



Retroactive Child Support: Benefits and Burdens

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*Shelley Kierstead **

(March 2009)

Introduction

The Supreme Court of Canada's 2006 decision in four cases¹ dealing with retroactive child support has been widely referred to by courts across Canada. It seems fair to say that the test articulated by the Supreme Court in *SRG* for considering whether retroactive child support should be ordered, and if so, for what period and in what quantum, continues to be the subject of interpretation and commentary.

The following work aims to describe what is at issue in retroactive support claims, the approach that Mr. Justice Bastarache outlined in the majority decision, and the points of departure articulated in the concurring minority decision written by Justice Abella. The author attempts to “unpack the analysis” within the case, and to highlight complexities arising from the decision, as articulated both in subsequent cases and by various authors and family law practitioners.² Finally, the paper will close with a list of tips for lawyers dealing with child support cases.

1. How the Retroactive Support Question Came Before the Supreme Court of Canada

The Supreme Court of Canada's analysis applied specifically to four Alberta-based cases—three that had been combined by the Alberta Court of Appeal³ and a fourth that the Supreme Court added.⁴ In each case, the parent who was a recipient of child support was seeking an amount of support for a prior period—specifically, an amount that was in keeping with the support obligation attributable to the payor parent's income during that period.⁵ The tricky feature of these claims was that the specific obligations sought to be enforced were not ones that had been spelled out by order or agreement—had this been the case, the relief sought would have been enforcement of arrears that had accrued over the years. Instead, as the Supreme Court said, the claims concerned “the enforceability and quantification of support that was neither paid nor claimed when it was supposedly due.”⁶

In many cases, such claims will arise where support obligations have been settled pursuant to either an agreement or a court order,⁷ and subsequently, the payor's income increases, but the support paid does not. As the Court recognized in *SRG*, “retroactive” is technically a misnomer in such circumstances—the payor is not being asked to comply

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with a legal obligation that did not exist in the past. Instead, the recipient is seeking to hold the payor accountable for the obligations that would have been associated with his or her income during the period in question had support been calculated afresh at that time. The ultimate issues for the court were whether it could order such “retroactive” support, and if so, under what circumstances it should do so.

It is useful to consider, prior to reviewing the court’s analysis, the legislative backdrop to this question. An important shift in the characterization of child support obligations occurred in 1997 with amendments to the *Divorce Act*⁸ and a corresponding introduction of the *Federal Child Support Guidelines*.⁹ Under the current child support regime, assuming a post-separation situation where one parent has responsibility for the care of the children for the majority of the time while the children see their other parent for “access” visits, there is an assumption that the person with whom the children reside most of the time will automatically contribute to the children’s well-being in accordance with his or her financial ability. The other parent’s support obligation is calculated by using a table that dictates amounts owed for each income level. In other words, the payor’s obligation is established by direct link to his or her income (along with the number of children for whom support is owed and the province of residence).¹⁰ The monthly amount set out within the *Guidelines* table is said to approximate the proportion of one’s income that could appropriately be transferred based on that person’s ability to pay.

The method of calculation that sees support flowing directly from income levels represents a departure from the pre-*Guidelines* regime. Prior to the implementation of the *Guidelines*, support was determined by calculating children’s needs based on budgets provided by parents and then assessing the proportion of the required amount that each parent should contribute. This proportionate share was based on each parent’s financial ability.¹¹

Another essential backdrop to understanding the Supreme Court’s decision is the fact that neither the *Divorce Act*¹² nor the *Guidelines*¹³ specifically dictate that a parent must increase his or her payments as income increases. The key provisions speaking to this question are contained within s. 25 of the *Guidelines*, which provides:

- 25.** (1) Every spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse or the order assignee with
- (a) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;
 - (b) as applicable, any current information, in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and
 - (c) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship.

These subsections place an onus on the recipient spouse to request income disclosure from the payor spouse. One of the complicating factors in this analysis then, is whether, during any period that a recipient does not make such a request, and does not initiate subsequent proceedings (either through informal negotiations or court application) to alter support amounts in accordance with the new income information, the payor parent is entitled to assume that he or she need not adjust the support being paid for his or her children. And, when at some point the recipient spouse does make an application for changed support, to what extent should this “assumption” that nothing further was required of the payor parent impact the analysis?

