

CANADA / JUDGMENT

Hildebrand v. Hildebrand

2024 BCCA 395

COURT

British Columbia Court of Appeal

DECIDED

27 November 2024

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2024 BCCA 395 Hildebrand v. Hildebrand

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hildebrand v. Hildebrand,

2024 BCCA 395

Date: 20241127

Docket: CA49753

Between:

Wendy Rachele Hildebrand

Appellant

(Respondent)

And

Douglas William Hildebrand

Respondent

(Claimant)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

February 27, 2024 (Hildebrand v. Hildebrand, Penticton Docket E47144).

Counsel for the Appellant:

S. Stanislaus

J.A. Hutlet

Counsel for the Respondent:

M.J. Long

Place and Date of Hearing:

Vancouver, British Columbia

October 23, 2024

Place and Date of Judgment:

Vancouver, British Columbia

November 27, 2024

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Claimant applied for order "setting" his family support obligations retroactively to 2014, when "interim without prejudice" consent orders for child and spousal support were made in Alberta. Claimant's income in 2014 was \$131,500 but had declined substantially since then for reasons beyond his control. Although claimant paid fairly substantial amounts (estimated by the judge as amounting to \$237,600) over the years, his arrears plus interest and charges imposed by the FMEP amounted to some \$280,000. Interest was now accruing at such a rate that claimant simply could not reduce his arrears. Based on claimant's actual income, judge calculated he had in fact "overpaid" some \$27,300. Judge ordered that all arrears, interest and penalties be cancelled and determined that based on actual income of \$90,000 in 2023, claimant should pay \$1,338 (calculated in accordance with the Guidelines) going forward for child support. Spousal support was cancelled in future; this part of the order was not challenged.

Primary ground of appeal was that chambers judge had erred by treating claimant's application as seeking a "de novo review" rather than a variation order under s. 17 of the Divorce Act, to which D.B.S. and Colucci applied. The fact the Alberta Court's orders had been made 'without prejudice' (i.e., without precedential value) did not mean that they were not interim support

orders. The judge's approach ignored fact that the parties had been divorced long ago, so that any variation of support or cancellation of arrears had to be made under s. 17. Since the judge did consider the Colucci/D.B.S. factors in the alternative, this error was not fatal to his order. Judge had not erred in departing from the presumptive three year limitation on retroactive variation given the unusual circumstances of this case; nor did he commit reversible error in accepting claimant's reasons for delay in applying for the retroactive order. The appeal was allowed in part on certain minor factual grounds only.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The appellant Ms. Goertzen (as she is now known) appeals an order made by a Supreme Court justice in response to an application made by her former husband for the "setting" of the amounts of child and spousal support payable by him, in place of those originally ordered by consent. One might think this is not an uncommon phenomenon: support orders are often varied to reflect changes in circumstances. The circumstances of this case, however, are uncommon. First, the original orders of child and spousal support (the "Alberta Orders") were described by the courts that made them as "interim without prejudice consent orders". Because of this, the chambers judge below found the parties had always been aware there was to be a final determination of support and that the Alberta Orders did not "set a precedent or make an actual finding." (At para. 24 of his reasons.) It followed, in his analysis, that the leading cases on variation had no or limited applicability.
- [2] Second, the applicant Mr. Hildebrand, respondent in this court, sought a retroactive order back to 2014, when the Alberta Orders were made. Since then, his income had dropped considerably for reasons apparently beyond his control, although he continued to pay amounts of support that were not insubstantial over the ten years from 2014 on. Yet he did not come to court for the retroactive "setting" of reduced amounts of child and spousal support until late 2023; nor did he seek a variation order.
- [3] The chambers judge's order was also unusual: he cancelled (or 'rescinded') arrears of support of some \$280,789 that had accrued against Mr. Hildebrand over the ten-year period. This included interest and penalties imposed by the Family Maintenance Enforcement Program ("FMEP", now known as the B.C. Family Maintenance Agency), which charges had grown so large that at the rate of the payments specified in the second Alberta Order, Mr. Hildebrand was not able even to cover interest on the arrears. Indeed, the judge found that, based on Mr. Hildebrand's actual income over the period, he had "overpaid" some \$27,300. The Court ordered the respondent to pay child support of \$1,388 per month in future (calculated under the Federal Child Support Guidelines SOR/97-175, and based on his actual income in each year.) Section 7 expenses were to be shared by the parties in proportion to their respective incomes. The Court also terminated spousal support going forward -- an order not challenged on this appeal.

