



SUPREME COURT OF CANADA

CITATION: Colucci v. Colucci,
2021 SCC 24

APPEAL HEARD: November 4,
2020

JUDGMENT RENDERED: June 4,
2021

DOCKET: 38808

BETWEEN:

Felice Colucci
Appellant

and

Lina Colucci
Respondent

- and -

**West Coast Legal Education and Action Fund Association, Women's Legal
Education and Action Fund Inc. and Canada Without Poverty**
Interveners

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

REASONS FOR JUDGMENT: Martin J. (Wagner C.J. and Abella, Moldaver,
(paras. 1 to 143) Karakatsanis, Côté, Brown, Rowe and
Kasirer JJ. concurring)

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COLUCCI v. COLUCCI

Felice Colucci

Appellant

v.

Lina Colucci

Respondent

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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 ONTARIO

Family law — Support — Child support — Retroactive decrease — Rescission of arrears — Father owing \$170,000 in child support arrears and seeking retroactive decrease in child support and rescission of arrears — Framework governing applications by payor parent to retroactively decrease child support based on material change in circumstances — Framework governing applications by payor parent for rescission of child support arrears based on current and ongoing inability to pay — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 17.

The parties were married in 1983 and divorced in 1996. The mother was granted sole custody of the parties' two daughters and the father was required to pay child support of \$115 per week per child until they were no longer children of the marriage. In 1998, the father requested a reduction in his child support obligations, but provided no financial disclosure to support his request and the parties reached no agreement at that time. The father's child support obligations ended in 2012. From 1998 to 2016, the father made no voluntary child support payments and only limited sums were collected through enforcement mechanisms. During the period in which the arrears accrued, the father was absent from the children's lives and his whereabouts were unknown. In 2016, the father applied to retroactively reduce child support and rescind the arrears of approximately \$170,000. He provided little documentation or financial disclosure to support his claims. The motion judge retroactively decreased support, effectively reducing the arrears owing to \$41,642. He found that this variation was warranted in order to bring the child support in line with the *Federal Child Support Guidelines* and to reflect the father's drop in income over the period when the arrears

were accruing. The Court of Appeal overturned that decision and ordered that the father pay the full amount of the arrears.

Held: The appeal should be dismissed.

Courts have and need wide discretion to vary child support orders to ensure the correct amount of child support is being paid and to adapt to the enormous diversity of individual circumstances that families face. In building a framework for cases involving the variation of child support and the rescission of arrears, three interests must be balanced to achieve a fair result: the child's interest in receiving the appropriate amount of support to which they are entitled; the interest of the parties and the child in certainty and predictability; and the need for flexibility to ensure a just result in light of fluctuations in the payor's income. The child's interest in a fair standard of support commensurate with income is the core interest to which all rules and principles must yield. A fair result that adequately protects this interest will sometimes lean toward preserving certainty, and sometimes toward flexibility.

Any framework for decreased child support must also account for the informational asymmetry between the parties and the resulting need for full and frank disclosure of the payor's income. The child support system depends upon adequate, accurate and timely financial disclosure. Disclosure is the linchpin on which fair support depends and the relevant legal tests must encourage the timely provision of necessary information. In a system that ties support to payor income, it is the payor who knows and controls the information needed to calculate the appropriate amount of

support. The recipient does not have access to this information, except to the extent that the payor chooses or is made to share it. Thus, full and frank disclosure of income information by the payor lies at the foundation of the child support regime and is also a precondition to good faith negotiation. Without it, the parties cannot stand on the equal footing required to make informed decisions and resolve child support disputes outside of court. The payor's duty to disclose income information is a corollary of the legal obligation to pay support commensurate with income. Proactive disclosure of changes in income is the first step to ensuring that child support obligations are tied to payor income as it fluctuates.

The framework applicable to a payor's application for a retroactive decrease in support based on a material change in circumstances covers situations in which the payor has experienced a material drop in income that affected their ability to make payments as they came due. A payor seeking a downward retroactive change must first show a past change in circumstances. Most commonly, the retroactive variation claim will be based on a material change in income. The payor must have disclosed sufficient reliable evidence to determine when and how far their income fell, and to ascertain whether the change was significant, long lasting, and not one of choice. A payor's whose income was originally imputed because of an initial lack of disclosure cannot rely on their own late disclosure as a change in circumstances to ground a variation order.

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. 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 — it is not enough for the payor to merely broach the subject of a reduction of support with the recipient. The presumption that support will be reduced back to the date of effective notice strikes a fair balance between the certainty interests of the child and recipient and the payor’s interest in flexibility. While recipients should be aware that support varies with payor income, they are at an informational disadvantage. The recipient is entitled to rely on the court order or agreement in the absence of proper communication and disclosure by the payor showing a decrease in income that is lasting and genuine. While a drop in support can be presumed to have detrimental impacts on the child, ongoing communication and disclosure cushions those impacts and preserves the child’s best interests to the fullest extent possible. In the absence of effective notice of a drop in payor income, certainty and predictability for the child are to be prioritized over the payor’s interest in flexibility. The payor’s interest in flexibility comes to the forefront only once effective notice is given. The presumption provides payors with the certainty of knowing that any material change in income should be disclosed. The payor therefore has control over the date of notice and the date of retroactivity.

Even where the payor has given proper effective notice, the period of retroactivity is presumed to extend no further than three years before the date of formal notice. The presumptive three-year limit allows the parties time to negotiate but recognizes that the payor must commence proceedings in a timely manner if negotiations fail in order to protect the certainty interests of the child and recipient. The presumptive three-year limit is also justified by evidentiary concerns as the best evidence of income or ability to earn income is generally more readily available closer to the time that the income is earned. 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.

The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair in the circumstances of a particular case. The four factors set out in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231 — adapted to suit the retroactive decrease context — help the court reach a fair balancing of the three interests at play, namely the child’s interest in a fair standard of support, the payor’s interest in flexibility, and the interest of the child and recipient in certainty. The first factor is whether the payor has an understandable reason for the delay in giving effective notice or seeking relief in the courts. Judges are well placed to assess whether the reasons proffered for the delay explain the extent of the payor’s inactivity. Where the payor has such a reason, fairness may militate in favour of extending the date of retroactivity to a time before the date of effective notice or not

applying the three-year limit. The recipient's delay in enforcing arrears is irrelevant to the analysis. The second factor is the payor's conduct. The payor's efforts to disclose and communicate will often be prominent considerations. Genuine efforts to continue paying as much as the payor can will show good faith and a willingness to support the child. The circumstances of the child are the third factor. If the child has experienced hardship or is currently in need, this factor militates in favour of a shorter period of retroactivity. Another relevant consideration is whether the retroactive decrease would result in an order requiring the recipient to repay support to remedy an overpayment. In cases involving claims of overpayment, it will rarely be appropriate, given the recipient's absence of knowledge, to retroactively decrease support to a date before the recipient could have expected that child support payments received from the payor might need to be repaid at some future date. This approach protects the child's best interests and the recipient's certainty interest, while allowing payors who have overpaid to seek a retroactive decrease as long as the recipient has been given proper notice and disclosure. The final factor is hardship to the payor if the period of retroactivity is not lengthened beyond the presumptive date. The payor must adduce evidence to establish real facts supporting a finding of hardship. A showing of hardship will not automatically justify a departure from the presumed date of retroactivity. Hardship carries much less weight where brought on by the payor's own unreasonable failure to make proper disclosure and give notice to the recipient. Hardship to the payor must also be viewed in the context of hardship to the recipient and child if the court were to extend the period of the retroactive decrease.

Once a 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 statutory scheme that applies to the award. Full and complete disclosure is required to quantify the appropriate amount of support for the period of retroactivity, just as it would be when quantifying prospective support. The onus is on the payor to show the extent to which their income decreased during the period of retroactivity. If the payor fails to provide all relevant evidence required for the court to fully appreciate their true income during any part of the period of retroactivity, the court may draw an adverse inference against the payor. The payor must also make complete disclosure of their current financial circumstances if seeking a periodic payment plan or temporary suspension on hardship grounds.

In applications where the payor seeks rescission of arrears based on current inability to pay, the prior child support order or agreement corresponds with the payor's income and the arrears accurately reflect the amount of support that the payor should have paid. The only relevant factor is the payor's ongoing financial capacity and therefore the payor must provide sufficient reliable evidence to enable the court to assess their current and prospective financial circumstances. The payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that even with a flexible payment plan, they cannot and will not ever be able to pay the arrears. While the presumption in favour of enforcing arrears may be rebutted in unusual

circumstances, the standard should remain a stringent one. Rescission of arrears is a last resort in exceptional cases. The rule should not allow or encourage debtors to wait out their obligations or subvert statutory enforcement regimes that recognize child support arrears as debts to be taken seriously. If the court concludes that the payor's financial circumstances will give rise to difficulties paying down arrears, it ought first to consider whether hardship can be mitigated by ordering a temporary suspension, periodic payments, or other creative payment options.

In the instant case, the coming into force of the *Guidelines* did constitute a change in circumstances. While this legal change opens the door at the threshold step, it does not obviate the need for evidence of the father's earnings in the years since the *Guidelines* came into force. To the extent that he relies on drops in income, the father's deficient communication, inadequate evidence and insufficient disclosure are fatal to his application. It was not enough for the father to advise the mother that his income had fallen without taking any further steps, and since the father did not provide reasonable proof to allow the mother to meaningfully assess the situation, his request fell short of effective notice. As the father gave no effective notice before arrears stopped accumulating in 2012, he is not entitled to any retroactive decrease in his child support obligations. The application of the three-year rule would preclude any retroactive decrease, given that the children were no longer eligible for child support beginning in 2012 and he gave formal notice in 2016. Nor would the application of the *D.B.S.* factors support a longer period of retroactivity. The father made few, if any, voluntary payments and showed no willingness to support the children, who suffered

hardship as a result of his failure to fulfill his obligations. His conduct shows bad faith efforts to evade the enforcement of a court order. This case provides an example of the kind of inadequate disclosure that would justify a refusal to vary back to the date of formal notice. The father is not entitled to relief on the basis of a decrease in income. Further, the father's failure to adduce adequate evidence of his financial circumstances would be fatal to any application to rescind arrears. As such, he has not discharged his onus of showing that he will be unable to pay now or in the future even with a flexible payment plan.

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Applied: *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231; **considered:** *Corcios v. Burgos*, 2011 ONSC 3326; *Gray v. Rizzi*, 2016 ONCA 152, 129 O.R. (3d) 201; *Brown v. Brown*, 2010 NBCA 5, 353 N.B.R. (2d) 323; **referred to:** *D.B.S. v. S.R.G.*, 2005 ABCA 2, 361 A.R. 60; *Brear v. Brear*, 2019 ABCA 419, 97 Alta. L.R. (6th) 1; *MacMinn v. MacMinn* (1995), 174 A.R. 261; *Hunt v. Smolis-Hunt*, 2001 ABCA 229, 97 Alta. L.R. (3d) 238; *Paras v. Paras*, [1971] 1 O.R. 130; *Whitton v. Shippelt*, 2001 ABCA 307, 23 R.F.L. (5th) 437; *Michel v. Graydon*, 2020 SCC 24; *C. (M.) v. O. (J.)*, 2017 NBCA 15, 93 R.F.L. (7th) 59; *Goulding v. Keck*, 2014 ABCA 138, 42 R.F.L. (7th) 259; *Burchill v. Roberts*, 2013 BCCA 39, 41 B.C.L.R. (5th) 217; *Greene v. Greene*, 2010 BCCA 595, 12 B.C.L.R. (5th) 330; *Carlaw v. Carlaw*, 2009 NSSC 428, 299 N.S.R. (2d) 1; *Damphouse v. Damphouse*, 2020 ABQB 101; *Templeton v. Nuttall*, 2018 ONSC 815; *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R.