2. How Did the Supreme Court Approach the Issues?

A. Establishing the Obligation

Justice Bastarache, speaking for the majority,¹⁴ began his analysis by noting that parentage, in and of itself, establishes a support obligation: “upon the birth of a child, parents are immediately placed in the roles of guardians and providers.”¹⁵ For over a century, this parent-child relationship has been understood as entailing both moral and legal obligations.¹⁶ Notwithstanding the breakdown of his or her parents’ marriage, the child’s right to support from his or her parents survives.¹⁷ Financial support, which is the child’s right, survives the breakdown of his or her parents’ marriage and should, to the extent possible, provide children with the same standard of living they enjoyed during the time the parents were together.¹⁸

A key distinction to be recognized, the court held, was between the existence of an obligation and the enforcement of an unfulfilled obligation. Clearly, there was no difficulty in finding that there is an ongoing obligation to pay child support in accordance with income. However, in Canada, the mechanism for seeking to have a court enforce¹⁹ this ongoing obligation is to bring an application pursuant to either the *Divorce Act* or provincial/territorial legislation. While the legislature could have chosen a different mechanism for enforcement, and indeed, s. 25.1 of the *Divorce Act* contemplates federal-provincial agreements whereby provincial child support services would be created to recalculate the amount of support owed at regular intervals,²⁰ in light of this policy decision, the obligation for ensuring compliance rests partially on the recipient parent.²¹ However, the existence of an application-based regime does not preclude the court’s ability to contemplate retroactive awards, assuming the child is a child of the marriage within the meaning of the *Divorce Act*²² and therefore entitled to support at the time the application for retroactive support is filed. Whether a retroactive award should be made in a given case will depend on the specific legislation in effect within a particular jurisdiction, the legislation that applies to a specific case, and the exercise of judicial discretion.²³

B. Enforcing the Obligation—Stage 1

It is important, in the Supreme Court's view, to balance the payor parent's interest in certainty with the need for flexibility in fulfilling one's parental obligation:

Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted.²⁴

The paying parent's certainty interest is strongest when the payor has been in compliance with a valid court order. However, parents need to understand that the order is based on the circumstances at play when the order is made. It is still possible that a change in underlying circumstances can lead to changed obligations.

According to Justice Bastarache, a payor's certainty interest is somewhat less strong where the obligation has been established by virtue of a private agreement, though agreements should certainly receive considerable weight: “[A] payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that (s)he is fulfilling his/her legal obligations as does a payor parent acting pursuant to a court order.”²⁵ Finally, a paying parent does not enjoy any certainty interest where there is no existing order or agreement.²⁶

The next aspect of the analysis involves the court considering specific circumstances associated with the case. Among these is the question, noted above, of whether the child qualified for support at the time of the application.²⁷ Assuming this threshold inquiry is met, one should delve into the reasons for the recipient spouse having delayed in commencing the application for retroactive support. Such delay would, in Justice Bastarache's view, have the effect of strengthening the payor parent's perception that his/her obligations were being adequately fulfilled. “Acceptable” reasons for delay, in the court's opinion, would be the existence of situations where the applicant feared that the payor parent would “react vindictively to the application to the detriment of the family.”²⁸ Equally, a reasonable excuse might exist where the applicant lacked the emotional or financial means to commence an application, or was given inadequate legal advice. However, “a recipient parent will generally lack a reasonable excuse where s(he) knew higher child support payments were warranted, but decided arbitrarily not to apply.”²⁹ Interestingly, as one author has noted:

[T]he difference between a reasonable and unreasonable delay is often determined by the conduct of the *payor* parent. A payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable.”³⁰

Moving from an assessment of the recipient parent's conduct, the Court next looks at the payor's conduct, noting that when he or she has engaged in “blameworthy” conduct, his

or her interest in certainty will become less compelling.³¹ What, then, is “blameworthy conduct” that will diminish the certainty interest? It is “[a]nything that privileges the payor parent’s own interests over his/her children’s right to an appropriate amount of support.”³² Hiding income, misleading the recipient about real income, consciously ignoring one’s support obligation, and intimidating the recipient such that he/she feels unable to pursue increased support all point to blameworthy conduct.³³ A parent who knowingly avoids support obligations should not profit from such behaviour, though not increasing support payments automatically does not necessarily amount to blameworthy conduct.

The issue of blameworthy conduct requires an assessment of the payor parent’s subjective view, though objective indicia are helpful in determining whether blameworthiness arises. For example, where the amount paid is fairly close to the amount that should have been paid, the belief that one’s obligations were being met is more plausible.³⁴ While compliance with a previous court order or agreement may raise a presumption that the payor was acting reasonably, this presumption can be rebutted where a change in financial circumstances was significant enough that the payor parent could no longer reasonably rely on the order/agreement and was not reasonable in failing to disclose increased ability to pay.³⁵ Finally, a payor may have behaved in a way that militates against a retroactive award, as for example, when he or she has paid for expenses over and above amounts required by statute or an order or agreement.³⁶

Next, in the court’s opinion, it is essential to examine the child’s past and present circumstances in deciding whether a retroactive award is appropriate. A child who underwent hardship in the past may be compensated by a retroactive support award, while a child who already enjoyed all of the advantages that he or she would have enjoyed with full parental support reveals a less compelling case for retroactive support.³⁷ Note that hardship suffered by other family members who made additional sacrifices to assist the child is irrelevant in determining whether retroactive support is appropriate.³⁸