Factual Background

The Alberta Proceedings

- [4] The parties were married in Summerland, B.C. in 2003 when they were both in their 20s. During their marriage, they lived principally in Alberta, where Mr. Hildebrand was a licensed pipefitter and had work in the oil industry. Through counsel, he acknowledged in 2014 that his income in 2013 had been about \$131,500. The parties had two children -- B.H., born in 2007 and P.H., born in 2010 -- and Ms. Goertzen had primary responsibility for raising the children. The chambers judge below found that the couple separated on January 1, 2013.
- [5] The parties experienced a high level of conflict concerning the children from an early date after separation. One of the first court proceedings between them occurred on April 17, 2013 before a justice of the peace, who heard an ex parte application brought by Mr. Hildebrand for a protection order. The justice ruled that family violence on the part of Ms. Goertzen had been shown and ordered her not to go within 100 metres of the family home in Fort Saskatchewan where Mr. Hildebrand was living.
- [6] When the parties attended the Court of Queen's Bench on April 30, 2013, the Court made an "interim order" that the parties would have "interim joint custody" of the children, that Ms. Goertzen would have "interim residential care" of them; that they were not to be removed from the area; and that Mr. Hildebrand would have generous access. The Court acknowledged that the order did not deal with support of the children, but specified that that fact was not to impede Ms. Goertzen from applying for same.
- [7] Almost a year later, on April 8, 2014, the Court of Queen's Bench made another order entitled "Interim Without Prejudice Consent Order". It fixed child support payable by Mr. Hildebrand at \$1,854 per month (based on the \$131,500 figure), and required him to pay mortgage payments, property taxes and utilities relating to the matrimonial home, and payments on two cars until further order of the Court. (The home-related items added up to approximately \$2,018 per month.) The matrimonial home was to be listed for sale and the proceeds held in trust pending a determination of the division of matrimonial property. Issues of child and spousal support were scheduled to be heard in June of 2014 and the parties were directed to provide their income tax returns and notices of assessment to each other no later than July 1 of each year.
- [8] On October 23, 2014, the Court made a second order, also entitled "Interim Without Prejudice Consent Order", which permitted Ms. Goertzen to relocate with the children from Edmonton to Olds, Alberta. Mr. Hildebrand was to have "reasonable and generous access" to the children, including every second weekend and every long weekend. The Court ordered him to pay child support of \$1,848 per month, 100% of s. 7 expenses, and "Interim Without Prejudice Spousal Support" to Ms. Goertzen of \$2,200 per month. Credit was to be given for payment of \$3,139, leaving arrears of \$5,661 as of October 15, 2014. Amounts owing under the order were to be paid directly to the Director of Maintenance Enforcement. We were not referred to any evidence regarding the division of the proceeds of sale of the matrimonial

home or other assets.

- [9] An order of divorce was granted by the Alberta Court of Queen's Bench in October 2015. One of the recitals to the divorce order referred to the fact that leave had been granted to sever the claims for corollary relief from the divorce claim.
- [10] In June 2018, Ms. Goertzen applied in the Alberta Court of Queen's Bench for permission to relocate with the children to Penticton, B.C., where her parents lived and her costs would be lower. The Court granted the application and specified that she was to continue to have primary day-to-day care of the children. Mr. Hildebrand was to have one month of access in the summer, half of the children's Christmas vacations and reasonable and generous access "as agreed upon between the parties." In a reply affidavit filed at the time, Ms. Goertzen alleged that Mr. Hildebrand was choosing to be unemployed "instead of taking any full-time job that is available." She said she could not rely on him to provide support and that he had not provided any of his tax returns to her.

