SUPREME COURT OF CANADA

CITATION: D.B.S. *v.* S.R.G.; L.J.W. *v.* T.A.R.; Henry *v.* Henry; Hiemstra *v.* Hiemstra, 2006 SCC 37 [2006] S.C.J. No. 37

DATE: 20060731
DOCKET: 30808, 30809, 30807, 30837

BETWEEN:

D.B.S.
Appellant
and
S.R.G.
Respondent

AND BETWEEN:

T.A.R.
Appellant
and
L.J.W.
Respondent

AND BETWEEN:

Daryl Ross Henry
Appellant
and
Celeste Rosanne Henry
Respondent

AND BETWEEN:

Kenneth Hiemstra
Appellant
and
Geraldine Hiemstra
Respondent

CORAM: McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 155) Bastarache J. (McLachlin C.J. and LeBel and Deschamps JJ. concurring)

CONCURRING REASONS: (paras. 156 to 180) Abella J. (Fish and Charron JJ. concurring)

d.b.s. *v.* s.r.g.

D.B.S. *Appellant*

v.

S.R.G. *Respondent*

- and -

T.A.R. *Appellant*

v.

L.J.W. *Respondent*

- and -

Daryl Ross Henry *Appellant*

v.

Celeste Rosanne Henry *Respondent*

- and -

Kenneth Hiemstra *Appellant*

v.

Geraldine Hiemstra *Respondent*

Indexed as: *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*

Neutral citation: 2006 SCC 37.

File Nos.: 30808, 30809, 30807, 30837.

2006: February 13; 2006: July 31.

Present: McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for alberta

Family law — Maintenance — Child support — Retroactive support — Whether court can make retroactive child support order — If so, in what circumstances is it appropriate to do so — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), ss. 15.1, 17, 25.1 — Federal Child Support Guidelines, SOR/97-563, ss. 1-4, 9, 10, 14, 25 — Parentage and Maintenance Act, R.S.A. 2000, c. P-1.

These four appeals raise the issue of retroactive child support. In *D.B.S. v. S.R.G.*, the parents had three children in the course of their 10-year common law

relationship. Following their separation in 1998, the father had sole interim custody, but the parties subsequently entered into an informal shared custody arrangement. Neither party paid support to the other, although the father's income substantially exceeded the mother's. In 2003, the mother brought proceedings under Alberta's *Parentage and Maintenance Act* for retroactive and ongoing support. The chambers judge awarded the mother prospective support but declined to make a retroactive award because their household incomes were at that time approximately the same and because the father had clearly contributed to the children's support since the separation. Further, he was not satisfied that it would benefit the children to make such an award, and stated that retroactive support would be inappropriate in the circumstances. The Court of Appeal allowed the mother's appeal, set out factors that a court should consider in deciding whether to make a retroactive award, and sent the matter back to the chambers judge for reconsideration.

In *T.A.R. v. L.J.W.*, the parents also had three children in the course of their common law relationship. Following the parents'separation in 1991, the children lived with the mother. Some months later, the father started paying support of $150 per month pursuant to a maintenance agreement, which was increased to $300 a month in April 2003 pursuant to a consent order. The mother is now married and her annual household income was approximately $50,000. The father was living in a common law relationship with a new spouse and her two children. He was earning $23,000 per annum. In June 2003, the court awarded child support in the amount of $465 per month. In dismissing the mother's claim under Alberta's *Parentage and Maintenance Act* for support retroactive to 1999, representing the difference between the child support paid and the $465 amount, the chambers judge considered the hardship such an award would cause, the father's meagre income, the fact that he had honoured his support obligations

and that he had incurred substantial expenses in exercising his access rights. The Court of Appeal held that the matter should be returned to the chambers judge to consider whether the burden of a retroactive award could be alleviated by a creative award and on whom the burden of the unfulfilled obligation should fall.

In *Henry v. Henry*, the parents married in 1984 and were divorced in 1991. After they separated their two children resided with the mother, and the divorce judgment ordered the father to pay $700 per month in child support. In February 2000, the mother signalled an intention to seek increased support. Although the father raised his support payments in 2000 and 2003, the amounts he paid were substantially below those set out in the *Federal Child Support Guidelines* ("*Guidelines*"). The mother was unaware that his income had increased dramatically since the divorce, while she was experiencing financial difficulties. The father had refused to provide financial assistance at various times when requested, responding to the mother with acrimony and intimidation. The mother applied to vary the child support payments in February 2003. The chambers judge granted her application for retroactive support, deciding that the award should be retroactive to July 1, 1997 and that it should be based on the father's applicable *Guidelines* income. The majority of the Court of Appeal upheld the decision, but one judge dissented on the issue of the date to which the order should be made retroactive.

In *Hiemstra v. Hiemstra*, the parents were divorced in 1996. The two children of the marriage went to live with the father, and the mother paid child support. In November 2000, the son moved in with the mother and the child support payments ceased. Although the father had a substantial income, he did not comply with the mother's April 2003 request that he contribute to their daughter's college expenses. By

February 2004, the mother was supporting both children; three months later, she applied for retroactive child support. The chambers judge held that this was an appropriate circumstance for a retroactive award, and he calculated it from January 1, 2003 onward, to be paid in the amount of $500 per month, as a "reasonable compromise" that best fit the situation of the parties. The Court of Appeal upheld the decision.

Held: The appeals in *D.B.S.* and *T.A.R.* should be allowed and the decisions of the chambers judges restored.

Held: The appeals in *Henry* and *Hiemstra* should be dismissed.

Per McLachlin C.J. and **Bastarache**, LeBel and Deschamps JJ.: Parents have an obligation to support their children in a manner commensurate with their income, and this obligation and the children's concomitant right to support exist independently of any statute or court order. To determine whether a retroactive award would be appropriate, the court must first consider the prevailing legislation and child support scheme. To the extent that the federal scheme has eschewed a purely needs-based analysis, this free-standing obligation implies that the total amount of child support owed will generally fluctuate based on the payor parent's income. Thus, under that scheme, payor parents who do not increase their child support payments to correspond with their incomes will not have fulfilled their obligations to their children. However, the provinces remain free to espouse a different paradigm. When an application for retroactive support is made, therefore, it will be incumbent upon the court to analyse the statutory scheme pursuant to which the application was brought. [54]

The fact that the current child support scheme under both the *Divorce Act* and Alberta's *Parentage and Maintenance Act* are application-based does not preclude courts from considering retroactive awards. While child support orders should provide payor parents with the benefit of predictability, and a degree of certainty in managing their affairs, such an order does not absolve the payor parent — or the recipient parent — of the responsibility of continually ensuring that the children are receiving an appropriate amount of support. As the circumstances underlying the original award change, the value of that award in defining the parents' obligations necessarily diminishes. In situations where payor parents are found to be deficient in their support obligations to their children, it will be open for the courts, acting pursuant to the *Divorce Act* or the *Parentage and Maintenance Act*, to vary the existing orders retroactively. The consequence will be that amounts that should have been paid earlier will become immediately enforceable. Similarly, a court may award retroactive support where there has been a previous agreement between the parents. Although such agreements should be given considerable weight, where circumstances have changed and the actual support obligations of the payor parent have not been met, the court may order a retroactive award so long as the applicable statutory regime permits it. Under the *Divorce Act* or the *Parentage and Maintenance Act*, courts also have the power to order original retroactive child support awards in appropriate circumstances. Lastly, where support, including retroactive support, is requested pursuant to the *Parentage and Maintenance Act*, a court will not have 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. Under the *Divorce Act*, a court will not be able to make a retroactive award if the child in question is no longer a "child of the marriage", as defined in s. 2, when the application is made. [59] [74] [78] [84] [87-89]

In determining whether to make a retroactive award, a court should strive for a holistic view of the matter and decide each case on the basis of its particular facts. The payor parent's interest in certainty must be balanced with the need for fairness to the child and for flexibility. In doing this, the court should consider the reason for the recipient parent's delay in seeking child support, the conduct of the payor parent, the past and present circumstances of the child, including the child's needs at the time the support should have been paid, and whether the retroactive award might entail hardship. Once the court determines that a retroactive child support award should be ordered, the award should as a general rule be retroactive to the date of effective notice by the recipient parent that child support should be paid or increased, but to no more than three years in the past. Effective notice does not require the recipient parent to take legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the status quo is fair. However, where the payor parent has engaged in blameworthy conduct, the date when the circumstances changed materially will be the presumptive start date of the award. Finally, the court must ensure not only that the quantum of a retroactive support award is consistent with the statutory scheme under which it is operating, but also that it fits the circumstances. [99-135]

In view of this analysis, the following dispositions should be made in the instant cases. In *D.B.S.*, retroactive support is not justified. The two household incomes were roughly equal and there was no blameworthy conduct on the part of the payor father. More importantly, the chambers judge held that a retroactive award would be "inappropriate and inequitable" and would not benefit the children. In these circumstances, deference is owed to the chamber judge's order. Similarly, in *T.A.R.*, the chambers judge's decision not to grant retroactive support also merits deference. He found that the father's conduct was not deceitful or blameworthy and that he had

honoured his obligation faithfully. Although the chambers judge did not consider all the factors, he took a holistic view of the matter and arrived at the conclusion that this was not an appropriate case to grant retroactive support. [139-141] [144-145]

In *Henry*, the retroactive award is affirmed. There was no unreasonable delay by the mother in applying for an increase in support. She broached the topic of increasing the father's child support obligations to the best of her ability, given her ignorance of her ex-husband's actual income and the way he intimidated her. The father acted in a blameworthy manner: even though he was aware that his income had risen substantially since the original order was rendered and that his children were living at levels commensurate with his ex-wife's low income, he refused to raise his payments to levels appropriate to his income. The chambers judge's retroactive award would not impose too great a burden on the father, and the children should benefit from this award. The fact that the eldest child affected by the award was no longer a "child of the marriage" when the notice of motion for retroactive support was filed had no effect on the court's jurisdiction to make a retroactive child support order under the *Divorce Act*. Because the ex-husband did not disclose his increases in income to his ex-wife earlier, she was compelled to serve him with a notice to disclose in order to ascertain his income for the years relevant to this appeal. This procedure, contemplated in the *Guidelines*, sufficed to trigger the court's jurisdiction under the *Divorce Act*. Since the procedure was completed prior to the time the eldest child ceased being a child of the marriage, it was appropriate for the court to make a retroactive order for this child. [146-150]

Lastly, in *Hiemstra*, the chambers judge properly weighed the relevant considerations in deciding upon the award, and his retroactive order should be affirmed. Given the father's substantial income, he cannot be considered blameless in not paying

child support. He did not have a reasonable belief that his support obligation was being fulfilled. The chambers judge chose to make the award retroactive only to January 1, 2003, despite the father's failure to provide child support for a longer period of time. As the date has not been cross-appealed by the mother, it should not be disturbed. [152-154]

Per Fish, **Abella** and Charron JJ.: Parents have a free-standing joint obligation to support their children based on their ability to do so, and this obligation creates a right in the child. Because the child's right to support varies with changes in income, the child's entitlement to a change in support should not be limited to the date of the recipient parent's notice of an intention to enforce it. So long as the change in income warrants different child support from what is being paid, the presumptive starting point for the child's entitlement is when the change occurred, not when it was disclosed or discovered. For payor parents, certainty and predictability are protected by the legal certainty that whenever their income changes materially, that is the moment their obligation changes automatically, even if enforcement of that increased obligation is not automatic. Since the existence of the increased support obligation depends on the existence of the increased income, there is no role for blameworthy conduct in determining the date at which children can recover the support to which they are entitled. The obligation fluctuates with parental income, not with parental misconduct. In the same way, the recipient parent need not demonstrate that the failure to pay child support has resulted in hardship for the child. A presumptive date of entitlement to a change in child support does not, however, eliminate the role of judicial discretion. It will be up to the court in each circumstance to determine whether the presumptive date has been rebutted. While undue hardship could militate against a retroactive order being made as of the date of the change of circumstances, there is no reason to deprive children of the support to which they are entitled by imposing an arbitrary three-year judicial limitation period on the amount of child support that can be recovered. Such a clear restriction on a

child's entitlement is an unnecessary fettering of judicial discretion and requires an express statutory direction to that effect. Notwithstanding the differences in approach, there is agreement with the majority's disposition of the four appeals. [157-179]

Cases Cited

By Bastarache J.