The potential hardship of a retroactive award to the payor should also be thrown into the mix of items to consider. For example, a payor’s new family obligations should be taken into account, along with the extent to which a retroactive support award would disrupt the payor’s management of his or her financial affairs.³⁹ While retroactive awards should be crafted in a way that minimizes hardship, it will not always be possible to avoid hardship. In Justice Bastarache’s view, the extent to which a court should be concerned about this issue is directly linked to the extent to which the payor parent has engaged in blameworthy conduct.⁴⁰

C. Enforcing the Obligation: Stage 2—Commencement Date

Where a court has determined, in light of the balancing of the factors set out above, that retroactive support is appropriate, the next question is which date to use as the commencement date for the order. The possible candidates are: the date that the financial circumstances of the payor parent changed such that a higher support amount was owed; the date of “formal” notice⁴¹ by the recipient parent that additional support was being requested; the date the application for variation was made; and the date of “effective” notice by the recipient parent that there was a need to pay or re-negotiate support payments. In the court’s view, using the date on which formal proceedings are commenced would have the effect of discouraging parents from settling matters informally:

[L]itigation can be costly and hostile, with the ultimate result being that fewer resources—both financial and emotional—are available to help the children when they need them most. If parents are to be encouraged to resolve child support matters efficiently, courts must ensure that parents are not penalized for treating judicial recourse as the last resource.⁴²

On the other hand, Justice Bastarache takes the position that applying the date that the support obligation would have changed erodes the payor’s certainty interest too much.⁴³ As a result, he adopts the middle-ground “effective notice” date. Justice Abella, in writing the concurring minority opinion, disagrees with Justice Bastarache on this point. In her view, regardless of notice date, support should be varied retroactively to the date of the change in income:

[The payor parent] is the parent with the major responsibility for ensuring that a child benefits from the change as soon as reasonably possible. A system of support that depends on when and how often the recipient parent takes the payor parent’s financial temperature is impractical and unrealistic. ... Because the child’s right to support varies with the [parent’s income] change, it cannot ... be contingent on whether the recipient parent has made an application on the child’s behalf or given notice of an intention to do so.⁴⁴

In addition to setting the generally applicable commencement date, the court introduced what has been referred to as a three year “limitation period” for retroactive child support orders. According to Justice Bastarache, it will usually be inappropriate to make a support award retroactive to a date more than three years before the date of formal notice, though this presumptive three year limitation can be eschewed where the payor has engaged in blameworthy conduct.⁴⁵ In one commentator’s view, Justice Bastarache’s pronouncement “is at once a warning to payor parents to fulfill their child support responsibilities once fixed with effective notice of a claim, and a caution to recipient parents to advance their claims diligently once effective notice has been served.”⁴⁶

Again, Justice Abella takes a different view of this aspect of the decision. In her opinion, absent an express statutory direction, a three year limitation is inappropriate.⁴⁷ Further, she finds there is no role for blameworthy conduct in determining the date at which

children can recover the support to which they are entitled. In her view, “[t]he existence of the increased obligation depends on the existence of the increased income, and fluctuates with parental income, not with parental conduct.”⁴⁸

One of the interesting aspects of the three year limitation period is that the issue was “not before the Alberta Court of Appeal, was not pleaded by any party in the Supreme Court of Canada, was not argued by any party and was never mentioned by the court.”⁴⁹

While commentators agree that the three year limitation was not stated as an absolute,⁵⁰ there is potential for parties seeking some level of predictability to characterize it as such.⁵¹ Concern has been voiced to the effect that the three year period may not always reflect the reality of separated families: “[S]ometimes people do want to wait until the kids grow up in order to avoid the greater evil of grinding the kids up in a fight over money between the parents.”⁵²

D. Enforcing the Obligation: Stage 3—Quantum

Finally, having determined the appropriate date for the retroactive award, the court must determine an appropriate quantum. This amount must still fit the circumstances, and blind adherence to the applicable tables is not recommended.⁵³ In summary, “a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case.”⁵⁴

In applying the factors set out earlier in its judgment, the court held that retroactive support was inappropriate in two of the cases and appropriate in the other two. In the two cases where retroactive support was held to be inappropriate, the court seemed to focus on the payor’s non-blameless conduct,⁵⁵ while in the latter two cases, payors’ blameworthy conduct in refusing to increase support payments where their incomes had increased significantly played a large role in the decision to award retroactive support.⁵⁶ Further, in one of the cases where retroactive support was held to be appropriate, the recipient parent had been unable to discern changes in the payor’s changed income.⁵⁷ In the other, the court accepted that in light of previous overwhelming litigation that had strained the mother-child relationship, it was understandable that the recipient mother would be reticent to commence further proceedings.⁵⁸

