



SUPREME COURT OF CANADA

CITATION: Michel v. Graydon, 2020 SCC 24

APPEAL HEARD AND JUDGMENT

RENDERED: November 14, 2019

REASONS FOR JUDGMENT:

September 18, 2020

DOCKET: 38498

BETWEEN:

Danelle Michel
Appellant

and

Sean Graydon
Respondent

- and -

West Coast Legal Education and Action Fund Association
Intervener

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 37)

Brown J. (Moldaver, Côté, Rowe and Kasirer JJ.
concurring)

CONCURRING REASONS:
(paras. 38 to 135)

Martin J. (Wagner C.J. concurring)

CONCURRING REASONS:
(para. 136)

Abella J. (Karakatsanis J. concurring)

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MICHEL v. GRAYDON

Danelle Michel

Appellant

v.

Sean Graydon

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West Coast Legal Education and Action Fund Association

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Indexed as: Michel v. Graydon

2020 SCC 24

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Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Family law — Support — Child support — Retroactive support — Mother seeking retroactive variation of child support order under British Columbia’s Family Law Act — Variation sought after child had become adult — Whether court has jurisdiction to vary child support order after order has expired and after child support beneficiary has ceased to be child — Family Law Act, S.B.C. 2011, c. 25, s. 152.

M and G were in a common law relationship and are the parents of A, born in 1991. After M and G separated in 1994, A lived with M, and G agreed to pay child support based upon his stated annual income. This was formalized in a consent order made in 2001. G had, however, understated his income from the time of the consent order — with the exception of 2004 — until his child support obligation was terminated by court order in 2012. In January 2015, M applied under s. 152 of British Columbia’s *Family Law Act* (“*FLA*”) to retroactively vary child support for the period between April 2001 and April 2012, to reflect G’s actual income during that period of time. The hearing judge allowed M’s application and G was ordered to pay \$23,000 in retroactive child support. The Supreme Court of British Columbia allowed G’s appeal and set aside the hearing judge’s order. In its view, the Court’s conclusion in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, that an application for child support under the federal *Divorce Act* had to be made while the child remained a “child of the marriage” was equally applicable where child support was sought under the *FLA*. The Court of Appeal dismissed M’s appeal.

Held: The appeal should be allowed and the order of the hearing judge reinstated.

Per Moldaver, Côté, Rowe, **Brown** and Kasirer JJ.: Section 152 of the *FLA* authorizes a court to retroactively vary a child support order, irrespective of whether the beneficiary is a “child” at the time of the application, and irrespective of whether the order has expired. The order of the hearing judge should therefore not have been disturbed.

When deciding an application for retroactive child support, a court must analyze the statutory scheme in which the application was brought, and the different policy choices made by the federal and provincial governments must be respected. In *D.B.S.*, the Court examined the enforcement mechanism set out in s. 15.1 of the *Divorce Act*, which addresses original child support orders, and concluded that a court has no authority to grant a retroactive award of child support under that provision if the child beneficiary is no longer a “child of the marriage” at the time of the application. The Court did not consider or decide the issue of retroactive variation orders under s. 17 of the *Divorce Act*. Accordingly, *D.B.S.* does not stand for the proposition that courts can retroactively vary child support only while the child beneficiary is a “child of the marriage”; furthermore, the Court in *D.B.S.* did not state a sweeping principle that transcends the *Divorce Act* to embrace all other statutory schemes regardless of legislative intent. The Court insisted that provinces remain free to espouse a different paradigm than that adopted by Parliament in the *Divorce Act*. Where they do so via

legislation establishing an application-based regime such as the *FLA*, and where an application for retroactive child support is brought thereunder, it is that legislation which governs a court's authority to grant retroactive child support. Courts should not be hasty to recognize jurisdictional impediments that bar applications for retroactive child support. Jurisdictional constraints are inimical to the principles and policy objectives articulated in *D.B.S.*, and may be imposed only where the legislature has clearly intended that they be imposed. Such constraints must therefore be apparent in the statutory scheme, bearing in mind that preventing courts from even considering an award for retroactive child support would prevent enforcement of an unfulfilled legal obligation even in the most appropriate of circumstances. Unless compelled by the applicable legislative scheme, courts should avoid creating an incentive whatsoever for payor parents to avoid meeting their child support obligations.

For the purposes of determining who is eligible to receive child support, the *FLA* defines the term "child" in different ways; but in essence, says that children who are dependent on their parents are eligible to receive child support. Section 152 authorizes a court to change, suspend or terminate an order respecting child support, and to do so prospectively or retroactively. Far from erecting barriers, s. 152 of the *FLA* creates an avenue for courts to retroactively change any child support order, irrespective of the beneficiary's dependent status and irrespective of whether the order is extant at the time of the application. Section 152(1) contains no reference to the defined term "child" that might serve to qualify the authority of a court to vary child support, nor does it contain any conditions which relate to the dependent status of the

beneficiary of a child support order. The text of s. 152 and the scheme of the *FLA* indicate that the Legislature authorized a court to vary any child support order, irrespective of whether the beneficiary remains a dependent child, and irrespective of whether the order continues to require payment. Straining to read jurisdictional impediments into s. 152 that would prevent a court from ordering retroactive child support in circumstances in which such an order is warranted would defeat that legislative purpose and create a perverse incentive for payor parents to avoid their obligations.

Child support awards are highly discretionary, and the hearing judge's findings and inferences of fact may not be disturbed absent an error on an extricable question of law, a palpable and overriding error, or a fundamental mischaracterization or misapprehension of the evidence. In the present case, the hearing judge was correct to conclude that s. 152 gave him authority to order retroactive child support, he identified and applied the appropriate factors from *D.B.S.*, and his conclusion that A experienced hardship in her childhood as a result of G's neglect of his child support obligations was amply supported on the record. He also found that G would not experience hardship from a retroactive award. G's failure to accurately disclose his income at the time of the 2001 order, and to disclose material changes in his income for the 11 years that followed, constituted blameworthy conduct, which justifies an order for retroactive child support. Further, there is no basis for interfering with the hearing judge's conclusion that M's delay in seeking retroactive support was reasonable. Finally, it was clearly appropriate for the hearing judge to award support

dating back to the 2001 consent order, as the date of effective notice is not relevant when a payor parent has engaged in blameworthy conduct.

Per Wagner C.J. and **Martin J.**: There is agreement with the majority's conclusion and with its analysis of s. 152 of the *FLA*, and there is agreement that *D.B.S.* did not decide the question at issue in this case. However, there are other compelling considerations and numerous additional reasons why s. 152 should be read to permit applications such as the one in this case. The jurisprudence on child support calls for a fair, large and liberal construction and interpretation as best ensures the attainment of its objects. Such objects include a consideration of the best interests of the child. The required contextual and purposive reading of s. 152 thus requires the Court to look to its wider legislative purposes, societal implications, and actual impacts. Seen this way, a jurisdictional bar preventing these cases from being heard not only rests on unsound legal foundations, it is inconsistent with the bedrock principles underlying modern child support and contributes to systemic inequalities.

The purpose and promise of child support is to protect the financial entitlements due to children by their parents. Canadian jurisprudence has not consistently fulfilled that promise when it comes to historical child support, when retroactive child support is sought after the child no longer qualifies as a beneficiary under the applicable legislation. This is evidenced by muddled jurisprudence: confused, contradictory, and divided judgments across different provinces about whether

applications for historical awards can be considered, and a multiplying number of exceptions to and other creative ways around principles set out in *D.B.S.*

Child support obligations arise upon a child's birth or the separation of their parents. Retroactive awards are a recognized way to enforce such pre-existing, free-standing obligations and to recover monies owed but yet unpaid. Such a debt is a continuing obligation which does not evaporate or fade into history upon a child's 18th or 19th birthday or their graduation from university. Under s. 152 of the *FLA*, a debt exists if the child qualified as a beneficiary at the time the support was due, irrespective of their status at the moment of the application. This reading not only accords with the text, legislative scheme, and purpose of s. 152, it promotes the best interests of children, enhances access to justice, reinforces that child support is the right of the child and the responsibility of the parents, encourages the payment of child support, acknowledges that there are many reasons why a parent may delay making an application, and recognizes how the underpayment of child support leads to hardship and contributes to the feminization of poverty.

In *D.B.S.*, when interpreting s. 15.1 of the *Divorce Act*, the majority of the Court expressed the view that courts have no jurisdiction to hear original applications for child support brought after a child ceases to be a "child of the marriage". These comments have led some courts to believe that the same jurisdictional bar also prevents applications to vary historical child support under s. 17 of the *Divorce Act*, and under similarly-worded provincial legislation, like s. 152 of the *FLA*. However, *D.B.S.* did

not decide the issue for variation orders under s. 17. There is therefore no binding authority requiring s. 152 to be read as imposing a jurisdictional bar on the hearing of variation application for historical child support.

Section 152 must be interpreted and applied in accordance with first principles. In addition to the reasons provided by the majority, there are other strong and equally compelling reasons that support allowing the consideration of historical child support claims. An analysis that takes into account the policies and values of contemporary Canadian society, focuses on the best interests of the child, and interprets s. 152 in a fair, large, and liberal manner to best ensure the attainment of the objects of child support clearly supports permitting historical child support claims to be heard by a court to determine if monies are owing and what amounts may be fairly recovered. A procedural bar to historical child support claims prevents access to justice, runs counter to the best interest of many children, gives rise to an under-inclusive outcome, and reinforces patterns of socio-economic inequality. It operates to prevent applications advanced on behalf of Canada's children from ever being heard on their merits. The courtroom doors should not be closed because certain categories of debts owed to children are classified as coming "too late". Unmet child support obligations, whether they are in the form of arrears or have not yet been judicially recognized, are a valid debt that must be paid, similar to any other financial obligation, regardless of whether the quantum is significant. Further, the obligation to support one's child exists irrespective of whether an action has been started by the recipient parent against the payor parent to enforce it, because child support is a continued obligation owed

independently of any statute or court order. Any interpretation of s. 152 should support the modern understanding of child support and not encourage behaviour that undercuts its values, efficiency, or effectiveness. Thus, the court should not create a perverse incentive by granting payor parents immunity after the child ceases to be a child of the marriage.

Preventing historical claims for child support under s. 152 of the *FLA* also ignores how family law calls for an approach that takes into account the broader social framework in which family dynamics operate. Gender roles, divorce, separation, and lone parenthood contribute to child poverty and place a disproportionate burden on women. A bar against applications for historical child support means children have gone without their due, and the law provides no remedy for the hardship this has created for the children and their caregivers, most of whom are still women. Today, women still bear the bulk of child care and custody obligations and earn less money than men, so women's poverty remains inextricably linked to child poverty. Women who obtain custody are often badly placed to evaluate their co-parent's financial situation and to take action against it. Measures that place further barriers on their ability to claim and enforce their rights, like a jurisdictional bar, inhibit their ability to improve their circumstances and those of their children. Family law's holistic approach demands taking account of the interconnected nature of issues of child support, child poverty, and the consequent feminization of poverty. A system that can account for the social dynamics which act to impoverish certain members of society over others, or to prevent them from accessing the courtroom and reclaiming their rights, is a fairer system for

all. The principles of child support also favour the interpretation that is favourable to children such that the best interest of the child is at the heart of any interpretive exercise. Moreover, an interpretation adverse to the pre-existing common law rights of children and to the interests of recipient parents should be avoided absent clear statutory expression. The best interests of the child, which are intrinsically tied to those of their caregiver, are in favour of reading s. 152 of the *FLA* to allow applications for historical child support.

Removing the jurisdictional bar from variation applications means that courts will be called upon to hear these matters on their merits. Judges will have to first determine whether there is a debt outstanding and will then have to consider what would be a fair award under the *D.B.S.* factors: the recipient parent's reason for delaying their application for child support, the conduct of the payor parent, the circumstances of the child, and the hardship the award creates for the payor parent. Under the first factor, there are many reasons why even a person in need might delay making an application. There is a growing body of jurisprudence and social science findings demonstrating that, sometimes, parents delay their application for child support to protect their children from harm or because making an application is impracticable or inaccessible in their circumstances. The focus should be on whether the reason provided is understandable rather than whether there is a reasonable excuse, taking into account a generous appreciation of the social context in which the claimant's decision to seek child support was made.

With respect to the conduct of the payor parent, *D.B.S.* purposively provided an expansive definition of blameworthy conduct, being anything that privileges the payor parent's own interests over their children's right to an appropriate amount of support. The failure to disclose actual income, a fact within the knowledge of the payor, is a failure of a significant obligation and is often the root cause of a delayed application. The primary focus needs to be on the payor's actions and their consequences — the payor's subjective intention is rarely relevant. The presence of blameworthy conduct is not a necessary trigger to the payor's obligation to pay the claimed child support. Regarding the third factor, a child's needs may be relevant in awarding and calculating retroactive child support. If there has been hardship present during their childhood, or if the child needs funds at the time of the hearing, this weighs in favour not only of an award but also of extending the temporal reach of the award. However, this does not mean that any kind of hardship is a necessary antecedent to an award of retroactive child support. Furthermore, the fact that a child did not have to suffer hardship because of their custodial parent's sacrifice is not one that weighs against awarding retroactive or historical child support.

The final factor — the hardship that the award might entail — takes into account the ease with which the payor might be able to pay the award. If the award would cause the payor undue hardship, and if the other factors do not militate against it, this factor may weigh against an award or affect its temporal scope to achieve a fair result. While the focus is on hardship to the payor, that hardship can only be assessed

after taking into account the hardship which would be caused to the child and the recipient parent from not ordering the payment of sums owing but unpaid.

Regarding the date to which a child support award should be retroactive, the date of retroactivity should perhaps correspond to the date when the support ought to have been paid. Effective notice to the payor parent, the default date to which a child support award should be retroactive, is a broad concept which goes well beyond actual knowledge of a filed variation application. The distinct features of child support reduce somewhat the strength of concerns about lack of notice, and today, certainty for payor parents is provided by the Federal Child Support Tables and the payor parents' knowledge that they are liable according to their actual income and will be held accountable for missed payments and underpayment.

Finally, historical child support can be awarded in part or in whole to either or both the child or their parent, given findings of fact and depending on whom the hardship — if there was any — was visited upon. Courts should be flexible when determining how to apportion the award between the recipient parent and the child beneficiary. However, there should be no general reluctance to put monies in the hands of the recipient parent. Where the recipient parent and child beneficiary agree on how the award should be divided, the court should be reluctant to disturb their agreement.