Applied: *MacMinn v. MacMinn* (1995), 174 A.R. 261; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254, 1999 BCCA 393; *Paras v. Paras*, [1971] 1 O.R. 130; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Francis v. Baker*, [1999] 3 S.C.R. 250; *Horner v. Horner* (2004), 72 O.R. (3d) 561; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; **distinguished:** *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; **considered:** *M.C. v. V.Z.* (1998), 228 A.R. 283; *Walsh v. Walsh* (2004), 69 O.R. (3d) 577; *Marinangeli v. Marinangeli* (2003), 38 R.F.L. (5th) 307; *Andries v. Andries* (1998), 126 Man. R. (2d) 189; *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24; *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, 2004 SCC 22; *C. (S.E.) v. G. (D.C.)* (2003), 43 R.F.L. (5th) 41, 2003 BCSC 896; *Hunt v. Smolis-Hunt* (2001), 97 Alta. L.R. (3d) 238, 2001 ABCA 229; *Tedham v. Tedham* (2003), 20 B.C.L.R. (4th) 56, 2003 BCCA 600; *Chrintz v. Chrintz* (1998), 41 R.F.L. (4th) 219; *Passero v. Passero*, [1991] O.J. No. 406 (QL); *Hess v. Hess* (1994), 2 R.F.L. (4th) 22; *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; *Dahl v. Dahl* (1995), 178 A.R. 119; *A. (J.) v. A. (P.)* (1997), 37 R.F.L. (4th) 197; *Haisman v. Haisman* (1994), 22 Alta. L.R. (3d) 56; *MacNeal v. MacNeal* (1993), 50 R.F.L. (3d) 235; *Steinhuebl v. Steinhuebl*, [1970] 2 O.R. 683; *Dickie v. Dickie* (2001), 20 R.F.L. (5th) 343; **referred to:** *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Poissant v. Barrette* (1879), 3 L.N. 12; *Childs v. Forfar* (1921), 51 O.L.R. 10; *McTaggart v. McTaggart*, [1947] O.J. No. 100 (QL); *Malcolm v. Malcolm* (1919), 46 O.L.R. 198, aff'd 46 O.L.R. 609; *Jackson v. Jackson*, [1973] S.C.R. 205; *Zacks v. Zacks*, [1973] S.C.R. 891; *T. (P.) v. B. (R.)* (2004), 30 Alta. L.R. (4th) 36, 2004 ABCA 244; *Chartier v. Chartier*, [1999] 1 S.C.R. 242.

By Abella J.

Referred to: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Horner v. Horner* (2004), 72 O.R. (3d) 561; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Francis v. Baker*, [1999] 3 S.C.R. 250; *MacMinn v. MacMinn* (1995), 174 A.R. 261; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254, 1999 BCCA 393; *Haisman v. Haisman* (1994), 22 Alta. L.R. (3d) 56, leave to appeal dismissed, [1995] 3 S.C.R. vi; *Paras v. Paras*, [1971] 1 O.R. 130.

Statutes and Regulations Cited

Civil Code of Lower Canada, art. 169.

Civil Code of Québec, S.Q. 1991, c. 64, art. 587.1.

Constitution Act, 1867, s. 91(26).

Criminal Code, 1892, S.C. 1892, c. 29, s. 209.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [am. 1997, c. 1], ss. 2(1) "child of the marriage", (5), 15.1, 17, 25.1, 26.1(2).

Family Law Act, S.A. 2003, c. F-4.5, s. 77(2).

Federal Child Support Guidelines, SOR/97-175 [am. SOR/97-563; am. SOR/2000-337], ss. 1, 2, 3, 4, 9, 10, 11, 14, 16, 17, 25.

Parentage and Maintenance Act, R.S.A. 2000, c. P-1 [am. 2003, c. I-0.5, s. 58(6); rep. 2003, c. F-4.5], ss. 7(1), 15, 16, 18.

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APPEAL from a judgment of the Alberta Court of Appeal (Fraser C.J.A. and Côté and Paperny JJ.A.) in *D.B.S. v. S.R.G.* (*sub nom. S. (D.B.) v. G. (S.R.)*) (2005), 249 D.L.R. (4th) 72, 5 W.W.R. 229, 38 Alta. L.R. (4th) 199, 361 A.R. 60, 7 R.F.L. (6th) 373, [2005] A.J. No. 2 (QL), 2005 ABCA 2, setting aside a decision of Verville J. Appeal allowed.

APPEAL from a judgment of the Alberta Court of Appeal (Fraser C.J.A. and Côté and Paperny JJ.A.) in *L.J.W. v. T.A.R.* (*sub nom. W. (L.J.) v. R. (T.A.)*) (2005), 249 D.L.R. (4th) 136, 9 R.F.L. (6th) 232, [2005] A.J. No. 3 (QL), 2005 ABCA 3, setting aside a decision of Perras J., [2003] A.J. No. 1243 (QL), 2003 ABQB 569. Appeal allowed.

APPEAL from a judgment of the Alberta Court of Appeal (Russell, Hunt and Paperny JJ.A.) in *Henry v. Henry* (2005), 249 D.L.R. (4th) 141, 38 Alta. L.R. (4th) 1, 357 A.R. 388, 7 R.F.L. (6th) 275, [2005] A.J. No. 4 (QL), 2005 ABCA 5, affirming a

decision of Rowbotham J. (2003), 20 Alta. L.R. (4th) 300, 344 A.R. 377, 43 R.F.L. (5th) 357, [2003] A.J. No. 1056 (QL), 2003 ABQB 717. Appeal dismissed.

APPEAL from a judgment of the Alberta Court of Appeal (Côté J.A. and Hembroff and Hughes JJ. (*ad hoc*)) in *Hiemstra v. Hiemstra* (2005), 363 A.R. 281, 13 R.F.L. (6th) 166, [2005] A.J. No. 27 (QL), 2005 ABCA 16, affirming a decision of Belzil J. Appeal dismissed.

D. Smith and *Susan E. Milne*, for the appellants.

Carole Curtis, *Valda Blenman* and *Victoria Starr*, for the respondents S.R.G. and L.J.W.

Daniel Colborne and *Roy W. Dawson*, for the respondent Celeste Rosanne Henry.

Gregory D. Turner, for the respondent Geraldine Hiemstra.

The judgment of McLachlin C.J., and Bastarache, LeBel and Deschamps JJ. was delivered by

BASTARACHE J. —

1. Introduction

1 The present appeals involve the parental obligation to support one's children, and the question of whether this obligation compels parents to make child support payments for periods of time when the responsibility to do so was never identified, much less enforced. This question will arise when the parent receiving child support (the "recipient parent") determines that (s)he should have been paid greater amounts than (s)he actually received, despite the fact that no court order or separation agreement provided for these higher payments. 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.

2 The awards contemplated in the present appeals are often termed "retroactive awards" because they involve enforcing past obligations, not ensuring prospective support. Though misleading in the technical sense, I will adopt this terminology in these reasons because it helps identify the tension that underlies such awards. Still, I must observe that these "retroactive" awards are not truly retroactive. They do not hold parents to a legal standard that did not exist at the relevant time: see *MacMinn v. MacMinn* (1995), 174 A.R. 261 (C.A.). But they are "retroactive" in the sense that they are not being made on a go-forward basis: the parents who owe support (the "payor parents") are being ordered to pay what, in hindsight, should have been paid before: see *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254, 1999 BCCA 393, at paras. 55-57. Unlike prospective child support awards, then, retroactive awards implicate the delicate balance between certainty and flexibility in this area of the law.

3 The four appeals before this Court raise a broad cross-section of circumstances. Two appeals deal with retroactive awards claimed under the federal government's

jurisdiction over divorce, while two relate to Alberta's provincial regime under the now-repealed *Parentage and Maintenance Act*, R.S.A. 2000, c. P-1. Two of them involve claims for retroactive awards where no support payments had ever been paid by the other parent, while the other two ask for original awards to be increased. As I will explain, differences like these will have important implications for how cases should be treated and, ultimately, decided.

4 At the same time, however, the similarities between the four appeals are unmistakable. Each case involves a recipient parent who failed to apply to a court for an increase in child support payments in a timely manner. Most unfortunate, each case involves children who lived prolonged periods without the support they were due. 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.

5 Against this backdrop, it becomes clear that retroactive awards cannot simply be regarded as exceptional orders to be made in exceptional circumstances. A modern approach compels consideration of all relevant factors in order to determine whether a retroactive award is appropriate in the circumstances. Thus, while the propriety of a retroactive award should not be presumed, it will not only be found in rare cases either. Unreasonable delay by the recipient parent in seeking an increase in support will militate against a retroactive award, while blameworthy conduct by the payor parent will have the opposite effect. Where ordered, an award should generally be retroactive to the date when the recipient parent gave the payor parent effective notice of his/her intention to

seek an increase in support payments; this date represents a fair balance between certainty and flexibility.

6 Given the different factual circumstances presented by the appeals before this Court, and the contextual approach endorsed by these reasons, it should not be surprising that the results of all four appeals are not identical. Courts must be open to ordering retroactive support where fairness to children dictates it, but should also be mindful of the certainty that fairness to payor parents often demands. It is only after a detailed examination of the facts in a particular case that the appropriateness of a retroactive award can be evaluated.

2. Facts and Judicial History

2.1 *D.B.S. v. S.R.G.*

7 D.B.S. (the father) and S.R.G. (the mother) had three children during the course of their ten-year common law relationship. The two parents separated in 1998; an *ex parte* order under the *Parentage and Maintenance Act* provided the father with sole interim custody. The parties then entered into a separation and property contract, which was confirmed by a consent order on March 1, 1999. The mother has stated that she had no input into the contract and she did not have counsel negotiate its content; however, she was represented at the time. In fact, she signed the contract against the advice of counsel.

8 The agreement provided for joint custody, with the father having primary, day-to-day residence. However, the mother did not need to pay child support under the

agreement; her income in 1999 was $6,272. Later, the parents would enter into a shared custody relationship. Custody issues would arise again in November 2002, when the eldest child ran away from home.

9 The present dispute began when the mother sought joint custody with primary residence of all three children and specified access to the father. Before the commencement of court proceedings in April 2003, the parents participated in settlement and mediation sessions. Before the chambers judge, the mother also requested an award of retroactive support for 36 months, going back as far as the father's recent financial disclosure would allow. During the period in question, the income of the father was substantially higher than that of the mother. However, the mother had apparently been unaware she could have sought support during the years of shared custody.

10 Verville J., of the Court of Queen's Bench of Alberta, gave oral reasons for his decision. Noting that he believed both D.B.S. and S.R.G. – and their present partners – to be suitable parents, he concluded that the mother should have custody of the eldest child after considering the conflict between the latter and the father's partner. Generous access for the father was ordered, and shared custody was ordered to continue with respect to the other two children. The father was ordered to pay prospective child support.

11 Verville J. also considered the issue of retroactive support. Referring to the jurisprudence, he seemed to recognize that courts have a discretion, in appropriate circumstances, to order such support. However, he chose not to exercise that discretion. He noted that the present incomes of the respective family units were approximately the same and that, while there was no clear evidence as to what the parents had paid in past

support, the father "clearly made a contribution". He also mentioned that the father allowed the mother shared custody after the consent order providing him with primary residence. Most important, he declared, "I am not satisfied it would benefit the children" to make such an award. He therefore concluded that it would be "inappropriate and inequitable" to award retroactive child support.

12 The Alberta Court of Appeal used this case as its lead in the trilogy of *D.B.S.*, *T.A.R.*, and *Henry*. (The *Hiemstra* decision was released separately.) The unanimous decision, written by Paperny J.A., provides a thorough examination of the issue of retroactive child support ((2005), 361 A.R. 60, 2005 ABCA 2).

