judges should follow in determining whether retroactive child support orders should be made. The framework balanced a payor's interest in certainty with the need for fairness for the child. Courts were directed to consider the reason for the delay in seeking child support, the conduct of the payor parent, the past and present circumstances of the child and whether a retroactive award might entail hardship. The Court recognized that it would not always be possible for a court to enforce an unfulfilled child support obligation by the payor parent because of the limited enforcement jurisdiction of courts as conferred by statute (at para. 90).

48. With respect to whether the same analysis applies to both original orders and variation orders, the British Columbia Court of Appeal in *Dring* states:

> [97] In my respectful opinion the court does not have jurisdiction to make a statutory retroactive award unless at the date of the application the child retains the status of a child, or there has been a prior application which brings the matter under the "*Henry* exception". <u>The answer to the jurisdiction question is the same regardless of whether the application is an original application or for a variation of an existing order. There is no juridical or rational reason to distinguish the two situations.</u>[18]
>
> [Emphasis Added]

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[18] *Dring*, para. 97

49. The Court's decision in *Dring* is consistent with other appellate courts that have addressed the court's jurisdictional limit on ordering retroactive support on both original and variation applications when the application was made after the child had lost its status as a child of the marriage.

Alberta

50. In *Dring*, Justice Goepel relied on the Alberta Court of Appeal decision in *Calver*, where the Appellant father argued that the trial judge erred in law when he ordered retroactive child support and retroactive section 7 expenses for the oldest child who was no longer a child of the marriage when the application for retroactive support was made.[19] The Appellant mother argued that there was a previous order obliging the father to disclose his annual income, thereby bringing her application within the *Henry* exception. On this point, the Alberta Court of Appeal reasoned as follows:

> **32** The mother's argument overlooks the fact that the *Divorce Act* is an application-based regime: *DBS* at para 56. The *Henry* exception is understandable when viewed from this perspective. The same could be said of any other application to enforce a disclosure obligation, for example, an application for contempt of previous court orders imposing such obligations. Simply put, such applications may be pre-requisites to an application for retroactive support, since without the necessary information a payee will lack the basis for seeking retroactive support.
>
> **33** As the parties acknowledged, disclosure obligations in support orders are the norm now. They are mandated by the *Alberta Rules of Court*, Alta Reg 124/2010: see Rule 12.53 and forms FL-26 and FL-27. The position urged upon the Court by the mother ignores the application-based nature of the *Divorce Act*. It would undercut the very foundation of *DBS*, which is that retroactive support will not generally be awarded for someone who is not a child of the marriage at the time of the application. Expanding the *Henry* exception as proposed by the mother would disentitle a person to retroactive support in only the rarest of circumstances, thus making the basic approach taken in *DBS* an exception rather than the general rule.[20]

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[19] *Calver*, para. 25
[20] *Calver*, para. 32-33

51. In allowing the father's appeal, the Alberta Court of Appeal found that the court lacked jurisdiction to consider the mother's application as she had brought her application after the child ceased to have the legal status of a child of the marriage:

> A court's jurisdiction to make a retroactive support order exists if the child is still a child of the marriage when the payor is served with an application: (i) for retroactive support (*DBS*); or (ii) to disclose income (*Henry*)."[21]

Manitoba

52. In *Daoust v. Alberg*, 2016 MBCA 24 ("*Daoust*"), the Manitoba Court of Appeal heard an appeal arising from the dismissal of the mother's motion for retroactive variation of a child support order made pursuant to Manitoba's provincial legislation. In finding that the child was not a "child" qualifying for support under section 35.1 of *Manitoba's Family Maintenance Act,* C.C.S.M. c. F20 ("*FMA*"). In dismissing the mother's appeal, the Court relied on *D.B.S.* and ruled that "because the motion was filed at a time when the child did not fall within section 35.1 of the *FMA*, the court did not have jurisdiction over the matter"[22]

53. In applying *D.B.S.* to the provincial *FMA*, the Court considered the variation in the definition of "child" under both the *Divorce Act* and the *FMA.* In finding that the difference in the definition of child was "a distinction without difference" the Court explained as follows:

> [4] A slight difference between the definition of child found in section 35.1 of the *FMA* and the definition of child of the marriage found in section 2(1) of the *DA* is that the *DA* specifies that the child must fit within the definition of child of the marriage at the "material time" and the *FMA* states that the child must fit within the definition of child within the "relevant time". The motion judge held that this was a distinction without a difference. We agree. We also agree with the motion judge that there is no legal or policy basis put forward that would justify an interpretation different than that given by the majority of the Supreme Court of Canada.[23]

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[21] *Calver*, para. 28
[22] *Daoust*, para. 6
[23] *Daoust*, para. 4

54. The Manitoba Court of Appeal also rejected the Appellant's argument that the court had jurisdiction of the matter on the basis that the there was a previous child support order in place. At paragraph 5 of *Daoust*, the Court rejected this argument ruling as follows:

> [5] …as is the case with the *DA*, the *FMA* is an application-based regime. The jurisdiction of the court is invoked by way of application. In these circumstances, it is not invoked by the fact that the Court had made a previous support order, nor by the fact that the petitioner made an informal request for disclosure prior to the child ceasing to fall within section 35.1 of the *FMA*[24]

55. Citing *Daoust*, the British Columbia Court of Appeal specifically rejected this argument in *Dring* at paragraph 78:

> [78] The proposition that the court is seized of all future applications regardless of when they are made if there is a prior child support order was, as noted at para. 69 above, specifically rejected by the Manitoba Court of Appeal in *Daoust*. It was also in my view implicitly rejected in *D.B.S.* If a prior order was all that was needed to trigger jurisdiction there would have been no need for the Henry exception. I would not accede to this submission.

56. It is the Respondent's position that the Appellant's application for retroactive support does not fall within the *Henry* exception as there was no formal request for disclosure served while Alyssa remained a child of the marriage.

Saskatchewan

57. In *Hnidy v. Hnidy*, 2017 SKCA 44 ("*Hnidy*"), the Saskatchewan Court of Appeal considered whether the court had jurisdiction to make a retroactive child support award on original and variation applications under the federal *Divorce Act* and the provincial *Family Maintenance Act*, 1997, S.S. 1997, c. F-6.2 when the application was brought after the children ceased to hold the status of a child of the marriage under the *Divorce Act.* The parties had entered into an interspousal contract which settled division of property, spousal support and child support. When

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[24] *Daoust*, para. 5

the father applied for divorce, the parties filed an "Agreement as to Child Support" (akin to the "Child Support Affidavit" in British Columbia) to satisfy the court that reasonable arrangements have been made for the support of any children of the marriage, which would enable to court to grant the divorce in the absence of a court order setting out the child support obligations of the parties. Accordingly, there was no court order with respect to child support at the time the mother brought her application for retroactive support.

58. The Appellant mother argued that court's jurisdiction to make a retroactive child support order existed by virtue of the fact a divorce was granted by the court. The Court rejected this argument, reasoning that the court's jurisdiction over child support payments will arise only "upon application by a person authorized pursuant to the legislation" and that "in the absence of any claim for corollary relief, the act of dissolving the marriage did not seize the court with jurisdiction over child support."[25]

59. The Court also found that the mother's application did not fall within the *Henry* exception as the formal request for disclosure was served after the children had lost their status as children within the meaning of the *Divorce Act.* Importantly, the Court stated that "informal requests to disclose income cannot enlarge the court's jurisdiction outside the '*Henry* exception'"[26]. At paragraph 81, the Court in *Hnidy* made the following obiter analysis on the limits of the *Henry* exception:

> [81] The "*Henry* exception" widened the ambit in variation applications, but where there was compulsion to disclose by legal process before a child had lost the required status. The mother's application was not a variation application, as no prior court order had ever been granted. In any event, *Calver* and *Daoust* have determined that the existence of a prior support order, a provision in a prior order for annual income disclosure or simply an informal request for income disclosure, cannot serve to enlarge the "*Henry* exception" or confer jurisdiction where none existed at the time of the application.

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[25] *Hnidy*, para. 83
[26] *Hnidy*, para. 84

60. The Saskatchewan Court of Appeal found that the Chambers judge did not err in ruling that she lacked jurisdiction to make an order for retroactive or ongoing support under either federal or provincial support legislation. The Court then went on to consider the Appellant's alternate claim based on breach of the interspousal contract, and it was on this ground that the mother's claim returned to Queen's Bench for reconsideration as it had not been considered by the court below.