Conflict over Children

- [11] The foregoing recitation of court orders does not give a full picture of the high-conflict relationship between the parties concerning their children. I do not intend to rehearse the parties' respective affidavits on this subject, it being sufficient for our purposes to note the judge's statement that until recently, the parties had "focussed on battles over time with children and this has gone on for a number of years." (At para. 5.) Obviously, this conflict (in which police have been involved on several occasions) has become a central feature of Mr. Hildebrand's life, if not of Ms. Goertzen's as well. The conflict is the primary reason proffered by Mr. Hildebrand for his failing to act earlier to seek a 'setting' of his support obligations anew.
- [12] Ms. Goertzen's affidavit filed in 2023 spoke to her inability to afford many items for the children or herself. For some years, from 2018, she and the children lived with her parents in Penticton in order to save on expenses. Friends in her community had assisted her in many ways and she had incurred student loans in furthering her education. She denies many of the respondent's allegations, including his complaint in late 2023 that he had not seen the children at Christmas for the past six years, and that she had refused to provide her address in Penticton to him. She had been unable to afford health insurance, regular dental care for the children, proper treatment for their ADHD condition, or counselling and tutoring for the children. When she moved out of her parents' basement in Penticton, she said, she did not "feel comfortable" providing Mr. Hildebrand with her new address because he had a "history of calling the police on us." She had also blocked his cellphone number because she felt he was harassing her. She had set up a "third party" email address through which Mr. Hildebrand was told he could communicate with her about the children. This arrangement has obviously done nothing to foster productive communication.

Financial Circumstances

[13] The parties' disagreements about the children played out against the background of Mr. Hildebrand's declining economic circumstances. He deposed, and the chambers judge accepted, that his actual annual income over the years 2014 to 2023 was in fact as set out in the first column of the table attached as Schedule A to these reasons. These figures were taken from line 150 of his tax returns (which were finally disclosed in November 2022.) I understand that except for the year 2016, the calculations of child support amounts under the Guidelines are not challenged by Ms. Goertzen.

[14] Mr. Hildebrand deposed that shortly after the order of April 8, 2014, he had been laid off by his employer in Fort Saskatchewan, Alberta. In 2015 and 2016, oil prices had crashed and Alberta fell into a deep recession. He was unemployed for most of 2016 and from then worked for fairly short periods for various employers doing maintenance work, pipefitters' work for two months in 2018, and work as a foreman, welder's assistant, oilfield service technician and in a series of lower paying jobs between December 2020 and August 2021. His affidavit continues:

From September 2021 to May 2022, I worked for the District Municipality of Hudson's Hope in a maintenance role.

From May 2022 to July 2022, I worked for Strait on a pipefitting site in Fort St. John, B.C.

From August 2022 to February 2023, I worked for Conuma Resources at the Willow Creek Mine in Chetwynd, B.C.

Since February 2023, I have been employed by Flint Corp. as a project coordinator in Fort St. John. Unfortunately, on November 6, 2023, I was sent home by Flint Corp. and told that there was not enough work. I technically still have a job but I am no longer being paid. I was told to check in periodically to see if the situation has changed. I am looking for a new job, but do not expect to find a new job until early 2024.

[15] Having obtained some training in environmental management in 2018, Ms. Goertzen has in recent years earned employment income ranging between \$36,000 and \$39,000. To her affidavit sworn in April 2018, she exhibited a record from FMEP showing the "enforceable balance due" (or in her words, the "tremendous amount owing") by Mr. Hildebrand of \$124,779.63. She also attached the results of a records search that showed he had declared bankruptcy in January 2016. It is clear, then, that she was aware of his parlous financial position by April 2018 at the latest. She deposed then that the bankruptcy resulted in the FMEP's being unable to "enforce against him, leaving me without any support." Her income figures, after the deduction of spousal support, appear in the table in Schedule A to these reasons. They were taken from her tax returns for 2014-2018 (disclosed in 2018) and for later years (disclosed in 2022.)

The 2023 Application

[16] In November 2023, Mr. Hildebrand applied through counsel in the Supreme Court of British Columbia for an order "setting" his interim child and spousal support obligations for the years 2014-2023 (i.e., retroactively) to be the amounts appearing in the table attached as Schedule A; an order reducing his prospective interim spousal support obligation to zero as of December 1, 2023; and an order declaring his proportionate share of s. 7 expenses under the Federal Child Support Guidelines to accord with the actual incomes of the parties. The application stated in part:

As of November 8, 2023, the Claimant [Mr. Hildebrand] has paid a total of \$235,522 in child support, spousal support, and s. 7 expenses according to FMEP records.