Per Abella and Karakatsanis JJ.: There is agreement with the majority. There is also agreement with Martin J., who adds important policy considerations.

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By Brown J.

Explained: *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231; **referred to:** *Dring v. Gheyle*, 2018 BCCA 435, 17 B.C.L.R. (6th) 30; *Colucci v. Colucci*, 2017 ONCA 892, 138 O.R. (3d) 321; *Brear v. Brear*, 2019 ABCA 419, 97 Alta. L.R. (6th) 1; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Quinn v. Leathem*, [1901] A.C. 495; *Buckingham v. Buckingham*, 2013 ABQB 155, 554 A.R. 256; *de Rooy v. Bergstrom*, 2010 BCCA 5, 4 B.C.L.R. (5th) 74; *McDonald v. McDonald*, 2008 BCSC 1203; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93; *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920.

By Martin J.

Explained: *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231; **referred to:** *Chartier v. Chartier*, [1999] 1 S.C.R. 242; *MacMinn v. MacMinn* (1995), 174 A.R. 261; *Poissant v. Barrette* (1879), 3 L.N. 12; *Paras v. Paras*, [1971] 1 O.R. 130; *Levesque v. Levesque* (1994), 155 A.R. 26; *Vincent v. Vincent* (1995), 132 Nfld. & P.E.I.R. 181; *Wright v. Wright* (1996), 141 Sask. R. 44; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Cherry v. Cherry* (1996), 24 B.C.L.R. (3d) 158; *Wang v. Wang* (1998), 58 B.C.L.R. (3d) 159; *Childs v. Childs* (1990), 107 N.B.R. (2d) 176; *Francis v. Baker*, [1999] 3 S.C.R. 250; *D.B.S. v. S.R.G.*, 2005 ABCA 2, 361 A.R. 60; *Contino v.*

Leonelli-Contino, 2005 SCC 63, [2005] 3 S.C.R. 217; *Innes v. Van Den Ende* (1993), 83 B.C.L.R. (2d) 273; *Dickson v. Dickson* (1987), 21 B.C.L.R. (2d) 69; *S. (L.) v. P. (E.)*, 1999 BCCA 393, 67 B.C.L.R. (3d) 254; *de Rooy v. Bergstrom*, 2010 BCCA 5, 4 B.C.L.R. (5th) 74; *Dring v. Gheyle*, 2018 BCCA 435, 17 B.C.L.R. (6th) 30; *Daoust v. Alberg*, 2016 MBCA 24, 71 R.F.L. (7th) 274; *Calver v. Calver*, 2014 ABCA 63, 569 A.R. 170; *Selig v. Smith*, 2008 NSCA 54, 266 N.S.R. (2d) 102; *Krivanek v. Krivanek* (2008), 56 R.F.L. (6th) 390; *Hnidy v. Hnidy*, 2017 SKCA 44, 414 D.L.R. (4th) 87; *Brear v. Brear*, 2019 ABCA 419, 97 Alta. L.R. (6th) 1; *Colucci v. Colucci*, 2017 ONCA 892, 138 O.R. (3d) 321; *MacCarthy v. MacCarthy*, 2015 BCCA 496, 380 B.C.A.C. 102; *Buckingham v. Buckingham*, 2013 ABQB 155, 554 A.R. 256; *Catena v. Catena*, 2015 ONSC 3186, 61 R.F.L. (7th) 463; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Simone v. Herres*, 2011 ONSC 1788; *George v. Gayed*, 2014 ONSC 5360; *Gordashko v. Boston*, 2009 ABQB 229; *J.P. v. J.A.P.*, 2010 ABQB 53; *Pitre v. Lalonde*, 2017 ONSC 208; *Vohra v. Vohra*, 2009 ONCJ 135, 66 R.F.L. (6th) 216; *S.P. v. R.P.*, 2010 ONSC 2247, rev'd 2011 ONCA 336, 281 O.A.C. 263; *Hartshorne v. Hartshorne*, 2010 BCCA 327, 289 B.C.A.C. 244; *MacLennan v. MacLennan*, 2003 NSCA 9, 212 N.S.R. (2d) 116; *Hunt v. Smolis-Hunt*, 2001 ABCA 229, 97 Alta. L.R. (3d) 238; *Dahl v. Dahl* (1995), 178 A.R. 119; *B. (T.K.) v. S. (P.M.)*, 2008 BCSC 1350; *Swiderski v. Dussault*, 2008 BCSC 1629, rev'd in part 2009 BCCA 461, 98 B.C.L.R. (4th) 40; *C.B.E. v. J.A.E.*, 2003 ABQB 961; *Roseberry v. Roseberry*, 2015 ABQB 75, 13 Alta. L.R. (6th) 215, rev'd 2015 ABCA 218, 68 R.F.L. (7th) 30; *W. (L.J.) v. H. (R.L.)*, 2005 ABCA 252, 18 R.F.L. (6th) 461; *Burchill v. Roberts*, 2013 BCCA 39, 332 B.C.A.C. 126; *Webber v. Lane*, 2008 ONCJ 672; *Irving v. Clouthier*, 2008 CanLII

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APPEAL from a judgment of the British Columbia Court of Appeal (Willcock, Savage and Hunter JJ.A.), 2018 BCCA 449, 19 R.F.L. (8th) 26, 20 B.C.L.R. (6th) 1, [2018] B.C.J. No. 3759 (QL), 2018 CarswellBC 3197 (WL Can.), affirming a decision of Young J., 2017 BCSC 887, [2017] B.C.J. No. 1031 (QL), 2017 CarswellBC 1442 (WL Can.), setting aside an order of Smith Prov. Ct. J., B.C. Prov. Ct., No. F3319, September 26, 2016. Appeal allowed.

Peter M. Mennie and Michael Sobkin, for the appellant.

Ryan Dueckman, Karen Tiwana and Shawn Duguay, for the respondent.

Jennifer Klinck, Dustin Klaudt and Joshua Sealy-Harrington, for the intervener.

The reasons for judgment of Moldaver, Côté, Brown, Rowe and Kasirer JJ. were delivered by

BROWN J. —

I. Introduction and Background

[1] At the conclusion of the hearing of this appeal, the Court allowed the appeal with costs throughout, and reinstated the order of Judge G. Smith of the Provincial Court of British Columbia, dated September 26, 2016, with reasons to follow. These are the reasons for that judgment.

[2] In *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, [2006] 2 S.C.R. 231, this Court interpreted s. 15.1 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), as precluding a court from granting an order on an original application for retroactive child support unless the child beneficiary is a “child of the marriage”, as defined in the *Divorce Act*, when the application is made. This appeal raises the issue of whether the court’s authority to grant an order under s. 152 of the *Family Law Act*, S.B.C. 2011, c. 25 (“*FLA*”), is similarly confined. More particularly, is it possible to vary a child support order under the *FLA* after the order has expired, and after the child support beneficiary ceases to be a “child” as defined in the *FLA*?

[3] This question arises from the breakdown of a common law relationship between the parties, Danelle Michel and Sean Graydon. They are the parents of A.G., born in December 1991. After Ms. Michel and Mr. Graydon separated in 1994, A.G. lived with Ms. Michel, and Mr. Graydon agreed to pay child support of \$341/month, based on an annual income of \$39,832. This was formalized in a consent order made on March 29, 2001.

[4] Mr. Graydon had, in fact, understated his income. He earned \$45,580 in 2001, and — with the exception of 2004 — his actual annual income continued to exceed his disclosed income until his child support obligation was terminated by court order effective April 30, 2012.

[5] During A.G.'s childhood, Ms. Michel was dependent on income assistance or disability benefits, in return for which she was required to assign her rights to receive child support to the Minister under the *Employment and Assistance Act*, S.B.C. 2002, c. 40. While Ms. Michel's rights were assigned, the Minister never authorized an application to review child support for A.G.

[6] In January 2015, Ms. Michel applied to the Provincial Court to retroactively vary child support for the period between April 2009 (later amended to April 2001) and April 2012, to reflect Mr. Graydon's actual income during that time. In granting that order, Smith Prov. Ct. J. rejected Mr. Graydon's argument that, because A.G. was not a "child" when Ms. Michel brought her application, the court lacked authority to grant the order sought. In his view, and while his authority may have been so restricted under the now-repealed *Family Relations Act*, R.S.B.C. 1996, c. 128, no such limitation exists in the *FLA*. Applying this Court's decision in *D.B.S.*, he held that the circumstances of Ms. Michel's application warranted granting an award for retroactive child support. Her delay in bringing the application was reasonable; Mr. Graydon had engaged in blameworthy conduct by failing to accurately disclose his income; A.G. suffered as a result, as she could not attend her desired post-secondary

program; and Mr. Graydon would not experience hardship from a retroactive award. He therefore ordered Mr. Graydon to pay \$23,000 in retroactive child support — half to Ms. Michel, and half to A.G.

[7] The Supreme Court of British Columbia allowed Mr. Graydon’s appeal (2017 BCSC 887), holding that this Court’s conclusion in *D.B.S.* that an application for child support must be made while the child remains a “child of the marriage” was equally applicable where child support is sought under the *FLA*. Ms. Michel then appealed to the British Columbia Court of Appeal (2018 BCCA 449, 20 B.C.L.R. (6th) 1).

[8] After Ms. Michel’s appeal was heard, but before judgment was rendered, the Court of Appeal sat as a five-member division in *Dring v. Gheyle*, 2018 BCCA 435, 17 B.C.L.R. (6th) 30. In *Dring*, a majority of the Court of Appeal held that the *FLA* does not authorize a court to retroactively vary child support if the beneficiary is not a “child” at the time of the application. In light of *Dring*, Ms. Michel’s appeal was dismissed. *D.B.S.*, the Court of Appeal held, established a general rule precluding *all* orders for child support where the application is brought after the beneficiary is no longer a “child”. It followed that the hearing judge did not have authority to grant the order for retroactive child support that Ms. Michel sought.

[9] I disagree. Section 152 of the *FLA* authorizes a court to retroactively vary a child support order, irrespective of whether the beneficiary is a “child” at the time of

the application, and irrespective of whether the order has expired. The order of Smith Prov. Ct. J. should therefore not have been disturbed.

II. Analysis

A. *Authority to Grant a Retroactive Child Support Award*

(1) D.B.S.

[10] In *D.B.S.*, this Court endorsed certain important principles governing orders for child support (including retroactive child support) that merit restating here:

- Child support is the right of *the child*, which right cannot be bargained away by the parents, and survives the breakdown of the relationship of the child's parents (para. 38);
- Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together (para. 38);
- The child support owed will vary based upon the income of the payor parent, and is not confined to furnishing the "necessities of life" (paras. 38-45).

- Retroactive awards are not truly “retroactive”, since they merely hold payors to the legal obligation they always had to pay support commensurate with their income (para. 2);
- Retroactive awards are not confined to “exceptional circumstances” or “rare cases” (para. 5); and
- In determining whether to make a retroactive award, the payor parent’s interest in certainty in his/her obligations must be balanced with the need for “fairness and . . . flexibility”. A court should consider whether the recipient parent’s delay in seeking retroactive support was reasonable in the circumstances, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail (para. 133).

[11] Further, this Court cautioned that, when deciding an application for retroactive child support, a court must analyze the statutory scheme in which the application was brought (at para. 54): “different policy choices made by the federal and provincial governments must be respected” (para. 55). While a “retroactive” child support award does not impose a new obligation but simply serves to enforce a past unfulfilled obligation, the *mechanism* for enforcing that obligation must be found in the governing legislative scheme. A court can enforce an unfulfilled child support obligation only where the governing legislation provides a mechanism for enforcement, and only in accordance with that mechanism.

[12] In *D.B.S.*, this Court examined the enforcement mechanism set out in 15.1 of the *Divorce Act*, which addresses original child support orders. This result follows from the language of s. 15.1, which permits a court to make an original order compelling child support payments only for “children of the marriage. And s. 2 defines “child of the marriage” as “a child of two spouses or former spouses who, at the material time, is under the age of majority and who has not withdrawn from their charge, or 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 Court concluded in *D.B.S.* that the “material time” for retroactive child support awards is the time of the application, and therefore that a court has no authority to grant a retroactive award of child support under s. 15.1 of the *Divorce Act* if the child beneficiary is no longer a “child of the marriage” at the time of the application (paras. 88-89).

[13] Since *D.B.S.*, lower courts have grappled with whether the same principle also applies to provincial legislative schemes, or to variation applications under s. 17 of the *Divorce Act* (see *Colucci v. Colucci*, 2017 ONCA 892, 138 O.R. (3d) 321; *Dring; Brear v. Brear*, 2019 ABCA 419, 97 Alta. L.R. (6th) 1). In particular, courts have recognized that unjust results can flow from imposing impediments that prevent otherwise deserving parents from seeking retroactive child support (*Colucci*, at para. 26; *Dring*, at paras. 155-56, per Hunter J.A., concurring; *Brear*, at para. 60). Indeed, fairness concerns appear to have animated this Court’s approach to jurisdiction in *D.B.S.*, as it saw fit to create an exception that applies whenever a recipient parent

initiates formal proceedings while the beneficiary remains a child of the marriage (para. 130). Moreover, and significantly, because women continue to face a disproportionate burden of the economic consequences flowing from marriage breakdown (*Moge v. Moge*, [1992] 3 S.C.R. 813, at pp. 849-50; I.F., at para. 20), they are also most affected by barriers that prevent courts from considering applications for retroactive child support. Motivated by these concerns, lower courts continue to create exceptions establishing jurisdiction to award support in respect of beneficiaries who are no longer children of the marriage (*Brear*, at para. 63).