Nova Scotia

61. The Nova Scotia Court of Appeal considered the issue of retroactive support in *Selig v. Smith*, 2008 NSCA 54. The Appellant mother sought a retroactive increase in child support for her two children. The trial judge granted retroactive child support for the parties daughter, who was enrolled in university studies at the time of the mother's application, but denied it for the parties son on the basis that he was no longer a child of the marriage at the time the application for retroactive support was made. The Court confirmed the trial judge's ruling that there was no jurisdiction for the court to order a retroactive child support award for the son as he was not a "child of the marriage" at the time the mother made her application for retroactive support.

New Brunswick

62. In *Brown v. Brown*, 2010 NBCA 5 ("*Brown*"), the New Brunswick Court of Appeal distinguished between a retroactive *award* of child support and a retroactive *reduction* of child support. The Appellant in the case at bar has argued that "this difference does not warrant differential treatment in terms of the jurisdictional issue at play in this case" and asks, "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*?"[27]

63. In *Brown,* the Court recognized the very real difference in the two types of orders:

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[27] Appellant's Factum, para. 75

> [3] ….In [*D.B.S.*] the Supreme Court outlined four factors to be considered when deciding whether to order a retroactive increase in child support, including the two factors just cited. But the present case involves a retroactive order to reduce both spousal and a child support. The distinction between the two orders is not without difference and one which did not escape the Supreme Court. It is one thing to demand immediate payment of monies with respect to a past obligation that only recently matured and quite another to seek an order that recalculates and reduces the amount owing with respect to a debt never paid.[28]
>
> [Emphasis added]

64. The New Brunswick Court of Appeal considered *D.B.S.* and the underlying policy considerations for differential treatment of the two types of orders:

> [26] For purposes of deciding the present appeal, the decision in *D.B.S. v. S.R.G.* is important because the majority opinion expressly acknowledges that the policy considerations – certainty and predictability - underscoring the need to examine the four factors outlined above do not come into play when dealing with support arrears. On that point, Bastarache J. for the majority wrote:
>
> > Before canvassing the myriad of factors that a court should consider before ordering a retroactive child support award, I also want to mention that these factors are not meant to apply to circumstances where arrears have accumulated. In such situations, the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainty and predictability militate in the opposite direction. There is no analogy that can be made to the present cases [of retroactive increases in child support]. [para. 98]
>
> ….
>
> [28] From a policy perspective, it is not difficult to justify the differential treatment accorded to variation orders that seek a retroactive increase in arrears from those that seek a decrease in either child or spousal support. Orders falling within the latter group require the court to confirm that a lower amount of support was payable despite the failure to pay the higher amount. Neither the applicant payer nor the support recipient is prejudiced by the granting of the retroactive variation order in the sense that neither is being asked to pay or repay monies which they may or may not have at the time of the application for variation. Thus, the policy objectives of certainty and predictability in the law are fully respected. This is not necessarily so in cases where the retroactive variation seeks an increase in

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[28] *Brown*, para 3.

> support. The payer is being asked to pay money that he or she may not presently have or may have difficulty in paying. Hence, a plea of hardship or unfairness cannot be ignored and that is why it is necessary to look at a number of factors before ruling on a retroactive variation order that seeks an increase in support.[29]

Newfoundland and Labrador

65. The appropriateness of a retroactive child support award was considered by the Newfoundland and Labrador Court of Appeal in *B.W. v. J.G.*, 2014 NLCA 5. Citing Justice Bastararche in *D.B.S.,* the Court acknowledged that the *D.B.S.* principles applicable to awards of retroactive child support are distinguished from those applicable to arrears.