13 Tracing the historical foundations of child support in Canada, Paperny J.A. observed that parents have a mutual obligation to support their children, and this obligation translates into the legal basis for child support. She also noted that child support is the right of the child, that courts are always free to intervene to determine the proper level of support, and that incidental benefits to the custodial parent cannot diminish the quantum of child support due. Paperny J.A. emphasized that these conclusions apply with equal force to original and variation applications.

14 In her view, the obligation to support a child exists independent of any court action taken. Paperny J.A. wrote that this idea was accepted even before the advent of the *Federal Child Support Guidelines*, SOR/97-175 ("*Guidelines*"). Yet, she also recognized that the *Guidelines* did alter the child support landscape: most notably, focus was placed on the means of the payor parent instead of the need of the recipient.

15 Holding that courts have a discretion, both under the *Parentage and Maintenance Act* and the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), to make retroactive child support awards, Paperny J.A. concentrated on the factors a court should consider in exercising its discretion. She summarized her conclusions in eight points:

> 1. A child is entitled to child support. Need is presumed.
>
> 2. The *Guidelines* presume an ability to pay on the part of the payor in accordance with his or her income as established in accordance with s. 16 of the *Guidelines*.
>
> 3. Blameworthy conduct on the part of the payor is not required.
>
> 4. The payee does not need to demonstrate an encroachment on his or her capital.
>
> 5. Notice of an intention to pursue child support is not a prerequisite to a retroactive award.
>
> 6. Whether there is an unreasonable burden placed on the payor should not be assumed, but must be established; it must be incapable of alleviation by creative payment options. Further, the reason for or the cause of the inability to pay must be considered and any burden must be balanced against the corresponding deprivation to the payee and the child.
>
> 7. A lump sum payment is not precluded merely because it involves a transfer of capital.
>
> 8. The date of the increased income as defined by the *Guidelines* is the presumptive date for the commencement of a retroactive award unless the payor has satisfied the additional financial obligation in some other manner, has taken all reasonable steps to fulfill the obligation, has a previous arrangement for child support that contemplates the provisions of the *Guidelines*, or the payee fails to act diligently without reasonable excuse. [para. 153]

16 In reaching her conclusions, Paperny J.A. deliberately chose not to attach importance to the fact that the present appeal fell under the jurisdiction of provincial family law, and not federal divorce law. She noted that, in Alberta, courts have applied the *Guidelines* in circumstances of unmarried as well as married parents. Paperny J.A. also held that the same law should apply to interim, trial and variation orders.

Accordingly, the principles elaborated in this case were applied without distinction to all the appeals heard by her court.

17 With respect to *D.B.S.*, Paperny J.A. allowed the appeal. Specifically, she felt that Verville J. failed to consider when the obligation to pay support arose, whether the father satisfied his obligation in another manner, whether the previous arrangement between the parents contemplated the *Guidelines*, whether the mother was aware of the father's increased income and, on the whole, whether there were indeed circumstances that militated against a retroactive award. Paperny J.A. also stated that Verville J. should have considered whether the father had established that a retroactive award would cause hardship, whether such hardship could have been alleviated by a creative award and, if not, on whom the burden of the unfulfilled obligation should fall. Finally, she remarked that even if the award might not have helped the children, the potential it had to compensate the mother for her past sacrifices should have been considered.

18 Paperny J.A. returned the matter to a chambers judge to decide the case on the basis of her reasons and the additional considerations listed in s. 9 of the *Guidelines*, which apply to shared custody situations.

2.2 *T.A.R. v. L.J.W.*

19 As in *D.B.S.*, the two parents in this appeal also had three children during the course of a common law relationship. Following their parents' separation in 1991, the children lived with the mother, L.J.W. Some months later, the father started paying support at the rate of $50 per month per child pursuant to a maintenance agreement. The

formal child custody order, which came in the summer of 1991, granted custody to the mother but did not mention child support.

20 Through the years, both parents began new relationships; the mother is now married and the father resides in a common law relationship. Since their separation, the mother has asked the father for more financial help, but he has refused on the basis that he could not afford to pay more. Nonetheless, an April 22, 2003 consent order increased the father's child support obligation to $300 per month. Some months later, on June 11, 2003, in a part of the order that is not being appealed, Perras J. awarded child support in the amount of $465 per month ([2003] A.J. No. 1243 (QL), 2003 ABQB 569).

21 In this appeal, the mother seeks retroactive child support for the difference between the amount she was paid in child support and the *Guidelines* amount she claims was due. She has applied for this award to be retroactive to January 1, 1999.

22 Though he increased the amount of child support on a go-forward basis, Perras J. refused to grant retroactive child support. He recognized that such an award may be ordered in appropriate circumstances, but he decided that this was not an appropriate case. In coming to this conclusion, Perras J. considered that the father earns a "meagre" gross income, that the father had honoured the obligation agreed upon by both parents, that the father advanced a claim of hardship (though he was unsuccessful, based on the criteria listed in the *Guidelines*), that the father incurs substantial expense already in exercising his access rights, and, finally, that the father has not tried to avoid his obligation and has not failed to disclose a greatly increased income.

23 On appeal, Paperny J.A. reviewed the Alberta Court of Appeal's decision in *D.B.S.* Applying those reasons to this appeal, she held, for a unanimous court, that the matter should be returned to a chambers judge ((2005), 249 D.L.R. (4th) 136, 2005 ABCA 3). Paperny J.A. emphasized that, while Perras J. concluded a retroactive award would place an unfair burden on the father, he did not consider whether that burden could have been alleviated by a creative award and, if not, on whom the burden of the unfulfilled obligation should fall.

2.3 *Henry v. Henry*

24 In the other appeal in the trilogy, the parents married in 1984, separated in 1990, and divorced in 1991. They had two children. Upon separation, the father paid $1,200 per month in child support. However, the divorce judgment directed child support of only $700, an amount that "shocked" the mother; she had had difficulties finding competent legal assistance both before and after this judgment.

25 There were some increases of child support over the years. In February 2000, the father increased support to $1,050. In March 2003, he started paying $1,186 in support. Despite these increases, however, the amount of support paid by the father remained dramatically below what he would have been ordered to pay under the *Guidelines*. Unknown to Ms. Henry, her ex-husband's income had increased dramatically since the divorce. Though his income at the time of the divorce petition was $73,500, by the mid-1990s, it was firmly above $180,000, peaking at $235,034 in 2001.

26 In the meantime, Ms. Henry "struggled to provide the two girls with the basic necessities", according to Rowbotham J.((2003), 20 Alta. L.R. (4th) 300, 2003 ABQB

717, at para. 8). Her income around the time of divorce was $1,500 per month. Accordingly, the children did not enjoy a lifestyle commensurate with the income of their father. Evidence reviewed at trial confirmed that the father was well aware of the financial difficulties suffered by the mother. Still, he had refused to provide financial assistance at various times upon request. To the contrary, he had responded with acrimony and intimidation, generally blaming Ms. Henry for her predicament. On one occasion, Mr. Henry even asked *her* to pay for their daughter's bus ticket and some expenses when the latter went to visit him. (She did.)

27 This appeal arises out of Ms. Henry's motion to vary child support, notice of which was served in February 2003. In her judgment, Rowbotham J. stopped just shy of finding that the father engaged in blameworthy conduct, but nevertheless ordered that he pay a retroactive award. Mindful of the potential hardship that could be caused by a retroactive order, she nonetheless decided that the award should be retroactive to July 1, 1997 based on the father's applicable *Guidelines* income.

28 For the majority at the Court of Appeal, Paperny J.A. applied the *ratio* of *D.B.S.* to the facts and dismissed the appeal ((2005), 249 D.L.R. (4th) 141, 2005 ABCA 5). Hunt J.A. dissented, however, on the date to which the order was retroactive. In her view, Parliament did not intend that support arrangements be varied automatically; fairness demanded that support orders be valid until notice of a claim was given, and respect for the legal system would be undermined if court orders were varied retroactively. Given that Rowbotham J. did not find Mr. Henry to have engaged in blameworthy conduct, she would have awarded child support retroactive only to the date when Ms. Henry signalled an intention to seek increased support, i.e., February 2000.

2.4 *Hiemstra v. Hiemstra*

29 The parents in this appeal were divorced in 1996. Upon divorce, both children of the marriage went to live with the father; therefore, it was the mother who had the initial child support obligation. In November 2000, the son moved in with the mother and the child support payments ceased. In March 2001, a court ordered that the parents divide certain expenses and froze the child support situation (with no payments being made) until November of that year. The parents did not return to court to resolve the support issue and no further payments were made.

30 In September 2002, the daughter began to attend college. On April 3, 2003, the mother sent the father an e-mail that broached the topic of "financial responsibilities"; the reply from the father suggested, essentially, that the mother knew what she was getting into when she took in the son. He did not start paying support. By February 2004, the daughter had moved out as well, with the consequence that the father supported neither child. The mother supported both.

31 Ms. Heimstra filed a notice of motion on May 28, 2004 seeking retroactive child support. In deciding this issue, Belzil J. asked whether this was an "appropriate" circumstance for an award. He concluded that it was. He chose to calculate the retroactive award from January 1, 2003 onward, to be paid in the amount of $500 per month, as a "reasonable compromise" that best fits the situation of the parties. He also awarded prospective support for both children in amounts that are not in dispute.

32 On appeal, the Court of Appeal again referred to the principles established in *D.B.S.* Remarking that any error in the date of retroactivity chosen could not have

harmed the father, the court dismissed the appeal ((2005), 363 A.R. 281, 2005 ABCA 16).

3. Issues

33 Can a court make an order for retroactive child support? If so, in what circumstances is it appropriate to do so?

4. Relevant Statutory Provisions

34 See Appendix.

5. Analysis

35 In my analysis, I first explain some basic principles of child support that are relevant to the question of retroactive awards. While not purporting to supply an exhaustive review, I endeavour to show how the principles found in the federal child support regime are complementary to the ordering of retroactive awards in suitable cases. I then turn to focus more specifically on the question of enforcement, as I elaborate the legal basis for enforcing the unmet child support obligations in these appeals. Finally, I consider the factors that will help determine whether a retroactive award should be ordered, and the content of a retroactive award order.

5.1 *Basic Principles Applicable to the Issue of Retroactive Child Support*

36 It is trite to declare that the mere fact of parentage places great responsibility upon parents. Upon the birth of a child, parents are immediately placed in the roles of guardians and providers. As La Forest J. wrote in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 62, it is "[f]or obvious reasons [that] society has imposed upon parents the obligation to care for, protect and rear their children".

37 The parent-child relationship engages not only moral obligations, but legal ones as well. Canadians will be familiar with these legal obligations as they have come to be refined, quantified and amplified through contemporary legislative enactments. But the notion of child support, as a basic obligation of parents, is in no way a recent concept. In 1896, P.B. Mignault wrote that [TRANSLATION] "[t]he principal effect of the recognition, whether voluntary or forced, of illegitimate children is the claim to maintenance it gives the children against their fathers and mothers" (*Le droit civil canadien*, t. 2, 1896, at p. 138). The obligation of support was thus seen to arise automatically, upon birth; in one 1879 case, this meant that a child support award that included a period pre-dating the institution of the mother's action was confirmed on appeal: see *Poissant v. Barrette* (1879), 3 L.N. 12. And in one Ontario case, where the legal foundation for compensating someone who took care of another person's child was questioned, the moral obligation to support the child was still given legal recognition: *Childs v. Forfar* (1921), 51 O.L.R. 210 (S.C. (A.D.)). Middleton J. explained his reasoning in these terms:

> While it is the law that there is no civil obligation on the part of a parent to maintain his infant child (*Bazeley v. Forder*, L.R. 3 Q.B. 559), his undoubted moral obligation to do so makes it very easy to find an implied promise to remunerate any person who, at his request or with his knowledge, undertakes to discharge this moral obligation for him: *Latimer v. Hill*, 35 O.L.R. 36, 26 D.L.R. 800, 36 O.L.R. 321, 30 D.L.R. 660. [p. 217]

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

39 This last principle is of particular importance to the present appeals and merits some further elaboration. The appellants have argued that their obligation at common law is merely to provide the "necessities of life". And it is true that the provision of necessities has traditionally demarcated the border between criminal and non-criminal conduct: see s. 209 of the *Criminal Code, 1892*, S.C. 1892, c. 29, and *Childs*, for a statement on the common law. But this low level of support cannot define where a parent's full legal obligation ends.