[14] Given this history, I agree with my colleague Martin J. that this Court's interpretation in *D.B.S.* of "material time", as that term appears in s. 2 of the *Divorce Act*, might merit reconsideration. In my respectful view, however, our deliberations on this point would likely benefit from submissions on-point. Further, it is unnecessary to undertake that reconsideration in order to resolve this appeal. The narrow question to be decided here is, ultimately, whether the *FLA* authorizes variation of an existing child support order after the beneficiary ceases to be a "child". Mr. Graydon argues that *D.B.S.* states a general rule conditioning a court's authority to grant both original and variation applications for retroactive child support upon the child beneficiary remaining a dependent child. He relies heavily upon a single passage from *D.B.S.* where, in disposing of one of the four appeals addressed in the *D.B.S.* reasons (*Henry v. Henry*), which involved an application to retroactively vary an existing child support order, Bastarache J., for the majority, wrote the following:

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. [para. 150]

Mr. Graydon's argument is that it is necessarily implicit in this passage that Bastarache J. would have found that, *but for* the earlier delivery of the Notice to Disclose/Notice of Motion, the court would have lacked authority to make the order sought, since the subject child "was no longer a child of the marriage when the Notice of Motion for retroactive support was filed."

[15] Significantly, however, the *Henry* appeal arose from an application to vary an *existing* child support order which engaged s. 17 of the *Divorce Act*. Unlike s. 15.1, ss. 17(1) and 17(4) do not refer to "children of the marriage". While it may therefore not have been strictly necessary to address jurisdiction in relation to the *Henry* appeal, it remains that "a case is only an authority for what it actually decides" (*Quinn v. Leathem*, [1901] A.C. 495 (H.L.), at p. 506). By referencing the phrase "child of the marriage", Bastarache J.'s comments were plainly limited to the jurisdictional issue that arises under s. 15.1 of the *Divorce Act*, which he had already canvassed in his reasons (*D.B.S.*, at paras. 88-89). I therefore reject Mr. Graydon's suggestion that the

discussion of jurisdiction in relation to the *Henry* appeal was implicitly intended to apply to retroactive variation orders under s. 17 of the *Divorce Act*, without any reference to the language of that provision. On my reading, the Court did not consider or decide the issue as it was unnecessary to dispose of the appeal. *D.B.S.* therefore does not stand for the proposition that courts can retroactively vary child support only while the child beneficiary is a “child of the marriage” (see *Colucci*, at paras. 12-14; *Dring*, at paras. 190-200, per Hunter J.A., concurring; *Brear*, at paras. 46-50).

[16] Nor do I accept that the Court in *D.B.S.* stated a sweeping principle that transcends the *Divorce Act* to embrace all other statutory schemes and operates irrespective of legislative intent. Indeed, the Court insisted that provinces remain “free to espouse a different paradigm” than that adopted by Parliament in the *Divorce Act* (para. 54). And where they do so via legislation establishing an application-based regime such as the *FLA*, and where an application for retroactive child support is brought thereunder, it is *that legislation* which governs a court’s authority to grant retroactive child support (paras. 55-56).

[17] Moreover, courts should not be hasty to recognize jurisdictional impediments that bar applications for retroactive child support. This is because jurisdictional constraints are “inimical to the principles and policy objectives articulated in [*D.B.S.*]” (*Brear*, at para. 60), and may be imposed only where the legislature has clearly intended that they be imposed. Such constraints must therefore be apparent in the statutory scheme, bearing in mind that preventing courts from even

considering an award for retroactive child support would prevent enforcement of an unfulfilled legal obligation even in the most appropriate of circumstances. As Sharpe J.A. explained in *Colucci*:

I can see no reason why the court should be deprived of jurisdiction to consider the request of a recipient parent who struggled to support the children and to shift part of that burden to the payor parent if there was a change in circumstance that would have justified a variation while the children were still children of the marriage [A] regime that gave payor parents immunity after the children ceased to be children of the marriage would create a perverse incentive. If the payor parent is to be absolved from responsibility once the children cease to be “children of the marriage”, the payor whose income increases might be encouraged not to respond to his or her increased obligations in the hope that the reciprocal spouse will delay making an application for a variation increasing support until the children lose their status to avoid opening the door to an increased obligation [para. 26]

Unless compelled by the applicable legislative scheme, courts should avoid creating any incentive whatsoever for payor parents to avoid meeting their child support obligations (*D.B.S.*, at para. 4). Permitting retroactive child support awards, as this Court recognized in *D.B.S.*, is perfectly consistent with the child support system (para. 60).

(2) The *FLA*

[18] I turn now to interpreting the relevant provisions of the statutory scheme at issue here: the *FLA*. For the purposes of determining who is eligible to receive child support, the *FLA* defines the term “child” in different ways. While “child” is defined in s. 1 as meaning “a person who is under 19 years of age”, the *FLA* expands that

general definition in relation to a parent or guardian's duty to provide child support (ss. 146 and 147). In essence, the *FLA* (like the *Divorce Act*) says that children who are dependent on their parents are eligible to receive child support.

[19] Further, the *FLA* authorizes two kinds of applications respecting child support. First, s. 149(1) and (2), taken together, authorize a child's parent or guardian, the child, a person acting on behalf of the child or (if the right to child support has been assigned to a minister) a minister to apply for an order of child support. Secondly, s. 152 authorizes a court to "change, suspend or terminate an order respecting child support", and to do so prospectively or retroactively, so long as the court is "satisfied that at least one of the following exists, and take[s] it into consideration":

- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

[20] Ms. Michel relies on s. 152 in support of her application — that is, she says she seeks to vary the March 29, 2001 consent order. For two reasons, Mr. Graydon argues that she cannot succeed under s. 152. First, he contends that the application must be made while the beneficiary remains a dependent child. And secondly, he says that s. 152 can be used only to vary an extant order that imposes continuing child support obligations at the time the application is made. Properly interpreted, however, and as I

shall explain, s. 152 of the *FLA* does not support either of Mr. Graydon's arguments. Far from erecting barriers, s. 152 creates *an avenue* for courts to retroactively change any child support order, irrespective of the beneficiary's dependent status and irrespective of whether the order is extant at the time of the application.

[21] It is now trite law in Canada that statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects. In this case, this Court's task of interpreting s. 152 of the *FLA* has been lightened considerably by persuasive judicial analyses at other courts regarding its meaning (see *Dring*, at paras. 133-73, per Hunter J.A., concurring) and the meaning of similar provisions in other legislation (see *Brear*, at paras. 29-50, per Pentelchuk J.A.; *Colucci*, at paras. 8-31, per Sharpe J.A.; *Buckingham v. Buckingham*, 2013 ABQB 155, 554 A.R. 256, at paras. 40-48, per Strekaf J. (as she then was)).

[22] Examining s. 152 of the *FLA* in the light of this Court's examination in *D.B.S.* of s. 15.1 of the *Divorce Act*, what becomes readily apparent is what s. 152 does *not* contain. The *FLA* replaced its predecessor, the *Family Relations Act*, which stated, for both original and variation applications, that "[a]ny person may apply for an order . . . on behalf of a child" (s. 91(3)). Relying on *D.B.S.*, courts have interpreted this language as conditioning a court's authority to order child support upon the beneficiary's dependant status, which was the state of the law in British Columbia when the *FLA* was enacted (*de Rooy v. Bergstrom*, 2010 BCCA 5, 4 B.C.L.R. (5th) 74, at

para. 65, citing *McDonald v. McDonald*, 2008 BCSC 1203, at para. 34 (CanLII). While it is unnecessary to decide here whether a reference to the defined term “child” should properly be construed as limiting the court’s authority to grant retroactive support, what *is* clear is that this same language was not included in s. 152(1) when the *FLA* was enacted. Section 152(1) contains no reference to the defined term “child” that might serve to qualify the authority of a court to vary child support. Rather, s. 152(1) states simply that “[o]n application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.” While s. 152(2) lists preconditions (at least one of which must be present before making a variation order), none of those conditions relate to the dependent status of the beneficiary of a child support order.

[23] Examining the *FLA* more broadly makes plain that, where the Legislature intends to state limitations relating to the types of persons who can bring an application (or on whose behalf an application can be brought), it states such limitations expressly. In this respect, s. 152’s bare reference to an “application”, with no conditions upon who may apply, contrasts sharply with other applications authorized by the *FLA* (see, e.g., s. 45 (“application by a guardian”); s. 148(3) (“application by a party”); s. 157(1) (“application by a payor or recipient”); s. 164(3) (“application by a spouse”)). The absence from s. 152 of any limitations comparable to those used throughout the *FLA* implies that they were deliberately excluded (see R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 248).

[24] Further, s. 152 allows the court to “change, suspend or terminate” an order respecting child support. Given that s. 170(a) of the *FLA* authorizes child support orders of an indefinite duration, payor parents may need to resort to s. 152 to terminate an indefinite order after the support beneficiary ceases to be a dependent child. Indeed, that is exactly what Mr. Graydon did to terminate his child support payments in 2012. There would, however, be no way to change or terminate an indefinite child support order after the beneficiary ceases to be a “child”, if s. 152 were subject to the limitation advanced by Mr. Graydon (*Dring*, at paras. 142-44). In my view, the Legislature is unlikely to have intended that result.

[25] As to Mr. Graydon’s argument that s. 152’s operation is confined to varying an extant (that is, not expired or terminated) child support order, I reiterate that retroactive child support simply holds payor parents to their existing (and unfulfilled) legal obligations (*D.B.S.*, at para. 2). Modifying a previous court order to reflect the proper measure of support “is in no way arbitrary for the payor parent” (*D.B.S.*, at para. 68). Thus, there is nothing wrong in principle with varying an order that no longer imposes continuing child support obligations at the time the application is made, so long as the statutory text allows for that result.

[26] With respect to the language of s. 152, I observe that the provision allows the court to vary “an order respecting child support”. Mr. Graydon’s argument therefore rests on the premise that once a child support order expires, it is no longer *an order* respecting child support. Such a conclusion is belied, however, by examining

s. 152 alongside other provisions of the *FLA* that expressly limit the court's ability to vary orders that are no longer extant. Section 167 of the *FLA*, for example, authorizes a court to vary a spousal support order. Much of s. 167 mirrors s. 152, but subs. 167(3) imposes an additional caveat where the variation relates to an expired spousal support order:

. . . if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order . . . for the purpose of resuming spousal support unless satisfied that

- (a) the order is necessary to relieve economic hardship that
 - (i) arises from [a change in the condition, means, needs or other circumstances of either spouse [that] occurred since the order respecting spousal support was made], and
 - (ii) is related to the relationship between the spouses, and
- (b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

To be sure, the text of s. 167 confines a court's ability to vary an expired order. The point here is twofold: s. 167 shows that the *FLA* contemplates that a court *may* vary an expired order; and, s. 152 places none of the restrictions upon a court's authority to vary a *child* support order which s. 167 imposes upon a court's authority to vary a *spousal* support order.

[27] Similarly, while s. 187(1) of the *FLA* allows the court to shorten, extend, terminate, or otherwise change an order respecting protection, s. 187(2) requires an application under s. 187 to be made "before the expiry of the order that is the subject

of the application.” This provision further demonstrates that the *FLA* allows expired orders to be varied, subject to the express limitations that it imposes for specific types of orders. Mr. Graydon is effectively urging this Court to read similar limitations into s. 152, but that avenue is simply not open to us where the scheme of the *FLA* shows the Legislature’s intent to give courts broad discretion in matters of child support.

[28] In sum, the text of s. 152 and the scheme of the *FLA* indicate that the Legislature authorized a court to vary any child support order, irrespective of whether the beneficiary remains a dependent child, and irrespective of whether the order continues to require payment. This makes sense given that one of the purposes for replacing the *Family Relations Act* with the *FLA* was to “expan[d] on the circumstances under which a court may vary a child support order” (British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (2010), at p. 117). Straining to read jurisdictional impediments into s. 152 that would prevent a court from ordering retroactive child support in circumstances in which such an order is warranted would defeat that legislative purpose and create a perverse incentive for payor parents to avoid their obligations.

B. *Is a Retroactive Award Appropriate in This Case?*

[29] Having decided that the applicable legislative scheme confers authority on a court to order retroactive child support, the question then arises whether a court *should* order retroactive child support in the circumstances of the case. To be clear, and as *D.B.S.* shows, this is a distinct question and entails a distinct analysis. A court

hearing an application for retroactive child support must consider whether the recipient parent's delay in seeking variation is reasonable in the circumstances, the payor parent's conduct, the circumstances of the child, and whether any hardship would result from a retroactive award (*D.B.S.*, at para. 133). These same considerations are equally applicable after the child support beneficiary ceases to be a dependent child; while the beneficiary may no longer be a dependent child because of the recipient parent's delay, it remains open to the recipient parent to show that their delay was reasonable.

[30] Child support awards are highly discretionary, and the hearing judge's findings and inferences of fact may not be disturbed absent an error on an extricable question of law, a palpable and overriding error, or a fundamental mischaracterization or misapprehension of the evidence (*Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 30; see also *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 11). Here, as I have explained, the hearing judge was correct to conclude that s. 152 gave him authority to order retroactive child support. He also identified and applied the factors I have just recounted from *D.B.S.* His conclusion that A.G. experienced hardship in her childhood as a result of Mr. Graydon's neglect of his child support obligations was amply supported on the record. The hearing judge also found that Mr. Graydon would not experience hardship from a retroactive award.

[31] As to Mr. Graydon's conduct as the payor parent in this case, it is really this simple. When a payor parent fails to pay the appropriate amount of child support, the recipient parent is left to shoulder the burden. If the recipient parent does not have

the means to provide their child reasonable support, the child suffers. Both the recipient parent and the child may experience hardship because of a payor parent's neglect. Seen in this light, it bears repeating that retroactive child support is not exceptional relief (*D.B.S.*, at para. 5): there is nothing exceptional about judicial relief from the miserable consequences that can flow from payor parents' indifference to their child support obligations. This is not to say that hardship is required to ground an award for retroactive child support, as there is also nothing exceptional about relief that creates a systemic incentive for payor parents to meet their obligations in the first place. Just as an order of child support is intended to provide children with the same standard of living they enjoyed when their parents were together (*D.B.S.*, at para. 38), an order of retroactive child support provides an (albeit imperfect) remedy where that does not occur. And as this Court recognized in *D.B.S.*, "courts are not to be discouraged from defending the rights of children when they have the opportunity to do so" (para. 60).