Summation on the Canadian Jurisprudence

66. Although provincial statutes vary from province to province, it is the Respondent's position that the issue of retroactive support for children who have ceased to be children of the marriage under the *Divorce Act* was resolved by Justice Batarache in *D.B.S.* unequivocally and still governs. Since *D.B.S.* – with one exception being *Colucci* – neither the Supreme Court of Canada, nor any appellate court interpreting its provincial legislation or the *Divorce Act,* has held that the court has jurisdiction to make a retroactive support order for a child who is no longer a child under the appropriate legislation. Since the appellate decisions in *Dring* and *Colucci,* lower Courts in other provinces have followed the analysis in *Dring:* see *S.E.B. v. J.T.M.,* 2019 NBQB 76, *M.W. v. K.T.*, 2019 NLSC 14, *McCrate v. McCrate* 2019 NSSC 167 ("*McCrate*"). In *McCrate* at paragraphs 65 through 66, Justice Jollimore specifically rejects *Colucci* and accepts *Dring*:

> [65] I am aware of *Colucci*, 2017 ONCA 892 (CanLII) where Justice Sharpe said that jurisdiction to vary child support when a child is no longer a "child of the marriage" is not ousted by the language of subsection 17(1) of the *Divorce Act* or the principles of child support: *Colucci*, 2017 ONCA 892 at paragraph 30.
>
> [66] With respect, I disagree. I do so for the reasons given in *Dring v. Gheyle*, 2018 BCCA 435 (CanLII): Justice Sharpe's comments were in the context of a request to cancel arrears, not a request to increase child support. The analysis involved in applications to

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[29] *Brown*, paras. 26, 28

> vary arrears is quite different from the analysis in applications to increase child support retroactively: *Smith v. Helppi*, 2011 NSCA 65 (CanLII) at paragraph 20.

67. The policy objectives stated in *D.B.S.*, and accepted by appellate courts in *British Columbia, Alberta, Manitoba, Saskatchewan, New Brunswick, Nova Scotia,* and *Newfoundland and Labrador* provide insight into the policy considerations dismissed by the Appellant on the basis that there should not be differential treatment on applications for retroactive *increases* and retroactive *reductions* to a child support order. The Appellant's argument overlooks that this Court stated at paragraph 1 of *D.B.S.* that "these appeals do not concern the non-payment of arrears; they concern the enforceability and qualification of support that was neither paid nor claimed when it was supposedly due". Furthermore, the Supreme Court at paragraph 98 of *D.B.S.* observed, "these factors are not meant to apply to circumstances where arrears have accumulated". *Colucci* does not help the Appellant as that case dealt with retroactive decrease in support payable and can be distinguished from the case at bar on that ground alone.

68. The Appellant argues that the British Columbia Court of Appeal's ruling in the case at bar is contrary to the Legislature's objective of ensuring that child support is paid according to the *Guidelines,* and creates a precedent that will encourage "payors to ignore the *Guidelines* and underpay child support in the hope that their increased income will remain undetected until their child becomes independent."[30] This argument fails to appreciate that child support is a shared obligation of both parents. This policy choice arising from the application-based regimes of the *Family Law Act* and the *Divorce Act.* As stated at paragraph 56 of *D.B.S.* "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."

69. It is the Respondent's respectful submission that the issue of the court's jurisdiction to make a retroactive award on a variation application was contemplated by the Supreme Court of Canada in *D.B.S.* and it was determined that, save for the *Henry* exception, a court does not have

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[30] Appellant's Factum, para. 56-57

jurisdiction under the *Divorce Act* to make a make a retroactive support order for a child who is no longer a child of the marriage at the time the application is made to the court.

The Order Appealed From is Not a Variation of an Existing Order

70. The original support Order of March 29, 2001[31] was terminated by order of Judge Woods on May 15, 2012[32], and in any event terminated automatically upon the child ceasing to be a child pursuant to the *Family Relations Act*, R.S.B.C. 1996, c. 128 .

71. There is no dispute that Alyssa ceased to be a "child of the marriage" as defined by the *FLA* on April 30, 2012.

72. The effect of the words, "Without Prejudice" in the order of Judge Woods does not affect the automatic termination as per the terms of the original support Order of March 29, 2001.