217; *Shamli v. Shamli*, 2004 CanLII 45956; *Hietanen v. Hietanen*, 2004 BCSC 306, 7 R.F.L. (6th) 67; *M.K.R. v. J.A.R.*, 2015 NBCA 73, 443 N.B.R. (2d) 313; *Francis v. Terry*, 2004 NSCA 118, 227 N.S.R. (2d) 99; *Roberts v. Roberts*, 2015 ONCA 450, 65 R.F.L. (7th) 6; *Leitch v. Novac*, 2020 ONCA 257, 150 O.R. (3d) 587; *Roseberry v. Roseberry*, 2015 ABQB 75, 13 Alta. L.R. (6th) 215; *Cunningham v. Seveny*, 2017 ABCA 4, 88 R.F.L. (7th) 1; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295; *Sawatzky v. Sawatzky*, 2018 MBCA 102, 428 D.L.R. (4th) 247; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Punzo v. Punzo*, 2016 ONCA 957, 90 R.F.L. (7th) 304; *Earle v. Earle*, 1999 CanLII 6914; *MacCarthy v. MacCarthy*, 2015 BCCA 496, 380 B.C.A.C. 102; *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775; *Tougher v. Tougher*, 1999 ABQB 552; *Trang v. Trang*, 2013 ONSC 1980, 29 R.F.L. (7th) 364; *M.W. v. K.T.*, 2019 NLSC 14, 19 R.F.L. (8th) 51; *Morwald-Benevides v. Benevides*, 2019 ONCA 1023, 148 O.R. (3d) 305; *MacEachern v. Bell*, 2019 ONSC 4720, 33 R.F.L. (8th) 68; *H.G.S. v. J.R.M.*, 2018 ABQB 892, 16 R.F.L. (8th) 404; *Hrynkow v. Gosse*, 2017 ABQB 675; *Hodges v. Hodges*, 2018 ABCA 197; *Brown v. Barber*, 2016 ABQB 687, 85 R.F.L. (7th) 401; *Janik v. Drotlef*, 2018 ONCJ 287; *Haisman v. Haisman* (1994), 157 A.R. 47, rev'g (1993), 7 Alta. L.R. (3d) 157; *DiFrancesco v. Couto* (2001), 56 O.R. (3d) 363; *Fleury v. Fleury*, 2009 ABCA 43, 448 A.R. 92; *Kinsella v. Mills*, 2020 ONSC 4785, 44 R.F.L. (8th) 1; *C.L.W. v. S.V.W.*, 2017 ABCA 121; *Blanchard v. Blanchard*, 2019 ABCA 53; *S.A.L. v. B.J.L.*, 2019 ABCA 350, 31 R.F.L. (8th) 299; *Semancik v. Saunders*, 2011 BCCA 264, 19 B.C.L.R. (5th) 219; *Mayotte v. Salthouse* (1997), 29 R.F.L. (4th) 38; *Heiden v. British Columbia (Director of Maintenance Enforcement)* (1995), 16 B.C.L.R. (3d) 48; *Walsh v. Walsh* (2004), 69 O.R. (3d) 577, with additional

reasons (2004), 6 R.F.L. (6th) 432; *St-Jules v. St-Jules*, 2012 NSCA 97, 321 N.S.R. (2d) 133; *Tremblay v. Daley*, 2012 ONCA 780, 23 R.F.L. (7th) 91; *Schmidt v. Schmidt* (1985), 46 R.F.L. (2d) 71.

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APPEAL from a judgment of the Ontario Court of Appeal (Brown, Roberts and Zarnett JJ.A.), 2019 ONCA 561, 26 R.F.L. (8th) 259, [2019] O.J. No. 3528 (QL), 2019 CarswellOnt 10845 (WL Can.), setting aside in part a decision of Hockin J., 2018 ONSC 6627. Appeal dismissed.

Richard Gordner and Michael Gordner, for the appellant.

Cheryl Goldhart and Surinder Multani, for the respondent.

Jennifer Klinck, for the interveners the West Coast Legal Education and Action Fund Association and the Women’s Legal Education and Action Fund Inc.

Ceilidh Joan Henderson, for the intervener Canada Without Poverty.

The judgment of the Court was delivered by

I. Overview

[1] This appeal centres on the appropriate framework for determining applications to retroactively decrease the amount of child support owing or forgive child support arrears under s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The amount of child support payable varies based on the payor parent's income, and income often fluctuates. As a result, applications to retroactively vary support are a common occurrence in courtrooms across the country. In an ideal world, when parents work together in the best interests of their children, they will provide full and accurate income information every year and recalculate the proper amount of support owing. When that does not occur, s. 17 of the *Divorce Act* allows a parent to ask the court to vary an existing order retroactively to align with the payor's actual income for the relevant period.

[2] In the present case, Mr. Colucci did not make any voluntary payments toward his child support obligations for over 16 years and now owes approximately \$170,000 in arrears. On application by Mr. Colucci, the motion judge retroactively decreased support, effectively reducing the arrears owing to \$41,642. The Court of Appeal for Ontario overturned that decision and ordered him to pay the full amount of the arrears.

[3] The divergent results in the lower courts highlight the confusion surrounding the applicable framework with respect to applications under s. 17 to retroactively reduce or rescind arrears, a confusion that has persisted since this Court’s landmark decision in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231. In that case, the Court considered the principles and competing interests underlying recipients’ applications for retroactive child support. The Court is now asked to clarify the principles which guide the exercise of judicial discretion where a payor seeks to retroactively decrease support to reflect a past reduction in income. The courts have and need wide discretion to vary child support orders to ensure the correct amount of child support is being paid and to adapt to the enormous diversity of individual circumstances that families face. There is, however, a pressing need for clear statements about what must be established before a court will retroactively decrease the amount owing under an existing child support order.

[4] The applicable framework must give effect to the objectives and provisions of the *Federal Child Support Guidelines*, SOR/97-175 (“*Guidelines*”), particularly the core objective of safeguarding the child’s right to a “fair standard of support” (s. 1). Retroactive variation applications also require courts to weigh the certainty and predictability provided by an existing court order against the need for flexibility in a system that ties support to fluctuating payor income. The framework set out below balances these interests in a way that incentivizes payment of the right amount of child support when it is due and the timely disclosure of financial information — the linchpin of a just and effective family law system. Rules which create perverse incentives to

ignore or postpone parental support obligations are to be firmly rejected in favour of legal standards designed with the fundamental purposes of child support in mind.

[5] The controversy between the parties centres on whether the framework for retroactive decreases under s. 17 should reflect the flexible and discretionary approach applied to retroactive increases in *D.B.S.* With certain modifications, I conclude that it should. A payor who has established a past decrease in income is not automatically entitled to a retroactive decrease of support back to the date of the decrease, as suggested by the motion judge in this case. The overall decision is a discretionary one.

[6] As I will explain further, the court's discretion is structured by a presumption in favour of retroactively decreasing support to the date the payor gave the recipient effective notice of an intention to seek a downward adjustment of the child support obligation, up to three years before formal notice is given of an application to vary under s. 17. This presumption is triggered as soon as a past material change in circumstances is established — it is no longer necessary to first ask whether retroactive relief is generally appropriate before moving to the question of how far back retroactive relief should extend. Discretionary factors parallel to those considered in *D.B.S.* may justify departing from the presumptive date in favour of a longer or shorter period of retroactivity. For consistency, this presumption-based approach should be mirrored where the recipient seeks a retroactive increase. Once a past material change in income is established, a presumption is triggered in favour of retroactively increasing support

to a certain date, with the *D.B.S.* factors guiding the court's exercise of discretion in deciding whether to depart from that date.

[7] Given the informational asymmetry between the parties, a payor's success in obtaining a retroactive decrease will depend largely on the payor's financial disclosure and communication. Indeed, effective notice in this context is only "effective" when there has been disclosure of the changed financial circumstances. At the stage of considering the *D.B.S.* factors, disclosure will once again be a key consideration in assessing whether the payor's conduct operates to shorten or lengthen the presumptive period of retroactivity.

[8] In the courts below, it appears Mr. Colucci also sought rescission of all or part of his arrears on the basis of a current and ongoing inability to pay. Applications of this kind require a different analysis. In these cases, the court order or agreement reflects the correct amount of child support owing, but the payor has failed to keep up with payments as they fell due. The payor subsequently asks the court to forgive all or part of the accrued debt because of present financial hardship. When the arrears reflect the amount that ought to have been paid, the payor cannot rely on a past decrease in income to explain why there are arrears. In these cases, there is a presumption against rescinding any part of the arrears, as courts have a range of other remedial options. Rescission sits at the far end of the range because it wipes out a legally recognized debt. As such, rescission is only appropriate in exceptional circumstances. Such circumstances may arise where full disclosure of the payor's financial circumstances

shows that the payor is unable to pay the arrears and will be unable to pay in the future, even with a flexible payment plan.

[9] In these reasons, I will set out the foundational principles established by the *Guidelines* and *D.B.S.*, followed by a discussion of the centrality of financial disclosure to the child support regime. Against this backdrop, I will explain the framework courts ought to apply to determine when to retroactively reduce child support under s. 17 of the *Divorce Act*. In doing so, I will reconcile the divergent lines of authority on the applicability of the contextual *D.B.S.* factors. Finally, I will set out the analysis that applies where the payor seeks rescission of arrears based on current inability to pay rather than a past change in circumstances. Applying the framework to the facts of this case, there is no reason for this Court to intervene to reduce or forgive the debt accrued under the existing child support order. I would dismiss Mr. Colucci's appeal.

II. Background

[10] In 2016, Mr. Colucci applied to retroactively reduce child support and rescind arrears totalling approximately \$170,000 at the time of the application.

[11] The parties were married in 1983 and divorced in 1996. The order of McMahon J., dated May 13, 1996 ("Divorce Order"), made on consent, provided that Ms. Colucci would have sole custody of the parties' two daughters, aged 8 and 6 at the time, and required Mr. Colucci to pay child support of \$115 per week per child

(indexed) until they were no longer “child[ren] of the marriage”. The record does not show what Mr. Colucci’s income was at the time of the order, but the amount of child support was negotiated taking into account that Ms. Colucci forewent any claim to spousal support. One year after the order was made, the *Guidelines* came into force.

[12] In April 1998, Mr. Colucci contacted Ms. Colucci through counsel to request a reduction in his child support obligations on the basis of a decrease in his income. He provided no financial disclosure to support his request and the parties reached no agreement at that time. Mr. Colucci’s child support obligations ended in 2012, when the daughters were no longer children of the marriage. After that time, no further support payments accrued. Until he brought this application in 2016, Mr. Colucci took no further steps to vary the Divorce Order.

[13] From 1998 to 2012, the period during which arrears accrued, Mr. Colucci was absent from the children’s lives and his whereabouts were unknown to Ms. Colucci and the children. He made no voluntary child support payments and the Family Responsibility Office (“FRO”) was only able to collect limited sums through enforcement mechanisms from 1998 to 2016. Enforcement action taken by the FRO includes garnishment of Mr. Colucci’s Workplace Safety and Insurance Board payments and federal income tax refunds, the suspension of his driver’s license and Canadian passport, the issuance of a writ of seizure and sale, and reporting to the credit bureau.

[14] Mr. Colucci commenced a motion to change in November 2016. He sought orders retroactively varying child support to the date the *Guidelines* came into force (May 1, 1997) and “[f]ixing the arrears of child support if any and determining the payments on those arrears in accordance with [his] income” (A.R., vol. II, at p. 4). He also asked that “any arrears of support . . . not only be fixed but that the payments on those arrears be fixed in accordance with [his] ability to pay” (p. 10).

[15] In the course of these proceedings, Mr. Colucci eventually disclosed where he had been all these years. He said he moved to the United States in 2000 and worked there until 2005. He claims he earned approximately USD 25,000 annually during those years. In 2005, he returned to Italy to care for his mother until her death in 2008. From 2005 to 2008, he states that he made between €3,000 and €4,000 per year, with the exception of 2007, when he made €19,000. Soon after his mother’s death, he received an inheritance of €15,000. He said he lived on these funds until 2016, when he returned to Canada. In 2016, Mr. Colucci received an additional €15,000 from the sale of his mother’s property. He is entitled to a further €15,000 from the sale, which he was scheduled to receive on August 31, 2019.

[16] Mr. Colucci provided little documentation or financial disclosure to support these claims. He relied largely on unsubstantiated assertions in his affidavit about where he worked and how much he was paid, making it extremely difficult to accurately determine his income for the relevant years. Mr. Colucci claims he is unable to provide tax returns for the years 2000 to 2015. He says he cannot obtain tax returns

from the Internal Revenue Service for the years he worked in the United States, in part because “[h]e does not have a Canadian passport . . . and may be denied re-entry” if he attends in person to obtain the returns (A.R., vol. II, at p. 59). He claims he worked for cash only between 2007 and 2015 and “did not file any income tax returns” (*ibid.*). Mr. Colucci offers no other explanation for the absence of tax returns for these years. He explained that he did not file a tax return in 2017 because he did not want the authorities to garnish his tax refund.