40 It is not novel – now, or when *Paras* was decided 35 years ago – for courts to recognize a support obligation that goes well beyond the obligation to provide mere necessities. Specifically, the income of the payor parent has often been considered in the calculation of support, with the amount due varying depending on the income of the payor parent. For instance, in one 1941 case, an award for the maintenance of a recipient parent and child was explicitly premised on the payor parent's income; when that income was shown to have increased, the amount of support was ordered to be increased as well

(though not retroactively): see *McTaggart v. McTaggart*, [1947] O.J. No. 100 (QL) (H.C.J.). That decision cited *Malcolm v. Malcolm* (1919), 46 O.L.R. 198 (H.C.J.), aff'd (1920), 46 O.L.R. 609 (S.C. (A.D.)), which connected the general principle that a husband is to provide maintenance for his wife "in proportion to his ability so to do" (p. 200) back to the laws of England. Quebec Civil Law has espoused this principle at least since the *Civil Code of Lower Canada* was enacted in 1866, stating that maintenance is to be granted "in proportion to the wants [*du besoin*] of the party claiming it and the fortune of the party by whom it is due": art. 169.

41 In rendering his decision in *Paras*, Kelly J.A. followed this tradition. He wrote that the amount of child support should be ascertained based on the care, support and educational needs of the child, and that this sum should then be divided according to the respective incomes and resources of the parents: see pp. 134-35. In this Court's decision in *Richardson*, Kelly J.A.'s comments were related as follows, at p. 869:

> The legal basis of child maintenance is the parents' mutual obligation to support their children according to their need. That obligation should be borne by the parents in proportion to their respective incomes and ability to pay: *Paras v. Paras, supra*.

42 Both the *Paras* and *Richardson* decisions were decided at a time when need-based support was the paradigm being followed. In other words, while the amount of child support due was *divided* according to parents' incomes, it was still *determined* primarily on the basis of the child's needs. With the introduction of the *Guidelines*, which came into force on May 1, 1997, Parliament announced an important change to that regime.

43 The *Guidelines* provide a simplified way for parents – and courts – to quantify child support obligations. They respond to the desire to "take the mystery out" of the process (Department of Justice, *Federal Child Support Guidelines Reference Manual* (July 1997), at p. i). This desire was a response to the need-based system, whereby costly – and unpredictable – litigation was often necessary to define what amount of support was due. Not surprisingly, this fact had preoccupied legislators prior to the *Guidelines*: see Hon. Allan Rock (Minister of Justice and Attorney General of Canada), *House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., April 25, 1995, at p. 11760. But while they seek to instill efficiency and consistency in child support matters, the *Guidelines* are also attentive to concerns of fairness and flexibility, adopting a "children first" perspective: see *Francis v. Baker*, [1999] 3 S.C.R. 250, at para. 39; *Guidelines*, s. 1.

44 In order to accomplish its goals, the *Guidelines* generally make only two numbers relevant in computing the amount of child support owed: the number of children being supported, and the income of the payor parent. Thus, under the *Guidelines*, not only is the amount of child support divided according to parents' incomes, but it is determined on that basis as well:

> The guidelines will establish without the need for trial the levels of child support to be paid according to the income of the person paying. The amounts are calculated by a formula that takes into account average expenditures on children at various income levels. As income levels increase or decrease so will the parents' contributions to the needs of the children, just as they would if the family had remained together.
>
> (Mr. Gordon Kirkby (Parliamentary Secretary to Minister of Justice and Attorney General of Canada), *House of Commons Debates*, vol. 134, 2nd Sess., 35th Parl., October 1, 1996, at p. 4901)

45 The implications of this approach are profound. Except for situations of shared custody, where additional considerations apply, a parent's increase in income will not only increase his/her *share* of the child support burden; it will increase the *total amount* of support owed. Under a pure need-based regime, the underlying theory is that both parents should provide enough support to their children to meet their needs, and that they should share this obligation proportionate to their incomes. But under the general *Guidelines* regime, the underlying theory is that the support obligation itself should fluctuate with the payor parent's income. Under a pure need-based regime, when a payor parent does not increase the amount of his/her support when his/her income increases, it is the *recipient parent* who loses: the recipient parent is the one entitled to receive greater help in meeting the child's needs. But under the general *Guidelines* regime, when a payor parent does not increase the amount of his/her support when his/her income increases, it is the *child* who loses: the child is the one who is entitled to a greater quantum of support in absolute terms.

46 That said, however, it would be wrong to think that the *Guidelines* represent a complete break from the past. Even before the *Guidelines* came into force, this Court endorsed a more nuanced need-based approach by recognizing that "a significant increase in the means of the payor parent may require that the needs of the child include benefits that previously were not available": *Willick*, at p. 691. By the same token, the *Guidelines* do not impose a regime where the needs of the child are regarded as completely irrelevant. As I wrote in *Francis*, presumptively applicable Table amounts listed for payor parents earning over $150,000 may be altered when they "are so in excess of the children's reasonable needs so as no longer to qualify as child support" (para. 41). Parliament also allows the court to consider "the condition, means, needs and

other circumstances of the child" in other situations when the court exercises its discretion in calculating support amounts: ss. 3(2)(*b*) and 9(*c*) of the *Guidelines*.

47 The *Guidelines* therefore adopt a paradigm that moves away from pure need-based criteria without representing a complete departure from the principles of child support that existed in the past. While the *Guidelines* regime differs from the regime discussed in *Paras* and *Richardson* in important ways, the obligations recognized in the latter have not disappeared. The *Guidelines* do not purport to replace – much less eliminate – the previously recognized system of support obligations. In fact, both the *Divorce Act* and the *Guidelines* seek to apply a new structure to these obligations, building on the premise that they already exist.

48 This interpretation is supported by language in the *Divorce Act*. For instance, s. 26.1(2) provides:

> The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

This wording suggests that the principle being discussed – "that spouses have a joint financial obligation ..." – exists prior to the enactment of the provision itself. Further, this principle is not said to be dependent on a court order or on any other kind of action by the recipient parent, consistent with pre-*Guidelines* jurisprudence: see *MacMinn*, at para. 15. The *Divorce Act* in the *Guidelines* era thus confirms that there still exists a free-standing obligation for parents to support their children commensurate with their income. Its payor parent income-based approach then shapes this obligation, with the result that the total amount of child support is determined – and not merely divided –

according to the income of the payor parent. A parent who fails to do this will have failed to fulfil his/her obligation to his/her children.

49 Of course, this federal regime does not apply to all child support situations in Canada. The federal government's jurisdiction over child support is located in its power over divorce: s. 91(26) of the *Constitution Act, 1867*. Where the child support order cannot be seen as an incident of divorce, it is the provinces that have jurisdiction over the matter: see *Jackson v. Jackson*, [1973] S.C.R. 205, at p. 211; *Zacks v. Zacks*, [1973] S.C.R. 891, at p. 912.

50 In exercising their own power to legislate matters concerning child support, the provinces need not conform to the paradigm espoused by the *Divorce Act* and the *Guidelines*. Two of the present appeals proceed under Alberta's now-repealed *Parentage and Maintenance Act*. Following Alberta jurisprudence encouraging the province's courts to exercise their statutory discretion under the *Parentage and Maintenance Act* consistent with the federal *Guidelines* regime, the parties in those appeals accepted that their cases would be decided substantially as if they fell under the federal system: see *M.C. v. V.Z.* (1998), 228 A.R. 283 (C.A.); *T. (P.) v. B. (R.)* (2004), 30 Alta. L.R. (4th) 36, 2004 ABCA 244. The Alberta Court of Appeal endorsed this approach in the context of these appeals: see para. 43 of the *D.B.S.* decision.

51 I will reluctantly accept this proposition for the purposes of deciding these appeals. The parties do not dispute that Alberta courts, under the *Parentage and Maintenance Act*, have the discretion to adopt the paradigm espoused by the federal regime. However, I cannot support a general approach that purports to follow the *Guidelines* whenever a court's discretion under applicable provincial law is invoked. A

provincial legislature that affords its courts discretion in determining child support matters is not offering them *carte blanche* to render support orders pursuant to another legislature's will. To read a grant of discretion in this way would offend principles of statutory interpretation as well as the division of powers enshrined in the Constitution.

52 The provincial power to regulate child support matters in contexts not involving divorce must therefore remain unfettered. While it is desirable that the federal and provincial governments treat children of married and unmarried parents the same, this does not mean that the *Guidelines* should trump the legislative will of the provinces. To the contrary, symmetry for married and unmarried parents can be achieved both ways: provinces may choose to adopt the federal regime, but Parliament may also decide to accept provincial solutions. Accordingly, the *Divorce Act* presently ensures consistency within the province by allowing certain provincial regimes to apply to divorces within the province: s. 2(5). It is not for courts to take it upon themselves to create a single, national system of child support.

53 Thus, within constitutional limits, provincial governments are free to adopt a different approach than the one found in the *Divorce Act* and in the *Guidelines*. For instance, a province may choose to implement a regime wherein both parents have joint and several responsibility to support their children according to their needs. In such a situation, any deficit in payment from the payor parent would need to be made up by the recipient parent, such that the child would never be left with an unfulfilled entitlement. To the extent the recipient parent picks up this deficit, then, the child could not seek further compensation from the deficient payor parent. In such a case, the difference between the federal and provincial regimes could mean the difference between finding that the payor parent has an unfulfilled obligation towards his/her children, and finding

that no such unfulfilled obligation exists. In the present appeals, having accepted that the general federal paradigm of child support applies equally under the *Parentage and Maintenance Act*, no such difference arises.

54 In summary, then, parents have an obligation to support their children in a way that is commensurate with their income. This parental obligation, like the children's concomitant right to support, exists independent of any statute or court order. To the extent the federal regime has eschewed a purely need-based analysis, this free-standing obligation has come to imply that the total amount of child support owed will generally fluctuate based on the payor parent's income. Thus, under the federal scheme, a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children. However, provinces remain free to espouse a different paradigm. When an application for retroactive support is made, therefore, it will be incumbent upon the court to analyze the statutory scheme in which the application was brought.

5.2 *The Legal Basis for Enforcing the Child Support Obligation Retroactively*

55 In the previous section, I established that a payor parent under the federal regime has the obligation to increase his/her child support payments when his/her income rises. Yet, this conclusion says nothing about the enforcement of this unfulfilled obligation. If retroactive child support awards are to be ordered, the legal basis for making such an order must be found in the applicable law. Again, different policy choices made by the federal and provincial governments must be respected.

5.2.1 Application-based Regimes

56 The above description of the child support system in Canada is replete with notions of free-standing obligations and parental responsibility. However, one must not forget that the regimes enacted by Parliament and the province of Alberta are application-based regimes. Except where a court is already seized of a divorce or separation matter, the court's jurisdiction over child support payments will arise only upon application by a person authorized pursuant to the legislation: see s. 15.1(1) of the *Divorce Act* and s. 7(1) of the *Parentage and Maintenance Act* (the latter provision uses the more permissive language of "an application may be made"). Accordingly, a parent's child support obligation will only be *enforceable* once an application to a court has been made. 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.

57 There is no doubt, of course, that the federal or provincial government could have chosen a different course. For instance, at s. 25.1, the *Divorce Act* contemplates a federal-provincial agreement through which provincial child support services would be created to recalculate the amount of child support at regular intervals. Such a service would respond to research suggesting that inadequate child support payments are linked to the infrequent updating of child support amounts (see Department of Justice, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* (2002), vol. 1, at p. 36). Indeed there may be beneficial outcomes associated with an approach that envisions the automatic tailoring of child support payments to new circumstances, at least in simple situations where the Table amounts in the *Guidelines* clearly apply. But this path has not yet been chosen and it is not for this Court to force the legislatures' hands in this matter.