73. Furthermore, the effect of the words, "Without Prejudice", would only preclude the Respondent from raising the Order of Judge Woods as having predetermined the issue of Alyssa ceasing to be a child of the marriage as an issue *res judicata.* The issue of how far the words "Without Prejudice" can go with regards to an order was raised in *Goulding v. Ternoey*, 1982 CanLII 2259 (ONCA) at paragraph 25:

> The plaintiff urges that a dismissal "without prejudice" 1982 CanLII 2259 (ON CA) means without prejudice to the continuance of personal jurisdiction resulting from the service of summons under the first declaration. This misapprehends the effect of a dismissal without prejudice. The words "without prejudice" in respect of a voluntary non-suit have the effect only of causing the judgment not to operate, upon the theory of res adjudicata, as a bar to a subsequent suit by the plaintiff against the defendant on the same cause. They do not operate to relieve the plaintiff of the necessity of obtaining, in a second suit on either the same or a different cause, personal jurisdiction of the defendant by a new service of process.

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[31] Order, March 29, 2001 [AR tab 12]
[32] Order of Judge Woods, May 15, 2012 [AR tab 16]

74. There was no extant order to be varied at the time the Application was made, as the 2001 order was spent, and terminated, in April 2012.

75. In our respectful submission, the attempt to frame the order as a variation is a wholly artificial and unnecessary exercise to avoid the ratio of *D.B.S.* and the plain language of the *FLA.* Allowing such an exception would not benefit the children for whom the child support regime was intended, and would create confusion and litigation for parents of adults who previously held the status of children.

76. Furthermore, the judgment of Judge Smith, appealed from and does not vary, or purport to vary, the terminated order.

77. Judge Smith at all times considered the matter an originating application for retroactive support. He explicitly only considered the four factors set out in *D.B.S.* when determining a retroactive original order. The Court did not at any time consider or reflect on the fact that the originating order was terminated, and that Alyssa was an adult at the time the application was made.

78. From *D.B.S.* at paragraph 83, when describing the difference between a variation order and an original order for retroactive support:

> 83 It is true that the term "retroactively" is absent from s. 15.1 of the *Divorce Act*, while Parliament used this explicit wording to demonstrate its intention in s. 17. But I believe this drafting choice can be explained based on my reasoning above. Neither in the case of a retroactive variation order nor in the case of a retroactive original order is the court creating a new obligation for the payor parent and applying it after the fact. However, in the case of a retroactive variation order, the original order itself is indeed being varied retroactively: in the strictest, literal sense, the court order that stated a certain amount was due on a certain date is now being altered — after that date has passed — to state that a greater amount was due. The obligation to pay the greater amount was always present, but the original order had to be changed to reflect that. This feature is not present in the case of retroactive original orders. It is for this reason that I believe Parliament felt it unnecessary to resort to language permitting retroactivity.

79. The Order of Judge Smith[33], as made, can only be described as an "order requiring a child's parent or guardian to pay child support to a designated person", which may only be pursuant to s. 149(1) of the *FLA.* As a result, the Respondent was indisputably not a "parent or guardian" at the time the Appellant's application was made, the Appellant was not the child's "parent or guardian", and under the authority of *D.B.S*, the Judge did not have jurisdiction to make such an order.

80. The Application being one of variation does not bear scrutiny. Beyond the simple plain language of the Order, the logic of the order falls apart when considering it as a variation. As the Order paid half of the money to Alyssa as the Former Child, the Court would be asserting a past obligation to pay support funds directly to a party who would have been 9 years old at the time.

81. The reasoning of Mr. Justice Goepel from *Dring* at paragraph 101 provides a simple analysis that produces a just and reasonable result, avoiding confusion and the potential for extensive litigation, that would provide both parties with certainty and would ensure both parties move within a reasonable time to ensure proper support is paid:

> [101] I agree with the Father that as of the date of their agreement to pay additional child support the Hutchison Order was spent. As of January 2016 there was no extant order to vary. The Mother's application for retroactive support was an original application. On the authority of *D.B.S.* and *de Rooy* the Supreme Court did not have jurisdiction to embark on the application. On this basis as well the award for retroactive support must be set aside.