III. Judicial History

A. *Ontario Superior Court of Justice, 2018 ONSC 6627 (Hockin J.)*

[17] In brief reasons, the motion judge held that a material change in circumstances occurred when the *Guidelines* were adopted in May 1997, entitling Mr. Colucci to a retroactive adjustment of his child support obligation from that date forward. The motion judge relied on principles from *Corcios v. Burgos*, 2011 ONSC 3326, at para. 40 (CanLII), to impute income to Mr. Colucci based on Ontario’s minimum wage for the two years before he went to the U.S. and six of the years he spent in Italy. However, the motion judge did not apply the factors set out in *Corcios* for assessing whether a reduction of arrears is warranted.

[18] After finding a material change in circumstances, the motion judge simply completed a mathematical calculation. Based on the income attributed to Mr. Colucci for the years 1997 to 2012, the motion judge retroactively reduced Mr. Colucci’s child

support obligations, effectively reducing the arrears owing from approximately \$170,000 to \$41,642. The motion judge found that this variation was warranted in order to bring the child support arrears in line with the principles stemming from the *Guidelines*, in particular the table amounts (which were implemented one year after the Divorce Order), and to reflect changes in Mr. Colucci's drop in income over the period when the arrears were accruing (paras. 14-15).

[19] Prospective payments against the arrears were fixed at \$425 per month based on Mr. Colucci's asserted current income. Mr. Colucci was also ordered to pay Ms. Colucci €15,000 upon receiving the funds from the sale of his mother's house. He was scheduled to receive the funds on August 31, 2019. As of the date of the hearing before this Court, this amount had yet to be paid to Ms. Colucci.

[20] The motion judge made no reference to the *D.B.S.* factors, referring to *D.B.S.* only to note that "the so-called [three-year] rule does not apply" (para. 20). The "three-year rule" is a presumption established in *D.B.S.* that a retroactive increase in support should extend no more than three years before the recipient gave formal notice of the application to vary under s. 17 of the *Divorce Act*. The motion judge added that

[t]his is not a retroactive support order but a case where arrears have accumulated and require adjustment. In any event, it would be wrong to limit the calculation in view of [Mr. Colucci's] delinquency. [para. 20]

B. *Court of Appeal, 2019 ONCA 561, 26 R.F.L. (8th) 259 (Brown, Roberts and Zarnett J.J.A.)*

[21] Ms. Colucci appealed the motion judge’s order on three grounds: (1) the motion judge failed to apply the principles on retroactive variation from *D.B.S.* and *Gray v. Rizzi*, 2016 ONCA 152, 129 O.R. (3d) 201, in order to evaluate whether it was appropriate to reduce the arrears in this case; (2) the motion judge failed to apply the three-year rule; and (3) the motion judge incorrectly imputed income to Mr. Colucci (para. 13).

[22] Speaking for the court, Roberts J.A. found that, while the enactment of the *Guidelines* constituted a change in circumstances, the motion judge erred in concluding that Mr. Colucci was entitled to a retroactive variation extending back to 1997 “as of right” (para. 14). The motion judge also erred in distinguishing *D.B.S.* and failing to follow *Gray*. Roberts J.A. stated:

While [*D.B.S.*] involved an application for a retroactive increase in support, the factors articulated by the Supreme Court were intended to serve as general principles applicable, with appropriate adaptation, to retroactive support variations that would decrease the quantum of child support. [para. 15]

[23] In line with these remarks, the Ontario Court of Appeal in *Gray* adapted the four *D.B.S.* factors to applications to reduce or rescind child support arrears, along with the rule that variation should extend to the date of effective notice unless that date is more than three years before formal notice (C.A. reasons, at paras. 15-18).

[24] Roberts J.A. noted that, given Mr. Colucci’s failure to make full and accurate financial disclosure, the court was unable to determine whether he sought

relief based on a current inability to pay the arrears or a change in financial circumstances that affected his ability to meet his obligations as they came due. However, the outcome is the same in either scenario (para. 28).

[25] With respect to the second scenario of changed circumstances based on decreased income, the motion judge ought to have applied the *Corcios/Gray* factors (C.A. reasons, at paras. 22-23). Applying those factors, the Court of Appeal found that Mr. Colucci failed to “discharg[e] his onus to explain his significant failure to make support payments and his extraordinary delay in proceeding with his application to vary” (para. 31). His blameworthy conduct as a “recalcitrant payor” (para. 30) and in failing to produce documents and misrepresenting his mother’s estate, along with hardship experienced by his daughters (including considerable student debt), militated against varying the child support order more than three years from the date of effective notice, that is November 17, 2016, the commencement of the motion to change (paras. 27-32). As this date does not affect the amount of the accumulated arrears to 2012, no reduction in arrears was allowed (paras. 34-36).

[26] Further, the Court of Appeal noted that Mr. Colucci was in breach of his ongoing requirement to make full documentary and financial disclosure (at para. 32) and had failed to produce any reliable evidence of his inability to pay while arrears were accumulating (para. 31).

IV. Issues

[27] This appeal raises two questions: first, what is the appropriate framework for deciding applications to retroactively reduce child support under s. 17 of the *Divorce Act*, and second, what is the appropriate framework where the payor parent seeks to rescind child support arrears under s. 17 based on current and ongoing inability to pay?

V. Analysis

[28] While children should be shielded from the economic consequences of divorce to the fullest extent possible, the federal child support regime contemplates that the family as a whole — including the child — will share the rising and falling fortunes of the payor parent, just as they would have before the separation. Because child support under the *Divorce Act* is tied to payor income and income tends to fluctuate, a child support order or agreement reflects a snapshot in time and is never final (*D.B.S.*, at para. 64; *D.B.S. v. S.R.G.*, 2005 ABCA 2, 361 A.R. 60 (“*D.B.S. (C.A.)*”), at para. 100; *Brear v. Brear*, 2019 ABCA 419, 97 Alta. L.R. (6th) 1, at para. 20, per Pentelchuk J.A.). Various legal, administrative and consent-based mechanisms exist to periodically change child support orders to bring them in line with financial realities.

[29] Section 17 of the *Divorce Act* is one such mechanism. It provides that, on application, a court “may make an order varying, rescinding or suspending, retroactively or prospectively, a support order or any provision of one” (s. 17(1)(a)). As the wording indicates, s. 17 confers wide discretion on the judge, who “may” — but

is not required to — vary, rescind, or suspend an order into the future, the past, or both. The *Divorce Act* expressly confers such broad powers because wide judicial discretion is necessary to respond to the multiplicity of factual situations produced by human behaviour.

[30] Experience teaches that there are three main categories of claims for retroactive relief under s. 17, each with its own particular set of considerations:

1. The recipient seeks to retroactively increase support because of a past change in circumstances, with the change usually being an increase in the payor's income. In such circumstances, the existing order or agreement underestimates the payor's income.
2. The payor seeks a retroactive decrease in support because of a past change in circumstances. The paradigmatic change is a drop in income that impacts the payor's ability to make payments as they come due. In such circumstances, the existing order or agreement overestimates the payor's income.
3. The payor seeks to rescind or suspend arrears because of current and future inability to pay rather than a past change in circumstances.

[31] Mr. Colucci seeks two forms of relief under s. 17. He invokes the second category when he asks this Court to go back to the date the *Guidelines* came into force in 1997 and reduce his support obligation to correspond to what he says his income was for each of the years during which child support was payable, up until 2012. In his motion to change and before the Court of Appeal, it appears that he also sought to rescind all or some of what he ought to have paid because he says he is unable to pay even a reduced amount. This falls within the third category of cases.

[32] In this section, I start by setting out the basic principles of child support law established in the *Guidelines* and *D.B.S.*, which must underpin and inform the courts' approach to variation of child support and rescission of arrears. It will become clear from this discussion that the linchpin holding the child support regime together is financial disclosure. As such, before turning to the applicable framework under s. 17, I will elaborate on the importance of disclosure, a theme that will run throughout the analysis that follows.

A. *Foundational Principles in the Guidelines and D.B.S.*

[33] Child support under the *Divorce Act* is determined in accordance with the *Guidelines*, which are legally binding as subordinate legislation enacted pursuant to s. 26.1 of the *Divorce Act*. The *Guidelines* establish the goals, principles and provisions which govern all child support applications and determinations under the *Divorce Act*. Section 1 of the *Guidelines* sets out four overarching objectives that must be borne in mind in any child support proceeding in which the *Guidelines* apply:

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

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

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

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

[34] The enactment of the *Guidelines* in 1997 marked a paradigm shift in Canadian child support law away from a need-based approach to one which clearly established the child's entitlement to support commensurate with the payor's income (*D.B.S.*, at paras. 42-45). The *Guidelines* rest on the principle that "spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation" (*Divorce Act*, s. 26.1(2)). Section 3 of the *Guidelines* provides that the amount of child support is presumptively determined in accordance with the applicable table in Schedule I. Putting aside shared custody arrangements, the tables generally allow parents and courts to calculate the amount of child support owing based on just two numbers: the payor's income, and the number of children to be supported. (For s. 7 expenses under the *Guidelines*, the income of the recipient is also relevant.) The amount of child support is determined based solely on parental income and not the child's needs (unless the payor's income is over \$150,000) (s. 4).

[35] All provinces and territories have an equivalent to the *Guidelines* or have adopted the federal *Guidelines* for the purpose of determining child support under provincial family law legislation. Of course, the provinces are free to depart from the approach in the federal *Guidelines*, as child support that is not incidental to divorce falls within provincial competence (*D.B.S.*, at paras. 49 and 53).

[36] Building on the sea change initiated by the *Guidelines*, *D.B.S.* was a landmark decision in which the Court considered four cases involving applications by recipient parents for retroactive child support. The Court confirmed the long-established principles that support is the right of the child and that parents have a financial obligation to their children arising at birth and continuing after separation (*D.B.S.*, at paras. 37-38; see also *MacMinn v. MacMinn* (1995), 174 A.R. 261 (C.A.), at para. 15; *Hunt v. Smolis-Hunt*, 2001 ABCA 229, 97 Alta. L.R. (3d) 238, at para. 17; *Paras v. Paras*, [1971] 1 O.R. 130 (C.A.), at p. 134). The Court also explained that, in the *Guidelines* era, the payor parent is always under a free-standing legal obligation — independent of any court order — to pay child support commensurate with income (*D.B.S.*, at para. 68).

[37] Prior to *D.B.S.*, some courts had yet to move away from the judicial reluctance to award retroactive support that characterized the pre-*Guidelines* era. In order to obtain retroactive support capturing the period before formal proceedings were commenced, the recipient parent generally had to show exceptional circumstances or, at the very least, “appropriate circumstances” (C. Davies, “Retroactive Child Support:

the Alberta Trilogy” (2005), 24 *C.F.L.Q.* 1, at p. 8; *Whitton v. Shippelt*, 2001 ABCA 307, 23 R.F.L. (5th) 437, at para. 19). In *D.B.S.*, the Court took a decisive step into the *Guidelines* era by emphasizing that retroactive child support awards “cannot simply be regarded as exceptional orders to be made in exceptional circumstances” (para. 5). When the payor’s income rises but they continue to pay in accordance with an existing court order, they fall short of meeting the free-standing legal obligation to pay support commensurate with income. *D.B.S.* confirmed that a retroactive increase of support in such circumstances is therefore “not truly retroactive”; rather, it “enforce[s] an obligation that should have been fulfilled already” (paras. 67-68; see also para. 69).

[38] The majority in *D.B.S.* found that a retroactive increase in support will not always be appropriate (para. 95). The court must exercise its discretion to determine whether a retroactive award should be given at all, and how far back it should extend. Justice Bastarache set out four factors to guide the courts’ discretion: (a) the recipient’s delay in seeking retroactive support; (b) the payor’s conduct; (c) the child’s circumstances; and (d) hardship entailed by a retroactive award. These factors were recently considered by this Court in *Michel v. Graydon*, 2020 SCC 24 (para. 29, per Brown J.; paras. 111-26, per Martin J.).

[39] Where a retroactive increase in child support is appropriate, the majority in *D.B.S.* suggested that the date of retroactivity should generally be the date of “effective notice” (para. 118). “Effective notice” in this context was said to simply require the recipient to “broac[h]” the subject of an increase in child support

(para. 121). The majority of the Court noted, however, that recipients should be encouraged to move discussions forward after giving effective notice. To that end, the majority concluded that retroactive awards should generally extend no further than three years before the date of formal notice. This is known as the “three-year rule”, although it is a presumption only.