58 The same could be said about automatic disclosure requirements. The *Guidelines* provide, at s. 25, that a payor parent must disclose his/her income not more than once per year upon request by the recipient parent. (Though I assume a single custody situation in my discussion here, I should note that this rule will apply to both parents in a shared custody context, as both of their incomes are relevant in determining the amount of child support due: s. 9 of the *Guidelines*.) Thus the scheme in the *Guidelines* does not burden a payor parent with an automatic disclosure obligation every time his/her income increases: *Walsh v. Walsh* (2004), 69 O.R. (3d) 577 (C.A.), at paras. 24-25. In crafting this system, Parliament was obviously concerned with the balance between the privacy of payor parents and the expectation of recipient parents that they will be paid the appropriate *Guidelines* amount based on the true income of the payor parent. This is not to suggest that court orders or separation agreements cannot themselves provide for automatic disclosure; to the contrary, if the circumstances so demand, courts may even find disclosure obligations *implicit* in separation agreements: see *Marinangeli v. Marinangeli* (2003), 38 R.F.L. (5th) 307 (Ont. C.A.). But it is not for this Court to second-guess Parliament's policy choice, absent indication that a court ordered, or the parties agreed, otherwise.

59 Still, the fact that the current child care regime is application-based does not preclude courts from considering retroactive awards. Parliament and the Government of Alberta have placed responsibility on *both* parents to ensure that their children are receiving a proper amount of support. While the payor parent does not shoulder the burden of automatically adjusting payments, or automatically disclosing income increases, this does not mean that (s)he will satisfy his/her child support obligation by

doing nothing. If his/her income rises and the amount of child support paid does not, there will remain an unfulfilled obligation that could later merit enforcement by a court.

60 No child support analysis should ever lose sight of the fact that support is the right of the child: *Richardson*, at p. 869. Where one or both parents fail to vigilantly monitor child support payment amounts, the child should not be left to suffer without a remedy. The fact that Parliament and the Alberta legislature have not compelled payor parents to automatically disclose changes in income, so that the amount of child support they owe could be varied accordingly, says nothing about a court's jurisdiction to make retroactive awards once the parties are properly in front of it. In fact, a policy that is permissive of retroactive awards would be perfectly consistent with the rest of the child support system: parents are to be trusted with the responsibility of caring for their children, but courts are not to be discouraged from defending the rights of children when they have the opportunity to do so. Thus, while an application is a necessary trigger to the court's jurisdiction, the court may still retain the power to make a retroactive order once it is properly seized of a matter.

5.2.2 Situations Where Retroactive Awards May Be Ordered

61 There are three separate situations in which it may be appropriate for a court to order that a retroactive award be paid.

5.2.2.1 *Awarding Retroactive Support Where There Has Already Been a Court Order for Child Support to Be Paid*

62 A first situation where a recipient parent may claim retroactive support is where there has already been a court order for child support, but this amount has been

inadequate for some time. The most common cause for an application of this variety would be an increase in the payor parent's income that is not reflected by an increase in the amount of child support paid. In addition to a request for prospective variation, a parent in this situation would ask for a retroactive award representing an additional amount due.

63 The immediate concern with such retroactive awards is that they disturb the certainty that a payor parent has come to expect: see *Andries v. Andries* (1998), 126 Man. R. (2d) 189 (C.A.), at para. 48. A payor parent who diligently follows the instructions of a court order may expect that (s)he would not be confronted with a claim that (s)he was deficient in meeting his/her obligations. After all, until it is varied, a court order is legally binding. It provides comfort and security to the recipient parent, but it also provides predictability to the payor parent. Put most simply, the payor parent's interest in certainty appears to be most compelling where (s)he has been following a court order.

64 On the other hand, parents should not have the impression that child support orders are set in stone. Even where an order does not provide for automatic disclosure, variation or review, parents must understand that it is based upon a specific snapshot of circumstances which existed at the time the order was made. For this reason, there is always the possibility that orders may be varied when these underlying circumstances change: see s. 17 of the *Divorce Act*; s. 18(2) of the *Parentage and Maintenance Act*. But even if the parents choose not to seek variation of an order, depending on why (and how freely) this choice was made, the child may still have the right to receive support in the amount that should have been payable. The certainty offered by a court order does

not absolve parents of their responsibility to continually ensure that their children receive the appropriate amount of support.

65 In my view, a court order awarding a certain amount of child support must be considered presumptively valid. This presumption is necessary not only to maintain the certainty promised by a court order, but also to maintain respect for the legal system itself. It is inappropriate for a court, just as it is inappropriate for a parent, to assume that a previously ordered award is invalid.

66 The presumption that a court order is valid, however, is not absolute. As noted above, the applicable legislation recognizes that a previously ordered award may merit being altered. This power will be triggered by a material change in circumstances. Notably, the coming into force of the *Guidelines* themselves constitutes such a change under the federal regime: s. 14(*c*) of the *Guidelines*. An increase in income that would alter the amount payable by a payor parent is also a material change in circumstances: s. 14 of the *Guidelines*; *Willick*, at p. 688; see also s. 18(2) of the *Parentage and Maintenance Act*. Thus, where the situations of the parents have changed materially since the original order was handed down, that original order may not be as helpful as it once was in defining the parents' obligations.

67 But the question relevant to the present appeals is not merely whether a child support order can be varied prospectively; it is whether it can be varied retroactively. And if so, how can this be reconciled with the presumption against the retroactive application of legislative provisions? To resolve this dilemma, I must refer to the comment I made earlier in these reasons: that the awards contemplated in the present appeals are not truly retroactive. Let me explain.

68 The concern associated with retroactivity is that, from the perspective of the person on whom a retroactive obligation is imposed, the order is arbitrary and unfair: see R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 553-54. Yet a retroactive child support order, as considered in the present appeals, does not involve imposing an obligation on a payor parent that did not exist at the time for which support is being claimed: compare *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 279. As I concluded above, a payor parent always has the obligation to pay – and the dependent child always has the right to receive – child support in an amount that is commensurate to his/her income. This obligation is independent of any court order that may have been previously awarded. Accordingly, even where the payor parent has made payments consistent with an existing court order, (s)he would not have been fulfilling his/her obligation to his/her children if those payments did not increase when they should have, according to the applicable law at the time. Thus, the support obligation of a payor parent, while *presumed* to be the amount ordered by a court, will not necessarily be *frozen* to the amount ordered by a court. It is the responsibility of both parents to ensure that the payor parent fulfils his/her actual obligation, tailored to the circumstances at the relevant time. Where they fail in this obligation, a court may order an award that recognizes and corrects this failure. Such an award is in no way arbitrary for the payor parent. To the contrary, it serves to enforce an obligation that should have been fulfilled already.

69 In ordering that an award be calculated retroactive to a certain date, a court would therefore be acting consistently with the law that existed at the relevant time. While the order itself would be varied with retroactive effect, the obligation that formed the basis of the court's decision would not be imposed after the fact. Because the recipient parent

could have arrived at the same result had (s)he applied for an increase in child support earlier, it cannot be said that the court is subjecting the payor parent to legal rules different from those that applied at the relevant time.

70 Having resolved that the support requested is not truly retroactive, the presumption against retroactive application cannot apply. On application of the regular principles of statutory interpretation, it remains to determine whether courts have the power to vary the original child support awards in the way the respondents request.

71 Parliament has left no doubt on this issue in the *Divorce Act*. 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.

72 Though Alberta's newer *Family Law Act*, S.A. 2003, c. F-4.5, repeats Parliament's explicit reference to "retroactiv[e]" variation at s. 77(2), the situation under Alberta's *Parentage and Maintenance Act* is less clear. In that statute, s. 18(1) simply provides with respect to variation that an "application to vary or terminate an order or a filed agreement may be made to the Court" by certain listed persons. On a contextual reading of the statute, I conclude that this grant of jurisdiction is broad enough to include retroactive variation orders.

73 With respect to child support payments, the paradigm espoused by the *Parentage and Maintenance Act* is one of judicial discretion. For instance, in contrast to the detailed guidelines in the federal and current Alberta regimes, the *Parentage and Maintenance Act* supplied judges with wide discretion in determining the amount of child support payable: see s. 16; *M.C. v. V.Z.*, at para. 9. Similarly, with respect to variation orders, judges are given no further restrictions on how the original order is to be varied, so long as one of the listed substantial changes has occurred: see s. 18(2). In this context, I find it difficult to believe the Alberta legislature intended to deny judges the possibility of awarding retroactive support where the circumstances so demanded. Like the *Divorce Act*, I believe the *Parentage and Maintenance Act* allows courts to make retroactive child support awards where appropriate.

74 In summary, a payor parent who diligently pays the child support amount ordered by a court must be presumed to have fulfilled his/her support obligation towards his/her children. Acting consistently with the court order should provide the payor parent with the benefit of predictability, and a degree of certainty in managing his/her affairs. However, the court order does not absolve the payor parent – or the recipient parent, for that matter – of the responsibility of continually ensuring that the children are receiving an appropriate amount of support. As the circumstances underlying the original award change, the value of that award in defining parents' obligations necessarily diminishes. In a situation where the payor parent is found to be deficient in his/her support obligation to his/her children, it will be open for a court, acting pursuant to the *Divorce Act* or the *Parentage and Maintenance Act*, to vary an existing order retroactively. The consequence will be that amounts that should have been paid earlier will become immediately enforceable.

5.2.2.2 *Awarding Retroactive Support Where There Has Been a Previous Agreement Between the Parents*

75 A similar, but not identical, situation arises where child support obligations have previously been set out in an agreement between the parents. While many of the same considerations apply to this situation that applied to the situation of a previous court order – e.g., the payor parent's expectation that his/her support obligations have been fully defined – the difference between an agreement and a court order cannot be ignored.

76 In *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24, and *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, 2004 SCC 22, I (along with Arbour J. in the former case) discussed the importance of encouraging spouses to resolve their own affairs, as well as the complementary importance of having courts defer to that resolution. These cases dealt with spousal support issues, but many of the same considerations apply in the child support context. Prolonged and adversarial litigation is just as troubling – if not more so – in the child support context as in the spousal support context.

77 The fact that we are dealing with children must remain of primary significance in a court's analysis. Thus in the *Divorce Act*, Parliament has provided that a court may depart from the *Guidelines* if both parents consent, but only "if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates": s. 15.1(7). What is "reasonable" will be determined with reference to the *Guidelines*: s. 15.1(8). Because of this, a payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that (s)he is fulfilling his/her legal obligations as does a payor parent acting pursuant to a court order.

78 In most circumstances, however, agreements reached by the parents should be given considerable weight. In so doing, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents. However, as is the case with court orders, where circumstances have changed (or were never as they first appeared) and the actual support obligations of the payor parent have not been met, courts may order a retroactive award so long as the applicable statutory regime permits it: compare *C. (S.E.) v. G. (D.C.)* (2003), 43 R.F.L. (5th) 41, 2003 BCSC 896.

79 Before concluding on this point, I should add that the award may or may not be considered a "variation" of a previous arrangement depending on the applicable legislative regime. This can have important implications on a court's jurisdiction to alter the *status quo*. For instance, the *Parentage and Maintenance Act* differentiates agreements that were "filed" from those that were not. Agreements falling in the former category can only be varied when certain conditions exist, while courts appear to be free to make orders inconsistent with agreements falling in the latter category: see s. 18(2). Where the legislature accords agreements between parents a special status, courts must be attentive to it.

5.2.2.3 *Awarding Retroactive Support Where There Has Not Already Been a Court Order for Child Support to Be Paid*

80 Unlike the previous two situations, in this third one, the *status quo* does not involve any existing payment of child support. This fact immediately differentiates the

present context in a very important way: absent special circumstances (e.g., hardship or *ad hoc* sharing of expenses with the custodial parent), it becomes unreasonable for the non-custodial parent to believe (s)he was acquitting him/herself of his/her obligations towards his/her children. The non-custodial parent's interest in certainty is generally not very compelling here.