82. This view was echoed by the concurring judgment of Madam Justice Saunders, who went further in stating that a child support order would automatically be spent once the subject no longer met the definition of "child" in the *FLA*:

> [116] I conclude that the *Family Law Act* does not support, let alone compel, the proposition that a child support order continues until terminated by a court order. The proposition that such an application is necessary to terminate a child support order is contrary to current and long-standing practice in the area of support orders. If embraced, in my view, it will be susceptible to creating great disharmony where none is present, invites re-opening issues quiescent between parties, and will promote further litigation

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[33] Order of Judge Smith, September 26, 2016 [AR tab 2]

> expense for many families, all contrary to the objectives of the legislation. Absent clear language in the *Act* requiring this interpretation, I cannot agree with the proposition.
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> [117] The view propounded by Justice Goepel is that a child support order takes as its foundation the fact that the support is in respect of a child, with the natural consequence being that the order is spent once the subject of support ceases to be a child. This means that once the order is so spent, there is no longer any order available for variation. It is possible, of course, that child support may be re-ordered in the event the subject again meets the definition of a child, but where that occurs, it must occur with a fresh application or by agreement.[34]

83. In his dissent, although the Honourable Mr. Justice Hunter for the minority disagreed that there was no jurisdiction to vary a child support order once it is spent, he determined that the fact that it is spent is a considerable factor to be taken into account when varying an order, and the Trial Judge's refusal to consider this amounts to a reversible error in law:

> [205] The Hutchison Order required child support for only a few months. Thereafter, the parties agreed on the amount of child support. No further application was made to invoke the authority of the court to require additional child support until August of 2016. The order of the trial judge requiring retroactive child support from 2013 to 2016 was responsive to the conclusion of Bastarache J. that generally speaking, retroactive child support orders should not reach back more than three years. The result, however, was that an order that had had no operative effect since 2004 was being revived to impose obligations from 2013 to 2016. While I am of the view that s. 152 authorizes retroactive changes to child support orders that are spent, there is an undeniable artificiality to the exercise of this authority in these somewhat unusual circumstances.
>
> [206] In my view, the failure to take into consideration the fact that the Hutchison Order was substantially spent in 2004 when deciding whether to change it retroactively in 2016, combined with the error concerning the status of the son when the application was brought, amounts to an error in principle that vitiates the order of the trial judge and warrants appellate intervention. Giving due weight to the additional factors in this case arising from these circumstances, I would set aside the order and dismiss the application for retroactive child support.[35]

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[34] *Dring*, paras. 116-117
[35] *Dring*, paras. 205-206

84. The immediate problem caused by the reasoning of the Honourable Mr. Justice Hunter is that there would be no certainty as to what would, and would not, be considered for a retroactive application until the trial and decision by the courts. There would be no limitation on when spent orders could be re-opened for review, other than the discretion of the Trial Judge at the end of the litigation process. This would multiply the number of cases open for review, and potentially open the floodgates for litigation, without any of those variation applications going to benefit children of the marriage as per the *FLA*.

85. As these cases would all rely on the discretion of the Trial Judge, it would be difficult to resolve these matters expeditiously. These retroactive applications would by necessity involve lengthy periods of time, which indicates that the real effect of adding a substantial number of lengthy trials to the already burdened court system. The mere argument that it may potentially act as a deterrent for payor parents to avoid their obligations, when those obligations can be met while the child is still a child by the payee parent requesting disclosure of income in a timely fashion. In the words of Mr. Justice Bastarache as stated in paragraph 89 of *D.B.S.*, "Child support is for children of the marriage, not adults who used to have that status."

86. Once an order is spent, and no funds are owing under it, there is no policy reason to create what must be a separate and unique legal regime, dealing with facts specific to closed and completed orders, that would require judicial review with regards to the problems inherent in reviewing, re-opening and modifying orders completed in many cases years in the past. It would substantially impair the balance between certainty and flexibility in a manner that takes up court resources in what would amount to re-apportionment battles between former parents, instead of using those resources to assist children.

Unreasonable Delay/Date of Effective Notice

87. The Court's failure to consider the Appellant's 14-year wait to bring an application for support as an unreasonable delay, and its finding of 2001 to be the date of effective notice, is egregious enough to amount to a tangible error in law. The Court did not consider if or when effective notice was given regarding the Appellant seeking retroactive support; rather, the Court simply backdated support.

88. The Appellant has been aware that the Respondent had underpaid since some time prior to 2009.

89. The Appellant did not ever state she was unable to apply due to injury. She recounted that she was injured at work in 2009 (the "Farm Injury"). Her evidence on this point was limited to the following comment:

[redacted].[36]

90. Judge Smith described this injury as a "severe injury", without referencing what the injury was, how long it lasted, or how and why the injury changed her life.[37]

91. The Appellant did not specifically claim she was unable to bring an Application, or was unable to request the Respondent's financials, due to the injury.