[32] Retroactive child support awards will commonly be appropriate where payor parents fail to disclose increases in their income. Again, *D.B.S.* is instructive: "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" (para. 107). And where the strategy for avoiding child support obligations takes the form of inadequate or delayed disclosure of income, the effect on the child support regime is especially pernicious. This is because the methodology adopted by the *Federal Child Support Guidelines*, SOR/97-175, which are expressly incorporated in the *FLA*, results in information asymmetry. Apart from shared parenting arrangements, the *Guidelines* calculate child

support payments solely from the payor parent's income. At any given point in time, therefore, the payor parent has the information required to determine the appropriate amount of child support owing, while the recipient parent may not. Quite simply, the payor parent is the one who holds the cards. While an application-based regime places responsibility on both parents in relation to child support (*D.B.S.*, at para. 56), the practical reality is that, without adequate disclosure, the recipient parent will not be well-positioned to marshal the case for variation.

[33] Failure to disclose material information is the cancer of family law litigation (*Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.), at para. 9, quoted in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, at para. 34). And yet, payor parents are typically well aware of their obligation as a parent to support their children, and are subject to a duty of full and honest disclosure — a duty comparable to that arising in matrimonial negotiations (*Brandsema*, at paras. 47-49). The payor parent's obligation to disclose changes in income protects the integrity and certainty afforded by an existing order or agreement respecting child support. Absent full and honest disclosure, the recipient parent — and the child — are vulnerable to the payor parent's non-disclosure.

[34] It follows that I agree with the hearing judge that Mr. Graydon's failure to accurately disclose his income at the time of the March 29, 2001 order, and failure to disclose material changes in his income for the 11 years that followed, constituted blameworthy conduct, which justifies an order for retroactive child support (and which

also eliminates any need to protect Mr. Graydon's interest in the certainty of his child support obligations (*D.B.S.*, at para. 125)). As I have explained, failure to disclose material changes in income undermines the child support regime imposed by the *Guidelines*. The record here also indicates that Mr. Graydon knew about his daughter's financial circumstances and made disparaging remarks about her standard of living instead of modifying his child support payments to assist her.

[35] The only true dispute before the hearing judge in relation to the factors governing retroactive child support was whether Ms. Michel's delay in seeking retroactive support was reasonable. The hearing judge accepted her evidence that she did not apply for retroactive support because she had suffered a severe injury and because her right to support was assigned to the Minister. I see no basis for interfering with the hearing judge's conclusion that Ms. Michel's delay was reasonable in light of those circumstances. Even were it otherwise, the reasonableness of Ms. Michel's delay had to be weighed against the other factors canvassed by the hearing judge, all of which showed that a retroactive award would be appropriate.

[36] Finally, Mr. Graydon contests the effective date of retroactive child support adopted in the hearing judge's award. The hearing judge awarded retroactive child support dating back to the March 29, 2001 consent order of child support (which he treated as taking effect on April 1, 2001). The hearing judge's conclusion was based on his finding that the date when Ms. Michel presented a settlement agreement to Mr. Graydon was the date of effective notice given to him. Mr. Graydon argues that

merely presenting a draft settlement agreement could not serve as effective notice. His argument on this point is immaterial, however, because the date of effective notice is not relevant when a payor parent has engaged in blameworthy conduct (irrespective of the degree of blameworthiness). Again, in light of such conduct, there is no need to protect Mr. Graydon's interest in the certainty of his obligations beyond the date when circumstances changed materially (*D.B.S.*, at para. 125). Having furnished an inaccurate picture of his income from the start of his child support payments, it does not lie in his mouth to now insist that it was inappropriate for the hearing judge to award support dating back to the March 29, 2001 consent order. Indeed, in the circumstances of this case it was clearly appropriate for the hearing judge to do so.

III. Conclusion

[37] For these reasons, the Court allowed Ms. Michel's appeal with costs throughout, and reinstated the hearing judge's order.

The reasons of Wagner C.J. and Martin J. were delivered by

MARTIN J. —

I. Introduction

[38] The purpose and promise of child support is to protect the financial entitlements due to children by their parents. Canadian jurisprudence has not consistently fulfilled that promise when it comes to historical child support, which is the term used to describe when retroactive child support is sought after the child no longer qualifies as a beneficiary under the applicable legislation. This is evidenced by contrary judgments across different provinces about whether applications for historical awards can be considered, a multiplying number of exceptions to principles set out in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, and a growing body of jurisprudence and social science findings demonstrating that, sometimes, parents delay their application for child support to protect their children from harm or because making an application is impracticable or inaccessible in their circumstances.

[39] In the case at bar, the appellant Danelle Michel asks this Court to recognize that s. 152 of British Columbia's *Family Law Act*, S.B.C. 2011, c. 25, does not constrain the courts' ability to grant retroactive child support once the child beneficiary is no longer a "child" under that legislation. The British Columbia Court of Appeal held that, in *D.B.S.*, this Court imposed a jurisdictional bar preventing such claims from being heard (2018 BCCA 449, 20 B.C.L.R. (6th) 1).

[40] In his reasons, my colleague Brown J. analyzes s. 152 of the *Family Law Act* and concludes that the provincial legislation allows parents to seek retroactive child support even after their child no longer fits the definition of "child" in s. 1 of the *Family Law Act* (Brown J.'s reasons, at paras. 19-28). I agree with his conclusion, his analysis

of s. 152, and that *D.B.S.* did not decide this question. However, there are other compelling considerations and numerous additional reasons why s. 152 should be read to permit such applications. The jurisprudence on child support calls for a “fair, large and liberal construction and interpretation as best ensures the attainment of its objects” (*Chartier v. Chartier*, [1999] 1 S.C.R. 242, at para. 32). Such objects include a consideration of the best interests of the child. The required contextual and purposive reading of s. 152 thus requires us to look to its wider legislative purposes, societal implications, and actual impacts. Seen in this way, a jurisdictional bar preventing these cases from being heard not only rests on unsound legal foundations, it is inconsistent with the bedrock principles underlying modern child support and contributes to systemic inequalities.

[41] Child support obligations arise upon a child’s birth or the separation of their parents. Retroactive awards are a recognized way to enforce such pre-existing, free-standing obligations and to recover monies owed but yet unpaid. Such a debt is a continuing obligation which does not evaporate or fade into history upon a child’s 18th or 19th birthday or their graduation from university. Under s. 152 of the *Family Law Act*, a debt exists if the child qualified as a beneficiary at the time the support was due, irrespective of their status at the moment of the application. This reading not only accords with the text, legislative scheme, and purpose of s. 152, it enhances access to justice, reinforces that child support is the right of the child and the responsibility of the parents, encourages the payment of child support, acknowledges that there are many reasons why a parent may delay making an application, and recognizes how the

underpayment of child support leads to hardship and contributes to the feminization of poverty. In short, allowing recipient parents to make claims for historical child support is in the best interests of children and promotes equality and access to justice for all.

[42] Child support issues rarely make their way to this Court due to the high cost of appeals and the comparatively low value of awards. The evasiveness of review attaching to historical child support issues justifies that we begin to discuss and reconcile the deeply divided and confused jurisprudence which prevents the hearing of historical child support claims across Canada.

[43] In these reasons, I first provide an overview of the purposes and principles of child support in Canadian law to lay the groundwork for a fair, large, and liberal interpretation of the British Columbia legislation. Second, I turn to s. 152 and conclude that the *Family Law Act* allows variation applications for historical child support because the imposition of a jurisdictional bar prevents access to justice for children, fails to account for the reasons why support applications may be delayed, and creates significant financial hardship for children and their caregivers. Third, I discuss the factors that courts ought to take into account to determine the scope of historical child support awards. My application of these principles to the facts of this case leads me to agree with Brown J. and allow Ms. Michel's appeal.

II. The Principles of Child Support

[44] Child support is the means through which the law ensures that individuals with parental responsibilities provide financial assistance to their children upon separation from their children's other parent(s), or upon their children's birth if the parents never cohabitated. The historical evolution of Canadian child support law bears on the proper interpretation not only the *Family Law Act*, but also of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and similar legislation across the country.

A. *Pre-Guidelines Jurisprudence and Legislation on Child Support*

[45] Far from being solely moral in nature, the child support obligation “arises out of the common law, equity and statute” (*MacMinn v. MacMinn* (1995), 174 A.R. 261 (C.A.), at para. 15). Indeed, child support has found statutory expression as a feature of Canadian family law since 1855 (*An Act to amend the Law relating to the custody of Infants*, S.U.C. 1855, 18 Vict., c. 126, s. 1; see also P. Millar and A. H. Gauthier, “What Were They Thinking? The Development of Child Support Guidelines in Canada” (2002), 17 *C.J.L.S.* 139, at pp. 139-40). The law has long recognized that a parent's obligation of support to their child “arise[s] automatically, upon birth” and that these obligations “have come to be refined, quantified and amplified” through statute (*D.B.S.*, at para. 37, citing *Poissant v. Barrette* (1879), 3 L.N. 12 (Que. C.A.)).

[46] Earlier statutory schemes, including the first iterations of the *Divorce Act*, treated need and judicial discretion as the governing principles in awards of child

support, leaving it to judges to decide upon a reasonable sum to commit for the care of the child. In response, the courts attempted to specify guiding principles for awards of child support (see, e.g., *Paras v. Paras*, [1971] 1 O.R. 130 (C.A.), at pp. 134-35; *Levesque v. Levesque* (1994), 155 A.R. 26 (C.A.), at pp. 29-42; *Vincent v. Vincent* (1995), 132 Nfld. & P.E.I.R. 181 (Nfld. C.A.), at paras. 38-46; see also *Wright v. Wright* (1996), 141 Sask. R. 44 (C.A.), at paras. 35-39; C. J. Rogerson, “Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part II)” (1991), 7 *C.F.L.Q.* 271, at pp. 276-85).

[47] Consistent with the primacy of the child’s best interests, the courts thus recognized that “the children of the marriage should be sheltered from the economic consequences of divorce” (*Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 690). Since the provisions of the *Divorce Act* evinced Parliament’s intention that “the children’s needs come first”, neither a delay in enforcing the child’s right to support on the part of the custodial parent nor the putative “retroactivity” of a support order could override the parent’s obligation to support their children (*MacMinn*, at para. 15; *Cherry v. Cherry* (1996), 24 B.C.L.R. (3d) 158 (C.A.), at para. 11).

[48] Commentators, however, criticized this discretionary approach, which was simultaneously subjective and needs-focussed, for being uncertain, inconsistent, and often resulting in unfair awards. In many cases, the inadequacy of awards resulted from judges, counsel, or parties underestimating the cost of raising a child, coupled with the courts’ insistence on proof of the child’s expenses. One adverse impact of this approach

was to place the burden of proof on the custodial parent, though this same parent would often be the least able to afford litigation (Federal/Provincial/Territorial Family Law Committee, *Child Support: Public Discussion Paper* (1991), at pp. 1 and 4-5; *Wang v. Wang* (1998), 58 B.C.L.R. (3d) 159 (C.A.), at para. 13; T. Maisonneuve, “Child Support Under the Federal and Quebec Guidelines: A Step Forward or Behind?” (1999), 16 *Can. J. Fam. L.* 284, at p. 300). In cases where such evidence was not adduced, there existed the concern that any award made under the prevailing approach would “necessarily be subjective and arbitrary” (*Childs v. Childs* (1990), 107 N.B.R. (2d) 176 (C.A.), at para. 6).

B. *Core Principles, Purposes, and Objectives in the Guidelines Era*

[49] The objective of the *Federal Child Support Guidelines*, SOR/97-175 (“*Guidelines*”) was to remedy this situation by maintaining the principles core to child support while providing much-needed certainty, consistency, predictability, and efficiency (*Francis v. Baker*, [1999] 3 S.C.R. 250, at paras. 39-40). In 1990, the federal, provincial, and territorial governments formed a Family Law Committee with the mandate to study child support in Canada. In its initial *Public Discussion Paper*, the Committee acknowledged the criticisms relating to child support awards, proposing a new method that would “[y]ield adequate and equitable levels of child support,” produce “objectively determinable, consistent and predictable” awards, ensure flexibility, and be “understandable and inexpensive to administer” (p. 7). Following research and consultation, the Committee (with a reservation from Quebec) ultimately

recommended the application of a child support formula under the *Divorce Act*, “guided by the principle that both parents have a responsibility to meet the financial needs of the children according to their income” (Federal/Provincial/Territorial Family Law Committee, *Report and Recommendations on Child Support* (1995), at p. i). In 1997, Parliament gave effect to the Committee’s proposals by introducing the *Guidelines*.

[50] The *Guidelines* heralded a shift from a “need-based” regime, which focussed on expenses, to one that determines a child’s entitlement to support (*D.B.S. v. S.R.G.*, 2005 ABCA 2, 361 A.R. 60, at para. 66 (“*D.B.S. (C.A.)*”). The “Federal Child Support Tables” (“Tables”, incorporated in Sch. I of the *Guidelines*) prescribe the amount of support to which a child is entitled on the basis of the income of the payer parent and the number of children supported. Because the *Guidelines* determine the amount of child support by reference to the payor parent’s actual income, an accurate assessment of that income is imperative. To this effect, the *Guidelines* impose an obligation of disclosure on both the applicant and respondent of a child support order (s. 21).

[51] These *Guidelines* were not “a complete break from the past” (*D.B.S.*, at para. 46). Rather, as the *Report and Recommendations* of the Committee indicates, this shift in the child support regime was developed with “[t]he best interest of the children being at the centre of this project” (p. 24). Therefore, although the implementation of the *Guidelines* simplified the quantification of child support, it was not intended to displace the significance of the best interests of the child.

[52] Similarly, in *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217, this Court observed that the underlying principle of the *Guidelines* is a financial obligation resting jointly on the spouses (see *Contino*, at para. 32, citing *Divorce Act*, s. 26.1(2)). The *Guidelines* thus helped shift the focus from the child’s needs to their entitlement to support, embracing in the process the principles of fairness and flexibility, balanced with consistency and efficiency, all in the child’s best interests. While the courts’ fact-specific inquiries and judicial discretion provide fairness and flexibility, the Tables provide certainty by determining how much child support a recipient parent is entitled to, based solely on the payor parent’s income and the number of children supported (unless the payor parent’s annual income surpasses \$150,000). In addition to applying to all divorced couples, the *Guidelines* and Tables have also been adopted or slightly modified to apply to unmarried separated parents in nine provinces, including British Columbia.

C. Core Principles of British Columbia Laws on Child Support

[53] Both the British Columbia *Family Law Act* and its predecessor, the *Family Relations Act*, R.S.B.C. 1996, c. 128, embody this same understanding of the nature of child support, animated by the best interests of the child.