Despite regular payments, the Claimant had FMEP arrears of \$206,000 as of October 6, 2022, that have continued to grow. The FMEP currently charges over \$1,400 of interest each month. The FMEP has seized tax refunds, suspended the Claimant's driver's license, and revoked his passport.

The Claimant fell into arrears because his income was always lower than \$131,000, even in 2014, and he could not afford to keep up with the payments, especially during periods of unemployment.

The Claimant has no ability to repay these arrears and has few assets. [Emphasis added.]

[17] Mr. Hildebrand deposed that he had paid the following amounts to the FMEP over the ten years commencing 2014:

2014 -- \$1,848;

2015 -- \$29,711.17;

2016 -- \$3,164

2017 -- \$21,107.16

2018 -- \$22,292.51

2019 -- \$46,766.57

2020 -- \$54,109.26

2021 -- \$11,328.70

2022 -- \$30,645

2023 -- \$14,550 (as of November 8, 2023)

These totalled \$235,522 as of November 2023. (It will be recalled that the second Alberta Order required Mr. Hildebrand to pay a total of \$4,048 per month, or \$48,576 per annum for child and spousal support, plus s. 7 expenses.) The FMEP had "enforced" amounts totalling \$29,427.44 in respect of such expenses.

[18] Mr. Hildebrand further deposed:

In total, the FMEP has recorded a total of \$235,522 in payments for child support, spousal support, and s. 7 expenses, as of November 8, 2023.

(Previously attached hereto as Exhibit "L" is a copy of my Family Maintenance Enforcement Program transactions as of November 8, 2023)

I have not been able to keep up with court ordered child support and spousal support because my income has always been lower than the Guideline income that was set in 2014. As of October 6, 2022, I had FMEP arrears of over \$206,000, which has continued to grow despite continuous payments. I am currently being charged over \$1,400 of interest each month and have no prospect of paying off the arrears if child support and spousal support is not retroactively adjusted to reflect my actual income. [Emphasis added.]

[19] Ms. Goertzen deposed in her responding affidavit that at a court appearance in 2018, Mr. Hildebrand had tried to have the Court address the matter of support but the Court "refused to hear it", instead ordering that the respondent pay the costs of the hearing and a previous one. He was also to be responsible for all costs of facilitating access to the children. Ms. Goertzen also deposed that Mr. Hildebrand "mentioned that he could not afford support payments" at a judicial case conference on March 1, 2022. Yet she says he "only ended up providing financial documents on November 2022, when I received his financial statement, which included his 2019 to 2021 T1 Income Tax Returns and CRA Notices of Assessment." Both parties were self-represented at the hearing.

[20] Ms. Goertzen had become employed only recently in Armstrong B.C. and said she expected her employment income for 2023 to be approximately \$23,000. She itemized the hockey expenses incurred in respect of the parties' son B.H. as coming to some \$12,022. The parties had been unable to send B.H. to a "hockey academy" in Saskatchewan, the cost of which would have been approximately \$40,000. P.H.'s special expenses were estimated to amount to a further \$1,139.25.

Legal Basis of the Application

[21] Mr. Hildebrand's application came before the chambers judge below on February 8, 2024. It failed to specify whether it was brought under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), or the Family Law Act, S.B.C. 2011, c. 25, both of which were listed under the heading "Legal Basis" in the pleading. In *C.L.B. v. A.H.B.* 2013 BCCA 472, this court observed that where a final order fails to specify the legislation under which family support was granted, and both statutes have been pleaded, the court will apply the doctrine of paramountcy and assume

the orders were made under the Divorce Act. (At para. 3.) The Alberta Orders were of course not final, but were arguably ancillary to divorce, having been sought and granted in the divorce proceeding.