[40] In a significant caveat to these general rules, Justice Bastarache added that the date of the payor’s increase in income may sometimes be a more appropriate date of retroactivity, particularly where the payor engages in “blameworthy conduct” (para. 124). Such conduct includes the payor’s failure to disclose material increases in income. At para. 124, Bastarache J. said:

Not disclosing a material change in circumstances — including an increase in income that one would expect to alter the amount of child support payable — is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

[41] Since *D.B.S.*, various courts have accepted and acted upon the principle that failing to disclose an increase in income is blameworthy conduct justifying variation to the date of the change (*C. (M.) v. O. (J.)*, 2017 NBCA 15, 93 R.F.L. (7th) 59, at para. 37; *Goulding v. Keck*, 2014 ABCA 138, 42 R.F.L. (7th) 259, at para. 44; *Brear*, at para. 74, per Pentelechuk J.A.; *Burchill v. Roberts*, 2013 BCCA 39, 41 B.C.L.R. (5th) 217, at paras. 29-30; *Greene v. Greene*, 2010 BCCA 595, 12 B.C.L.R. (5th) 330, at para. 73; *Carlaw v. Carlaw*, 2009 NSSC 428, 299 N.S.R. (2d) 1, at

paras. 23-25; *Damphouse v. Damphouse*, 2020 ABQB 101, at para. 72 (CanLII). “Blameworthy conduct”, as that concept has developed in the cases, does not simply extend to the most egregious cases of deception or intentional evasion, like this case. It may also extend to cases of mere passivity and “taking the path of least resistance” (*Burchill*, at para. 30).

[42] Most recently, in *Michel*, my colleague Brown J. (speaking for the Court on this point) confirmed that “the date of effective notice is not relevant when a payor parent has engaged in blameworthy conduct (irrespective of the degree of blameworthiness)”, including failure to disclose material information (para. 36; see also para. 33). Payor parents are “subject to a duty of full and honest disclosure” (para. 33). Where the payor fails to comply with this duty and leaves the recipient unaware of increases in income, a retroactive award “will commonly be appropriate” because non-disclosure “eliminates any need to protect [the payor’s] interest in the certainty of his [or her] child support obligations” (paras. 32 and 34).

[43] In practice, then, the date of retroactivity is frequently adjusted to align with the date of the material increase in income, despite the “general rule” of varying to the date of effective notice in *D.B.S.* (para. 118). It would be “untenable to suggest that a parent who fails to provide financial disclosure can assume that the amount being provided is adequate because the recipient parent has not brought a court application” (*Brear*, at para. 74, per Pentelechuk J.A.). Further, even where the payor has disclosed

increases in income, the *D.B.S.* factors may support extending a retroactive increase of support back to the time of the change in income.

[44] In settling on the date of effective notice as the “general rule”, *D.B.S.* represented a kind of compromise between the pre-*Guidelines* world — with its payor-focused concepts of *laches* and hoarding — and the child-centered era of the *Guidelines*. In the pre-*Guidelines* era, notice was considered important because it was viewed as unfair to surprise payors with a retroactive award when they could not know the extent of their child support obligation until it was determined by the court (*D.B.S.* (C.A.), at para. 79). After the *Guidelines* became law, parents knew about the existence and extent of their obligations, but courts continued to show reluctance to grant retroactive awards and pre-*Guidelines* concepts like notice and *laches* retained some influence. This background helps explain the majority’s wariness in *D.B.S.* about changing the rules for payors mid-stream. Since *D.B.S.*, however, expectations of and for payors have evolved. The *Guidelines* and s. 17 of the *Divorce Act* are clear and *D.B.S.* itself gave notice to payor parents that they must pay more support as income rises and that this obligation may be enforced after the fact.

[45] In light of the existing approach to blameworthy conduct and the pervasiveness of non-disclosure, it may be necessary in a future case to revisit the presumptive date of retroactivity in cases where the recipient seeks a retroactive variation to reflect increases in the payor’s income. A presumption in favour of varying support to the date of the increase would better reflect the recipient’s informational

disadvantage and remove any incentive for payors to withhold disclosure or underpay support in the hopes that the *status quo* will be maintained. Such a presumption would accord with other core principles of child support and reinforce that payors share the burden of ensuring the child receives the appropriate amount of support.

[46] In *D.B.S.*, the Court also drew attention to three interests which must be balanced to achieve a fair result in retroactive variation cases: first and foremost, the child's interest in receiving the appropriate amount of support to which they are entitled; second, the interest of the parties and the child in certainty and predictability; and third, the need for flexibility to ensure a just result in light of fluctuations in payor income (*D.B.S.*, at paras. 2, 74 and 96; see also *Templeton v. Nuttall*, 2018 ONSC 815, at para. 43 (CanLII); *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217, at para. 33). The child's interest in a fair standard of support commensurate with income is the core interest to which all rules and principles must yield. A fair result that adequately protects this interest will sometimes lean toward preserving certainty, and sometimes toward flexibility.

[47] In addition to the fundamental principles established in the *Guidelines* and *D.B.S.*, any framework for decreased child support must account for the informational asymmetry between the parties and the resulting need for full and frank disclosure of the payor's income. It is to this point which I now turn.

B. *Encouraging Timely and Full Disclosure*

[48] After applying the *Guidelines* and *D.B.S.* for many years, it has become clear just how much the child support system, including s. 17 variations, depends upon adequate, accurate and timely financial disclosure. The centrality of disclosure in child support matters has been recognized in a rich body of jurisprudence both before and after *D.B.S.* (see, e.g., *Shamli v. Shamli*, 2004 CanLII 45956 (Ont. S.C.J.), at para. 8; *Hietanen v. Hietanen*, 2004 BCSC 306, 7 R.F.L. (6th) 67, at para. 11; *Gray*, at para. 63; *M.K.R. v. J.A.R.*, 2015 NBCA 73, 443 N.B.R. (2d) 313, at paras. 14 and 20; *Francis v. Terry*, 2004 NSCA 118, 227 N.S.R. (2d) 99, at para. 9; *Goulding*, at para. 44). Simply stated, disclosure is the linchpin on which fair child support depends and the relevant legal tests must encourage the timely provision of necessary information.

[49] The pivotal role of disclosure comes as no surprise since the premise underlying the *Guidelines* “is that the support obligation itself should fluctuate with the payor parent’s income” (*D.B.S.*, at para. 45). The structure of the *Guidelines* thus creates an informational asymmetry between the parties. In a system that ties support to payor income, it is the payor who knows and controls the information needed to calculate the appropriate amount of support. The recipient does not have access to this information, except to the extent that the payor chooses or is made to share it. It would thus be illogical, unfair and contrary to the child’s best interests to make the recipient solely responsible for policing the payor’s ongoing compliance with their support obligation.

[50] This is why frank disclosure of income information by the payor lies at the foundation of the child support regime. In *Roberts v. Roberts*, 2015 ONCA 450, 65 R.F.L. (7th) 6, the Court of Appeal described the duty to disclose financial information as “[t]he most basic obligation in family law” (para. 11). A payor’s failure to make timely, proactive and full disclosure undermines the policies underlying the family law regime and “the processes that have been carefully designed to achieve those policy goals” (*Leitch v. Novac*, 2020 ONCA 257, 150 O.R. (3d) 587, at para. 44). Without proper disclosure, the system simply cannot function and the objective of establishing a fair standard of support for children that ensures they benefit from the means of both parents will be out of reach (*Michel*, at para. 32, per Brown J.; *Brear*, at para. 19, per Pentelechuk J.A.).

[51] Full and frank disclosure is also a precondition to good faith negotiation. Without it, the parties cannot stand on the equal footing required to make informed decisions and resolve child support disputes outside of court. Promoting proactive payor disclosure thus advances the objectives — found in s. 1 of the *Guidelines* — of reducing conflict between the parties and encouraging settlement.

[52] In line with these realities, courts have increasingly recognized that the payor’s duty to disclose income information is a corollary of the legal obligation to pay support commensurate with income (*Brear*, at paras. 19 and 69, per Pentelechuk J.A.; *Roseberry v. Roseberry*, 2015 ABQB 75, 13 Alta. L.R. (6th) 215, at para. 63; *Cunningham v. Seveny*, 2017 ABCA 4, 88 R.F.L. (7th) 1, at paras. 21 and 26). As

explained by Brown J., speaking for the full Court in *Michel*, payor parents “are subject to a duty of full and honest disclosure — a duty comparable to that arising in matrimonial negotiations” (para. 33, referencing *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at paras. 47-49). Courts and legislatures have also implemented various mechanisms to incentivize and even require regular ongoing disclosure of updated income information by the payor, along with tools to move proceedings forward in the face of non-disclosure. Those mechanisms include imputing income to payors who have failed to make adequate disclosure, striking pleadings, drawing adverse inferences, and awarding costs. By encouraging timely disclosure, these tools reduce the likelihood that the recipient will be forced to apply to court multiple times to secure disclosure.

[53] Following *D.B.S.*, lawyers and courts also began implementing “proactive strategies to avoid tedious and conflicting arguments related to ‘asking versus telling’ about income increases”, such as the use of mandatory annual disclosure obligations in child support orders in Alberta and Ontario (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, at p. 72; see also *Sawatzky v. Sawatzky*, 2018 MBCA 102, 428 D.L.R. (4th) 247, at para. 58; *Roseberry*, at para. 64). In Ontario, the legislature has echoed this trend by amending the guidelines to include a requirement that payors disclose income information annually without the requirement of a request from the recipient (*Child Support Guidelines*, O. Reg. 391/97, s. 24.1(1)). Similarly, in British Columbia, s. 5(1)

of the *Family Law Act*, S.B.C. 2011, c. 25, imposes a general duty to disclose “full and true information” for the purpose of resolving family law disputes.

[54] In keeping with these developments, the exercise of judicial discretion and the setting of legal standards under s. 17 of the *Divorce Act* must encourage financial disclosure and in no way reward those who improperly withhold, hide or misrepresent information they ought to have shared. Proactive disclosure of changes in income is the first step to ensuring that child support obligations are tied to payor income as it fluctuates. Inadequate disclosure breeds “a backlog of [retroactive] support applications” (*Roseberry*, at para. 61). Indeed, with full, frank and regular disclosure, long-term arrears — such as Mr. Colucci’s — should be rare.

C. *The Applicable Framework*

[55] In building a framework for the variation of child support and the rescission of arrears, judicial discretion must be structured to safeguard the child’s interest in receiving the appropriate amount of support to which they are entitled. Alongside this paramount interest, there must be a fair balancing of certainty and flexibility to reach a just result in light of fluctuations in payor income and the particular circumstances of each case. In addition, the framework under s. 17 must promote the timely disclosure of accurate information, which in turn encourages equal bargaining and fair settlements, as the payor parent “holds the cards” when it comes to child support (*Michel*, at para. 32, per Brown J.). Above all, “the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it. Any

incentives for payor parents to be deficient in meeting their obligations should be eliminated” (*D.B.S.*, at para. 4). Payors should not be better off from a legal standpoint if they do not pay the child support the law says they owe. Nor should payors receive any sort of benefit or advantage from failing to disclose their real financial situation or providing disclosure on the eve of the hearing.

[56] Based on these guiding principles, I will first set out the framework applicable to a payor’s application for a retroactive decrease in support based on a material change in circumstances. I will then explain the applicable framework where the payor seeks to rescind arrears based on present inability to pay rather than a past change in circumstances.

(1) Retroactive Decreases Where The Prior Order Overestimates Payor Income

[57] This category of cases covers situations in which the payor has experienced a material drop in income that affected their ability to make payments as they came due. The payor will argue that the recipient was in fact owed a lower amount under the *Guidelines* than the amount payable under a pre-existing order or agreement, thus necessitating a recalculation of the amount owing for past years based on the payor’s actual income, the number of children to be supported in those years, and the table amounts. Decreased income is an all too common and unfortunate reality for many families. Any framework developed to accommodate retroactive variations of child support in response to decreased payor income must deal fairly with a wide range of

factual situations, from payors who diligently paid the proper amount until they lost their employment or otherwise fell on hard times, to those who have made little effort to meet their responsibilities and are absent, intentionally underemployed or persistently delinquent.

[58] In this section, I first discuss the threshold the payor must meet to access a retroactive decrease under s. 17, namely the requirement of showing a change in circumstances that would justify varying the amount of child support. I then reconcile the divergent lines of authority about what happens when this threshold is met, settling on a presumption-based approach that leaves space for judicial discretion structured by the *D.B.S.* factors. Under this approach, once the payor has met the threshold of showing a change in circumstances, a presumption is triggered in favour of varying support back to the date of effective notice, up to three years before formal notice. I explain what effective notice means and why it is an appropriate presumptive date in this category of case. I then discuss how the *D.B.S.* factors can be adapted to retroactive decreases in deciding whether to depart from the presumptive date of retroactivity. Finally, I address quantum, the final stage of the analysis, which requires the court to calculate the proper amount of support in accordance with the *Guidelines*.