[54] The provincial regime under the *Family Relations Act* provided statutory recognition that each parent “is responsible and liable for the reasonable and necessary support and maintenance of the child” (s. 88(1)). Courts in British Columbia have also embraced the fundamental principles under the *Family Relations Act* that “child support

is a right of the child” and “[t]he duty to support children is a duty owed to the children and not to the custodial parent” (*Innes v. Van Den Ende* (1993), 83 B.C.L.R. (2d) 273 (C.A.), at para. 11, quoting *Dickson v. Dickson* (1987), 21 B.C.L.R. (2d) 69 (C.A.), at pp. 90-91; *S. (L.) v. P. (E.)*, 1999 BCCA 393, 67 B.C.L.R. (3d) 254, at para. 58).

[55] After the adoption of the *Guidelines* in 1997, the Legislative Assembly enacted amendments to the *Family Relations Act*. Referring to those amendments, the Attorney General affirmed that:

The amendments are consistent with changes to the federal Divorce Act that came into effect on May 1, 1997. This will ensure that parents’ obligations to support their children are consistent under federal and provincial legislation, so that children will be treated equally regardless of whether their parents were ever married.

(British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 5, No. 15, 2nd Sess., 36th Parl., June 5, 1997, at p. 3953)

The overriding principle remained, in all cases, the best interests of the child (*de Rooy v. Bergstrom*, 2010 BCCA 5, 4 B.C.L.R. (5th) 74, at para. 71, per Chiasson J.A. (concurring)).

[56] Since 2013, the provincial regime of child support has been governed by the *Family Law Act*. The statute maintains the *Family Relations Act*’s focus on the best interests of the child, with s. 147(1) confirming that “[e]ach parent and guardian of a child has a duty to provide support for the child”. Unsurprisingly, there is an interpretive cohesion between these two statutes.

III. Section 152 of the *Family Law Act*

[57] Historical child support is a type of retroactive child support. Retroactive awards for child support are those which enforce past child support obligations, as opposed to prospective awards. Such support may be sought either by way of an original order (a first application for child support, per s. 149 of the *Family Law Act* or s. 15.1 of the *Divorce Act*) or a variation order (an application to vary a previous order for child support, per s. 152 of the *Family Law Act* or s. 17 of the *Divorce Act*). Historical child support requires the performance of pre-existing obligations owed in respect of child beneficiaries who have subsequently become adults. This case arises from a claim for historical child support under provincial legislation which involves an application to vary an existing child support order.

[58] The legal issue is whether s. 152 of the *Family Law Act* allows Ms. Michel to claim the amount of child support that ought to have been paid by Mr. Graydon even though she commenced her application after the parties' daughter reached the age of maturity and had finished her post-secondary education, and was therefore no longer a child. To address this issue, particular attention must be paid to this Court's decision in *D.B.S.* In the case at bar and in *Dring v. Gheyle*, 2018 BCCA 435, 17 B.C.L.R. (6th) 30, a prior decision on which the case at bar was based, the British Columbia Court of Appeal found that s. 152 creates a jurisdictional bar on retroactive applications for historical child support because "*D.B.S.* is binding on this Court" (para. 97). I will first set out what was said in *D.B.S.* and then explain how it was used in the British Columbia

Court of Appeal's reasoning. I will also explain why a fair large and liberal interpretation of s. 152, which accords with its purpose and the best interests of children, does not support the imposition of a jurisdictional bar.

A. *The British Columbia Court of Appeal Relies on D.B.S.*

[59] *D.B.S.* is a landmark decision on child support. In that case, four appeals were before this Court, implicating two different legislative schemes: *D.B.S. v. S.R.G.* and *T.A.R. v. L.J.W.* were two original applications for child support between unmarried parents arising under Alberta's repealed *Parentage and Maintenance Act*, R.S.A. 2000, c. P-1, which had very different wording than the *Divorce Act*. *Henry v. Henry* and *Hiemstra v. Hiemstra* were applications seeking the variation of a court order for child support to be paid, under s. 17 of the *Divorce Act*. All four applications involved a claim for retroactive child support by the support recipient. Only in *Henry* was one of the children no longer dependent when the application for child support was taken. This Court applied the *Guidelines* and the principles of child support that stem from them, without distinction, to all four appeals — whether they arose under provincial family law or federal divorce law (*D.B.S.*, at paras. 16 and 50-51; *D.B.S. (C.A.)*, at paras. 43 and 59).

[60] In *D.B.S.*, this Court articulated certain bedrock principles which shaped the law on child support responsibilities and deepened society's understanding of modern child support obligations. They include how:

. . . 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.
[para. 38]

[61] The Court ended the jurisprudential debate over whether parents could claim retroactive child support in favour of allowing such claims. It makes clear that awards for past child support “are not truly retroactive” because “a retroactive child support order . . . does not involve imposing an obligation on a payor parent that did not exist at the time for which support is being claimed” (paras. 67-68). Instead, in such awards, “the parents who owe support . . . are being ordered to pay what, in hindsight, should have been paid before” (para. 2). That is because in granting retroactive awards, courts are “enforcing an obligation that existed at the relevant time” (para. 82). For this reason, retroactive awards are not confined to “exceptional circumstances” or “rare cases” (para. 5). The Court emphasized the *Guidelines*' objectives of efficiency, consistency, fairness, and flexibility in child support matters. These principles led to finding that, although the child support regimes enacted by Parliament and the Alberta Legislature were application-based regimes, they could still give rise to retroactive awards (para. 59).

[62] The Court also set out certain factors which should guide the setting of fair and just awards for retroactive support. In respect of retroactive awards, “[t]he payor parent's interest in certainty must be balanced with the need for fairness and for flexibility” (para. 133). The Court said that to encourage certainty, retroactive awards

would generally go back no further than three years prior to the date when effective notice was given to the payor. Four factors are weighed to ensure the result in any given case is fair. They include the recipient parent's reason for delaying their application for child support, the conduct of the payor parent, the circumstances of the child, and the hardship the award creates for the payor parent.

[63] The majority further commented on whether a court has “jurisdiction to order support” when an application is brought after its beneficiary is no longer eligible for support (*D.B.S.*, at paras. 86-90). They expressed the view that courts have no “jurisdiction” to hear original applications for child support brought after a child ceases to be a “child of the marriage”. Thus, the notion of a jurisdictional bar for historical claims under the *Divorce Act* involved a rule for original orders and was based on the majority's interpretation of s. 15.1 of the *Divorce Act* and who qualified as a “child of marriage”.

[64] These comments have led some courts, including the British Columbia Court of Appeal, to believe that the same jurisdictional bar also prevents applications to vary historical child support (*Dring*; *Daoust v. Alberg*, 2016 MBCA 24, 71 R.F.L. (7th) 274; *Calver v. Calver*, 2014 ABCA 63, 569 A.R. 170; *Selig v. Smith*, 2008 NSCA 54, 266 N.S.R. (2d) 102; *Krivanek v. Krivanek* (2008), 56 R.F.L. (6th) 390 (Ont. S.C.J.)). These courts read *D.B.S.* as imposing a jurisdictional bar on original applications under s. 15.1 of the *Divorce Act*; they then extend this bar to variation applications under s. 17 of the *Divorce Act*, and from there, sometimes further extend

it to similarly-worded provincial legislation, like s. 152 of the *Family Law Act*. The rationale for extending the bar to variation orders under s. 17 of the *Divorce Act* is based on para. 150 of *D.B.S.*, in which the Court said it had jurisdiction to hear the variation application in the *Henry* case because the child's mother had filed a notice to disclose the payor's income before the child became an adult. In this, these courts see a bar on variation applications for historical awards and an exception that applies where a necessary procedural antecedent to the application had alerted the payor to the upcoming application while the child still qualified for support.

[65] While some courts have interpreted the exception as applying to variation orders only, others have extended it to original applications as well (see, e.g., *Dring*, at paras. 65, 97 and 195; *Hnidy v. Hnidy*, 2017 SKCA 44, 414 D.L.R. (4th) 87, at paras. 62, 70 and 81). Yet other courts have allowed variation applications not on the basis of the exception but on the grounds that *D.B.S.* only barred original applications for historical awards and did not preclude variation orders under s. 17 or relevant provincial legislation (see, e.g., *Brear v. Brear*, 2019 ABCA 419, 97 Alta. L.R. (6th) 1; *Colucci v. Colucci*, 2017 ONCA 892, 138 O.R. (3d) 321; *MacCarthy v. MacCarthy*, 2015 BCCA 496, 380 B.C.A.C. 102; *Buckingham v. Buckingham*, 2013 ABQB 155, 554 A.R. 256; *Catena v. Catena*, 2015 ONSC 3186, 61 R.F.L. (7th) 463).

[66] These courts all question what *D.B.S.* actually decided, and challenge the premises and sequence of reasoning employed to support the extension of the jurisdictional bar. Given that for variation applications neither the exception nor the

rule were ever made explicit by the Court in *D.B.S.*, some question the validity of the underlying proposition “that the unexpressed general rule is revealed by the purported exception” (*Dring*, at para. 196, per Hunter J.A.). The result has been a muddled jurisprudence: confused, contradictory, and divided. At some point it becomes futile, even impossible to untangle the strands of reasoning supporting the varied results between, or sometimes within provinces on historical child support.

[67] I agree with my colleague that *D.B.S.* did not decide the issue for variations orders under s. 17 (Brown J.’s reasons, at para. 15): there was no clear statement in *D.B.S.* about whether the *dicta* concerning original applications in s. 15.1 also apply to the differently-worded s. 17 variation applications.

[68] I similarly agree with Goepel J.A. in *Dring*, that “[a]lthough the language of [the *Divorce Act* and the *Family Law Act*] is not identical, it is sufficiently similar that they should be interpreted in the same manner” (para. 76). These two provisions share the same purpose, arise from the same social and legislative contexts, and address the same issue. When the focus is on the responsibilities of parents to their children, absent very clear legislative direction, little will turn on whether parents are married or not. There is therefore no binding authority requiring s. 152 to be read as imposing a jurisdictional bar on the hearing of variation application for historical child support. Section 152 must be interpreted and applied in accordance with first principles.

B. *Fair, Large, and Liberal Interpretation of Section 152 of the Family Law Act*

[69] Determining the meaning of s. 152 of the *Family Law Act* involves an exercise in statutory interpretation. Courts must “read [the words of an Act] in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[70] My colleague Brown J. has conducted a careful textual analysis of s. 152 and I agree with his conclusion. There is no need to repeat all of the strong reasons he gives for finding that applications for historical child support by way of variation order under s. 152 are allowed by the terms of British Columbia’s *Family Law Act*.

[71] In addition to the reasons provided by Brown J., however, there are other strong and equally-compelling reasons that support allowing the consideration of historical child support claims. In *Chartier*, a child support case, this Court applied the modern principles of statutory interpretation, articulating a truly purposive and contextual approach for family law issues that weaves the fundamental principles of child support law into the interpretation of the *Divorce Act*. The Court thus set out the following guidelines:

. . . the policies and values reflected in the *Divorce Act* must relate to contemporary Canadian society

. . .

. . . [thus] the proper approach to this issue . . . recognizes that the provisions of the *Divorce Act* dealing with children focus on what is in the best interests of the children of the marriage

. . .

The interpretation of the provisions of the *Divorce Act* relating to “child[ren] of the marriage” should be “given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”

(paras. 19 and 21; see also para. 32, citing *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12).

[72] Grounded in these principles, the Court sought the “interpretation that will best serve children” (at para. 32) and chose a measure for child support which allowed recovery from a step-parent. This same approach should also inform the interpretation of s. 152 of the *Family Law Act*. An analysis that takes into account the policies and values of contemporary Canadian society, focuses on the best interests of the child, and interprets s. 152 in a fair, large, and liberal manner to best ensure the attainment of the objects of child support clearly supports permitting historical child support claims to be heard by a court to determine if monies are owing and what amounts may be fairly recovered. This conclusion is supported by the fact that the jurisdictional bar imposed in this case prevents access to justice, runs counter to the best interest of many children, gives rise to an under-inclusive outcome, and reinforces patterns of socio-economic inequality.

(1) Access to Justice

[73] Whether seen as statutory authority, referred to as jurisdiction, or redefined as standing, the procedural bar that originated in *D.B.S.* and is challenged by

Ms. Michel in this appeal prevents access to justice for Canada’s children.¹ The courtroom doors should not be closed because certain categories of debts owed to children are classified as coming “too late”. As will be described later, keeping whole types of claims from the courts creates hardship for children and their caregivers by contributing to the underfunding of children and the feminization of poverty. But this procedural barrier not only works injustice, it is unnecessary: the present rules in relevant legislation and the *Guidelines* are up to the task of providing guidance to determine which retroactive awards should be granted and in what amount. Rather than being forced to wield the blunt instrument of a categorical exclusion, judges should be trusted to use their discretion to determine individual cases fairly. The jurisdictional bar imposed in this case thus creates an unnecessary barrier to access to justice, which operates to prevent applications advanced on behalf of children from ever being heard on their merits.

[74] The injustice caused by an exclusionary bar is conveyed by how many courts have developed a proliferating number of exceptions to permit variation awards when appropriate. There are many examples of how courts, seeing the hardship an absolute bar creates for children and their caregivers, have found multiple, often creative ways around it so as to decide the claims and do justice in individual cases

¹ In my view, the reference to “jurisdiction” in *D.B.S.* has always been somewhat of a misnomer and has been afforded a much broader meaning than was intended. In that case, the term was not used in the general legal sense of “[a] court’s power to decide a case or issue a decree” (*Black’s Law Dictionary* (11th ed. 2019), at p.1017). That type of jurisdiction is addressed in, for example, ss. 3 to 7 of the *Divorce Act*. What the Court refers to as the courts’ jurisdiction in *D.B.S.*, in contrast, is simply the authority that they are granted by statute to consider and adjudicate over a claim for child support: the circumstances in which they are properly seized of the matter by means of an authorized person’s application (see *D.B.S.*, at paras. 56 and 60).