3. Post-SCC Considerations

In light of the variety of factors to be considered on retroactive child support applications, and the Supreme Court of Canada’s direction that judges take a holistic view of the situations underlying the applications, it is not surprising that judges have approached cases in a very “fact specific” manner, which arguably makes it difficult to predict the result of any given application. In this author’s view, the factors that seem to be providing the most pronounced focal points for decision making in the post-SCC era are

the blameworthiness of the payor and the effect of delay by the recipient. In general, courts seem to be interpreting “blameworthiness” broadly, as the Supreme Court of Canada suggested they should.⁵⁹ It may actually prove more difficult to establish a predictable approach to determining the impact of recipient delay in seeking increased support. At this stage, no definitive approach seems to have emerged. As D. Smith notes:

It was hoped that in *Baldwin v. Funston* the Court of Appeal for Ontario would opine on how we are to assess the recipient’s duty to pursue support and the payor’s duty to increase support as income increases, in the context of a classic “she did not ask and he did not tell” situation … The court simply upheld the trial judge’s conclusions without further substantive analysis.⁶⁰

In addition to future judicial elaboration of this test, it has been suggested that the issue of the child’s past and present circumstances will also be the subject of keen consideration in future cases,⁶¹ though to date relatively few cases have addressed this question.

One question not directly raised in the Supreme Court decision is whether the principles set out within the *SRG* case apply to payors who seek a retroactive reduction in child support obligations.⁶² D. Smith discussed this issue, noting that the argument in support of extending the Supreme Court’s discussion to retroactive reduction claims was likely to be that “the underlying principle of the decision is that support should match income—as income changes, so should support. In that instance, it is difficult to conclude that a reduction in income historically should not at least open the door to the analysis.”⁶³ It appears that this rationale has been successfully applied in a handful of claims seeking retroactive reduction of support obligations.⁶⁴ D. Smith’s conclusion, however, that while payor variations may be possible based on the reasoning within the decision, it will be difficult to succeed factually, is likely true.⁶⁵

Despite the fact-specific application of the factors set out in *SRG* and the associated challenges of predicting likely outcomes, some practitioners feel that the decision has enhanced certainty in terms of overall client expectations. Phil Epstein, for example, says that clients are now clearer about their obligation to increase support with increased income, and about the likely ramifications of not doing so.⁶⁶ Epstein and Madsen suggest that “the safe and cautious message to give payors is certainly to disclose changes in their income, pay in accordance with the Guidelines, or be at risk of a retroactive award at some point in the future.”⁶⁷

The implementation of recalculation schemes within each province and territory would, in the author’s view, be the ideal manner by which to foster greater certainty and relieve recipient parents of the potentially daunting burden of initiating negotiations for revised support obligations with a former partner. Until such schemes are in place, however, it would be extremely useful for counsel to consider the following approaches⁶⁸ when dealing with child support matters:

A. Recipients' Counsel:

- Discuss the consequences of the *SRG* decision with clients.
- Include or ask for the inclusion of a requirement for annual **disclosure** pursuant to s. 25 of Guidelines in all agreements, minutes of settlement and court orders.
- Include or ask for the inclusion of a requirement for annual **adjustments** of child support in accordance with income in all agreements, minutes of settlement, and consent orders and court orders.
- Advise clients to make formal written demands for disclosure on a regular (not more than once a year) basis, and to record these demands in writing.
- Advise clients to make note of dates of any informal requests.
- Do not negotiate for too long.
- Adduce proper evidence regarding the reasons for any delay in seeking additional support.

B. Payors' Counsel:

- Discuss the consequences of the *SRG* decision with clients.
- Advise clients that their financial obligation towards their children survives the breakup of the relationship.
- Advise clients to consult the Guidelines and pay the appropriate amount on a voluntary basis.
- Disclose income increases on a regular and voluntary basis.
- Advise clients that failure to disclose or delay in disclosing (especially after requested to disclose by recipient) may lead to a finding of blameworthy conduct that could lead a court to order retroactive support back to the date of material change in income.

While there will continue to be interpretive challenges associated with retroactive child support calculations, it is hoped that the foregoing suggestions will assist in reducing future uncertainty about the obligations associated with changing income, and the current onus on each party to facilitate the child's right to benefit from each parent's financial ability.

Endnotes

¹ *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 [*SRG*].

² The paper makes reference to a number of articles written about the *SRG* decision. In addition, the following lawyers/academics generously agreed to discuss the case with the author: D. Smith, Phil Epstein, Julien Payne, Carole Curtis, and Doug Moe.

³ *D.B.S. v. S.R.G.*, 2005 ABA 2; *L.J.W. v. T.A.R.*, 2005 ABCA 3; and *Henry v. Henry*, 2005 ABCA 5.

⁴ *Hiemstra v. Hiemstra*, *SRG* *supra* note 1.