81 Jurisdiction to award retroactive child support in this circumstance is found in s. 15.1 of the *Divorce Act* and s. 16 of the *Parentage and Maintenance Act*. In the Alberta statute, the legislature simply decrees that an order may be made for payments for the maintenance of the child. Similarly, in the *Divorce Act*, Parliament allows a court to make "an order requiring a spouse to pay for the support of any or all children of the marriage": s. 15.1(1). There is therefore no restriction in either statute as to the date from which the court may order that the award take effect.

82 In my view, the legislatures left it open for courts to enforce obligations that predate the order itself. This interpretation is consistent with the *Guidelines*, which are meant to "establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation" (s. 1(*a*)). So long as the court is only enforcing an obligation that existed at the relevant time, and is therefore not making a retroactive order in the true sense, I see no reason why courts should be denied the option of making this sort of award.

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.

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

5.2.3. Specific Issues Affecting Retroactive Child Support Awards

85 Having established that courts will generally have jurisdiction to make retroactive child support awards, it remains to discuss a couple of issues that could curtail the power of judges to make such awards in specific circumstances.

5.2.3.1. *Status of the Child*

86 A first circumstance is where an application is brought which concerns a child who is no longer eligible for support under the relevant scheme. While the federal and provincial regimes differ in how they classify children – the *Divorce Act* refers to a "child of the marriage" while the *Parentage and Maintenance Act* refers to children

under 18 years of age – a problem will always arise where a retroactive award is being sought for a person for whom the court does not have jurisdiction to order child support.

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). This does not necessarily imply that those over the age of 18 will be ineligible for support. In *T. (P.) v. B. (R.)*, the Alberta Court of Appeal confirmed that such support may be available under the (now-repealed) *Maintenance Order Act*, R.S.A. 1980, c. M-1. Without commenting on the correctness of this decision – which was not the subject of argument in the present appeals – I will merely state that 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. But 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] 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.

90 Under both the *Parentage and Maintenance Act* and the *Divorce Act*, therefore, it will 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.

5.2.3.2 *Federal Jurisdiction for Original Orders*

91 Federal authority over child support orders can be directly traced to its jurisdiction over divorce. Parliament is only able to legislate child support to the extent it is necessarily ancillary to its power over divorce: *Zacks*, at pp. 900-901. The question arises, therefore, as to whether a court acting pursuant to the federal *Divorce Act* has the jurisdiction to make a retroactive order for child support that predates the application for divorce.

92 The situations where retroactive support is sought can immediately be contrasted with those where prospective support is sought. In prospective cases, before an application for divorce is filed with the court, support should be sought under provincial law. This is because the federal power over child support only arises from the latter's relationship to an actual divorce and, before the divorce is granted, this jurisdiction does not arise. However, in retroactive cases, the matter is much simpler: in such cases, it is easy to know whether the divorce was ultimately granted. In practice, there is no difficulty ascertaining whether the federal jurisdiction had been triggered at the time of separation. Therefore, with the benefit of hindsight, a court properly seized of a child support dispute between divorced parents will have the jurisdiction to order retroactive support to be payable from a date preceding the application for divorce.

93 This position is consistent with the Alberta Court of Appeal's reasoning in *Hunt v. Smolis-Hunt* (2001), 97 Alta. L.R. (3d) 238, 2001 ABCA 229. In that case, Berger

and Wittman JJ.A. agreed that a court would have jurisdiction to order retroactive support under the *Divorce Act* for a period pre-dating the petition for divorce; however, parents who did not wish to commence divorce proceedings would be left to apply under provincial law: para. 33. Payne and Payne also seem to recognize this jurisdiction, stating that a court "will not ordinarily make an order retroactive to a date prior to the commencement of the divorce proceeding" (p. 392 (emphasis added)). The nuance in their phrase is important: simply because courts have the constitutional authority to make such a retroactive award under the *Divorce Act* does not imply that they should regularly do so. As I will explain below, the presumptive date of retroactivity should not be the date of separation; but in certain circumstances, a court acting under the federal power will find it appropriate to make a child support order from this date, and it will have the jurisdiction to do so.

5.3 *Factors to Determine Whether Retroactive Child Support Should Be Ordered*

94 The foregoing analysis only confirms that courts ordering child support will generally have the power to order it retroactively. But having determined that a court may order a retroactive child support award, it becomes necessary to discuss when it should exercise that discretion.

95 It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children

must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.

96 Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable *status quo*; retroactive awards serve to supplant it.

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. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.

98 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.

99 I will now proceed to discuss the factors that a court should consider before awarding retroactive child support. None of these factors is decisive. For instance, it is entirely conceivable that retroactive support could be ordered where a payor parent engages in no blameworthy conduct. Thus, the British Columbia Court of Appeal has ordered retroactive support where an interim support award was based on incorrect financial information, even though the initial underestimate was honestly made: see *Tedham v. Tedham* (2003), 20 B.C.L.R. (4th) 56, 2003 BCCA 600. At all times, a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix.

5.3.1 Reasonable Excuse for Why Support Was Not Sought Earlier

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

101 Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: see *Chrintz v. Chrintz* (1998), 41 R.F.L. (4th) 219 (Ont.

Ct. (Gen. Div.)), at p. 245. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.

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

103 The second important concern is that recipient parents not be encouraged to delay in seeking the appropriate amount of support for their children. From a child's perspective, a retroactive award is a poor substitute for past obligations not met. Recipient parents must act promptly and responsibly in monitoring the amount of child support paid: see *Passero v. Passero*, [1991] O.J. No. 406 (QL) (Gen. Div.). Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of *both* parents to fulfill their obligations to their children.

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

5.3.2 Conduct of the Payor Parent

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

106 Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004),

72 O.R. (3d) 561, at para. 85, where children's broad "interests" – rather than their "right to an appropriate amount of support" – were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.)); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; *S. (L.)*. A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.

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

108 On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay;

generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following. Because the order (and, usually, the agreement) is presumed valid, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay.

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

5.3.3 Circumstances of the Child

110 A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time. Parents must endeavour to ensure that their children receive the support they deserve when they need it most. But because this will not always be the case with a

retroactive award, courts should consider the present circumstances of the child – as well as the past circumstances of the child – in deciding whether such an award is justified.

111 A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need. As I mentioned earlier, it is a core principle of child support that, after separation, a child's standard of living should approximate as much as possible the standard (s)he enjoyed while his/her parents were together. Yet, this kind of entitlement is impossible to bestow retroactively. Accordingly, it becomes necessary to consider other factors in order to assess the propriety of a retroactive award. Put differently, because the child must always be the focus of a child support analysis, I see no reason to abstract from his/her present situation in determining if a retroactive award is appropriate.

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

113 Because the awards contemplated are retroactive, it is also worth considering the child's needs at the time the support should have been paid. A child who underwent

hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her: see *S. (L.)*. This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit.

5.3.4 Hardship Occasioned by a Retroactive Award

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

115 There are various reasons why retroactive awards could lead to hardship in circumstances where a prospective award would not. For instance, the quantum of retroactive awards is usually based on past income rather than present income; in other words, unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor parent can currently afford. As well, payor parents may have new families, along with new family obligations to meet. On this point, courts should recognize that hardship considerations in this context are not limited to the payor

parent: it is difficult to justify a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children. In short, retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.

116 I agree with Paperny J.A., who stated in *D.B.S.* that courts should attempt to craft the retroactive award in a way that minimizes hardship (paras. 104 and 106). Statutory regimes may provide judges with the option of ordering the retroactive award as a lump sum, a series of periodic payments, or a combination of the two: see, e.g., s. 11 of the *Guidelines*. But I also recognize that it will not always be possible to avoid hardship. While hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct, it remains a strong one where this is not the case.

5.4 *Determining the Amount of a Retroactive Child Support Award*

117 Once a court determines that a retroactive child support award should be ordered, it must decide the amount of that award. There are two elements to this decision: first, the court must decide the date to which the award should be retroactive, and second, the court must decide the amount of support that would adequately quantify the payor parent's deficient obligations during that time. I will consider each issue in turn.

5.4.1 Date of Retroactivity

118 Having established that a retroactive award is due, a court will have four choices for the date to which the award should be retroactive: the date when an application was made to a court; the date when formal notice was given to the payor parent; the date

when effective notice was given to the payor parent; and the date when the amount of child support should have increased. For the reasons that follow, I would adopt the date of effective notice as a general rule.

119 Separation is a difficult time for families. But especially when the interests of children are at stake, it is vital that parents resolve matters arising out of separation promptly. The *Guidelines* and similar provincial schemes facilitate this task by providing a measure of consistency and predictability in child support matters. Still, as I have noted above, these child support regimes do not go so far as to provide for automatically enforceable support orders. Whether dealing with an original order, or circumstances that may merit a variation, the responsibility always lies with parents to negotiate the issue honestly and openly, with the best interests of their children in mind.

120 Disputes surrounding retroactive child support will generally arise when informal attempts at determining the proper amount of support have failed. Yet, this does not mean that formal recourse to the judicial system should have been sought earlier. To the contrary, litigation can be costly and hostile, with the ultimate result being that fewer resources – both financial and emotional – are available to help the children when they need them most. If parents are to be encouraged to resolve child support matters efficiently, courts must ensure that parents are not penalized for treating judicial recourse as a last resort. Accordingly, the first two start dates for retroactive awards – i.e., the date of application to court and the date of formal notice – ought not be used. So long as the enforcement of child support obligations is triggered by formal legal measures, a perverse incentive is created for recipient parents to avoid the informal resolution of their disputes: *MacNeal v. MacNeal* (1993), 50 R.F.L. (3d) 235 (Ont. Ct. (Gen. Div.)); *Steinhuebl v. Steinhuebl*, [1970] 2 O.R. 683 (C.A.). A recipient parent should not have

to sacrifice his/her claim for support (or increased support) during the months when (s)he engages in informal negotiation: *Chrintz*; see *Dickie v. Dickie* (2001), 20 R.F.L. (5th) 343 (Ont. S.C.J.).

121 Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the *status quo* is fair, and his/her interest in certainty becomes less compelling.

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

123 Once the recipient parent raises the issue of child support, his/her responsibility is not automatically fulfilled. Discussions should move forward. If they do not, legal action should be contemplated. While the date of effective notice will usually signal an effort on the part of the recipient parent to alter the child support situation, a prolonged period of inactivity after effective notice may indicate that the payor parent's reasonable

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

124 The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances – including an increase in income that one would expect to alter the amount of child support payable – is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

125 The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of

retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

5.4.2 Quantum of the Retroactive Award

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

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

128 That said, courts ordering a retroactive award pursuant to the *Divorce Act* must still ensure that the quantum of the award fits the circumstances. Blind adherence to the

amounts set out in the applicable Tables is not required—nor is it recommended. There are two ways that the federal regime allows courts to affect the quantum of retroactive awards.

129 The first involves exercising the discretion that the *Guidelines* allow. Thus, the presence of undue hardship can yield a lesser award: see s. 10. As stated above, it will generally be easier to show that a retroactive award causes undue hardship than to show that a prospective one does. Further, the categories of undue hardship listed in the *Guidelines* are not closed: see s. 10(2). And in addition to situations of undue hardship, courts may exercise their discretion with respect to quantum in a variety of other circumstances under the *Guidelines*: see ss. 3(2), 4 and 9.

130 A second way courts can affect the quantum of retroactive awards is by altering the time period that the retroactive award captures. While I stated above that the date of effective notice should be chosen as a general rule, this will not always yield a fair result. For instance, where a court finds that there has been an unreasonable delay after effective notice was given, it may be appropriate to exclude this period of unreasonable delay from the calculation of the award. Unless the statutory scheme clearly directs another outcome, a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case.

5.5 *Summary*

131 Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children

in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.

132 In the context of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.

133 In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.

134 Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.