(*Brear*, at para. 28; *Simone v. Herres*, 2011 ONSC 1788; *George v. Gayed*, 2014 ONSC 5360; *Gordashko v. Boston*, 2009 ABQB 229; *J.P. v. J.A.P.*, 2010 ABQB 53; *MacCarthy; Hnidy; Pitre v. Lalande*, 2017 ONSC 208; *Vohra v. Vohra*, 2009 ONCJ 135, 66 R.F.L. (6th) 216; *S.P. v. R.P.*, 2010 ONSC 2247, rev'd 2011 ONCA 336, 281 O.A.C. 263; *de Rooy; Hartshorne v. Hartshorne*, 2010 BCCA 327, 289 B.C.A.C. 244; *MacLennan v. MacLennan*, 2003 NSCA 9, 212 N.S.R. (2d) 116). The motive is clear: such exceptions “are born from a desire . . . to grant relief when it is fair and just to do so” (*Brear*, at para. 63).

[75] There is another form of unfairness imposed by a jurisdictional bar, which arises when the variation application is made on behalf of more than one child. The bar operates to prevent the recovery of any support for the child who no longer qualifies under the applicable legislation. This means that sums due for the period during which this child qualified are not recovered, but monies owed to the other children are. In such cases, the bar creates a disparate treatment among siblings and this inequality between children may negatively affect both family finances and family dynamics.

[76] A fair, large, and liberal interpretation of s. 152 of the *Family Law Act* cannot be one which creates exclusion and the type of injustice that invites the manufacture of multiple exceptions. Yet, this overview of Canadian jurisprudence demonstrates how a jurisdictional bar on variation applications for child support unfairly prevents access to child support payments and to the courts. The better

approach is to interpret s. 152 with its underlying purposes in mind; that is, in the best interests of the child who is entitled to child support.

[77] Arriving at the modern understanding that child support is a right of the child enforceable by court order has taken a great deal of time and is the result of hundreds of years of progress and numerous shifts in thinking about children, human relationships, societal roles, and legal responsibilities. The status of children has changed dramatically from the times when children were viewed as property and the payment of monies for their upkeep was grounded more in grace and generosity than legal duty. Today, children are viewed as individuals who, as full rights bearers and members of a group made vulnerable by dependency, age, and need, merit society's full protection. This includes a call on the real resources of their parents, translated into a right to child support based on their parents' actual incomes. The bedrock principles in *D.B.S.* both captured and significantly solidified such thinking.

[78] When modern family law obligations took shape, it became essential to remove any vestige of the view that child support obligations were a lesser form of debt. Allowing variation applications for historical child support to be heard thus not only respects the language of s. 152, but also the very nature of the award sought. Unmet child support obligations, whether they are in the form of arrears or have not yet been judicially recognized, are "a valid debt that must be paid, similar to any other financial obligation", regardless of whether the quantum is significant (N. Bakht et al., "*D.B.S. v. S.G.R.: Promoting Women's Equality through the Automatic Recalculation*

of Child Support” (2006), 18 *C.J.W.L.* 535, at p. 550). The obligation to support children is not contingent on notice by one party to the other of an intention to seek additional child support (*MacMinn*, at para. 15; *Hunt v. Smolis-Hunt*, 2001 ABCA 229, 97 Alta. L.R. (3d) 238, at paras. 17-18; *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.), at para. 4; *S (L.) v. P. (E.)*, at para. 55. Likewise, the fact that the obligation to pay child support is confirmed in a statute does not imply it is any less of a debt.

[79] Further, the obligation to support one’s child exists irrespective of whether an action has been started by the recipient parent against the payor parent to enforce it, because child support is a continued obligation owed independently of any statute or court order. While a child support debt may be forgiven by a court, it remains true that such a debt is owed from the moment it ought to have accrued — no matter the length of the delay.

[80] Before this Court, Ms. Michel argued against protecting payors who are deficient in their child support obligations by disallowing claims against them the moment their child becomes independent. I agree. Any interpretation of s. 152 should support the modern understanding of child support and not encourage behaviour that undercuts its values, efficiency, or effectiveness. *D.B.S.* makes clear that “[a]ny incentives for payor parents to be deficient in meeting their obligations should be eliminated” (para. 4). Thus, the court should not create a “perverse incentive” by granting “payor parents immunity after the children ceased to be children of the marriage”. As stated by Sharpe J.A. in *Colucci*:

If the payor parent is to be absolved from responsibility once the children cease to be “children of the marriage”, the payor whose income increases might be encouraged not to respond to his or her increased obligations in the hope that the reciprocal spouse will delay making an application for a variation increasing support until the children lose their status to avoid opening the door to an increased obligation. [para. 26].

[81] An additional “perverse incentive” is that the bar on applications for historical child support may also have the effect of discouraging negotiations between parents. As Pentelechuk J.A. points out in *Brear*, custodians wise to the legal effects of a bar might cut negotiations short of an agreement and file an application in order to secure the courts’ jurisdiction prior to their child ceasing to be a child of the marriage (para. 60).

[82] In a legal system which takes seriously that child support is an ongoing obligation throughout the child’s life and that retroactive claims are for amounts owed and unpaid, it is difficult to see why s. 152 of the *Family Law Act* should be read to wipe out debts to children. A jurisdictional bar produces a strong disincentive to the payment of child support, which is contrary to the objectives and purposes of child support and goes against a fair, large, and liberal construction of s. 152.

(2) Understanding the Reasons for Delay

[83] In many cases the consequences of an absolute bar may be more than perverse: they may become punitive. Developments in case law and social science research have shown a multitude of reasons that may justify a parent’s decision to delay

seeking or varying an order for child support or which may prevent the parent from seeking such an order earlier. Understanding more clearly why applications for child support come to courts delayed, whether as claims for arrears, retroactive, or historical child support, is part of the contextual and purposive interpretation of s. 152 or any provision dealing with historical child support. Not only that, this understanding also provides insight into where the best interests of children who are owed historical child support may lie.

[84] In the case at bar, the trial judge accepted Ms. Michel's evidence that she did not apply for retroactive support because she had suffered a severe injury, because her right to support was assigned to the Minister, and because she was afraid to raise these concerns with the respondent, Mr. Graydon (B.C. Prov. Ct., Port Coquitlam, File No. F3319, September 26, 2016). Ms. Michel also alleged domestic violence but the trial judge made no findings of fact in that regard.

[85] Jurisprudence similarly shows a vast array of reasons that courts have accepted as justifying a delayed application for child support:² fear of reprisal/violence from the payor parent;³ prohibitive costs of litigation or fear of protracted litigation;⁴

² See also M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2005), 23 *C.F.L.Q.* 243; M. L. Gordon, "An Update on Retroactive Child and Spousal Support: Five Years after *S. (D.B.) v. G. (S.R.)*" (2012), 31 *C.F.L.Q.* 71.

³ See, e.g., *B. (T.K.) v. S. (P.M.)*, 2008 BCSC 1350; *Swiderski v. Dussault*, 2008 BCSC 1629 ("*Swiderski (S.C.)*"), rev'd in part but not on this point, 2009 BCCA 461, 98 B.C.L.R. (4th) 40 ("*Swiderski (C.A.)*"); *C.B.E. v. J.A.E.*, 2003 ABQB 961; *Roseberry v. Roseberry*, 2015 ABQB 75, 13 Alta. L.R. (6th) 215, rev'd on other grounds, 2015 ABCA 218, 68 R.F.L. (7th) 30; *W. (L.J.) v. H. (R.L.)*, 2005 ABCA 252, 18 R.F.L. (6th) 461; *Burchill v. Roberts*, 2013 BCCA 39, 332 B.C.A.C. 126.

⁴ See, e.g., *Webber v. Lane*, 2008 ONCJ 672; *Irving v. Clouthier*, 2008 CanLII 48137 (Ont. S.C.J.); *Hartshorne v. Hartshorne*, 2009 BCSC 698, 70 R.F.L. (6th) 106, rev'd in part but not on this point,

lack of information or misinformation over the payor parent’s income;⁵ fear of counter-application for custody;⁶ the payor leaving the jurisdiction or recipient unable to contact payor;⁷ illness/disability of a child or the custodian;⁸ lack of emotional means;⁹ wanting the child and the payor to maintain a positive relationship or avoid the child’s involvement;¹⁰ ongoing discussions in view of reconciliation, settlement negotiations, or mediation;¹¹ and the deliberate delay of the application or the trial by the payor.¹²

[86] These cases bring two different notions to mind: on the one hand, impracticability and inaccessible justice; and on the other, fear and danger. In neither case should claimants be barred from having their applications heard. In the second type of case, custodians who have been victims of domestic violence by the payor may be fearful of asking for support or increased support and may decide to wait prior to bringing an application (*C.B.E. v. J.A.E.*, at para. 36). Studies have shown that “many, if not most, battered women will want to pursue child support if they can do so without increased risk to themselves or their children” (A. Menard and V. Turetsky, “Child

Hartshorne; de Rooy; Swiderski; Carlaw v. Carlaw, 2009 NSSC 428, 299 N.S.R. (2d) 1; *Eadie v. Eadie*, 2008 BCSC 1380.

⁵ See, e.g., *Reis v. Bucholtz*, 2010 BCCA 115, 3 B.C.L.R. (5th) 71; *Schick v. Schick*, 2008 ABCA 196, 55 R.F.L. (6th) 1; *Swiderski; Trick v. Trick* (2003), 39 R.F.L. (5th) 418 (Ont. S.C.J.); *Burchill; Goulding v. Keck*, 2014 ABCA 138, 572 A.R. 330.

⁶ See, e.g., *Swiderski*. This includes fear of losing custody due to discrimination or stereotyping (see S. B. Boyd, *Child Custody, Law, and Women’s Work* (2003), at p. 219).

⁷ See, e.g., *Simone; Farrell v. Oakley*, 2008 ABQB 422; *Howard v. Cox*, 2017 ABCA 111, 97 R.F.L. (7th) 85; *Ambrose v. Ambrose* (1990), 24 R.F.L. (3d) 353 (Man. C.A.).

⁸ See, e.g., *Eadie; Swiderski; de Rooy; Larson v. Larson*, 2014 ABQB 560; *C.M.M. v. P.M.M.*, 2019 ABQB 613; *Roseberry*.

⁹ See, e.g., *Hartshorne; de Rooy; B. (T.K.) v. S. (P.M.); Eadie; W. (L.J.) v. H. (R.L.)*.

¹⁰ See, e.g., *Swiderski; Smith v. Lagace*, 2017 ABQB 394; *S.P. v. R.P.*

¹¹ See, e.g., *Chrintz v. Chrintz*, 41 R.F.L. (4th) 219 (Ont. C.J. (Gen. Div.)); *McInutly v. Dacyshyn*, 2013 ABQB 538.

¹² See, e.g., *S.K. v. A.K.*, 2004 BCSC 37; *K.A.W. v. M.E.W.*, 2019 ABQB 563.

Support Enforcement and Domestic Violence” (1999), 50 *Juv. Fam. Court J.* 27, at p. 27).

[87] It is generally a good idea to seek child support as soon as practicable, but it is unfair to bar parents from applying for the financial support they are due because they put their safety and that of their children ahead of their financial needs or because they could not access justice earlier. Remember, “courts are not to be discouraged from defending the rights of children when they have the opportunity to do so” (*D.B.S.*, at para. 60) and this requires taking into account the realities of those recipient parents for whom it is impossible, impracticable, or unsafe to apply for child support without some delay. To read s. 152 of the *Family Law Act* as creating a jurisdictional bar fails to take these important realities into account. This is not only problematic, but curious: courts are required under the *D.B.S.* factors to consider the reasons for the delay and these very same realities when determining whether an award should be made and its amount. The better and more theoretically-consistent approach is to allow the reasons for delay to inform both whether a variation application may be heard under s. 152 as well as whether it should be granted or dismissed.

(3) Relationship Between Child Support and Poverty

[88] A decision preventing historical claims for child support under s. 152 of the *Family Law Act* also ignores how family law calls for an approach that takes into account the broader social framework in which family dynamics operate (*Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 853; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at

paras. 15-23; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at para. 204; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 41).

[89] In 1994, this Court took judicial notice of “the significant level of poverty amongst children in single parent families and the failure of courts to contemplate hidden costs in their calculation of child support awards” (*Willick*, at p. 704), and in 1995 that:

Separated or divorced custodial parents as heads of single-parent families confront economic, social and personal difficulties not faced by non-custodial parents or those in two-parent families. Several studies in Canada and abroad indicate that the standard of living of the custodial parent and the children is significantly reduced following a divorce, whereas the standard of living of the non-custodial parent increases following the divorce.

(*Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, at p. 723)

[90] Three decades later, it remains true that gender roles, divorce, separation, and lone parenthood contribute to child poverty and place a disproportionate burden on women. A bar against applications for historical child support means children have gone without their due, and the law provides no remedy for the hardship this has created for the children and their caregivers, most of whom are still women.

[91] The evidence in this case provides but one example of what happens when child support remains unpaid. Ms. Michel explained how she did her best as a single mother who, at times, required disability income assistance. She spoke to the

difficulties she faced providing for her child without receiving adequate child support based on Mr. Graydon's actual income:

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

(Transcript of proceedings before Smith J., reproduced in A.R., at p. 157)

[92] The daughter spoke of the situation for her mother and herself:

When a young woman is below the poverty line and is being under supported by her co-parent, where is she going to find money for daycare to go out and work a “9-5” job? Where is she going to find the money to put her child in extra activities? How could she possibly be expected to provide any more than her child's basic needs? I grew up thinking that I did not deserve “extra”. My Dad would drop me off and refer to my childhood neighbourhood as the “ghetto”.

Eventually my Dad and step-Mom started a family of their own in a nice house, white picket fence and all. I still lived in “the ghetto”. I listened to stories about how unlike me, my future siblings would play sports, learn to swim, learn whatever they wanted. It is not that I was not interested, I just did not deserve “extra”.

(Letter from A.G., reproduced in A.R., at p. 91)

[93] Mr. Graydon also testified that he was aware that Ms. Michel and his daughter were living in poverty when he was underpaying child support.