⁵ Two of the cases were commenced under Alberta's since-repealed *Parentage and Maintenance Act*, R.S.A. 2000, c. P-1, while the other two were commenced pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), and the *Federal Child Support Guidelines*, S.O.R./97-175. While the courts below were content to proceed on the basis that the analysis to be taken was common to each situation, the Supreme Court of Canada did not accede happily to this approach. At para. 51 of the decision, *supra* note 1, Justice Bastarache stated:

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

For the purposes of this paper, the legislative analysis focuses on the *Federal Child Support Guidelines*.

⁶ *SRG*, *supra* note 1 at para. 1.

⁷ It is also possible for an initial support application to include a request for retroactive support in relation to past years.

⁸ *Supra* note 5.

⁹ *Ibid.*

¹⁰ Note that this describes a basic amount of support owed. Often, children will have needs, or will be involved in special activities, that give rise to additional costs under s. 7 of the *Guidelines*. The guiding principle is that such expenses are distributed between parents in proportion with their respective incomes.

¹¹ *Paras* came to stand for the articulation of this approach: *Paras v. Paras*, (1970), [1971] 1 O.R. 130, 14 D.L.R. (3d) 546 (C.A.).

¹² *Divorce Act*, *supra* note 5, s. 17.

¹³ *Guidelines*, *ibid.*, s. 14.

¹⁴ The majority consisted of Chief Justice McLachlin, and Justices Bastarache, LeBel and Deschamps. A minority opinion was rendered by Justice Abella on behalf of herself, Justice Fish and Justice Charron.

¹⁵ *SRG*, *supra* note 1 at para. 36. The decision has been cited for this proposition subsequently in *P.H. v. P.H.*, 2008 NBCA 17 and *Doe v. Alberta*, 2007 ABCA 50. For an interesting discussion of the theoretical underpinnings of the child support obligation, see Lucinda Ferguson, "Retroactivity, Social Obligations, and Child Support" (2006) 43 Alta. L. Rev. 1049.

¹⁶ SRG, *ibid.* at para. 37. See also s. 26.1(2) of the *Divorce Act*, *supra* note 5 which provides: “The guidelines shall be based on the principles that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.”

¹⁷ SRG, *ibid.* at para. 38.

¹⁸ *Ibid.*

¹⁹ Within this work, unless specifically noted, “enforcement” relates to judicial confirmation that a payor is required to pay child support, rather than to actions taken through provincial or territorial administrative regimes to enforce established support obligations.

²⁰ For a good discussion of the desirability of such schemes, see Dena Bonnet “Recalculating D.B.S.: Envisioning a Child Support Recalculation Scheme for Ontario” (2007) 23 Can. J. Fam. L. 115. Recalculation services exist in Newfoundland and Labrador, Manitoba, Prince Edward Island and British Columbia. See Department of Justice (Canada), *Inventory of Government-Based Family Justice Services*: online: <http://canada.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/apps/fjis-rsgjf/brows-fure.asp>. Note also that in Ontario, a current bill (Bill 133—*An Act to amend various Acts in relation to certain family law matters and to repeal the Domestic Violence Protection Act, 2000*, 1st Sess., 39th Leg., Ontario, 2008 (2nd reading and ordered to Standing Committee on Social Policy February 25, 2009) proposes the authorization of a support recalculation service. In Alberta, amendments were made to the *Family Law Act* to introduce a Child Support Recalculation Program (Alberta Statutes, *Family Law Act*, Part 3, Support Obligations, Division 1.1, Child Support Recalculation Program, Heading added 2008, c. 15 s.3; SA 2003, c. F-4.5, s. 55.1-55.8) These amendments are not in force.

²¹ SRG, *supra* note 1 at para. 57.

²² If the application is not brought pursuant to the *Divorce Act*, the court’s ability to assert jurisdiction would depend on the specific provisions of the provincial or territorial legislation that serves as authority for the application.

²³ SRG, *supra* note 1 at paras. 60 and 94.

²⁴ *Ibid.* at para. 96.

²⁵ *Ibid.* at para. 77. In discussions following the decision, it has been noted that many people reach agreements for the payment of support rather than obtaining court orders, giving rise to the suggestion that this reality should signal a significant interest in having agreements upheld. According to Phil Epstein, it is important to consider potential administrative and legislative mechanisms that could ensure appropriate support payments and avoid the abrogation of agreements: Phil Epstein, Ontario Bar Association (Family Law Section) Panel Discussion: “More Certainty from the Supreme Court of Canada: Maybe You Can Get Retroactive Support” (20 September 2006) online: <http://www.oba.org> [OBA Panel].

²⁶ A survey of 136 cases conducted by the author, where courts have purported specifically to “follow” the SRG ruling [*Post-SRG Survey*], does not reveal a tendency for courts to give any particular weight to whether an order or agreement underlies the support obligation.