92. The Court did not explain the specific findings that led him to conclude that the Appellant had a reasonable excuse for the 14-year delay. The Court does not appear to have found that the Respondent pressured the Appellant. Instead, Judge Smith recounted the evidence, stating the conflicting evidence of the two parties without making any specific findings on those facts.[38]

93. However, when looking at the Respondent's conduct, the Court found that the Respondent was "blameworthy, but only to a small degree". The Court found the Respondent's only blameworthy conduct was preferring other creditors over the Appellant, and failing to disclose his income.[39] In other words, the Court did not find the blameworthy conduct the Appellant alleged discouraged her from seeking child support.

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[36] Transcript, p. 21, lines 34-39 [AR tab 23]
[37] BCPC Reasons, p. 5, para. 19 [AR tab 1]
[38] BCPC Reasons, p. 5, paras. 19-21 [AR tab 1]
[39] BCPC Reasons, p. 7, para. 26 [AR tab 1]

94. The Appellant's only remaining explanation to explain the 14-year delay was the 2009 Farm Injury.

95. From paragraph 103 of *D.B.S.*, with regards to the reasons for the delay:

> 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 CanLII 8165 (ON SC), [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.
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> …
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> 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.

96. The Respondent's level of blameworthiness in this matter is less than the case of *Brown v. Kucher*, 2015 BCSC 1258, aff'd 2016 BCCA 267, leave to appeal to SCC ref'd 2017 CanLII 6741 (SCC) (*"Kucher"*). The Respondent diligently paid his support at all times, pursuant to the court order in place. Compare that to the matter in *Kucher*, where the trial judge initially ordered 19 years of retroactive support. This was reversed on appeal to the Supreme Court of British Columbia, and the appeal judge instead ordered retroactive support payable to the date of the application. At paragraph 31 of the Appeal Judgment, Madam Justice Newbury stated the following:

> [31] It is because of the trial judge's characterization of Mr. Brown's conduct, however, that this appeal must in my view fail. The Court's ruling that Mr. Brown's 'doing nothing' for 18 years amounted to misconduct "at the high end of the scale of blameworthiness" constitutes in my respectful opinion a misapprehension of the relevant law. The authorities before the Court illustrated various other types of <u>active</u> misconduct that rank far worse on the scale of blameworthiness – active deception, hiding from the payee parent, creating

> false records of income – these are all far worse than Mr. Brown's conduct; yet Mr. Horn was not able to refer us to any case that sanctioned an award that went back anywhere near 19 years, even where the conduct was "active". (The longest period was 7 years in *Swiderski v. Dussault*, 2009 BCCA 461 (CanLII), a case that is obviously distinguishable from this; see also *DBS* itself at para. 141.) In my opinion, it was erroneous in law for the trial judge to rank Mr. Brown's 'waiting in the weeds' as more egregious than such active misconduct. Unfortunately, this error tainted the balance of the trial judge's consideration of Mr. Brown's financial circumstances and the final question of the appropriate date for the retroactive award. An award retroactive to a child's birthdate might conceivably be appropriate where the payor's conduct is at the high end of moral blameworthiness and where the child is considerably younger, but this was not such a case.

97. As well, the Honourable Judge Smith's determination of the date of effective notice, being the date on which the Appellant proposed a separation agreement, which proposed that the parties exchanging financial statements in 2001 just after the previous order for support was made[40], was arbitrary to the point of being an error in law. This could not reasonably be considered notice that the Appellant intended to review child support on date.

98. In this case, the Trial Judge made a palpable error in that such an order would not in any way benefit a child of the marriage. The award is effectively a re-allocation of capital, rather than an award to ensure a child is properly supported.

The Family Law Act with Respect to Retroactive Child Support

S. 152 and its Applicability

99. The Appellant relies on s. 152 the *FLA* to claim that the court had jurisdiction to make a retroactive child support order. Alyssa did not meet the definition of a "Child" at the time the application was made and the Respondent had no legal obligation to support her at the material time.