[22] The Divorce Act expressly contemplates the granting of interim support orders (see ss. 15.1(2) and 15.2(2)), but the variation provision, s. 17, permits only a former spouse to apply for the variation, suspension or cancellation of a "support order." There is longstanding authority for the proposition that an interim support order (i.e., one made prior to a divorce order) made in divorce proceedings can be varied only by the exercise of the court's inherent jurisdiction. In *Janmohamed v. Janmohamed* 2014 BCSC 107, Madam Justice Donegan, as she then was, explained that courts have historically been reluctant to vary orders made under the inherent jurisdiction of a (superior) court on the understanding that they were simply temporary measures to be considered more fully on the complete record of the trial of the divorce claim and related matrimonial matters. Consequently, support orders made prior to divorce would be varied only in exceptional circumstances. As Donegan J. wrote in *Janmohamed*:

The Claimant takes the position that there is no jurisdiction for this court to vary interim child and spousal support orders pursuant to the Divorce Act. In support of this position, she relies upon *Hama v. Werbes* (1999), 2 R.F.L. (5th) 203.

The Respondent takes a contrary view, submitting there is statutory authority to vary interim support orders and, if not, the court has inherent jurisdiction to do so. The Respondent referred the court to *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22; *Sork v. Sork*, 2009 BCSC 998; *Kirk v. Kirk*, 2007 BCSC 67; *Aschenbrenner v. Aschenbrenner*, 2000 BCSC 1405; *Huculak v. Huculak*, [1998] B.C.J. No. 242, 103 B.C.A.C. 276; *Burke v. Burke*, 2010 BCSC 2; and *Lamparski v. Lamparski*, [1997] B.C.J. No. 2730, 35 R.F.L. (4th) 52.

I have considered all of the authorities provided by counsel, as well as several others. This issue has been considered by courts across the country. In my view, it is settled law that this court does, pursuant to its inherent jurisdiction, have jurisdiction to vary interim Divorce Act support orders, but will do so only in exceptional circumstances.

Under the Divorce Act, the court may issue orders regarding spousal and child support pursuant to ss. 15.1 and 15.2. ...

Orders issued pursuant to subsection (1) of each section are final orders. Orders issued pursuant to subsection (2) are interim.

Orders for support relief granted pursuant to the Divorce Act may be varied pursuant to s. 17(1) (a), which states:

Order for variation, rescission or suspension

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision thereof on application by either or both former spouses;

The relevant sections of s. 2 of the Divorce Act define the following terms:

"support order" means a child support order or a spousal support order;

"child support order" means an order made under subsection 15.1(1);

"spousal support order" means an order made under subsection 15.2(1);

These provisions collectively make it clear that s. 17(1)(a) of the Divorce Act only applies to final orders, not interim orders. It should also be noted that only "former spouses" may bring an application pursuant to s. 17(1) for a variation of an order. In other words, the parties must be divorced before such an application can be brought, with the order to be varied, therefore, a final one.

In *Stannard v. Stannard*, [1991] A.J. No. 679 (Alta QB), McDonald J. concluded that the provisions of the Divorce Act do not contain any authority for the court to vary interim child and spousal support orders. He went on to hold that, despite this lack of statutory authority, superior courts do retain the inherent jurisdiction to vary interim orders. At paras. 6-11, he wrote:

- [6] Yet in my view the absence of a provision in the Divorce Act authorizing variation of an interim support order does not necessitate drawing the conclusion that the Court does not have the jurisdiction to order a variation of an interim support order .
- [7] Rather than examining the issue from the perspective of why Parliament remained silent as to variation of an interim order, I think it useful to ask "Why did Parliament, in s. 17, provide expressly for variation of a final support order?" (Exactly the same question could have been asked of the previous Divorce Act, R.S.C. 1970 c. D-8, s. 11(2) of which expressly permitted variation of an order contained in a Decree Nisi of divorce, whereas there was no similar provision in s. 10, which concerned interim orders.)
- [8] Surely the answer lies in this: In the absence of a provision such as is now found in s. 17(1), the final order for support would, like any other judgment of a Court, not be subject to review, alteration or variation. (See Halsbury's Laws of England, 4th ed., para. 556.) Hence, in order to ensure that a final support order may be varied in what Parliament considered (in s. 17(4)) to be appropriate circumstances, it was necessary to provide expressly for the power to vary such an order.
- [9] No such rule of law applies to interlocutory orders in any action. They are always subject to review, alteration or variation. Hence it was unnecessary for Parliament to include in the Divorce Act a portion that an interim support order may be varied.
- [10] (In addition to the inherent power of the Court to order a variation of an interlocutory order, this Court, by virtue of the Matrimonial Causes Act, 1857 (U.K.), c. 85, s. 6, has the same powers, in respect of what was once described as alimony for a spouse and maintenance for a child (now "support" in both instances), as were possessed by the Ecclesiastical Courts