²⁷ *SRG, supra* note 1 at paras. 86-90. Examples of post-SRG cases confirming the court’s inability to assert jurisdiction unless the child continued to be eligible for child support at the time the application for retroactive support is brought are *Cardinal v. Cardinal*, 2006 NWTSC, *Johnston v. Johnston*, 2006 SKQB 465 and *McDonald v. McDonald*, 2008 B.C.S.C. 120. While, as D. Smith notes in “Retroactive Child Support—An Update” (2007) 26 C.F.LQ. 209 at 211, this is not a matter of judicial discretion, one can imagine circumstances where this limitation leads to unfortunate results. Lawyer Doug Moe provides one example: “A parent could hang on for a few months to bring an application on the expectation of a child continuing high school ..., have the kid unexpectedly drop out after age 18 and lose any ability to have the payor parent meet their retroactive responsibility.” (Email correspondence between Mr. Moe and the author dated 7 December 2007.)

²⁸ *SRG, supra* note 1 at para. 101. In *Fallis v. Garcia*, 2008 CanLII 25048 (Ont. Sup. Ct. J.), the court accepted that the mother’s delay in pursuing litigation was understandable in light of the mental condition suffered by one of the parties’ sons. In *Eadie v. Eadie*, 2008 BSCS 1380, the recipient mother’s medical and financial circumstances provided reasonable justification for the delay in bringing variation proceedings. Financial resources, lack of self confidence necessary to commence court proceedings, and fear of the payor’s temper were considered sufficient to justify the recipient mother’s delay in *B.(T.K.) v. S.(P.M.)*, 2008 BCSC 1350. In *Schick v. Schick*, 2008 ABCA 196, the Court of Appeal dismissed the father’s appeal from a decision granting the mother child support retroactive to 2002. The Court accepted that the mother had been lulled into a mistaken belief about the father’s income, and had been led to believe for a number of years that further litigation would prove fruitless. In *Swiderski v. Dussault*, 2008 BCSC 1629, the court accepted that delay on the mother’s part in seeking a support variation stemmed from the fact that each time she had tried to discuss support with the father, he had reacted with anger and involved the parties’ child in the ensuing arguments. A similar rationale was applied to excuse the mother’s delay in *B.(T.K.) v. S.(P.M.)*, 2008 BCSC 1350. See, however, *Y.S. v. K.T.*, 2008 BCPC 101 (CanLII) (Prov. Ct.), where the mother’s claim for retroactive child support was dismissed based in part on the court’s view that, while the mother did not request support earlier due to a fear of the father challenging custody, there was no evidence that the father would have responded in such a manner. Further, in *Webber v. Lane*, 2008 ONCJ 672, the court limited the retroactive support award to three years prior to formal notice on the basis that while the recipient mother was young and had limited resources, she should have realized that the only way to deal with the payor’s “stonewalling” was to pursue litigation. In *Irving v. Clouthier*, 2008 CanLII 48137 (Ont. Sup. Ct. J.), the court accepted in part the recipient mother’s submission that her delay in varying support that was based on a 1997 order was based on financial hardship. However, in balancing this factor against the father’s interest in certainty, the court limited the retroactive support award to 2003. In *B.D.G. v. C.C.G.*, 2007 BCSC 989, the court rejected the mother’s argument that her delay was justified by the physical and emotional consequences she had experienced as a result of an accident in which she was involved.

²⁹ *Ibid.* In *Baldwin v. Funston*, 2007 ONCA 381, where there had been an unexplained five and a half year delay in seeing increased child support, the Court of Appeal upheld the lower court’s dismissal of the mother’s retroactive child support claim. Other cases where insufficient “excuse” for delay was established by the recipient parent are: *L.M. v. I.M.*, 2007 NLUFC 29; *Stemmler v. May* (2007), 43 R.F.L. (6th) 218 (Ont. Sup. Ct. J.); *Luca v. Luca* (2007), 43 R.F.L. (6th) 152 (Ont. Sup. Ct. J.); *Robertson v. Robertson*, 2007 NSSC 128; *Lefebvre v. Strilchuck* (2007), 281 D.L.R. (4th) 539 (Ont. Sup. Ct. J.); *P.V. v. D.B.*, 2007 BCSC 237; *I.A. v. G.R.*, 2007 NUCJ; and *P.A.B. v. K.M.B.*, 2006 BCPC 575.

³⁰ Carole Curtis, “The D.B.S. Cases: The Supreme Court of Canada and Retroactive Child Support” (County of Carleton Law Association 16th Annual Institute of Family Law, 1 June 2007) at 15 [*Carole Curtis*].

³¹ *SRG*, *supra* note 1 at para. 105.

³² *Ibid.* at para. 106.