[94] This case too illustrates how children's wellbeing and that of their custodian are intertwined parts of the same whole. Today, women still bear the bulk of

child care and custody obligations *and* earn less money than men, so women's poverty remains inextricably linked to child poverty (Statistics Canada, *The gender wage gap in Canada: 1998 to 2018* (October 2019), at pp. 4 and 10; Statistics Canada, *Maximum insights on minimum wage workers: 20 years of data* (September 2019), at p. 8. Among the Canadian population of children aged 14 years and under in 2016, 81.29 percent of children living in a lone-parent family lived with their mother (Statistics Canada, *Portrait of children's family life in Canada, 2016 Census* (August 2017), at p. 2). Children in lone-parent families live in low-income households at a rate more than three times higher than children in a two-parent household. Among these lone-parent families, the low income-rate for such children living with a mother (42 percent) is much higher than those living with a father (25.5 percent) (Statistics Canada, *Children living in low-income households, 2016 Census* (September 2017), at pp. 2-3). In 2018, Attorney General Wilson-Raybould announced that approximately 96 percent of cases registered for enforcement involved female recipients (*House of Commons Debates*, vol. 148, No. 326, 1st Sess., 42nd Parl., September 26, 2018, at p. 21867).

[95] Women in relationships are more likely to suffer intimate partner violence than their male counterparts (see Statistics Canada, *Family violence in Canada: A statistical profile, 2018* (December 2019), at p. 24, indicating that in 2018, women accounted for 79 percent of intimate partner violence victims in police-reported assaults). As a result, they are more likely to leave their home and belongings — and their financial security — behind and to seek shelter or become homeless. A 2014 Statistics Canada analysis reported most women in shelters for abused women in

Canada identified their abuser as a current or former partner; just over half of these were admitted with their children (*Shelters for abused women in Canada, 2014* (2015), at p. 6). The impact of unstable housing and the lack of legal or financial resources on a person's ability to bring any kind of legal claim is evident. The impact of a history of violence on a person's emotional health and their consequent potential fear, unwillingness to engage with their past abuser, or inability to do so are just as apparent. In addition to this, "some abusive fathers may use the child support process as a way to continue to exercise dominance and control over their ex-wives" (D. Bonnet, "Recalculating *D.B.S.*: Envisioning a Child Support Recalculation Scheme for Ontario" (2007), 23 *Can. J. Fam. L.* 115, at p. 144).

[96] Given these circumstances, women will often face financial, occupational, temporal, and emotional disadvantages. Moreover, access to justice in family law is not always possible due to the high costs of litigation. In this larger social context, women who obtain custody are often badly placed to evaluate their co-parent's financial situation and to take action against it. Measures that place further barriers on their ability to claim and enforce their rights, like a jurisdictional bar, inhibit their ability to improve their circumstances and those of their children. Yet, as this Court stated in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 1: "Without an effective and accessible means of enforcing rights, the rule of law is threatened."

[97] Similarly, the principle of statutory interpretation that the legislator is taken to know the social and historical context in which it makes its intention known also

supports reading s. 152 as allowing such claims to be heard (see *Moge*, at p. 857; *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865, at para. 37). In *Moge*, for instance, the majority relied on this principle to find that Parliament did not intend to adopt a deemed self-sufficiency approach to spousal support because of the social context that showed a link between the feminization of poverty and marriage breakdown. As L’Heureux-Dubé J. reasoned, in light of this social context, “[i]t would be perverse in the extreme to assume that Parliament’s intention was to financially penalize women” (p. 857). Likewise, in this case and in light of the social context showing the link between the underpayment of child support, child poverty, and the feminization of poverty that existed both at the time of the 1986 *Divorce Act* and today, it would also be perverse to assume that Parliament’s intention was to financially penalize women and children.

[98] “[T]he reality that the nurture of children is inextricably intertwined with the well being of the nurturing parent” has previously been acknowledged by this Court (*Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 845; see also *Willick*, at pp. 724-25, per L’Heureux-Dubé J.). In 1992, this Court recognized in *Moge* that “[w]omen have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution” (p. 861). A year later, it added that “women disproportionately incur the social costs of child care” (*Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 763 (emphasis deleted); see also *Young v. Young*, [1993] 4 S.C.R. 3, at p. 62, per L’Heureux-Dubé J.). These long-standing

recognitions and the current data bear on how courts should approach child support claims, including historical ones.

[99] In historical child support claims, what is really at stake is monies that ought to have been paid for the care and support of children but were directed elsewhere. This means children and their caregivers do without, and this has lasting consequences for each of them. As the child in this case poignantly said: “I was a confident, bright and enthusiastically ambitious kid. I am a bright and ambitious adult. Somewhere along the line confidence and enthusiasm fell to the wayside” (A.R., at p. 91).

[100] Family law’s holistic approach demands that we take account of the interconnected nature of issues of child support, child poverty, and the consequent feminization of poverty. Given the gender dynamics in child support law, legal rules cannot ignore the realities that shape women’s lives and opens them up to experiences and risks less likely to be experienced by men: like intimate partner violence, a higher proportion of unpaid domestic work accompanied by less work experience and lower wages, and the burden of most childcare obligations.

[101] At the same time, while we take account of women’s marginalization and lived experiences, we must not lose sight of the fact that equality and equity also require us to turn our minds to other forms of marginalization in the courtroom. The gendered dimensions of poverty at different times mirror or obscure its intersections with race, disability, religion, gender modality, sexual orientation, and socioeconomic class, for

instance. It is the delicate task of our judiciary to take these differences into account and to give them their due weight in considering the tests at issue. In the end, a system that can account for the social dynamics which act to impoverish certain members of society over others, or to prevent them from accessing the courtroom and reclaiming their rights, is a fairer system for all.

[102] The principles of child support also favour the interpretation that is favourable to children such that the best interest of the child is at the heart of any interpretive exercise (*Chartier*, at para. 21; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 47; *Paras*, at pp. 134-35; *Richardson v. Richardson*, [1987] 1 S.C.R. 857, at pp. 869-70; *Francis*, at para. 39; *Theriault v. Theriault* (1994), 149 A.R. 210 (C.A.), at pp. 212-14).

[103] Not only is this interpretive approach mandated by Canadian jurisprudence, it also results from Canada's international obligations. It is presumed that the legislature takes account of Canada's international obligations, which favour an understanding of legislative intent that is in conformity with customary and conventional international law (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 182). Canada is a party to international conventions that affirm the legal principle of "the best interests of the child" (*Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 3(1); *Convention on the Elimination of All Forms of Discrimination against Women*, Can. T.S. 1982 No. 31, art. 16(1)(d)). Article 27(2) of the *Convention on the Rights of the Child*, for instance, thus recognizes that

parents and custodians are primarily responsible for securing the conditions of living necessary for the child's development, and art. 27(4) recognizes the duty of state parties to "take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child". The principles embodied in these Conventions help inform the contextual approach to the interpretation of the *Family Law Act*, as well as the *Divorce Act* and the *Guidelines*, in understanding how to interpret the legislation with a focus on the best interests of the child (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 69-71).

[104] Moreover, an interpretation adverse to the pre-existing common law rights of children and to the interests of recipient parents should be avoided absent clear statutory expression. As a debt obligation, which exists independently of any statute, child support benefits from the well-established principle of statutory interpretation that the legislature is presumed not to intend to limit a citizen's right unless the statutory language is unequivocal (*Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493, at p. 509; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, at para. 20; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 110; see also R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 497-98; *Brear*, at para. 50). That is clearly not the case here. Rather, all the elements reviewed indicate that the best interests of the child, which are intrinsically tied to those of their caregiver, are in

favour of reading s. 152 of the *Family Law Act* to allow applications for historical child support.

(4) Conclusion on Section 152 of the *Family Law Act*

[105] For all of the above reasons, a fair, large and liberal reading of s. 152 of the *Family Law Act* means that courts may hear variation applications for historical child support. Recognizing that there is no bar preventing the consideration of historical child support for variation applications calls into question whether one should continue to exist for original orders under s. 15.1 of the *Divorce Act*. As Goepel J.A. compellingly stated in *Dring*:

There is no juridical or rational reason to distinguish the two situations. Parties are encouraged to settle their disputes outside the court process. When parties have reached an agreement concerning child support it is often pure happenstance whether they take the additional step of having their agreement embodied in a court order. I would suggest this is particularly so in the case of unmarried parents when child support is the only issue they need resolve. [para. 97]

[106] It may thus be time to reconsider the *obiter* comments from *D.B.S.* that stated that there is a procedural bar preventing courts from hearing original applications for historical child support.

[107] This Court has been prepared to revisit precedents that are “unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism” (*Vavilov*,

at para. 20). It has also recognized that precedents may be appropriately revisited when they result in unfairness (see *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 45-46; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 135, per Rothstein J.). None of the four appeals heard in *D.B.S.* were original applications for historical child support.¹³ The divided and confused jurisprudence that has followed *D.B.S.* evinces the unsound bases of the “jurisdictional bar” on original orders for child support, has rendered its application unnecessarily complex and operates to undermine the legislative objectives of clarity, certainty and consistency. The deleterious effects on access to justice and the relationship between child support underpayment and poverty canvassed above reveal the profound unfairness visited upon children and their custodians by this bar. All of these reasons make clear that the question of a “jurisdictional bar” on historical child support sought by original orders under the *Divorce Act* is ripe for reconsideration. However, given that reconsidering this issue is unnecessary to resolve this appeal, I leave its determination to a more appropriate case.

IV. Factors Affecting Awards for Retroactive and Historical Child Support and the Date of Retroactivity

¹³ The record indicates clearly that *Henry* and *Hiemstra*, the two cases under the *Divorce Act*, did not involve an application for an original order under s. 15.1. In both cases there was an existing child support award in the divorce judgment such that both were applications to vary under s. 17 of the *Divorce Act*. The cases under provincial legislation, although deemed to be original applications, did not involve a claim for historical child support and involved a different provision with express wording which limited claims.

[108] Removing the jurisdictional bar from variation applications means that courts will be called upon to hear these matters on their merits. Courts are well equipped to do justice in individual cases. Judges will still have to first determine whether there is a debt outstanding and will then also have to consider what would be a fair award under the *D.B.S.* factors. In this section, I review the application of the *D.B.S.* factors to awards of historical child support.

A. *The D.B.S. Factors*

[109] In *D.B.S.*, the majority presented four factors to help determine when an award for retroactive child support is appropriate: the recipient parent's reason(s) for delaying their application for child support; the conduct of the payor parent; the circumstances of the child; and the hardship the award creates for the payor parent. No one factor is decisive. These factors must be interpreted and applied in accordance with the fact that, as noted above, retroactive support is for a legally enforceable debt: by default, monies that were owed to the child but were unpaid ought to give rise to an award. In applying the *D.B.S.* factors, courts should be careful to avoid the past judicial error of treating child support as a lesser form of debt where debtors are entitled to an unusual leniency not present in other areas of creditor-debtor law (see *Hunt*, at para. 19).

[110] I now turn to the four *D.B.S.* factors as they arise in the context of historical claims.

(1) The Reasons for the Delay

[111] This factor requires the court to consider why a claimant waited to bring an application. While timely applications are the norm and are to be encouraged, there are many reasons why even a person in need may delay making an application. In light of what the jurisprudence discloses, the focus should be on whether the reason provided is understandable. I do not think we should be looking for a “reasonable excuse” for the recipient parent’s delay (*D.B.S.*, at paras. 100-3 (emphasis added)). That language, unfortunately, works to implicitly attribute blame onto parents who delay applications for child support.

[112] An analysis of Canadian case law on historical and retroactive child support awards since *D.B.S.* shows that courts focused on “excuses” have often been too quick to use this criterion as more of a precondition to an award than as one of many factors to consider. Indeed, “[d]elay is invariably raised as a defence to a claim for retroactive child support” (Gordon (2012), at p. 74), with courts interpreting *D.B.S.* as imposing upon recipients a “positive duty. . . to ensure that support was adequate” (D. Smith, “Retroactive Child Support — An Update” (2007), 26 *C.F.L.Q.* 209, at p. 245). At times, courts have considered that a failure to “justify” the recipient’s delay mitigated against a retroactive award (see, e.g., *Anderson v. Laboucan*, 2017 ABQB 642, at paras 45-55 (CanLII); *Baldwin v. Funston* (2007), 85 O.R. (3d) 721 (C.A.), at para. 25; *Foster v. Foster*, 2013 BCCA 205, at para. 17 (CanLII) or against an enlarged

temporal scope, even if blameworthy conduct was present (see, e.g., *Tepleski v. Girardin*, 2017 MBCA 37, at paras. 24-28 (CanLII)).

[113] It bears repeating that a delay, in itself, is not inherently unreasonable and the mere fact of a delay does not prejudice an application, as not all factors need to be present for a retroactive award to be granted (*D.B.S.*, at para. 99; *Swiderski* (C.A.), at para. 43 (CanLII)). Rather, a delay will be prejudicial only if it is deemed to be “unreasonable”, taking into account a generous appreciation of the social context in which the claimant’s decision to seek child support was made (*D.B.S.*, at para. 101). Indeed, the courts should not hold constraints and inequalities faced by recipient parents against the child. Accordingly, a delay motivated by any one of the reasons set out above, at para. 48, should generally not be understood as arbitrary within the meaning of *D.B.S.* Lastly, an unreasonable basis for the delay does not negate the payor parent’s blameworthy conduct; indeed the blameworthy conduct may sometimes cause or contribute to the delay.

[114] Courts may pay particular attention to the length of the delay *after* the beneficiary ceased to be a “child” or “child of the marriage” *or after* the reason that caused the delay has ceased to be. The longer this delay, the more weight may go against the justification (*Dring*, at para. 177, per Hunter J.A.). This tends to uphold the values of certainty and finality, with the goal of encouraging parties to move forward with their lives following family breakdown (see *Colucci*, at para. 28).

(2) Conduct of the Payor Parent

[115] This factor effectively serves to place the payor's conduct on a scale of blameworthiness. *D.B.S.* purposively provided an expansive definition of blameworthy conduct, being "anything that privileges the payor parent's own interests over [their] children's right to an appropriate amount of support" (para. 106).

[116] Despite its intentional breadth, some courts have been hesitant to apply this expansive definition, out of fear that any change in the payor's income which was not disclosed to the recipient would constitute blameworthy conduct. The failure to disclose actual income, a fact within the knowledge of the payor, is a failure of a significant obligation and is often the root cause of a delayed application. Indeed, in *D.B.S.*, the Court recognized at para. 124 that "[n]ot 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." It further commented that "a payor parent cannot use [their] informational advantage to justify [their] deficient child support payments" and at para. 106 that "[a] payor parent cannot hide [their] income increases from the recipient parent in the hopes of avoiding larger child support payments".