before 1857: see *Carvell v. Carvell* (1969) 6 D.L.R. (3d) 26 at 29 (per MacKay J.A.). The Ecclesiastical Courts, before 1857, exercised the right of granting interim alimony and varying such orders: *Cox v. Cox* (1826), 3 Add. 276, 162 E.R. 480; *Shirley v. Wardrop* (1858), 1 Sw. and Tr. 317, 164 E.R. 746.)

- [11] Thus I disagree with the view that interim support orders may not be varied before the final disposition of the application for corollary relief. I must respectfully decline to accept the authority of *Heschel v. Heschel* and *Validen v. Validen*. [At paras. 31-9; emphasis added.]

See also *Koivumaki v. Lusan* 2014 BCSC 1198 at para. 10; *Chicoine v. Chicoine* 2007 BCSC 735 per D. Smith J., as she then was; *Huculak v. Huculak* [1998] B.C.J. No. 242 (C.A.), per Hall J.A. in chambers; *Otteson v. Otteson* 2022 BCSC 405 at paras. 14-17.

- [23] In the court below, Mr. Hildebrand took the position that he was entitled to make an "application de novo" rather than seeking a variation under s. 17 of the Divorce Act. On this point, he relied on *R.F. v. H.M.* 2022 BCSC 38, a decision of Bilawich A.J. made in a family proceeding. Bilawich A.J. in turn relied on *Small v. Small* 2020 BCSC 707, in which (to quote from Mr. Hildebrand's application):

Madam Justice Horsman found that where an earlier interim without prejudice order had been made, the applicant respondent could seek a determination of interim support without showing a material change in circumstances:

- [229] I accept the respondent's submission that because the interim support order was made on a without prejudice basis, he is entitled to seek a determination of support in the pre-trial period without showing a material change in circumstances. [At para. 75 of *R.F. v. H.M.*; emphasis added.]

I will return to this question below, but emphasize here that the Court in *Small* was referring to the "pre-trial period" (i.e., before the issuance of a decree of divorce) and that the Court in *R.F. v. H.M.* was referring to a second interim order -- also before the issuance of a decree of divorce.

D.B.S. and Colucci

- [24] I turn next, however, to the seminal decisions of the Supreme Court of Canada in *D.B.S. v. S.R.G.* 2006 SCC 37 and more recently, *Colucci v. Colucci* 2021 SCC 24, both of which dealt at length with the retroactive variation of support orders under the Divorce Act. As will be seen later in these reasons, it is my view that they are clearly applicable in this instance, despite the respondent's argument to the contrary.

- [25] *D.B.S.* consisted of four appeals, each of which involved a recipient parent who had failed to apply to a court for child support in a timely manner; in two of the appeals, the payor parent had made no support payments at all. (See paras. 3-4.) Speaking for the Court, Bastarache J. observed that Canada's child support system is "application based", such that:

... a parent's child support obligation will only be enforceable once an application to a court has been made. This policy choice means that the responsibility of ensuring that the proper amount of support is being paid, in practice, does not lie uniquely with the payor parent. [At para. 56.]

At the same time, the Court acknowledged that support orders are not "set in stone" but may be varied with retroactive effect when circumstances change. Indeed, even where no variation is sought, the child may still have the right to receive support in the amount that should have been payable. Thus the certainty of a court order does not absolve parents of the responsibility of ensuring their children receive the appropriate amount of support. (At para. 64.) Until a support order is challenged, however, it is "presumptively valid". (At para. 65.)