³³ *Ibid.* In the *Post-SRG Survey*, *supra*, note 26, blameworthy conduct was found in 65 cases. See, in particular, *L. (R.E.) v. L. (S.M.)*, 2007 ABCA 169, where the payor father had failed to disclose increases in income notwithstanding that his financial situation had changed significantly in 2002; *Schick v. Schick*, *supra* note 28, where the payor father made statements to the mother that were intended to dissuade her from formally pursuing an increase in support, notwithstanding that he knew of the financial difficulty in the mother’s household, and the fact that it directly affected the child’s standard of living; *Whelan v. O’Connor*, 2008 NLCA, where the payor mother failed to disclose that her income had increased notwithstanding the existence of an order requiring disclosure; *Chera v. Chera*, 2008 BCCA 374, where the Court of Appeal held that the payor father’s decision to avoid his obligation to pay support until a final court order was made did not abrogate his obligation to pay support for his children from the date of his separation from the recipient mother; and *Waddle v. Carr*, 2008 ABCA 31, where the payor father was put on written notice that the recipient mother had retained a lawyer to deal with support issues in 2005, but subsequently refused to cooperate with his own counsel to complete the required processes.

³⁴ *SRG*, *supra* note 1 at para. 108.

³⁵ *Ibid.*

³⁶ *Ibid.* at para. 109. See *Morgan v. Morgan*, 2006 BCSC 1197 where, though the father did fail to disclose his increased income, his behaviour fell on the lower end of the “blameworthy” scale because he had often paid more than required under the applicable support order, and had contributed to health care costs, clothing expenses, and extracurricular activities costs. See also *Deane v. Pawluk*, 2006 SKQB 499, where the payor father had assumed almost total responsibility for the children’s extracurricular activities expenses; *Albo v. Albo*, 2006 ABQB 785, where the court held that the payor father reasonably believed that his support obligations were being met by providing a home for the recipient mother and the parties’ children; and *Baldwin v. Funston*, *supra* note 30, where the father had virtually never refused the mother’s requests for extra financial assistance.

³⁷ *SRG*, *supra* note 1 at paras. 110-113. In *Fallis v. Garcia*, *supra* note 28, the retroactive award would assist both children with their plans to attend post-secondary institutions. See also *Andrews v. Megaw*, 2008 CanLII 12709 (Ont. Sup. Ct. J.), and *Kardaras v. Kardaras*, 2008 ONCJ 493, where one of the parties’ children had incurred debts of \$12,000 to pay for post-secondary education. This debt would not have been incurred had proper support been paid when owed. In *Schick v. Schick*, *supra* note 28, the award would assist the child who had special needs. In *Irving v. Clouthier*, *supra* note 28, the court noted that the child of the marriage was in financial need and was not looked after while the payor’s new family received the benefits of the payor’s salary. Further, in *Webber v. Lane*, *supra* note 28, the court held that a retroactive support award would create more opportunity for the parties’ child who, up to the point of the order, had experienced adversity due to the recipient mother’s poverty and the payor’s selfish actions in not meeting support obligations. Similar benefits would enure to the children in *L.L. v. G.B.*, 2008 ABQB 536, who had faced financial hardship as a result of growing up without proper support.

³⁸ *Ibid.* at para. 113.

³⁹ *Ibid.* at para. 115. In *Albo v. Albo*, *supra* note 36, where the father's conduct was not found blameworthy and a retroactive award would be based on past income while his only current income was CPP benefits, undue hardship contributed to the dismissal of the mother's claim for retroactive child support. In *Lemky v. Emblin*, 2008 ABQB 383 (CanLII), the recipient mother's claim for retroactive support was dismissed, largely due to the undue hardship this would cause the father in light of the fact that his business was currently very slow and a retroactive award would be devastating to his financial situation. In *Purba v. Purba*, 2009 ABCA 3, where the appellant was able to demonstrate hardship the Court of Appeal ordered retroactive amounts should be paid at the rate of \$100 per month until ongoing support for one of the children was paid off, at which point payments should increase to \$300 per month until extinguished.

⁴⁰ *Ibid.* at 116. For a post-SRG case dealing with circumstances where blameworthy conduct outweighed concern for any hardship that father might possibly suffer as a result of paying retroactive support, see *Petten v. Efford*, 2007 NLUFC 3. Also, in *Malleye v. Brereton*, 2007 ONCJ 216, the court denied a retroactive decrease in support obligations, and held that while the payor parent might suffer undue hardship, his current unemployed status was self imposed. Further, any hardship could be mitigated through monthly, rather than lump sum, payments. See also *Webber v. Lane*, 2008 ONCJ 672. In *Robertson v. Robertson*, 2007 NSSC 128, the court held that the father's obligation to his daughter outweighed those to his new common law partner. Further, his support obligations trumped personal expenses associated with smoking, drinking, and driving a new vehicle. In *McGouran v. Connelly*, 2007 ONCA 578, the Court of Appeal held that the application judge erred in severely limiting the retroactive award against the payor father on the basis that it might impact on his ability to meet his ongoing obligations. The judge ought to have weighed the father's blameworthy conduct more heavily in her analysis.

