



Child support

Retroactive support
and variations for recipients

Provincial Advocates
Training Conference 2021



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Child Support: Retroactive, Variations, and Arrears

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Applicable Legislation

- *Divorce Act* (Canada): the Divorce Act is federal legislation. It applies to parties who are married, as well as to parties who were divorced under the the *Divorce Act*.
- The *Family Law Act* (FLA): the FLA is the BC provincial legislation. It applies to both married and unmarried (“common law”) parties.
- The Child Support Guidelines (CSG): the CSG are regulations to the *Divorce Act*, and they also apply to child support under the FLA. The CSG are an essential component of the law about child support.

What is Child Support?

- Monthly payment in a set amount (subject to review or variation), typically referred to as “table amount” or “basic child support”.

AND

- Additional amounts for “special and extraordinary expenses”, which are specified expenses listed at section 7 of the CSG, commonly referred to as “section 7 expenses”.

Note: child support may also be paid in lump sum, but this is highly unusual.

Child Support – Who is Responsible to Pay?

General Principle: Each parent is responsible for the support of their child.

Therefore:

Who is a parent?

Who is a child?

Divorce Act: Spouse and Child of the Marriage (s. 2(a))

spouse means either of two persons who are married to each other

Child of the marriage means a child of two spouses or former spouses who, at the material time:

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

Divorce Act: Child of the Marriage cont. (s. 2(b))

Child of the marriage

For the purposes of the definition ***child of the marriage***, a child of two spouses or former spouses includes:

(a) any child for whom they both stand in the place of parents;
and

(b) any child of whom one is the parent and for whom the other stands in the place of a parent.

Responsibility for Child Support under the FLA

Child: includes a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of his or her parents or guardians.

Persons responsible to pay child support under the FLA:

- Parents (important – remember definition)
- Guardians (important – remember limitations)

Unless the child:

(a) is a spouse, or

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

Who is a Parent under the FLA for the Purposes of Child Support?

General Parentage Principles:

- The parents are the child's birth mother and biological father.
- Exception: if the child is adopted, the parents are the adopting parents.
- Exception: assisted reproduction and surrogacy.

In addition, for child support purposes, "parent" may include a stepparent, which means: a person who is a spouse of the child's parent and lived with the child's parent and the child during the child's life

Spouse: Definition under the FLA

Spouse under the FLA:

(a) is married to another person, or

(b) has lived with another person in a marriage-like relationship,
and

(i) has done so for a continuous period of at least 2 years,
or

(ii) has a child with the other person (except for property
division purposes).

A spouse includes a former spouse.

Determining the Amount of Child Support

Basic Principle – determine the following:

- Income of the payor.
- Number of children entitled to support.
- Province of residence of the payor (if payor lives outside of Canada, then the province of residence of the recipient).

Based on the above:

Determine the table amount for the payor's income, number of children, and payor's province of residence.

Child support calculator is available at:

<https://www.justice.gc.ca/eng/fl-df/child-enfant/2017/look-rech.asp>

Beyond the Basic Principle

- Payor's income is above \$150,000 (CSG s. 4):
 - table amount; or
 - Table amount for \$150,000 plus a further amount that the court considers appropriate based on the condition, means, needs and other circumstances of the children and the financial ability of each spouse to contribute to the support of the children
- Payor “stands in the place of a parent” (CSG s. 5; note: also dealt with under FLA):
 - The amount of a child support order is the amount the court considers appropriate, having regard to the CSG and any other parent's legal duty to support the child.

Beyond the Basic Principle – Cont.

- Split custody – each spouse has one or more of the children living primarily with him/her (CSG s. 8):
 - The amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.
- Shared custody - the child(ren) are in the care of each spouse at least 40% of the time over the course of a year (CSG s. 9):
 - Threshold issue: How to determine the amount/percentage of time that the children are in the care of each spouse?

Note: this is often a topic of dispute, both in determining what the parenting arrangements should be and in determining whether an existing arrangement qualifies as “shared custody”.

Beyond the Basic Principle – Cont: determination of child support in shared custody

- After determining the setoff amount, consider:
 - The increased costs of shared custody arrangements; and
 - The conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

What does that mean in practice?

- Prepare a detailed budget, including fixed expenses (e.g. housing) and variable expenses (e.g. clothing, food).
- Understand and explain which expenses are related to the children, both directly (e.g. clothing) and indirectly (e.g. need for bigger home, increased food expenses, increased utilities bills, increased transportation bills).
- Any other effects of shared custody (e.g. – amount of child tax benefit)?