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[40] BCPC Reasons, p. 4-5, para. 18 [AR tab 1]

100. Section 152 of the *FLA* exclusively sets out when an application may be made to vary an existing order:

> **152**(1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.

101. This section is inapplicable on its face as any support order was terminated as per the order of Judge Woods on May 15, 2012. As such, there was no order respecting child support in effect at the time the Appellant's application was made. The Appellant was applying for a new child support order for arrears accrued in the past.

102. The Court in *Dring* discussed the interplay between variation applications under section 152 of the *FLA* and section 17 of the *Divorce Act*, and found that "although the language of the two statutes is not identical, it is sufficiently similar that they should be interpreted in the same manner."[41]

S. 147 and 149 in context

103. Notwithstanding the above, s. 152 only describes and limits what orders a court may make, and under what circumstances on an application to vary, including when a party may apply to suspend or terminate said order. Although it allows the order to be varied, it is silent regarding who is entitled to bring an application to vary, and who is obligated to pay support. The court must look at the section in context with the rest of the division of the *FLA*, specifically sections 147 to 152.

104. The duty to provide for a child is set out in s. 147 of the *FLA*:

> **147**(1) Each parent and guardian of a child has a duty to provide support for the child, unless the child
>
> (a) is a spouse, or

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[41] *Dring*, para. 76

> (b) is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were, considered objectively, intolerable.

105. The court's authority to order a guardian to pay support, and the limits on the parties that may make such an application on behalf of a child, are set out in s. 149(1) and s. 149(2) of the *FLA*:

> **149**(1) Subject to subsection (3), on application by a person referred to in subsection (2), a court may make an order requiring a child's parent or guardian to pay child support to a designated person.
>
> (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.
>
> [Emphasis Added]

106. From *D.B.S.* at paragraph 89, for determining whether or not a "child" is entitled to receive support, the "material time" is the time the application is made:

> [89] In their analysis of the [*Child Support*] *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.

107. At the material time, Alyssa was not a child of the marriage. According to s. 147 of the *FLA*, at the time the application was made by the Appellant, the Respondent had no obligation to

support Alyssa. According to s. 149(1), as Alyssa was not a child at that time, the Appellant had no authority to bring an application seeking support from the Respondent on behalf of Alyssa.

108. From the trial Reasons for Judgment:

> [62] Although s. 150 of the *FLA* does not restrict the date for which the court may order child support and s. 152 permits the court to make retroactive orders, the passage does not address the restriction that the child for whom support is being sought must still be a "child" at the time of the application in order to have standing.[42]

109. Section 152 of the *FLA* permits the court to vary an existing order, if there was one. Pursuant to s. 149, the Appellant was not entitled to bring such an application, and pursuant to the same section, the court could not order the Respondent to pay support. The Respondent had no obligation to support Alyssa at the relative time, and nothing in s. 152 changes the material time, permits applications by a party who is not a parent or guardian, or allows support to be ordered for a party who is not a child.

PART IV – SUBMISSIONS ON COSTS

110. If the appeal is dismissed, the Respondent requests that this Court grant an order awarding costs of this appeal to the Respondent. The general principle is that a successful party is entitled to his or her costs. However, despite being entirely successful in the appeal to the Supreme Court and entirely successful in the appeal to the Court of Appeal, the Respondent was denied his costs. Accordingly, pursuant to section 47 of the *Supreme Court Act*, the Respondent seeks also seeks costs of the proceedings below.

PART V - ORDER SOUGHT

111. The Respondent seeks an Order that the appeal be dismissed with costs to the Respondent.

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[42] SCBC Reasons, p. 30, para 62 [AR tab 3]

PART VI – SUBMISSIONS ON CASE SENSITIVITY

112. The Respondent's factum contains quotations from three unreported orders from the Provincial Court of British Columbia which are not accessible by the public pursuant to legislation (as noted in Form 23A filed March 6, 2019). As such, the Respondent is filing both an unredacted and redacted version of his factum. The unredacted version is not suitable for posting and the respondent would request that the Court's Reasons not quote from the redacted portions of the factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 21st day of October, 2019
at Maple Ridge, British Columbia

Watt as Agent

Ryan Dueckman
Counsel for the Respondent

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