(a) *The Threshold Requirement of a Change in Circumstances*

[59] Like any applicant seeking a retroactive variation under s. 17 of the *Divorce Act*, a payor seeking a downward retroactive change must first show a past change in circumstances, as required under s. 17(4). Section 14 of the *Guidelines* lists

situations constituting a change in circumstances for the purpose of s. 17(4) of the *Divorce Act*, including the coming into force of the *Guidelines* (s. 14(c)). A change in circumstances could also include a change that, if known at the time, would probably have resulted in different terms, such as a drop in income (*Guidelines*, s. 14(a); *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 688; *Gray*, at para. 39).

[60] The onus is on the party seeking a retroactive decrease to show a change in circumstances (*Punzo v. Punzo*, 2016 ONCA 957, 90 R.F.L. (7th) 304, at para. 26; *Templeton*, at para. 33). In some cases that may be relatively straightforward: for example, establishing that the children are no longer legally entitled to support because they are no longer children of the marriage.

[61] Most commonly, the retroactive variation claim will be based on a material change in income. To meet the threshold, a decrease in income must be significant and have some degree of continuity, and it must be real and not one of choice (*Willick*, at pp. 687-88; *Earle v. Earle*, 1999 CanLII 6914 (B.C.S.C.), at para. 27; *MacCarthy v. MacCarthy*, 2015 BCCA 496, 380 B.C.A.C. 102, at para. 58, citing *Earle*; *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 33; *Gray*, at para. 39; *Brown v. Brown*, 2010 NBCA 5, 353 N.B.R. (2d) 323 (“*Brown*”), at para. 2; *Templeton*, at para. 35). Trivial or short-lived changes are insufficient to justify a variation (*Templeton*, at para. 35). In this way, the threshold inquiry preserves some sense of certainty and predictability for the parties and the child, while allowing some flexibility in response to changes in the payor’s income.

[62] The payor must have disclosed sufficient reliable evidence for the court to determine when and how far their income fell, and to ascertain whether the change was significant, long lasting, and not one of choice. A decision to retroactively decrease support can only be made based on “reliable, accurate and complete information” (*Earle*, at para. 28). The payor cannot ask the court to make findings on income that are contrary to the recipient’s interests “while at the same time shielding information that is relevant to the determination of their income behind a protective wall” (*Templeton*, at para. 67; see also *Tougher v. Tougher*, 1999 ABQB 552, at paras. 14-15 (CanLII); *Terry*, at para. 9).

[63] Of course, a payor whose income was originally imputed because of an initial lack of disclosure cannot later claim that a change in circumstances occurs when he or she subsequently produces proper documentation showing the imputation was higher than the table amount for their actual income. The payor cannot rely on their own late disclosure as a change in circumstances to ground a variation order (*Gray*, at paras. 33-34). This would “defeat the purpose of imputing income in the first place” and act as “a disincentive for payors to participate in the initial court process” (*Trang v. Trang*, 2013 ONSC 1980, 29 R.F.L. (7th) 364, at para. 53).

(b) *Reconciling Divergent Authorities on the Application of D.B.S.*

[64] Assuming the threshold of a change in circumstances is met, the parties disagree on two crucial questions: how to decide whether retroactive relief should be

granted in the first place, and how far back a court should go when varying a previously ordered amount.

[65] To answer these questions, each party relies on one of two divergent lines of authority in the post-*D.B.S.* jurisprudence concerning retroactive decreases in child support. Mr. Colucci says the payor who satisfies the threshold is entitled to a retroactive decrease without any consideration of contextual factors. This reflects the approach taken in *Brown*. In *Brown*, the New Brunswick Court of Appeal concluded that *D.B.S.* does not apply to arrears at all, given Bastarache J.’s comments at paras. 1 and 98 of *D.B.S.* (discussed below). Under the *Brown* test, the court considers only whether there has been a material change in circumstances since the original order was made and, if so, what the proper amount of child support should have been under the *Guidelines*. As such, the *Brown* test is a “no-fault” test (*M.W. v. K.T.*, 2019 NLSC 14, 19 R.F.L. (8th) 51, at para. 43).

[66] Ms. Colucci relies on the *Corcios/Gray* line of authority, in which the contextual *D.B.S.* factors have been adapted to suit applications to retroactively decrease support. Under the *Corcios/Gray* framework, the court may consider these factors in deciding whether a retroactive decrease is appropriate, in setting the date of retroactivity, and sometimes in setting the amount to be paid (*Gray*, at para. 60; *Templeton*, at paras. 49-50). Mirroring *D.B.S.*, the *Corcios/Gray* approach establishes a general rule in favour of varying back to the date that the payor gave the recipient effective notice of their intention to seek a decrease based on changed circumstances,

up to a presumptive maximum of three years before the date of formal notice (*Gray*, at para. 61). The Court of Appeal followed the *Corcios/Gray* approach in the case at bar.

[67] In my view, both lines of authority have something to offer. *Brown* offers simplicity and predictability. However, it ignores the interest of the recipient and child in certainty and does nothing to encourage the payor to disclose changes in income to the recipient. Further, the *Brown* framework is inconsistent with the discretionary language of s. 17 of the *Divorce Act*, which provides that the court “may” retroactively vary a support order. On the *Brown* approach, the court *must* vary the order once the payor has established a change in circumstances, and *must* vary back to the date of the change. The *Brown* framework also makes it much easier for a payor parent to obtain a retroactive decrease than it is for a recipient to obtain a retroactive increase, a shortcoming that is even more unfair when considered in light of the recipient’s informational disadvantage. This undermines the objective in s. 1 of the *Guidelines* of ensuring consistent treatment of spouses in similar circumstances. These are serious limitations which stand in the way of a fair resolution on the facts of each case.

[68] The *Corcios/Gray* framework mitigates these limitations by adapting *D.B.S.* to the decrease context, in terms of both focusing on the date of effective notice as the default date of retroactivity and leaving room to shift the date of retroactivity based on contextual factors. The problem, however, is that *Gray* directs the court to consider multiple factors over three different questions (whether a retroactive order is

appropriate, how far back it should extend, and what the quantum should be) (*Gray*, at para. 60). The result is often confusion and undue complexity: the questions are mingled, the factors become muddled and the layering of discretion over multiple steps of the analysis means that predictability and transparency are sacrificed. This complexity makes the framework less useful for family law litigants who are increasingly self-represented (*Morwald-Benevides v. Benevides*, 2019 ONCA 1023, 148 O.R. (3d) 305, at para. 19).

[69] A framework that involves the application of multi-factoral discretion at multiple steps of the analysis is also less useful as an anchor for negotiations and settlement of child support matters. There is a trend in family law away from an adversarial culture of litigation to a culture of negotiation (see, e.g., D. Martinson and M. Jackson, “Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases” (2017), 30 *Can. J. Fam. L.* 11, at p. 22; D. M. Sowter, “Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code” (2018), 35 *Windsor Y.B. Access Just.* 401, at p. 402; P. J. Dalphond and A. Nag, “Enfin une réforme de la *Loi sur le divorce*” (2019), 78 *R. du B.* 255, at pp. 312 et seq.). Not only is encouraging settlement one of the objectives of the *Guidelines*, but recent amendments to the *Divorce Act* reflect this shift by requiring parties, where appropriate, to try to resolve family law disputes through family dispute resolution processes (s. 7.3). Parents should be encouraged — absent family violence or significant power imbalances — to resolve their disputes themselves outside the court structure and legal rules should be clear and accessible

so they may reach fair agreements. Reaching a negotiated settlement not only saves resources but also reduces the need for future court applications by setting up a less acrimonious relationship between the parties (N. Bala, “Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts”, in M. Trebilcock, A. Duggan and L. Sossin, eds., *Middle Income Access to Justice* (2012), 271, at pp. 286-87).

[70] To support a culture of negotiation, the framework under s. 17 of the *Divorce Act* must provide parties with a foundation for their efforts to resolve the matter themselves. A framework that promotes timely disclosure and structures judicial discretion through clear and simple presumptions will provide a solid starting point for negotiation between the parties.

[71] There is thus merit in a simplified framework which takes the benefits of *Brown* and *Corcios/Gray* but removes their drawbacks. To advance clarity, simplicity and predictability, the analysis should be focused on a single presumption regarding the date of retroactivity. Once the applicant establishes a change in circumstances, a presumption is triggered that support will be varied back to a certain date (i.e., effective notice, up to three years before formal notice). The *D.B.S.* factors are then concentrated on one question: should the court depart from the presumptive date of retroactivity to achieve a fair result? It is on this question only that the factors of delay, payor conduct, the child’s circumstances and potential hardship are brought to bear.

[72] It is therefore no longer necessary to first ask whether retroactive relief is warranted as a general proposition, with contextual factors guiding both this preliminary inquiry and the question of how far back retroactive relief should go. Already in the jurisprudence, this preliminary question has often been blurred with the question of the timing of any retroactive order, casting doubt on the utility of inquiring first into the general appropriateness of retroactive relief. For example, even though the analytical framework in *Corcios* called for a separate step of asking whether retroactive relief is appropriate in the first place, the court did not separate out this preliminary question from the inquiry into how far back retroactive relief should extend. Moving directly to a presumptive date simplifies the analysis and enhances fairness and predictability for the parties.

[73] To ensure consistency and even-handedness, this same presumption-based approach should be applied in all retroactive variation contexts, including where the recipient applies under s. 17 for a retroactive increase. It would not be fair if payors claiming a decrease benefit from a presumption that is unavailable to recipients claiming an increase, especially when applications to retroactively reduce support will often be countered by an application for a retroactive increase in the same proceeding, or vice versa. A recipient is thus no longer required to demonstrate as a preliminary matter that a retroactive award is appropriate based on the *D.B.S.* factors. Once an increase in the payor's income has been shown, the only question is how far back retroactive support should extend. No injustice arises if the inquiry into the general appropriateness of retroactive child support is omitted, as any fears that payors will be

taken by surprise by *ex post* changes are fully answered by the express reference to retroactive variations in the wording of s. 17, the way the *Guidelines* work, and the fact that the Court's reasons in *D.B.S.* were given over fifteen years ago.

[74] Thus, where a past material change in the payor's income is established, the amount set out in the child support order no longer reflects the content of the payor's legal obligation to pay support in line with the table amounts. The only question is what remedy flows from this legal fact. In the decrease context, the presumption of varying back to the date of effective notice, up to three years before formal notice, assists the court in answering this question. It will still be true under this approach that not all applications will lead to retroactive variation, but the focus will be on whether a material change in circumstances has been proven and the date to which a retroactive variation should extend.

[75] This means I reject Mr. Colucci's argument, based on *Brown*, that the *D.B.S.* factors have no role in retroactive decrease applications. He submits that para. 98 of *D.B.S.* is binding authority establishing that the *D.B.S.* factors do not apply to arrears. At para. 98, Bastarache J. wrote:

. . . these factors are not meant to apply to circumstances where arrears have accumulated. In such situations, the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainty and predictability militate in the opposite direction. There is no analogy that can be made to the present cases.

[76] In my view, this passage does not support the proposition that the *D.B.S.* factors are wholly irrelevant where the payor seeks a retroactive decrease based on a change in circumstances. Rather, Bastarache J. was pointing out that the balance between certainty and flexibility is very different as between the increase and decrease categories of cases. Those interests will pull in different directions depending on whether the recipient or the payor seeks to retroactively vary support. This is a point that bears further elucidation, as it will be relevant to the way effective notice is defined in the increase and decrease contexts.

[77] On an application for a retroactive increase, the recipient seeks the flexibility of a retroactive award to capture the payor's increased income and secure payment of child support in the correct amount. It is the payor who has some interest in the certainty and predictability supplied by an existing court order or agreement (*D.B.S.*, at para. 63). However, this certainty interest is heavily qualified by the *Guidelines*-era principle that more income means more support. The payor cannot reasonably expect their child support obligations to remain static in the face of material increases in income. Given the structure of the *Guidelines*, the only real "certainty" in the face of fluctuating income is that the payor is responsible for paying the table amount based on actual income. Further, a payor who has fallen into arrears cannot resist a retroactive increase based on their interest in certainty, as the payor cannot claim they relied on the order in arranging their affairs (*Gray*, at para. 51; *MacEachern v. Bell*, 2019 ONSC 4720, 33 R.F.L. (8th) 68, at para. 89).