135 The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

6. Application to the Facts

136 Before proceeding to apply the above reasoning to the facts of the four appeals, I should repeat the standard of review that applies to these decisions. The relevant passage can be found in this Court's decision in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 11:

> [A]ppeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong.

The lower courts did not have the benefit of these reasons in reaching their conclusions. Accordingly, and in the interests of finally resolving the present disputes, while I consider whether the chambers judges considered the above factors, I am also prepared to accept that they did not explicitly mention and analyze each one. My expectation, however, is that future decisions will be determined on a more thorough examination of the relevant considerations discussed above.

6.1 *D.B.S. v. S.R.G.*

137 The *D.B.S.* appeal involves an original application for support. As the parents were not married, the regime under the *Parentage and Maintenance Act* applies.

138 The chambers judge, Verville J., decided that a retroactive award would be unfair in the circumstances. Paperny J.A., writing for the Alberta Court of Appeal, allowed the appeal and ordered that the matter be returned to a chambers judge. I would restore Verville J.'s original order.

139 On application of the principles and factors discussed above, I agree with Verville J. that retroactive support is not justified in these circumstances. While the mother states that she did not know support might have been owed, parents have a responsibility to inquire into matters like this. Concerning the circumstances of the child, Verville J. noted that the present household incomes of the two parents were roughly equal.

140 As to the conduct of the father, the mother has made allegations of threatening and/or dominating behaviour with reference to various times in their post-separation relationship. Yet, the chambers judge made no finding of fact that would support such allegations. That said, a further question is what the father revealed about his income to the mother. A court must inquire into whether the payor parent was hiding, or failing to reveal, the factual circumstances that would give rise to a new or increased support obligation. Again, however, the chambers judge made no such finding.

141 Most important, however, Verville J. held that a retroactive order would not necessarily benefit the children. I believe this finding to be crucial. In the circumstances of this appeal, where I cannot find any blameworthy conduct on the part of the payor father, and where the chambers judge held that a retroactive award would be "inappropriate and inequitable", I find myself compelled to defer to his original order.

142 This appeal should be allowed and the order of Verville J. restored, with costs in this Court and in the Court of Appeal.

6.2 *T.A.R. v. L.R.J.*

143 The order of the chambers judge should be restored in the *T.A.R.* appeal as well.

144 In this appeal, the chambers judge considered factors that I have listed as being relevant to a decision of whether retroactive support should be granted. Perras J. seemed to attach particular significance to the hardship that could be caused by a retroactive award. This is not surprising, given that the $15,771 sought by the mother is a very large sum to pay for a father earning around $23,000 annually. Concerning the father's conduct, it is important that Perras J. did not find the father to be acting deceitfully. Rather, Perras J. found that he "honoured his obligation faithfully". That said, Perras J.'s prospective order clearly recognized that the father's income mandated higher child support payments than what he actually paid.

145 While he did not consider all the factors I have listed by name, I am satisfied that Perras J. took a holistic view of the matter and came to the conclusion that it would not be appropriate to order a retroactive child support award in the circumstances. For

instance, he seemed to consider the father's conduct far from blameworthy. He noted that the children in question are presently living in a home with a household income "in the low $50,000's". While there are other children from a previous relationship to support with this income, it remains substantially greater than what the father earns to help support his new spouse and her children. I ultimately believe the chambers judge's conclusion merits deference. The original order is restored and the appeal allowed, with costs in this Court and in the Court of Appeal.

6.3 *Henry v. Henry*

146 The appeal in the *Henry* case should be dismissed. Turning to the relevant factors, I believe there was no unreasonable delay in this case. Rowbotham J. accepted that the mother could not afford a lawyer. Nonetheless, the mother broached the topic of increasing the father's child support obligations to the best of her ability, given her lack of legal knowledge, her ignorance of Mr. Henry's actual income, and the intimidation she felt from her ex-husband. Though some requests from Ms. Henry resulted in the father making some financial contribution, these contributions stayed well below what they should have been. Living in a different city, the mother did not know precisely how substantial the father's financial means were.

147 Based on the principles I have discussed in these reasons, there should be no dispute that the father in the present appeal acted in a blameworthy manner. 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. But Mr. Henry went even further: he insinuated that he did not have great financial means and that the mother's financial management was to

blame; and on one occasion, he even asked *her* to give financial assistance. Although he complied with the obligation set forth in the child support order, in the circumstances of this appeal, this fact alone does not imply that Mr. Henry reasonably believed his children's entitlements were being fulfilled. Mr. Henry was aware that his income had risen substantially since the original order was rendered, he was aware that his children were living at levels commensurate with his ex-wife's low income, and he still refused to raise his payments to levels appropriate to his income. This conduct falls well short of what is expected from a parent.

148 On the issue of the children's circumstances, both children lived in conditions far below what they should have for substantial periods of time. The children implicated in this appeal deserve compensation for the unfulfilled obligation of their father, and I see no reason to conclude that they should not benefit from a retroactive award now.

149 Overall, I am satisfied that Rowbotham J.'s award would not impose too great a burden on the father. It is true that he has two children of his new marriage to provide for. But Rowbotham J.'s order of periodic payments, such that the unfulfilled obligation is paid off slowly until 2010, seems very fair to the father in this case, considering all the circumstances.

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.

151 The appeal is dismissed, with costs.

6.4 *Hiemstra v. Hiemstra*

152 Concerning this appeal, I believe the chambers judge properly weighed relevant considerations in deciding upon the award. Thus, he noted that the disparity of incomes between the parents was great and the mother paid a disproportionate share of the burden for supporting the children, but also that the financial burden of a retroactive award is significant. Although some remarks seemed to indicate that he saw the retroactive award as compensating the mother, I accept that he rightly ordered the award for the benefit of the children.

153 I believe Belzil J. came to an appropriate conclusion that a retroactive award was due, after a detailed consideration of the evidence before him. The mother explained that previous litigation has been overwhelming and had strained her relationship with her daughter; it is understandable that she would be reticent to commence the process again. More important, given the father's substantial income – almost $100,000 in 2003 – he cannot be considered blameless in not paying child support. In such circumstances, where the father was well aware that he could afford child support but where such support was coming uniquely from the mother, the father's failure to meet his obligations

to his children should not be easily excused. The blameworthiness of the father's conduct is only exacerbated by his e-mail of April 3, 2003, in which he did not take advantage of the opportunity to lend financial support when it so clearly arose.

154 Concerning the date chosen for the retroactive award to begin, I see no reason to alter Belzil J.'s award. The father has no compelling interest in certainty in this appeal: he had no reasonable belief that his support obligation was being fulfilled. Belzil J. still chose to make the award retroactive only to January 1, 2003, even though the father was deficient in his obligations well before this time. This date has not been cross-appealed by the mother, and I will therefore leave it undisturbed.

155 This appeal is therefore dismissed with costs.

The reasons of Fish, Abella and Charron JJ. were delivered by

156 ABELLA J. — While I agree with much of the analysis of Bastarache J., including his disposition of the four appeals, I am unable, with great respect, to share his views about the presumptive starting date for the calculation of child support arrears, about the relevance of blameworthy conduct, or about the desirability of a three-year limitation period.

157 My justification for all three departures is based on the underlying premise he cogently articulates at the beginning of his reasons: parents have a free-standing joint obligation to support their children based on their ability to do so.

158 As La Forest J. pointed out in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, this obligation is a fiduciary one. It is a parental obligation that creates a right in the child. The recognition that child support is the right of the child, not of the parent, is not disputed: see *Horner v. Horner* (2004), 72 O.R. (3d) 561 (C.A.); *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Willick v. Willick*, [1994] 3 S.C.R. 670; and *Francis v. Baker*, [1999] 3 S.C.R. 250.

159 Bastarache J.'s historical review demonstrates that these propositions claim at least a century-old pedigree. The fact that they have found renewed endorsement in statutory form, such as the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and the *Federal Child Support Guidelines*, SOR/97-175 ("*Guidelines*"), reinforces their status as the governing principles in awarding child support, principles which together proclaim that children come first, and that parents should expect to pay what they are obliged to pay when they are obliged to pay it.

160 I agree with Bastarache J. that it is a misnomer to refer to these as "retroactive" awards. They are, instead, compensation for what was legally owed. As the Alberta Court of Appeal stated in *MacMinn v. MacMinn* (1995), 174 A.R. 261:

> By questioning the rationale for a trial judge to order "retroactive" maintenance, the father implies that he is being asked, after the fact, to assume a liability for child support which he did not have in the first instance. This is simply wrong in law. Both parents of a child have financial obligations to that child. That obligation arises out of the common law, equity and statute; it is an obligation which exists from the time a child is born. When parents separate, the obligation continues. Thus, it exists irrespective of whether an action has been started by the custodial parent against the non-custodial parent to enforce the obligation: *Paras v. Paras* (1970), 2 R.F.L. 328 (Ont. C.A.); *Mannett v. Mannett* (1992), 111 N.S.R. (2d) 327 (T.D.). [para. 15]

161 The law is clear that separated parents are obliged to pay child support in accordance with their ability to do so. Only the payor parent knows when there has been a change in income that would warrant an adjustment to child support. That, therefore, is the parent with the major responsibility for ensuring that a child benefits from the change as soon as reasonably possible. A system of support that depends on when and how often the recipient parent takes the payor parent's financial temperature is impractical and unrealistic.

162 Unlike Bastarache J., therefore, I would not limit the child's entitlement to the date of the recipient parent's notice of an intention to enforce it. Because the child's right to support varies with the change, it cannot, therefore, be contingent on whether the recipient parent has made an application on the child's behalf or given notice of an intention to do so.

163 So long as the change would warrant different child support from what is being paid, the presumptive starting point for the child's entitlement to a change in support is when the change occurred, not when the change was disclosed or discovered.

164 To suggest, therefore, that the principle of certainty is impaired by the possibility of claims for child support being made in the future, is to suggest that the rights of children to the support to which they are entitled, should defer to the rights of payor parents not to have to worry that the amount they are paying may be found to be inadequate. Child support is inherently variable because parental incomes are.

165 I do not mean to devalue the importance of the ability of parents, after separation, to restructure their financial lives with some certainty. But the need for certainty and a

child's entitlement to support in accordance with parental ability to pay are not inconsistent propositions. Parents responsible for child support know that whether or not they choose to disclose a material change in their income, the fact of that change is enough to trigger a change in the amount they are responsible for paying.

166 They know what their obligations are, when they arise, and when they may be varied. If their ability to pay has increased, they know that the law presumes that at that moment, the child's entitlement increases. The operative certainty in the area of child support is the presumption that the obligation to pay child support will always depend on the payor parent's income at any given time. For payor parents, certainty and predictability are protected by the legal certainty that whenever their income changes materially, that is the moment their obligation changes automatically, even if *enforcement* of that increased obligation is not automatic.

167 Fairness is the Holy Grail in family law. Certainty and predictability of child support amounts do not justify a retreat from the primacy of a child's rights to a fair amount of support. To the extent that certainty is engaged, it should be the children's certainty that the support they are entitled to will not be wrongly withheld.

168 Prudence dictates full disclosure, as does good financial management, but if the payor parent decides not to let dependent children know that their entitlements have changed, he or she cannot be heard credibly to say that the subsequent enforcement of a support obligation as of the date of the changed circumstances, impaired his or her expectation of certainty.

169 Similarly, I see no role for "blameworthy conduct" in determining the date at which children can recover the support to which they are entitled. The right to support belongs to the child regardless of how his or her parents behave. Whether a payor refuses to pay or disclose wilfully, or falsifies the information, or provides false information mistakenly, are not germane. The existence of the increased obligation depends on the existence of the increased income, and fluctuates with parental income, not with parental misconduct.

170 In the same way, the recipient parent need not demonstrate that the failure to pay child support has resulted in hardship for the child. The children were deprived of support to which they were entitled. The fact that the recipient parent has or has not been able to attenuate the deprivation through other means has no impact on the fact that a debt was owing.