Special and Extraordinary Expenses (section 7 expenses)

To qualify as a section 7 expense, the expense must fall within one of the categories listed in section 7 of the CSG, and meet the criteria listed in that section.

Categories:

- **(a)** child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- **(b)** that portion of the medical and dental insurance premiums attributable to the child;
- **(c)** health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- **(d)** extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- **(e)** expenses for post-secondary education; and
- **(f)** extraordinary expenses for extracurricular activities.

“Extraordinary Expenses”

Expenses that exceed those that the requesting parent can reasonably cover, or

Expenses the court considers extraordinary taking into account

- (i) the amount of the expense in relation to the income of the requesting spouse
- (ii) the nature and number of educational programs and extracurricular activities
- (iii) any special needs or talents of the children
- (iv) the overall cost of the programs and activities
- (v) any other similar factor the court considers relevant

Sharing Section 7 Expenses

Court may order or parties may agree that:

- The parents share payment of section 7 expenses proportionately, based on their respective incomes (most common approach)
- Each parent pays for a set of expenses
- One parent pays less than what is required, based on each party's income. For example each pays 50/50 although one parent ought to pay more than 50%/

Retroactive, Variations, Arrears

- Applying for Retroactive Support:
 - Asking for support for a period before an application for support/increased support was filed
- Applying for Variation & Review of Support
 - Variations and reviews are both about changing the existing amount of support
- Applying to Enforce Arrears

Retroactive Support

- Retroactive Support:
 - Asking for support for a past period for which no support was paid and there was no order or agreement.
 - Asking for increased support for a past period in which some support was paid (whether or not there was an order or agreement in place).
- Topics under Retroactive Support:
 - Retroactive Support under the *Divorce Act*
 - *S. (D.B.) v. G. (S.R.)*, (2006 SCC 37)
 - Retroactive Support under the *Family Law Act*

Retroactive Support: Divorce Act

- Although not expressly stated under s. 15.1 of the *Divorce Act*, support may be awarded retroactively (*S. (D.B.) v. G. (S.R.)*, 2006 SCC 37).
- In *S. (D.B.) v. G. (S.R.)*, the Court concluded 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.

S. (D.B.) v. G. (S.R.), (2006 SCC 37)

The Supreme Court of Canada in *S. (D.B.) v. G. (S.R.)* endorsed core principles that govern child support, including retroactive child support, and these were restated in *Michel v. Graydon* as (at para. 10):

1. child support is the right of the child;
2. the right to support survives the breakdown of a child's parents' marriage;
3. child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together;
4. the specific amounts of child support owed will vary based on the income of the payor parent.
5. retroactive awards are not truly retroactive but rather hold the payor to the legal obligation they always had: to pay support commensurate with their income;
6. retroactive awards are not confined to "exceptional circumstances" or "rare cases"; and
7. a payor parent's interest in certainty must be balanced with the need for fairness and flexibility.

When is it appropriate to make a retroactive order?

The court in *S. (D.B.) v. G. (S.R.)* set out the following situations in which it may be appropriate to make a retroactive order:

1. there has already been a court order for payment of child support;
2. there has been a previous agreement between the parties; and
3. there has not already been a court order for payment of child support.

Retroactive Support: 4 Factors

1. The circumstances surrounding the delay in applying,
 2. The payor parent's conduct,
 3. The child's circumstances,
 4. Any hardship caused by a retroactive award
- (*S. (D.B.) v. G. (S.R.)*, 2006 SCC 37; *Michel v. Graydon*, 2020 SCC 24).

Retroactive Support & S.7 Expenses

The principles set out in *S. (D.B.) v. G. (S.R.)* are applicable to s. 7 expenses, and they also apply to a retroactive decrease (*W. (G.M.) v. W. (D.P.)*, 2014 BCCA 282).

Recipient parent bears the responsibility to communicate s.7 expenses to the payor parent.

In a child support case, a payor parent has knowledge of their own income and can determine the amount of child support payable. In the case of s. 7 expenses, it is the recipient parent who knows the details of the expense. If that information is not communicated, the payor is unable to meet the obligation (*Semancik v. Saunders*, 2011 BCCA 264, at para. 57).

Source: *Family Law Sourcebook for British Columbia*, CLEBC

Date of Retroactive Award: Effective Notice

- The date for the retroactive award should be the date on which the payor parent received **effective notice**.
- Effective notice
 - Legal notice not required
 - any indication by the recipient parent that child support should be paid, or if it is already being paid, that the current amount needs to be re-negotiated
 - Once that has occurred, the payor parent can no longer assume that the status quo is fair, (S. (D.B.) v. G. (S.R.), 2006 SCC 37 at para. 121).