[78] Conversely, in a claim for a retroactive decrease, as indicated in *D.B.S.*, at para. 98, the interest in certainty lies with the recipient parent and child, while the interest in flexibility lies with the payor parent. Under the *Guidelines*, the payor is only responsible for child support commensurate with income, but a retroactive reduction in support means a disruption to the certainty enjoyed by the child and the recipient. The recipient is entitled to expect that the existing order will be complied with unless they are in receipt of reasonable proof that a relevant change in the payor's circumstances has occurred. Again, the payor holds the relevant information and knows when there has been a decrease in income. It is in the payor's own best interest to use this knowledge to notify the recipient of the change in circumstances and take steps to formally vary a child support order.

[79] In my view, the role of para. 98 of *D.B.S.* is to capture these salient differences which demand a distinct balancing of interests in retroactive decrease and increase cases. Paragraph 98 does not preclude this Court from employing the four *D.B.S.* factors, with necessary modification, as part of a unified framework to govern increase and decrease variation applications under s. 17. Indeed, there is good reason to do so, as the *D.B.S.* factors will assist the court in weighing the equities and reaching a fair balancing of certainty, flexibility and the child's right to support based on income.

(c) *The Presumptive Date of Retroactivity*

[80] Even before the *D.B.S.* factors come into play, the choice of the presumptive date of retroactivity itself aims to reach a preliminary balancing of these

competing interests. Although the general preference for effective notice as the presumptive date in increase cases may need to be revisited for the reasons previously stated, for retroactive decreases, this presumptive date properly reflects the recipient's informational disadvantage and represents a fair balancing of certainty and flexibility. As such, once the payor establishes a change in circumstances, a presumption arises in favour of varying support to the date of effective notice, up to three years before formal notice.

[81] In this section, I outline why this presumption strikes the right balance between relevant interests; what is meant by “effective notice” in decrease cases; the role of the three-year rule; and the appropriate date of retroactivity where the payor has not given effective notice.

(i) The Rationale for Effective Notice as the Presumptive Date of Retroactivity in Decrease Cases

[82] The presumption in decrease cases that support will be reduced back to the date of effective notice strikes a fair balance between the certainty interest of the child and recipient and the payor's interest in flexibility. While recipients should be aware that support in the *Guidelines* era varies with payor income, they are at an informational disadvantage. The recipient is entitled to rely on the court order or agreement in the absence of proper communication and disclosure by the payor showing a decrease in income that is lasting and genuine (*H.G.S. v. J.R.M.*, 2018 ABQB 892, 16 R.F.L. (8th) 404, at para. 87). As the Court of Appeal stated in this

case, “the support amount provided for in the prior order or agreement will have formed a part of the recipient parent’s budget and the support recipient often will have undertaken financial obligations premised on the continuation of the support set out in the order” (para. 26).

[83] A retroactive decrease will mean less funds, a possible set-off and even a repayment from the recipient to the payor. This in turn implicates and intensifies the certainty interest of the child and the recipient who have relied on the prior court order. It will generally be more difficult to adjust to the receipt of lesser, rather than greater amounts of support, increasing the likelihood and severity of hardship. Those with lower incomes will have less ability to absorb negative financial events.

[84] The best interests of the child lie in predictability and stability of household finances. The *Guidelines* contemplate that a drop in payor income may lead to a drop in the child’s standard of living, just as it would if the parents were still together. However, payors must promptly communicate such changes to the recipient, just as they would if the parents had not separated, and move to have the terms of the order or agreement changed to restore certainty to child support arrangements between the parties. This ensures that the child is impacted as little as possible by the parents’ separation and continues to benefit from predictable and regular support from the payor parent. A drop in support can be presumed to have detrimental impacts on the child, but ongoing communication and disclosure cushions those impacts and preserves the child’s best interests to the fullest extent possible. For these reasons, in the absence of

effective notice of a drop in payor income, certainty and predictability for the child are to be prioritized over the payor's interest in flexibility.

[85] The payor's interest in flexibility comes to the forefront once effective notice is given (*H.G.S.*, at para. 82). As such, by making the date of effective notice the presumptive date of retroactivity, the framework preserves ample flexibility for the payor. The presumption also provides payors with the certainty of knowing that any material change in income should be disclosed. Not only is the payor the one who is aware of their financial situation, but they also control the date on which they disclose that information. The payor therefore has control over the date of notice and the date of retroactivity.

(ii) Effective Notice

[86] What qualifies as "effective notice" must be viewed in light of the information asymmetry between the parties and the way that certainty, flexibility and the child's best interests play out in retroactive decrease cases. When a recipient seeks a retroactive increase, the Court held in *D.B.S.* that the recipient will have provided effective notice simply by broaching the topic of a potential increase (para. 121). This low bar was justified by the recipient's informational disadvantage. Regardless of whether the recipient had given notice, the payor knew when their own income had increased and must be taken to know that more income means more support.

[87] In the decrease context, by contrast, experience has shown that it is not enough for the payor to merely broach the subject of a reduction of support with the recipient. A payor seeking a retroactive decrease has the informational advantage. The presumptive date of retroactivity must encourage payors to communicate with recipients on an ongoing basis and move with reasonable dispatch to formalize a decrease through a court order or change to a pre-existing agreement. The timing and extent of disclosure will be a critical consideration in ascertaining whether and when effective notice has been given and determining whether to depart from the presumptive date of retroactivity.

[88] In decrease cases, therefore, courts have recognized that effective notice must be accompanied by “reasonable proof” that is sufficient to allow the recipient to “independently assess the situation in a meaningful way and respond appropriately” (*Gray*, at para. 62, citing *Corcios*, at para. 55; *Templeton*, at para. 51). This ensures that effective notice provides a realistic starting point for negotiations and allows the recipient to adjust expectations, make necessary changes to lifestyle and expenditures, and make informed decisions (*Hrynkow v. Gosse*, 2017 ABQB 675, at para. 13 (CanLII); *Hodges v. Hodges*, 2018 ABCA 197, at para. 10 (CanLII)).

[89] In some cases, such as where the payor is incarcerated or suffers a serious health setback, clear communication may be sufficient to meet the requirements of effective notice. In other cases, the payor may not have access to full income information at the time notice is given, but should provide proof of the change in

circumstances by promptly obtaining and disclosing available documents, such as those demonstrating new employment, reduction of salary or termination of employment. Even where a diligent payor believes in good faith that a decrease in income will be temporary, the most prudent course of action is nevertheless to communicate the change to the recipient and provide information which substantiates the claimed change in circumstance.

[90] After communicating a change and providing available documents, a payor maintains “an ongoing obligation to engage in meaningful dialogue with the recipient, advise the recipient of changes in their circumstances that may impact their ability to pay support and voluntarily disclose pertinent information so that the recipient can continue to independently assess the situation and react appropriately” (*Templeton*, at para. 52). Failure to do so may impact the period of retroactivity when the court applies the discretionary *D.B.S.* factors. Further, effective notice of an initial change in income will not amount to effective notice of subsequent changes (*Corcios*, at para. 55).

(iii) The Three-Year Rule

[91] Even where the payor has given proper effective notice, the period of retroactivity is presumed to extend no further than three years before the date of formal notice. This three-year presumptive rule was established by the majority in *D.B.S.* to incentivize recipients seeking a retroactive variation to move discussions forward and to protect the payor’s certainty interests (para. 123).

[92] This three-year rule has been applied for parallel reasons in the retroactive decrease context, as it was by the Court of Appeal in this case (para. 27; see also *Corcios*, at para. 55; *Gray*, at para. 61; *H.G.S.*, at paras. 94-95 and 105-8). The informational asymmetry between the parties means the recipient will often lack the requisite information to know whether the change in circumstances communicated by the payor at the time of effective notice continues to reflect the payor’s situation. Thus, a lengthy “period of inactivity after effective notice may indicate that the [recipient] parent’s reasonable interest in certainty has returned” (*D.B.S.*, at para. 123). The longer the delay, the greater the recipient’s reliance on and certainty interest in the unchallenged order (*Brown v. Barber*, 2016 ABQB 687, 85 R.F.L. (7th) 401 (“*Barber*”), at para. 35).

[93] The presumptive three-year limit allows the parties time to negotiate but recognizes that the payor must commence proceedings in a timely manner if negotiations fail in order to protect the certainty interests of the child and recipient (*Corcios*, at para. 55). Payors should not be encouraged to wait until an enforcement agency takes steps to enforce an order to bring an application to vary. Further, as the interveners West Coast Legal Education and Action Fund Association and the Women’s Legal Education and Action Fund Inc. point out, given the pervasiveness of deficient disclosure in family law, recipients may often have good reason to doubt the adequacy of disclosure provided with effective notice. Resulting disputes about disclosure and payor income can only be resolved through formal proceedings, and

those proceedings must be commenced in a timely manner to restore certainty to child support arrangements between the parties.

[94] The presumptive three-year limit is also justified by evidentiary concerns. Reliable evidence is required to determine the payor's income. The best evidence of income or ability to earn income is generally more readily available closer to the time that the income is earned (*Janik v. Drotlef*, 2018 ONCJ 287, at para. 230 (CanLII)). If the payor delays in bringing an application, it may be more difficult to produce reliable and full documentation on income. This leaves recipients and courts to bridge the gaps through guesswork, adverse inferences and the imputation of income. Timely disclosure and applications to vary must be incentivized to preserve procedural fairness to the recipient and ensure the court has access to the information necessary to determine whether a material change in circumstances has occurred and to quantify support. Three years provide ample time. The legislature could step in to address these concerns by imposing a presumptive limitation period of a longer or shorter duration. For example, in Quebec, "in no case where the arrears claimed have been due for over six months may the debtor be released from payment of them unless he shows that it was impossible for him to exercise his right to obtain a review of the judgment fixing the support" (*Civil Code of Québec*, art. 596 para. 2).

(iv) Where No Effective Notice Given

[95] Where no effective notice was given before proceedings were commenced, the start date of the variation will generally be the date of formal notice. However, this

result is not automatic. Disclosure remains a relevant factor. For instance, if three years have elapsed since a motion to change was served on the recipient, but full and frank disclosure is only provided on the eve of the hearing, the payor parent generally should not benefit from a decrease for the period between the date of formal notice and the time of disclosure. Payors should not be rewarded for breaching disclosure obligations in the *Guidelines*, the rules of court, and other legislation. Slipshod or misleading disclosure deprives the parties of an opportunity to negotiate between the date of formal notice and the hearing. However, if the payor can show a good reason for delayed disclosure, the court may vary back to the date of formal notice despite the delay. Payors facing such difficulties must be prepared to adduce evidence of their efforts to obtain the relevant documents in a timely fashion.

(d) *Discretion to Depart from the Presumption: The Four D.B.S. Factors*

[96] The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair in the circumstances of a particular case. In this section, I explore how the *D.B.S.* factors — adapted to suit the retroactive decrease context — help the court reach a fair balancing of the three interests at play, namely the child’s interest in a fair standard of support, the payor’s interest in flexibility, and the interest of the child and recipient in certainty. There is no fixed formula; none of the factors is determinative and they must be viewed holistically (*D.B.S.*, at para. 99).

(i) Understandable Reason for the Delay

[97] The first factor is whether the payor has an understandable reason for the delay in giving effective notice or seeking relief in the courts. Judges are well placed to assess whether the reasons proffered for the delay explain the extent of the payor's inactivity. Where the payor has such a reason, fairness may militate in favour of extending the date of retroactivity to a time before the date of effective notice or not applying the three-year limit.

[98] Understandable reasons for delay may include health problems or other difficulties that prevent the payor from confronting the situation, or an unwillingness to disrupt a fragile parent-child relationship (D. Smith, "Retroactive Child Support — An Update" (2007), 26 *C.F.L.Q.* 209, at p. 239). The payor may also lack the financial or emotional wherewithal to proceed with the matter (*Brown*, at para. 34).

[99] In some cases, the recipient's conduct may be at play, such as where the recipient threatens to withhold access or uses other tactics to discourage the payor from applying to reduce support. To ensure the child's best interests are protected, recipient conduct is only a significant factor where the recipient is aware of the change in the payor's circumstances and has therefore been able to plan for a possible reduction in support. Courts must also be cautious to distinguish bad faith on the part of the recipient from situations where recipient conduct results from safety concerns arising from a history of family violence.

[100] The recipient's delay in enforcing arrears is irrelevant to the analysis (*Haisman v. Haisman* (1994), 157 A.R. 47 (C.A.), at para. 46; *Templeton*, at para. 48).