⁴¹ Justice Bastarache does not define "formal notice", but D. Smith suggests that a demand letter from counsel or the commencement of proceedings would constitute formal notice. See D. Smith, *supra* note 27 at 228.

⁴² SRG, *supra* note 1 at para. 120.

⁴³ *Ibid.* at para. 122.

⁴⁴ *Ibid.* at paras. 161-162.

⁴⁵ *Ibid.* at paras. 123-124.

⁴⁶ Michael B. Kleinman, "Is there a "3-Year Rule" in Retroactive Child Support?" (2007) 22 Money & Family Law 89 at 91.

⁴⁷ *Supra* note 1 at para. 175.

⁴⁸ *Ibid.* at para. 169.

⁴⁹ *Carole Curtis*, *supra* note 30 at 21.

⁵⁰ During the OBA Panel, *supra* note 25, panelists (Carole Curtis, Phil Epstein and D. Smith) described slightly different understandings of the three-year limitation, but all agreed that Justice Bastarache did not intend to establish a "hard and fast" rule. See the suggestion in *Armstrong v. Hill*, 2009 BCSC 179, that retroactive awards should not reach more than three years before the date of effective notice.

⁵¹ Kleinman, *supra* note 46 at 93-94. In the *Post-SRG Survey*, *supra* note 26, of the cases where retroactive support was awarded, 23 orders extended beyond a three-year period. Epstein and Madsen note that occasionally courts will go back more than three years: Phil Epstein and Lene Madsen, *Epstein and Madsen's This Week in Family Law* (8 January 2008) (WLeC). One example is *Dickson v. Dickson*, 2007 NBQB 221 (Q.B.), where the retroactive support order was granted for a four-year period. Here, the father had engaged in blameworthy conduct by failing to disclose increases in his income, and by intimidating the mother into refraining to take legal action to vary support obligations. See also *Schick v. Schick*, *supra* note 28, where retroactive support was ordered from 2002. Here, the payor father's income had increased significantly after a 2002 court order, and his blameworthy conduct had deterred the recipient mother from seeking an increase in support.

⁵² Correspondence between Doug Moe and the author dated 7 December 2007.

⁵³ *SRG*, *supra* note 1 at para. 128.

⁵⁴ *Ibid.* at para. 130.

⁵⁵ *D.B.S. v. S.R.G. and L.J.W. v. T.A.R.: SRG*, *ibid.* at paras. 137-145.

⁵⁶ *Henry v. Henry* and *Hiemstra v. Hiemstra: SRG*, *ibid.* at paras. 147 and 153.

⁵⁷ *Henry v. Henry; SRG*, *ibid.* at para. 146-147.

⁵⁸ *Hiemstra v. Hiemstra: SRG*, *ibid.* at paras. 152-154.

⁵⁹ Several cases note the broad definition of "blameworthy" employed by Justice Bastarache—see, for example, *Casals v. Casals*, [2006] O.J. No. 5602 (Ct. J.) (QL).

⁶⁰ D. Smith, *supra* note 27 at 242-243.

⁶¹ *Ibid.* at 236.

⁶² Note that an application for a retroactive variation is different from an application to have arrears rescinded. In the former case, the payor claims that the amount owing for a past period is lower than the amount reflected in an order or agreement, due to the actual income, custodial situation or entitlement status during that period. In the latter situation, the payor acknowledges that the amount payable under an agreement or order was appropriate, but seeks to have a court order a lesser amount payable due to the payor's current inability to pay. In *SRG*, the Supreme Court indicated clearly that the principles set out in the case did not apply to rescission of arrears cases: *SRG*, *supra* note 1 at para. 1.

⁶³ D. Smith, *supra* note 27 at 236.

⁶⁴ See, for example, *Jamieson v. Loureiro*, 2008 BCSC 998 (Canlii), where the court reasoned at para. 136: Although the *D.B.S.* case dealt with a payee's application to account for increases in the payor's income, the underlying theory, in relation to child support guidelines, applies. In particular, the support obligation itself should fluctuate with the payor parent's income.

⁶⁵ D. Smith, *supra* note 27 at 237. One example of an unsuccessful case of a payor seeking retroactive variation is *Vaughn v. Vaughn*, 2007 ONCJ 21. Another is *Malleye v Brereton*, *supra* note 40. *Vaughn* illustrates the potential difficulty of separating the recission of arrears analysis from the retroactive variation analysis, and D. Smith notes that the post-*SRG* caselaw continues to blur the distinction: *ibid.* at 238-240.

⁶⁶ Telephone conversation between Mr. Epstein and the author—8 January 2008.

⁶⁷ Epstein and Madsen, *supra* note 51.

⁶⁸ Many of these suggestions are contained in Carole Curtis' article, *supra* note 30 at 33.