Date of Retroactive Award: Three Years

- The award should as a general rule be retroactive to the date of effective notice by the recipient parent that child support should be paid or increased, but to no more than three years in the past (*D.B.) v. G. (S.R.)*, 2006 SCC 37 at para 123).
- However, if the payor engaged in blameworthy conduct, the date when the circumstances changed materially will be the presumptive start date of the award (at para 124).
 - Not disclosing a material change in circumstance is blameworthy conduct (para 124)

Retroactive Support: Family Law Act

- Under the *Family Law Act*, support can be ordered retroactively (s. 170(b)) and changed, suspended, or terminated retroactively (s. 152(1)).
- The S. (*D.B.*) v. G. (*S.R.*) factors for a retroactive child support order is appropriate under the *Divorce Act* also apply to orders made under s. 170 of the *Family Law Act* and under the *Family Relations Act* (*Sampley v. Burns*, 2018 BCCA 178 at para. 47).

Variation and Review

- Variation:
 - The person applying to vary must show that there has been a material change of circumstances. This is a threshold requirement – if no material change shown, the application will be dismissed.
 - A material change of circumstances means that if the new situation was known at the time of the original order, it would have likely resulted in a different order.
 - Not every change is “material”.
 - A party can always apply to vary an order (may not succeed but can try).
- Review:
 - no requirement for a material change of circumstances.
 - The order/agreement has to specify what can be reviewed and in what circumstances.

Variation and Review

Common examples of reviews:

- annual exchange of income information and subsequent adjustments to child support (Note: unusual for spousal support).
- Review of spousal support when the circumstances are expected to evolve (e.g. recipient is trying to return to the workforce after long period as homemaker).

Common examples of variation:

- Unexpected changes to employment, income, health, etc.
- Unexpected changes to parenting arrangements (e.g. change to/from shared custody).

Variation under the *Divorce Act*

- Section 17(1) of the *Divorce Act* provides for retroactive variation of for a child support order
- Test: material change of circumstances of one or both parents or child (*Johnson v. Johnson*, 2011 BCCA 190)
 - Material change: one that, if the court had known of the changed circumstance at the time the challenged order was made, it is likely that the order made would have had different circumstances: Section 14 of the CSG
- A separation agreement providing for review of child support obligations, where there is no pre-existing court order respecting child support, is not an order for the purpose of variation under s. 17 (*Harras v. Lhotka*, 2016 BCCA 246). The parties can apply for an order under s. 15.1 of the *Divorce Act* and need not prove a material change in circumstances.
 - Source: Family Law Sourcebook for British Columbia, CLEBC
- If you are applying to retroactive increase support under an existing order, you would apply to vary the child support order under Section 17 of the *Divorce Act*?

Colucci v. Colucci, 2021 SCC 24

- Father failed to make payments pursuant to 1996 child support orders and owed arrears of approximately \$170,000
- Father applied to vary and retroactively reduce child support under s.17 of the *Divorce Act*
- Court's analysis is applicable in situations where payors apply to retroactively decrease child support and recipients apply to retroactively increase child support.
- Outcome: Father's application to reduce arrears was dismissed for numerous reasons, including inadequate financial disclosure, lack of effective notice to mother, lack of voluntary payments, and hardship to children

Colucci v. Colucci, 2021 SCC 24 – Where Payor Applies

[113] To summarize, **where the payor applies under s. 17 of the *Divorce Act* to retroactively decrease child support, the following analysis applies:**

1) **The payor must meet the threshold of establishing a past material change in circumstances.** The onus is on the payor to show a material decrease in income that has some degree of continuity, and that is real and not one of choice.

(2) Once a material change in circumstances is established, **a presumption arises in favour of retroactively decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice of the application to vary. In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change** and allow the recipient parent to meaningfully assess the situation.

(3) **Where no effective notice is given by the payor parent, child support should generally be varied back to the date of formal notice**, or a later date where the payor has delayed making complete disclosure in the course of the proceedings.

(4) **The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors (adapted to the decrease context) guide this exercise of discretion. ... The payor's efforts to pay what they can and to communicate and disclose income information on an ongoing basis will often be a key consideration under the factor of payor conduct.**

(5) Finally, **once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified.** The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.