Courts must bear in mind that child support arrears are a debt. Under general principles of debtor-creditor law, the debtor is required to seek out and pay the creditor, and debts are not forgiven by the mere passage of time in the absence of a statutory limitation period (*Brown*, at para. 33).

(ii) The Payor's Conduct

[101] The second factor is the payor's conduct. Blameworthy conduct is conduct that has "the *effect* of privileging [the payor's] interests over the child's right to support" (*Goulding*, at para. 44 (emphasis in original); see also *D.B.S.*, at para. 106). The payor's subjective intentions are rarely relevant (*Goulding*, at para. 44).

[102] The payor's efforts to disclose and communicate will often be prominent considerations in assessing the payor's conduct in the context of an application for a retroactive decrease of support. For example, if the payor provides effective notice but fails to communicate and disclose information on an ongoing basis after the date of effective notice, the payor's silence may militate in favour of abbreviating the period of retroactivity. Conversely, if more than three years have passed between the date of effective notice and the date of formal notice, the court might consider declining to apply the three-year rule if the payor has made ongoing efforts to disclose, communicate and engage in dialogue with the recipient.

[103] The court may also consider whether the payor made voluntary payments against the arrears, continued to pay in accordance with their ability to pay, cooperated

with enforcement agencies, and showed a willingness to support the child rather than evading child support obligations (see *DiFrancesco v. Couto* (2001), 56 O.R. (3d) 363 (C.A.), at para. 25). It should go without saying that a person who is subject to a child support order must “comply with the order until it is no longer in effect”, and this principle is now expressly enshrined in the *Divorce Act* “[f]or greater certainty” (s. 7.5). Genuine efforts to continue paying as much as the payor can will show good faith and a willingness to support the child.

(iii) Circumstances of the Child

[104] The circumstances of the child are the third factor. If the child has experienced hardship or is currently in need, this factor militates in favour of a shorter period of retroactivity.

[105] Another relevant consideration is whether the retroactive decrease would result in an order requiring the recipient to repay support to remedy an overpayment. The framework under s. 17 of the *Divorce Act* should not penalize payors for having continued to pay the full amount of support under an order or agreement after they experience a drop in income. However, reimbursement or set-off may cause hardship for the child and recipient. As such, where repayment is a possibility, it is even more important for the payor to give the recipient prompt notice of the decrease in their income — complete with disclosure enabling the recipient to meaningfully assess the extent of any potential future repayment — and move with reasonable diligence to seek

a formal variation (*Corcios*, at para. 55; *Gray*, at para. 60; see also *Fleury v. Fleury*, 2009 ABCA 43, 448 A.R. 92, at para. 32).

[106] In cases involving claims of overpayment, it will rarely be appropriate, given the recipient's absence of knowledge, to retroactively decrease support to a date before the recipient could have expected that child support payments received from the payor might need to be repaid at some future date. This approach protects the child's best interests and the recipient's certainty interest, while allowing payors who have overpaid to seek a retroactive decrease as long as the recipient has been given proper notice and disclosure.

(iv) Hardship

[107] The final factor is hardship to the payor if the period of retroactivity is not lengthened beyond the presumptive date. The payor must adduce evidence to "establish real facts" supporting a finding of hardship (*Goulding*, at para. 57). Bald assertions are not enough (*ibid*). The payor must also provide a complete picture of their financial situation, including income, assets and debts. For example, in this case, an assessment of hardship requires consideration of not only Mr. Colucci's present income and future earning capacity, but also the funds he received from his mother's estate and any other assets.

[108] A showing of hardship will not automatically justify a departure from the presumed date of retroactivity. Hardship carries much less weight where brought on

by the payor's own unreasonable failure to make proper disclosure and give notice to the recipient (*D.B.S.*, at para. 116). Hardship to the payor must also be viewed in the context of hardship to the recipient and child if the court were to extend the period of the retroactive decrease (*Goulding*, at para. 56). It is a holistic and relative assessment (*Michel*, at para. 100, per Martin J.).

(e) *Quantum and Terms of Variation Order*

[109] If retroactive variation is appropriate, quantum is governed by the statutory scheme that applies to the award (*D.B.S.*, at para. 126). In this case, the *Guidelines* apply in determining the quantum of support. The *Guidelines* leave some space for discretion, such as when there is undue hardship within the meaning of s. 10. As in the prospective context, the court may also impute income under s. 19 of the *Guidelines*, such as where the payor has been intentionally under-employed or has unreasonably deducted expenses from income. Blameworthy conduct by the payor may be considered in setting interest or costs (*Michel*, at para. 119, per Martin J.).

[110] Full and complete disclosure is required to quantify the appropriate amount of support for the period of retroactivity, just as it would be when quantifying prospective support (*Brown*, at para. 20). The onus is on the payor to show the extent to which their income decreased during the period of retroactivity (*Templeton*, at para. 65). If the payor fails to provide all relevant evidence required for the court to fully appreciate their true income during any part of the period of retroactivity, the court may draw an adverse inference against the payor (*Templeton*, at para. 67). The payor

must also make complete disclosure of their current financial circumstances if seeking a periodic payment plan or temporary suspension on hardship grounds.

[111] Finally, while the above framework facilitates fair resolution of disputes after the fact, parties, counsel and the courts should be mindful of best practices designed to obviate the need to resort to the courts. Given the prevalence of fluctuating income, the preferred solution — absent family violence — is a yearly recalculation of child support based on disclosure of updated income. Some provinces offer an administrative recalculation service (see, e.g., *Family Law Act*, R.S.O. 1990, c. F.3, s. 39.1(2)) and/or free family mediation services if the parties cannot agree on a change in support following a change in the payor's income (see, e.g., family justice counsellors in British Columbia: *Family Law Act*, s. 10).

[112] Where an application under s. 17 of the *Divorce Act* has become necessary because the parties have not recalculated support regularly, courts should consider including a term in the order to obviate the need for future retroactive applications. The court might include an order requiring parties whose income is necessary to determine the amount of support to advise each other promptly of changes in income and to exchange the information listed in s. 21(1) of the *Guidelines* on an annual basis (see, e.g., *Corcios*, at para. 76; *Burchill*, at para. 64). The court might also consider a term providing that parties are to recalculate support on an annual basis and, if unable to agree, may apply to the court for a determination of the amount payable (*D.B.S. (C.A.)*,

at para. 94; 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. 556).

(f) *Summary*

[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. Those factors are: (i) whether the payor had an understandable reason for the delay in seeking a decrease; (ii) the payor's conduct; (iii) the child's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context of hardship to the child and recipient if support *is* decreased). 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*.

[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*.

(g) *Application to the Present Case*

[115] Support orders attract deference on appeal. Absent an error or an extricable question of law, a palpable and overriding error, or a fundamental mischaracterization or misapprehension of the evidence, an appellate court should not interfere with the trial judge's exercise of discretion (*Brandsema*, at para. 30).

[116] In this case, I agree with the Court of Appeal that the motion judge erred in principle. Instead of balancing the payor's interest in flexibility against the interests of the child and recipient, the motion judge concluded that the coming into force of the *Guidelines* was a change in circumstances that "entitled [Mr. Colucci] as of right to a variation and a calculation based on table amounts and his drop in income" (reasons of motion judge, at para. 15 (emphasis added)). While the motion judge did not have the benefit of these reasons, that conclusion was inconsistent with the principles underlying the *Guidelines* and the framework set out above.

[117] The motion judge was correct in concluding that the coming into force of the *Guidelines* constituted a change in circumstances under s. 14(c). While this legal change opens the door at the threshold step, it does not obviate the need for evidence

of Mr. Colucci's earnings in the years since the *Guidelines* came into force. Without reliable and complete income information, the court cannot recalculate support for the intervening years in accordance with the *Guidelines*. Thus, Mr. Colucci's failure to adduce adequate evidence of his income since 2000 is fatal to his application. Even if he adduced sufficient evidence of his income from 1997 to 2000, the three-year rule applies, as discussed below.

[118] Aside from the coming into force of the *Guidelines*, Mr. Colucci also relied on material decreases in his income after the *Guidelines* came into force as a justification for retroactively decreasing the amount of support. To the extent he relies on drops in income, however, his deficient communication, inadequate evidence and insufficient disclosure are fatal to his application: not only has he not proven a decrease in income, he can point to no actions which qualify as effective notice. The Court of Appeal properly rejected the submission that his child support obligations should be retroactively varied to April 1998, when he asked Ms. Colucci through counsel for a reduction in the amount of child support payable because of an alleged decrease in his income.

[119] It is not enough for a payor in Mr. Colucci's shoes to advise the recipient that their income has fallen without taking any further steps. Following Ms. Colucci's refusal to vary support in 1998, Mr. Colucci "produced no proof of his changed financial circumstances, nor, after his initial request for a reduction in 1998, did he instigate any further negotiations, mediation or court proceedings" (C.A. reasons, at

para. 34). Rather, he cut off communication and did nothing until commencing this proceeding in 2016. Since Mr. Colucci did not provide reasonable proof to allow the recipient to meaningfully assess the situation, his request fell short of effective notice. Further, the request in 1998 could not constitute notice of the more dramatic drops in his income after the initial request was made. A payor who experiences this kind of fluctuation in income must continue to communicate subsequent changes with proper disclosure to allow the recipient to plan accordingly.

[120] As Mr. Colucci gave no effective notice before arrears stopped accumulating in 2012, the presumption set out above leads to the conclusion that he is not entitled to any retroactive decrease in his child support obligations. Even if Mr. Colucci had given effective notice in 1998, the presumptive three-year limit would apply. The application of the three-year rule would preclude any retroactive decrease, given that his children were no longer eligible for child support beginning in 2012 and he gave formal notice in 2016. Nor would the application of the *D.B.S.* factors support a longer period of retroactivity. Indeed, had it been necessary to decide this point, all factors, particularly that of payor conduct, would support a shorter period of retroactivity. It is not enough for the payor to give notice and then disappear. The Court of Appeal correctly noted that, when the parties were unable to reach an agreement on a reduced amount of support, “it was incumbent on [Mr. Colucci] to initiate proceedings in a timely manner” (para. 34). Instead, he “unreasonably failed to do anything for 18 years” (*ibid.*).

[121] Mr. Colucci claimed that he did not commence a motion in 1998 because he lacked the financial resources to do so. However, lack of funds cannot justify his failure to produce reasonable proof of the change in income he claimed at the time of his request, or his subsequent failure to communicate, negotiate or seek a change for 18 years.

[122] Mr. Colucci also made few, if any, voluntary payments during that time and showed no willingness to support the children, who suffered hardship as a result of his failure to fulfill his obligations. His conduct shows bad faith efforts to evade the enforcement of a court order. He did not notify the recipient or the FRO when he left Canada or advise them of his whereabouts or income for the duration of his absence (C.A. reasons, at para. 8). The FRO took a number of steps that failed to spur Mr. Colucci to comply with his obligations voluntarily, including garnishing benefits and suspending his passport and driver's license. The FRO was only able to collect limited sums through these enforcement mechanisms. Ms. Colucci was thus left to shoulder the financial burden of raising and supporting the children on her own (para. 30). The daughters also incurred considerable debt in pursuing post-secondary education (*ibid.*).

[123] Mr. Colucci turned his back on his support obligations and a court order when he cut off communication and “absconded without a trace to the United States and Italy” (C.A. reasons, at para. 31). He only came out of hiding when he had returned to Canada and was facing enforcement action by the FRO, including potential

garnishment of his wages. Mr. Colucci cannot now seek to avoid the consequences of his actions. To depart from the presumptive date of retroactivity and grant a retroactive decrease in these circumstances would give tacit approval to this kind of conduct, contrary to the best interests of children. As Carey J. stated, Mr. Colucci’s “success at getting to the age of 62 without paying a dollar voluntarily . . . should not be rewarded” (*Colucci v. Colucci*, 2018 ONSC 4868, at para. 4; see also paras. 2-3).

[124] Moreover, Mr. Colucci has continued to evade his child support obligations by misrepresenting his financial circumstances and breaching his ongoing obligation to make full documentary and financial disclosure, even in the course of these proceedings (C.A. reasons, at para. 32). As such, this case provides an example of the kind of inadequate disclosure that would justify a refusal to vary back to the date of formal notice. Mr. Colucci did not provide his tax returns or any other documentary evidence of income for the years 2000 to 2015, and most of the little disclosure he made was provided well after he commenced the motion to change. Documentation regarding his mother’s estate was not produced until over a year later, and even then, the document was in Italian only. His income information for 2016 and 2017 was not provided until July 2018. In addition, Mr. Colucci redacted his employer’s name from his T4 and filed no tax return in 2017 to avoid garnishment of his wages and tax refund, preferring to forfeit the refund altogether than have it go toward his child support obligations. He also failed to pay Ms. Colucci the €15,000 that he was ordered to pay by the motion judge despite being in receipt of the earmarked funds from his mother’s estate.