[117] The nature and objective of the post-*Guidelines* child support system provide payor parents with the certainty and predictability that any material change in income should be disclosed and lead to a change in child support payments. The certainty provided by the *Guidelines* has been acknowledged by this Court in *Miglin*, at para. 56, *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 208, and

Contino, at paras. 94-95, per Fish J. It is also notable that s. 3(1)(a) of the *Guidelines* makes the presumptive amount of a child support order the amount set out in the applicable table. Therefore, a payor's conduct may be presumptively reasonable if they conform to an order or agreement, but only if there is no change in their income (see *Loughlin v. Loughlin*, 2007 ABQB 10, at para. 22 (CanLII); *Baldwin*, at paras. 18 and 22-23).

[118] While a subjective approach to the reasons for the recipient's delay in applying for child support should be explicitly endorsed, the same is no longer true of the payor's conduct. Since *D.B.S.*, Canadian courts have gradually steered away from a focus on what the payor meant by what they did, in light of the problems posed by a "subjective" inquiry into the payor's intention (see, e.g., *C.M.M. v. P.M.M.*, at para. 55 (CanLII); *Burchill*, at paras. 24-31; *Koback v. Koback*, 2013 SKCA 91, 423 Sask. R. 35, at para. 30; *L.L. v. G.B.*, 2008 ABQB 536, 10 Alta. L.R. (5th) 67, at para. 118). Intent can be a basis on which to increase blameworthiness but the primary focus needs to be on the payor's actions and their consequences. Today, "[t]he payor's subjective intention is rarely relevant — the real question is whether the payor's conduct had the *effect* of privileging [their] interests over the child's right to support" (*Goulding*, at para. 44).

[119] It bears repeating that the presence of blameworthy conduct is not a necessary trigger to the payor's obligation to pay the claimed child support. Where present, blameworthy conduct weighs in favour of an award and may also serve to

expand the temporal scope of the retroactive award, to increase its amount by providing for interest or costs, or create an additional consideration for the calculation of child support in cases of income above \$150,000 per s. 4(b)(ii) of the *Guidelines*. Generally speaking, this factor is not evaluated differently in cases involving historical child support than it is in general retroactive child support cases. The same expansive definition applies.

(3) Circumstances of the Child

[120] Although the *Guidelines* heralded a shift from the conception of need as the primary motivator for child support to an understanding of support as the child's entitlement, a child's needs may still be relevant in awarding and calculating retroactive child support. If there has been hardship present during their childhood, or if the child needs funds at the time of the hearing, this weighs in favour not only of an award but also of extending the temporal reach of the award. This factor may play a particular role in applications for historical child support.

[121] Where the child has suffered deprivation, this factor is a significant consideration in favour of relief. There is some suggestion in the commentary that courts have been subordinating this factor to others, such as delay (see Gordon (2012), at p. 74). But as I have discussed, the neglect or refusal to pay child support is strongly linked to child poverty and female poverty. As L'Heureux-Dubé J. pointed out in *Willick*:

. . . the financial burden of divorce should not be borne primarily by children and their custodial parents. Children are our country's most important resource, our future. Their needs cannot be minimized on account of their parents' divorce. They are entitled to be looked after properly both before and after divorce. I do not mean to imply that they must live in luxury. I strenuously object, however, to situations in which children live at or near the poverty level despite the fact that the means of the non-custodial parent are sufficient to meet their needs. [p. 718]

[122] At the same time, this does not mean that any kind of need or hardship is a necessary antecedent to an award for retroactive child support. Indeed, *D.B.S.* explicitly indicated at para. 113 that a payor parent's obligation will not "disappear where [their] children do not 'need' [their] financial support" (see also *Swiderski* (S.C.), at paras. 93-95). In *C.A.R. v. G.F.R.*, 2006 BCSC 1407, the court held that "if this factor were to tip the balance against making a retroactive award, then, in essence, the [payor] will have profited from 'holding off' on paying increased child support" (para. 48 (CanLII)).

[123] Additionally, there are plenty of circumstances where a parent will absorb the hardship that accompanies a dearth of child support so as to prioritize their child's wellbeing (see *Richardson*, at p. 869; *Willick*, at pp. 724-25; see also *Buckingham*, at para. 51). There is absolutely no principled reason why this parent should receive less support as a result of choices that protect their child (see *D.B.S.*, at para. 170, per Abella J. (concurring); *Colucci*, at para. 26). Indeed, it has been recognized that "[t]he fact that the respondent will indirectly benefit is not a reason to refuse to make the award of support" (*Debora v. Debora* (2006), 218 O.A.C. 237, at para. 70; *Innes*, at para. 11). Thus, the fact that a child did not have to suffer hardship because of their custodial parents' sacrifice is not one that weighs against awarding retroactive or

historical child support. Rather, a recipient parent's hardship, like that of a child, weighs in favour of the award of retroactive child support and an enlarged temporal scope.

(4) Hardship the Award Might Entail

[124] This factor takes into account the ease with which the payor might be able to pay the award. If the award would cause the payor undue hardship, and if the other factors do not militate against it, this factor may weigh against an award or affect its temporal scope to achieve a fair result. It is not necessary that there be no hardship caused by the award for it to be granted. If there is the potential for hardship on the payor's part, but there is also blameworthy conduct which precipitated or exacerbated the delay, it may be open to the courts to disregard the presence of undue hardship (*D.B.S.*, at para. 116; *Tschudi v. Tschudi*, 2010 BCCA 170, 86 R.F.L. (6th) 23, at paras. 4-5). In all cases, hardship may be addressed by the form of payment (*Purba v. Purba*, 2009 ABCA 32, 466 A.R. 175, at para. 15).

[125] While the focus is on hardship to the payor, that hardship can only be assessed after taking into account the hardship which would be caused to the child and the recipient parent from not ordering the payment of sums owing but unpaid (see, e.g., *Cornelissen v. Cornelissen*, 2003 BCCA 666, 21 B.C.L.R. (4th) 308, at paras. 9 and 38; *Brear*, at para. 59; *Warwoda v. Warwoda*, 2009 ABQB 582, at paras. 11-12 (CanLII); *George*, at para. 55). In *D.B.S.*, the majority recognized at para. 115 that "courts should recognize that hardship considerations in this context are not limited to

the payor parent.” While they referred to the impact on other children, it is clear that hardship cannot be measured in the abstract but must be grounded in the facts and the totality of the circumstances. For example, the payor may be able to establish that paying past due child support in the amount of \$20,000 would create hardship because the payor does not have the funds on hand and would be required to obtain a loan or sell property to discharge that child support debt. However, it must be taken into account that the payor had the benefit of the unpaid child support for the full time in which it was unpaid and such monies may have funded a preferred lifestyle or the very purchase of property which may now need to be sold.

[126] If children have gone without the appropriate level of support it often means that the recipient parents have been forced to go into debt themselves or spend all their monies, not on property, but on the child. As Ms. Michel testified: “it is me who provided”. It may also mean that custodial parents have foregone opportunities, like spending time with the child or pursuing higher education and enhancing their career prospects, because they had to work an additional job or two to provide for the child. The recipient parent may therefore have incurred debt to cover the cost of the child’s essentials or have no savings because all monies were absorbed by monthly outlays. Viewing matters in this holistic way places hardship to the payor in its actual factual and legal matrix. While it may appear difficult to ask the payor to obtain a loan for \$20,000 to repay the debt of unpaid child support, the recipient may be in debt in a similar amount. Thus, the hardship caused to the child and the recipient parent from non-payment is also a crucial part of the equation. With historical awards, there may

be a longer period of unpaid child support, resulting in larger amounts and greater hardship on all sides. All of which increases the need to see the full picture and assess hardship based on all the circumstances.

B. *Date of Retroactivity*

[127] In *D.B.S.*, the Court established that the date to which a child support award should be retroactive is, by default, the date when effective notice was given to the payor (para. 118). This is the date as of which the payor's child support obligation ought to be enforced. It is explicit in the majority's judgment that the date of effective notice constitutes a compromise between the date of the recipient's application for child support and the date the amount of child support ought to have increased (paras. 118 and 121). Pre-*D.B.S.* jurisprudence had similarly embraced effective notice as the date of retroactivity (see, e.g., *Ennis v. Ennis*, 2000 ABCA 33, 77 Alta. L.R. (3d) 289, at p. 313; *Wishlow v. Bingham*, 2000 ABCA 198, 82 Alta. L.R. (3d) 226, at para. 29; C. Davies, "Retroactive Child Support: the Alberta Trilogy" (2005), 24 *C.L.F.Q.* 1, at pp. 16-17). The Court also established a soft limit or rough guideline of three years' recovery.

[128] The idea behind requiring some form of notice is fairness: it is about having and sharing accurate information so everyone can meet their legal obligations and plan accordingly. Payor parents should be able to rely on the fact that the payments made in good faith and based on accurate information are meeting their legal obligations.

Recipient parents should be able to rely on the fact that the amounts paid are what is owed.

[129] While each parent has their own expectations, there is typically an inequality of information that needs to be addressed. Each parent knows how much they individually make. If payors make less than the previous year, they have the knowledge needed to decide if they wish to seek a reduction in child support. If payors make more, recipients will not always know this and will first be obliged to discover the payor's actual income before considering whether to seek an increase in child support. These practical realities have led some governments and courts to require the yearly disclosure and exchange of financial information between parents and to arrange for the automatic recalculation of child support (see, e.g., *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 12.53 and Forms FL-26 and FL-27; *Child Support Guidelines*, O. Reg. 391/97, ss. 13(g) and 24.1(1); *Calver*, at para. 33; *Sawatzky v. Sawatzky*, 2018 MBCA 102, 428 D.L.R. (4th) 247, at para. 58; *Family Law Act*, s. 158(1); *Family Law Act*, S.A. 2003, c. F-4.5, s. 55.41(1); *Family Maintenance Regulations*, 1998, R.R.S., c. F-6.2 Reg. 1, s. 21.23(1)(c); *Family Maintenance Act*, C.C.S.M., c. F20, s. 39.1.1; *Administrative Calculation and Recalculation of Child Support*, O. Reg. 190/15, s. 10.1(1); *Administrative Recalculation of Child Support Regulations*, N.L.R. 16/18, s. 5(1); see also Gordon (2012), at pp. 91-92).

[130] Effective notice is a broad concept which goes well beyond actual knowledge of a filed variation application. In para. 121 of *D.B.S.*, it was defined as

“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.” In *Kerr*, the Court further stated that the distinct features of child support “reduce somewhat the strength of concerns about lack of notice . . . in seeking child support” (para. 208). In some respects, *D.B.S.* itself provided effective notice of a parent’s responsibilities, by establishing the bedrock principles governing child support. Based on our shifted understanding of the payor’s certainty interest above, certainty materializes in different ways today than it did 14 years ago. Today, it is provided by the Tables and the payor parents’ knowledge that they are liable according to their actual income and will be held accountable for missed payments and underpayment, even if the enforcement of their obligations may not always be automatic.

[131] It results from this that it is now time to ask why the date of retroactivity of child support awards should not also correspond to the date when the support ought to have been paid. While *D.B.S.* evinced an attempt to balance certainty to the payor parent and fairness and flexibility to the recipient, and despite its emphasis on the other core principles of child support, it appears that the payor parent’s expectation “that the *status quo* is fair” remained the main rationale for maintaining effective notice as the default starting point (para. 121). In today’s legal landscape however, the impact of the different potential dates of retroactivity needs to be measured against much more than the payor’s certainty interest, and indeed, in *Contino* this Court recognized that the *Guidelines* sometimes privilege fairness to children over predictability (para. 33).

C. *Who Should Benefit from an Award for Historical Child Support?*

[132] Retroactive child support is a debt; by default, I see no reason why it should not be awarded unless there are strong reasons as between these factors not to do so. Historical child support can be awarded in part or in whole to either or both the child or their parent, given findings of fact and depending on whom the hardship — if there was any — was visited upon. Sometimes the recipient parent bears the bulk of the hardship by making financial sacrifices to support the child beneficiary (see *Cornelissen*, at paras. 9 and 38). In other cases, both the recipient parent and the child beneficiary experience significant hardship (see *Warwoda*, at para. 12). It is also conceivable that in certain cases the recipient parent may experience no hardship but the child beneficiary will have undergone hardship. Courts should be flexible and respond to these realities when determining how to apportion the award between the recipient parent and the child beneficiary. However, there should be no general reluctance to put monies into the hands of the recipient parent. Where the recipient parent and child beneficiary agree on how the award should be divided, as in this case, the court should be reluctant to disturb their agreement.

V. Application

[133] As stems from the above analysis of the *Family Law Act*, I agree that the British Columbia Provincial Court had the necessary statutory authority to grant a variation order for historical child support in the case at bar.

[134] The trial judge, Smith J., considered Ms. Michel's variation application for historical child support from April 2001 to April 2012 (para. 4). He found that A.G. had lived with Ms. Michel for the relevant period and that Mr. Graydon's income had surpassed that specified in the original support order every year with the exception of 2004. As a result, Mr. Graydon had underpaid child support from 2001 to 2003 and 2005 to 2012, and overpaid in 2004 (para. 47). Justice Smith's application of the *D.B.S.* factors also shows the following:

- Ms. Michel had a reasonable basis for being delayed in seeking child support (paras. 19-20);
- Mr. Graydon's conduct was blameworthy "to a small degree" (para. 26);
- A.G.'s circumstances were hindered by Mr. Graydon's underpayment of child support (para. 37);
- Mr. Graydon would suffer no hardship as a result of the award for historical child support (paras. 38 and 41).

Given these findings, I agree with the trial judge and my colleague that child support was owed to Ms. Michel. I also agree that it was appropriate on the facts of this case to award support dating back to March 29, 2001.

VI. Conclusion

[135] For these reasons, I allowed Ms. Michel's appeal with costs throughout, reinstating Smith J.'s order.

The reasons of Abella and Karakatsanis JJ. were delivered by

ABELLA J. —

[136] I agree with Justice Brown's excellent reasons. I also agree with those of Justice Martin, which complement his by adding some important policy considerations.

Appeal allowed with costs throughout.

Solicitors for the appellant: Westside Family Law, Vancouver; Michael J. Sobkin, Ottawa.

*Solicitors for the respondent: Centra Lawyers, Maple Ridge, B.C.;
Gowling WLG (Canada), Ottawa.*

Solicitors for the intervener: Power Law/Juristes Power, Vancouver.