Colucci v. Colucci, 2021 SCC 24 – Where Recipient Applies

[114] It is also helpful to summarize the **principles which now apply to cases in which the recipient applies under s. 17 to retroactively increase child support** :

- a) **The recipient must meet the threshold of establishing a past material change in circumstances.** While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.
- b) Once a material change in circumstances is established, **a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor .**
- c) **Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.**
- d) **The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors continue to guide this exercise of discretion, as described in *Michel*.** If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.
- e) **Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified.** The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*

Variation under the *Family Law Act*

Under section 152 of the *Family Law Act*, on application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.

An order may be changed if at least one of the following exists:

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

Michel v. Graydon, 2020 SCC 24

Facts:

- The mother and father had a child in 1991. They separated in 1994.
- After separation, the father started paying the mother \$341 a month in child support based on his disclosed income of approximately \$40,000 a year. These child support arrangements became part of a consent order in 2001.
- In 2012, the parties consented to an order terminating the father's child support obligations.
- In 2015, the mother started proceedings under *FLA* to compel the father to pay child support he ought to have paid based on his income from 2001 to 2012.
- The BC Supreme Court ordered the father to pay arrears. The father appealed to the BC Court of Appeal, who granted the appeal on the basis that the child was no longer "child of marriage" at the time of the application.
- The mother appealed to the Supreme Court of Canada.

Michel v. Graydon, 2020 SCC 24

The majority judgement held that:

1. *D.B.S* did not decide the issue of variation orders under s.17 of the *Divorce Act* (para 15);
2. Whether a court has jurisdiction to award historical child support where the child is no longer a child of marriage depends on the wording of the applicable statute (para 16);
3. There is nothing in the wording of section 152 of the *FLA* that prevents the court from awarding historical child support where the child is no longer a dependent at the time of the application.

Review of Child Support

- No specific provision for review of child support under the *Family Law Act* or the *Divorce Act*.
- A review hearing is a hearing *de novo* (new hearing) and it is not necessary to establish a material change in circumstances (*Morck v. Morck.*, 2013 BCCA 186). Source: *Family Law Sourcebook of British Columbia*, CLEBC.
 - *De novo* means that the application is treated as an initial application.
- A review is created by a previous court order or agreement.

Variation and Review: Summary

- Know your procedure – is it a review or a variation?
- If review – what are the terms of the review?
- If variation – has there been a material change of circumstances?
- For both: evidence in support of the new amounts of support that your client is asking for.

Applications for Reducing or Cancelling Arrears

- Arrears: outstanding amounts from existing order or written agreement.
- A payor may apply to reduce or cancel arrears under an existing order or agreement.
- *Divorce Act*: Payor may bring application under section 17.
 - An application to cancel arrears is different than an application to vary or reduce child support under section 17
- *Family Law Act* – Payor may bring application under section 174.
- The test remains whether it would be “grossly unfair” not to reduce or cancel the arrears under both *Divorce Act* and the *Family Law Act*: *Kular v. Kular*, 2018 BCSC 1715.

Reducing or Cancelling Arrears – Substantial Unfairness

- The test remains whether it would be “grossly unfair” not to reduce or cancel the arrears under both *Divorce Act* and the *Family Law Act*. *Kular v. Kular*, 2018 BCSC 1715.
- In *Semancik v. Saunders*, 2011 BCCA 264, the court held that there are two requirements for a successful application to reduce or cancel arrears (para 25):
 - There must be a material change in circumstances, which is significant and long lasting and,
 - It would be grossly unfair not to cancel the arrears (*Earle v. Earle*, 1999 BCSC 23).

Generally, arrears will be cancelled only if the applicant can show that there is an inability to pay now or in the future.

Enforcing Orders

- In court: the recipient takes steps herself.
- Through FMEP: FMEP decides on and takes enforcement steps.

FMEP:

- Free service.
- Either payor or recipient can enroll, whether or not there is a breach of order/agreement.
- FMEP can enforce support orders and written agreements for support that have been filed in court.
- Drafting considerations:
 - As precise as possible: nature of the payment, amounts to be paid and date of payment.
 - Section 7 Expenses: if possible, specify amount (but risky because expenses may fluctuate).

Applying for Retroactive or Variation of Support Orders

- Follow the rules of the applicable court (SCFR or PCFR) for starting a court action, for financial disclosure, and for bringing applications, including:
 - Service requirements;
 - Case conference requirements;
 - Court forms, financial statement, and affidavit with any necessary supporting documents.
- Overall framework:
 - What are the issues (what is your client asking for)?
 - What evidence does your client have to provide for each claim?
 - How to present the issues and the evidence in an organized and accessible manner?