[125] A few words on the recalculation of support and imputation of income. Mr. Colucci argued that the motion judge must have been satisfied with the financial information before him, as he relied on this information in recalculating Mr. Colucci's support obligation and in concluding that minimum wage should be imputed to Mr. Colucci in certain years due to under-employment.

[126] I agree with Ms. Colucci that it was problematic for the motion judge to rely on Mr. Colucci's limited financial disclosure to recalculate support and exercise his discretion to impute income. Apart from Mr. Colucci's own assertions about when he worked and how much he was paid, there was no objective or cogent evidence supporting his alleged income from 2000 to 2015. The motion judge essentially took Mr. Colucci's word for it, imputing income based on Mr. Colucci's assertion that he made substantially less than minimum wage in certain years and recalculating support based on the income he claimed to have made in other years.

[127] This case highlights one of the mischiefs of delayed applications to retroactively decrease support: as the years go by, it becomes more difficult to produce reliable income information, such as tax returns. For example, Mr. Colucci claims he was unable to obtain tax returns from the Internal Revenue Service for the years he worked in the United States. The payor cannot rely on the passage of time as an excuse for incomplete disclosure upon finally seeking retroactive variation. It would be unfair to the recipient and children to bridge gaps in the payor's disclosure with guesswork that works to their disadvantage. Such an approach would also incentivize payors to

provide inadequate disclosure in the hopes that the court will either accept their assertions or impute income that is lower than the income actually earned.

[128] Vague or incomplete information is also difficult to challenge on cross-examination. As Mr. Colucci had not produced documentation supporting his asserted income from 2000 to 2015, there would have been no documents to cross-examine him on with respect to those years, rendering the exercise futile. Recipients should not be expected to hire forensic accountants or investigators to uncover the financial information needed to effectively cross-examine the payor or challenge the payor's submission that only minimum wage should be imputed where a finding of under-employment is made. Such an expectation is particularly unrealistic where, as here, the payor has left the country and stopped making payments, leaving the recipient to struggle to care and provide for the children on her own.

[129] Payors are reminded that the onus is on them to establish that a retroactive decrease is warranted based on reliable evidence, and that parties to litigation are subject to a general obligation to disclose all information that is relevant and material to the case (*Kinsella v. Mills*, 2020 ONSC 4785, 44 R.F.L. (8th) 1, at para. 166). In this case, the obligation to disclose material information was breached and the payor fell short of his burden of proof. Mr. Colucci cannot expect a court to award relief that prejudices the recipient and his children while shielding material information and documentation from the view of the court and recipient.

[130] Finally, although he did not pursue a claim for reimbursement before the motion judge, Mr. Colucci claimed he overpaid \$2,310.90 in child support based on his asserted income and the table amounts. Even if he had supported this calculation with proper disclosure of financial information, the absence of any communication of his alleged changes in circumstances would be a strong factor militating against any claim for reimbursement from Ms. Colucci.

[131] In conclusion, Mr. Colucci is not entitled to relief on the basis of a decrease in income. He gave no effective notice of his intention to seek a reduction in support, either in 1998 or at any point before his daughters had ceased to be children of the marriage in 2012. Even if he had given effective notice in 1998, the presumptive three-year limit applies. The *D.B.S.* factors do not support a longer period of retroactivity. Since Mr. Colucci commenced his motion to change in 2016, four years after his support obligation had terminated and arrears stopped accumulating, the application of the three-year limit precludes retroactive variation of the amount of support owing under the prior order.

[132] I will now consider the scenario in which a payor who has fallen behind on payments seeks full or partial rescission of arrears under s. 17 on the basis of a current and ongoing inability to pay. Mr. Colucci relied on inability to pay as an alternative ground of relief in his motion to change, this ground was briefly addressed at the Court of Appeal (at paras. 9, 28 and 31) and it was discussed in Ms. Colucci's written submissions before this Court. The question of whether the courts have authority under

s. 17 to order the rescission of arrears based on present inability to pay, as discussed in *Brown*, was not raised before us and we will not address it.

(2) Rescission Of Arrears Where The Prior Order Corresponds With Payor's Income

(a) *The Presumption: No Rescission Unless Payor Shows Current and Future Inability to Pay*

[133] Although applications for rescission raise different considerations than those for a retroactive decrease of support based on a change in circumstances, in practice, both will frequently arise together. While a payor may simply ask for accumulated arrears to be forgiven on the basis of a current and ongoing inability to pay without challenging the accuracy of the underlying order, rescission applications will normally arise when the request to retroactively decrease arrears is unsuccessful or results in only a partial reduction of the arrears (see, e.g., *Templeton*, at para. 39; *H.G.S.*, at para. 113).

[134] In this category of cases, the prior child support order or agreement corresponds with the payor's income. The arrears accurately reflect the amount of support that the payor should have paid under the *Guidelines*, after all considerations, including any claim of hardship under s. 10, have been determined. In other words, the arrears represent sums that could have been paid at the time payments came due, but were not. The payor parent's claim for rescission is thus a form of "hardship" application, in which there has been no past change in circumstances justifying a

retroactive decrease in the support obligation (*Barber*, at paras. 15-16; *Brown*, at para. 43).

[135] It follows that, under this third category of cases, the payor’s ongoing financial capacity is the only relevant factor. The payor must therefore provide sufficient reliable evidence to enable the court to assess their current and prospective financial circumstances, including their employment prospects and any assets, pensions, inheritances or other potential sources of future capacity to pay.

[136] Courts have taken a highly restrictive approach to the availability of rescission or suspension of child support based solely on current and ongoing inability to pay (see, e.g., *Haisman*, at paras. 26-27; *Gray*, at para. 58; *C.L.W. v. S.V.W.*, 2017 ABCA 121, at para. 30 (CanLII); *Punzo*, at para. 46; *Blanchard v. Blanchard*, 2019 ABCA 53, at para. 32 (CanLII); *S.A.L. v. B.J.L.*, 2019 ABCA 350, 31 R.F.L. (8th) 299, at para. 12; *Semancik v. Saunders*, 2011 BCCA 264, 19 B.C.L.R. (5th) 219, at para. 25; *Mayotte v. Salthouse* (1997), 29 R.F.L. (4th) 38 (Alta. C.A.), at para. 2; *Heiden v. British Columbia (Director of Maintenance Enforcement)* (1995), 16 B.C.L.R. (3d) 48 (C.A.), at paras. 10 and 13). These cases demonstrate that any discretion to grant relief in this context is narrow.

[137] This strict approach to rescission and suspension of arrears based on current inability to pay is justified. The interests of the recipient and child in certainty and predictability are paramount, as the payor has failed to comply with a court order or agreement without any “excuse for non-payment of support when it came due”

(*Templeton*, at para. 47). The child’s interest in a fair standard of support is subverted when the payor directs support elsewhere; in such circumstances, “the child effectively subsidizes the payor’s improved standard of living” (*Walsh v. Walsh* (2004), 69 O.R. (3d) 577 (C.A.), at para. 25, with additional reasons (2004), 6 R.F.L. (6th) 432). The payor parent, on the other hand, “cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability” (*D.B.S.*, at para. 98).

[138] Accordingly, in this third category of cases, the payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that — even with a flexible payment plan — they cannot and will not ever be able to pay the arrears (*Earle*, at para. 26; *Corcios*, at para. 55; *Gray*, at para. 58). Present inability to pay does not, in itself, foreclose the prospect of future ability to pay, although it may justify a temporary suspension of arrears (*Haisman*, at para. 26). This presumption ensures rescission is a last resort available only where suspension or other creative payment options are inadequate to address the prejudice to the payor. It also encourages payors to keep up with their support obligations rather than allowing arrears to accumulate in the hopes that the courts will grant relief if the amount becomes sufficiently large. Arrears are a “valid debt that must be paid, similar to any other financial obligation”, regardless of whether the quantum is significant (*Bakht et al.*, at p. 550).

[139] While we speak of rescinding arrears, the wording of s. 17 of the *Divorce Act* makes clear that what it authorizes is rescission of the underlying court order or a

term of the order which gave rise to the unmet obligations. Thus a claim to cancel arrears asks the court to set aside an existing and accurate court order, replace it with another, and forgive what is otherwise a legally enforceable debt. That child support should not attract more leniency than other debts is reinforced by the range of maintenance enforcement regimes which exist across the country to enforce compliance with child support obligations. Governments in each province and territory have established administrative Maintenance Enforcement Programs (“MEPs”) (such as Ontario’s FRO) to administer child support orders and help ensure children receive the support owed to them under court orders, including by taking enforcement action such as garnishing wages and suspending drivers’ licenses (see, e.g., *Family Responsibility and Support Arrears Enforcement Act, 1996*, S.O. 1996, c. 31). Further, child support arrears are not released by an order of discharge under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 178(1)(c); these debts are prioritized even where providing a clean slate is a competing policy consideration (see *Brown*, at para. 42; *St-Jules v. St-Jules*, 2012 NSCA 97, 321 N.S.R. (2d) 133, at para. 50). Thus, s. 17 of the *Divorce Act* is not to be used to reduce or vacate arrears too readily, as this would undermine the recognition and enforcement of serious legal obligations.

[140] The court has a range of available options when faced with proven payor hardship. A court’s refusal to rescind arrears does not mean the payor must pay the entire amount immediately (*Earle*, at para. 24). If the court concludes that the payor’s financial circumstances will give rise to difficulties paying down arrears, the court ought to first consider whether hardship can be mitigated by ordering a temporary

suspension, periodic payments, or other creative payment options (*Haisman v. Haisman* (1993), 7 Alta. L.R. (3d) 157 (Q.B.) (“*Haisman* (Q.B.)”), at paras. 32-33, rev’d on other grounds (1994), 157 A.R. 47 (C.A.); *Templeton*, at para. 47; *Brown*, at para. 44). MEPs may also allow the debtor to enter into a reasonable payment plan where the debtor has fallen into arrears and is struggling to keep up with payments (see, e.g., *The Family Maintenance Act*, C.C.S.M., c. F20, s. 56.2(2) and (3); J. D. Payne and M. A. Payne, *Child Support Guidelines in Canada, 2020* (2020), at p. 476). After all, blood cannot be drawn from a stone — where the payor is truly unable to make payments toward the arrears, “any enforcement options available to the support recipient and the court are of no practical benefit” (*Brown*, at para. 44).

[141] While the presumption in favour of enforcing arrears may be rebutted in “unusual circumstances” (*Gray*, at para. 53), the standard should remain a stringent one. Rescission of arrears based solely on current financial incapacity should not be ordered lightly. It is a last resort in exceptional cases, such as where the payor suffers a “catastrophic injury” (*Gray*, at para. 53, citing *Tremblay v. Daley*, 2012 ONCA 780, 23 R.F.L. (7th) 91). I agree with Ms. Colucci that the availability of rescission would otherwise become an “open invitation to intentionally avoid one’s legal obligations” (*Haisman* (Q.B.), at para. 18, citing *Schmidt v. Schmidt* (1985), 46 R.F.L. (2d) 71 (Man. Q.B.), at p. 73; R.F., at para. 57). Simply stated, how many payors would pay in full when the amounts come due if they can expect to pay less later? The rule should not allow or encourage debtors to wait out their obligations or subvert statutory enforcement regimes that recognize child support arrears as debts to be taken seriously.

(b) *Application to the Present Case*

[142] To the extent that Mr. Colucci relies on current inability to pay in this case, his failure to adduce adequate evidence of his financial circumstances would be fatal to any application to rescind arrears. As stated by the Court of Appeal, Mr. Colucci has not provided complete and accurate disclosure of his income and assets and continued to misrepresent his financial circumstances in the course of the proceedings, including with respect to his inheritance from his mother's estate (paras. 28 and 31-32). As such, he has not discharged his onus of showing that he will be unable to pay now or in the future even with a flexible payment plan.

VI. Disposition

[143] For the foregoing reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Gordner Law Firm, Windsor.

Solicitors for the respondent: Goldhart & Associates, Toronto.

Solicitors for the interveners the West Coast Legal Education and Action Fund Association and the Women's Legal Education and Action Fund Inc.: Power Law, Vancouver.

Solicitors for the intervener Canada Without Poverty: Teshebaeva Henderson, Ottawa.