171 A presumptive date of entitlement to child support does not, however, eliminate the role of judicial discretion. It will be up to the court in each case to determine whether the presumptive date has been rebutted, what the appropriate quantum is, and how it should be repaid. This includes, most notably, determining whether undue hardship, as defined by s. 10 of the *Guidelines*, has been demonstrated. If, for example, a recipient parent, having received *full financial disclosure*, has delayed seeking enforcement for an inordinate and unjustified period of time, this delay may affect the child support awarded.

172 But if delay results from not being informed about a change that gives rise to a change in a child's entitlement, it will not usually affect the child support award. I agree, in particular, with Paperny J.A. in *D.B.S. v. S.R.G.* (2005), 361 A.R. 60, 2005 ABCA 2,

at paras. 120-22, that caution should be exercised before penalizing a child for a recipient parent's delay in attempting to recover support to which a child was entitled. There may be practical financial and psychological realities inhibiting a recipient parent's ability to respond to learning of a change in circumstances. As Rowles J.A. stated in *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254, 1999 BCCA 393, at para. 58:

> As the right belongs to the child it cannot be waived or bargained away by the custodial parent or lost due to that parent's neglect, delay, or lack of diligence in enforcing the right. [Emphasis added.]

173 While undue hardship could militate against a retroactive order being made as of the date of the change of circumstances, I do not believe that it necessarily flows from this that an automatic time limit should be imposed in every case. In particular, I see no reason to deprive children of the support to which they are entitled by imposing an arbitrary three-year judicial limitation period on the amount of child support recoverable as suggested by Bastarache J..

174 It is an approach which resembles the "one-year rule against hoarding", which courts used to apply to avoid enforcing long standing arrears unless special circumstances were established. In *Haisman v. Haisman* (1994), 22 Alta. L.R. (3d) 56 (C.A.), leave to appeal dismissed, [1995] 3 S.C.R. vi, the Alberta Court of Appeal rejected the "one-year" rule as being inapplicable to child support. In *D.B.S.*, Paperny J.A. referred to the rule as "an antiquated notion that had no place in the law on child support" (para. 27). In *Paras v. Paras*, [1971] 1 O.R. 130, the Ontario Court of Appeal recognised that delay and the inability to claim spousal support was not a consideration to deny interim *child* support.

175 Like the one-year rule, the suggestion of a three-year limitation period is, with respect, an unnecessary fettering of judicial discretion. Such a clear restriction of a child's entitlement requires, in my view, an express statutory direction to that effect.

176 Bastarache J. concludes that s. 25(1)(*a*) of the *Guidelines* – which limits a recipient parent's request for historical income information to a three-year period – provides support for the contention that it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.

177 Section 25 allows a parent to go back three years when asking for disclosure not to limit retroactive orders, but because three years of financial information can be looked to in determining the income amount to be used to calculate the *prospective* support obligation under the *Guidelines*. Significantly this three-year limit for disclosure of financial information is found only under the federal scheme; no equivalent provision is found in the *Parentage and Maintenance Act*, R.S.A. 2000, c. P-1.

178 Under s. 16 of the *Guidelines*, prospective support orders (original or variation) are based on the sources of income set out in the most recent T1 General form of the payor, unless a court is of the opinion that this is not the fairest determination of income. If the court is of the opinion that the most current T1 would not be the fairest determination, it is permitted under s. 17 of the *Guidelines* to consider the three most recent T1s of the payor to determine income in light of any pattern of income, fluctuation or receipt of a non-recurring amount. The "three-year limit" in s. 25(1)(*a*) is clearly tied to s. 17 of the *Guidelines*. After receiving financial information pursuant to a notice to disclose, the payee may or may not take any action for prospective support. I see no

endorsement in this provision for imposing a three year limit on support owed to children.

179 Notwithstanding the differences in my approach to the factors relevant to the calculation of retroactive child support orders, Bastarache J.'s disposition of all four appeals is tenable on the facts of each case. I agree with his analyses in *Hiemstra* and *Henry*. In *D.B.S.*, while I have some concerns about whether the result would have been different given the principles enunciated in these reasons, there was no "clear evidence" as to what was owed and from what date. And in *L.J.W. v. T.A.R.*, given the chambers judge's conclusion about the payor parent's "meagre gross income" and the expenses he incurred in exercising access ([2003] A.J. No. 1243 (QL), 2003 ABQB 569, at paras. 11 and 14), one can infer that the delay in bringing an application to vary caused undue hardship.

180 I would therefore dispose of the four appeals as recommended by Bastarache J.

APPENDIX

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) (am. S.C. 1997, c. 1)

> **15.1** (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.
>
> (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to pay for the support of any or all children of the marriage, pending the determination of the application under subsection (1).
>
> (3) A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines.
>
> (4) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event

occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just.

(5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

(*a*) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

(*b*) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

(6) Where the court awards, pursuant to subsection (5), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.

(7) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

(8) For the purposes of subsection (7), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

17. (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; or

(*b*) a custody order or any provision thereof on application by either or both former spouses or by any other person.

. . .

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

. . .

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

. . .

25.1 (1) With the approval of the Governor in Council, the Minister of Justice may, on behalf of the Government of Canada, enter into an agreement with a province authorizing a provincial child support service designated in the agreement to

(*a*) assist courts in the province in the determination of the amount of child support; and

(*b*) recalculate, at regular intervals, in accordance with the applicable guidelines, the amount of child support orders on the basis of updated income information.

(2) Subject to subsection (5), the amount of a child support order as recalculated pursuant to this section shall for all purposes be deemed to be the amount payable under the child support order.

(3) The former spouse against whom a child support order was made becomes liable to pay the amount as recalculated pursuant to this section thirty-one days after both former spouses to whom the order relates are notified of the recalculation in the manner provided for in the agreement authorizing the recalculation.

(4) Where either or both former spouses to whom a child support order relates do not agree with the amount of the order as recalculated pursuant to this section, either former spouse may, within thirty days after both former spouses are notified of the recalculation in the manner provided for in the agreement authorizing the recalculation, apply to a court of competent jurisdiction for an order under subsection 17(1).

(5) Where an application is made under subsection (4), the operation of subsection (3) is suspended pending the determination of the application, and the child support order continues in effect.

(6) Where an application made under subsection (4) is withdrawn before the determination of the application, the former spouse against whom the order was made becomes liable to pay the amount as recalculated pursuant to this section on the day on which the former spouse would have become liable had the application not been made.

26.1 . . .

(2) The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

. . .

Federal Child Support Guidelines, SOR/97-175 (am. SOR/97-563; am. SOR/2000-337)

1. The objectives of these Guidelines are

(*a*) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

(*b*) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

(*c*) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(*d*) to ensure consistent treatment of spouses and children who are in similar circumstances.

2. . . .

(3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

. . .

3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

(*a*) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

(*b*) the amount, if any, determined under section 7.

(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

(*a*) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(*b*) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

(3) The applicable table is

(*a*) if the spouse against whom an order is sought resides in Canada,

(i) the table for the province in which that spouse ordinarily resides at the time the application for the child support order, or for a variation order in respect of a child support order, is made or the amount is to be recalculated under section 25.1 of the Act,

(ii) where the court is satisfied that the province in which that spouse ordinarily resides has changed since the time described in subparagraph (i), the table for the province in which the spouse ordinarily resides at the time of determining the amount of support, or

(iii) where the court is satisfied that, in the near future after determination of the amount of support, that spouse will ordinarily reside in a given province other than the province in which the spouse ordinarily resides at the time of that determination, the table for the given province; and

(*b*) if the spouse against whom an order is sought resides outside of Canada, or if the residence of that spouse is unknown, the table for the province where the other spouse ordinarily resides at the time the application for the child support order or for a variation order in respect of a child support order is made or the amount is to be recalculated under section 25.1 of the Act.

4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is

(*a*) the amount determined under section 3; or

(*b*) if the court considers that amount to be inappropriate,

(i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

(iii) the amount, if any, determined under section 7.

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

(*a*) the amounts set out in the applicable tables for each of the spouses;

(*b*) the increased costs of shared custody arrangements; and

(*c*) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

(*a*) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

(*b*) the spouse has unusually high expenses in relation to exercising access to a child;

(*c*) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;

(*d*) the spouse has a legal duty to support a child, other than a child of the marriage, who is

(i) under the age of majority, or

(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and

(*e*) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

(4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

(5) Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

(6) Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so.

14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

(*a*) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;

(*b*) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and

(*c*) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).

25. (1) Every spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse or the order assignee with

(*a*) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;

(*b*) as applicable, any current information, in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and

(*c*) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship.

Parentage and Maintenance Act, R.S.A. 2000, c. P-1 (am. S.A. 2003, c. I-0.5, s. 58(6); rep. S.A. 2003, c. F-4.5, s. 129)

7. (1) Subject to subsection (5), an application may be made to the Court for an order

(a) declaring that the respondent is a parent for the purposes of this Act, and

(b) directing the payment of any or all of the expenses referred to in section 16(2).

15. (1) If the Court is satisfied that the respondent is a parent, the Court may make an order declaring the respondent to be a parent for the purposes of this Act.

(2) If 2 or more persons are named as respondents in an application and the Court

(a) is satisfied that any one of the respondents might be a parent, and

(b) is unable to determine which respondent is a parent,

the Court may make an order declaring each of the respondents who, in the opinion of the Court, might be a parent to be a parent for the purposes of this Act.

(3) No order may be made under this section if, at the date of the application for the order, the child in respect of whom the application is made has reached the age of 18 years.

16. (1) If an order is made under section 15, the Court may, subject to subsection (3), make a further order

(a) directing the respondent to pay any or all of the expenses referred to in subsection (2), or

(b) if the order is made under section 15(2), directing the respondents to pay any or all of the expenses referred to in subsection (2) in any proportion that the Court considers appropriate.

(2) A direction in an order under this section may refer to any or all of the following expenses:

(a) reasonable expenses for the maintenance of the mother

(i) during a period not exceeding 3 months preceding the birth of the child,

(ii) at the birth of the child, and

(iii) during a period after the birth of the child that, in the opinion of the Court, is necessary as a consequence of the birth of the child;

(b) reasonable expenses for the maintenance of the child before the date of the order;

(c) monthly or periodic payments for the maintenance of the child until the child reaches the age of 18 years;

(d) expenses of the burial of the child if the child dies before the date of the order;

(e) costs of any or all Court proceedings taken under this Act.

(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.

(4) In making an order under this section, the Court shall fix an amount to be paid for the maintenance of a child that will enable the child to be maintained at a reasonable standard of living having regard to the financial resources of each of the child's parents.

(5) An order may provide that the liability of a parent for the expenses referred to in subsection (2), other than for the maintenance of a child under subsection (2)(c), shall be satisfied by the payment of an amount specified in the order.

(6) When an order is made under this section, the applicant shall provide certified copies of the order to any person declared to be a parent under section 15.

18. (1) An application to vary or terminate an order or a filed agreement may be made to the Court by

(a) a person required by the order or filed agreement to make a payment,

(b) a parent of a child who is the subject of the order or filed agreement,

(c) a person who has the care and control of a child who is the subject of the order or filed agreement,

(d) a child who is the subject of the order or filed agreement, or

(e) the Director under the *Income and Employment Supports Act* on behalf of the Government, where the Director has a right under Part 5 of the *Income and Employment Supports Act*.

(2) The Court may vary or terminate an order or a filed agreement if it is satisfied that there has been a substantial change in

(a) the ability of a parent to pay the expenses specified in the order or filed agreement,

(b) the needs of the child, or

(c) the care and control of the child.

(3) An order under this section may not vary an amount specified under section 6(3) or 16(5).

Appeals allowed with costs in D.B.S. v. S.R.G. and in T.A.R. v. L.J.W.; appeals dismissed with costs in Henry v. Henry and in Hiemstra v. Hiemstra.

Solicitors for the appellants: Smith Family Law Group, Toronto.

Solicitor for the respondents S.R.G. and L.J.W.: Carole Curtis, Toronto.

Solicitors for the respondent Celeste Rosanne Henry: Thornborough Smeltz Gillis, Calgary.

Solicitors for the respondent Geraldine Hiemstra: Rand Kiss Turner, Edmonton.