[26] The Court went on to observe that although the word "retroactive" is used to describe such variation orders, a retroactive award does not involve an obligation that did not exist at the time for which the support is being sought. The support obligation is "independent of any court order that may have been previously awarded." Both parents should ensure that the payor parent "fulfills his/her actual obligation, tailored to the circumstances at the relevant time." (At para. 68.) The Court added this:

... I also want to mention that these factors are not meant to apply to circumstances where arrears have accumulated. In such situations, the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainty and predictability militate in the opposite direction. There is no analogy that can be made to the present cases. [At para. 98; emphasis added.]

[27] Beginning at para. 100, the Court discussed four factors to be considered where a retroactive award or variation is sought -- the reason why the order was not sought earlier; the conduct of the payor parent, including any blameworthy conduct; the circumstances of the child; and whether a retroactive award would result in hardship to the payor. As for the date on which a retroactive award should take effect, the Court stated:

The proper approach can be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing. [At para. 125; emphasis added.]

[28] In Colucci, the Court sought to provide an "appropriate framework for determining applications to retroactively decrease the amount of child support owing or forgive child support arrears" in a case where the respondent father had not made any voluntary payments for over 16 years. He owed approximately \$170,000 in arrears. The original

motions judge purported to decrease child support retroactively, effectively reducing the arrears to some \$41,000; the Ontario Court of Appeal overturned that decision and ordered him to pay the arrears in full. (See paras. 1-2.)

[29] The Supreme Court observed that an appropriate framework of analysis must recognize the "core objective" of safeguarding the rights of children to a "fair standard of support", the certainty and predictability provided by an existing court order and against that, the need for "flexibility in a system that ties support to fluctuating payor income." (At para. 4.) After comparing the approach taken in *Brown v. Brown* 2010 NBCA 5, with that taken in *Gray v. Rizzi* 2016 ONCA 152 and *Corcios v. Burgos* 2011 ONSC 3326, the Court, per Martin J., adopted a 'simplified' approach that is "focused on a single presumption regarding the date of retroactivity." Martin J. continued:

... 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. [At para. 71; emphasis added.]

[30] Where a "past material change" in the payor's income is established, Martin J. stated, the existing support order "no longer reflects the content of the payor's legal obligation" and the presumption of varying the order "back to the date of effective notice, up to three years before formal notice", assists the court in fashioning the appropriate remedy. This meant that it was wrong to suggest that the four factors set out in D.B.S. "have no role to play" in retroactive "decrease applications", where the balance between certainty and flexibility is very different. (At paras. 74-6.)

[31] Referring to para. 98 of D.B.S. (quoted above), the Court commented:

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.

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 [of D.B.S.] 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. [At paras. 78-79; emphasis added.]

[32] Summarizing the approach to be taken where a reduction in support is sought, Martin J. repeated that courts retain their discretion to depart from the presumptive date of retroactivity where the result of not doing so would be unfair. In these circumstances, the D.B.S. factors, "adapted to the decrease context", were:

... (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.

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. [At para. 113; emphasis added.]

[33] In Colucci itself the Court ruled that the Ontario Court of Appeal had correctly balanced the payor's interest in "flexibility" against the interests of the child and the recipient. The payor had failed to apply for variation in a timely manner and the lack of funds did not excuse him for failing to come forward for some 18 years. (At para. 121.) Further, he had evaded enforcement of a court order and ultimately absconded to the U.S. without advising the recipient of his whereabouts and continued to evade enforcement upon his return to Canada. Again in the Court's words:

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.

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. [At paras. 130-31; emphasis added.]

[34] The Court also rejected the notion that the payor in Colucci could seek the "rescission" of arrears based on a change of circumstances. Applications for rescission (i.e., for the abrogation or cancellation of arrears: see *Beninger v. Beninger* 2009 BCCA 145) were said to raise different considerations from those for retroactive reductions in support although, Martin J. observed, both will often arise together. (See also *Jones v. Anhorn* 2000 BCCA 213 at para. 13 and *Beninger* at para. 31 on this point.) She described rescission as follows:

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).

...

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; *Punzo*, at para. 46; *Blanchard v. Blanchard*, 2019 ABCA 53, at para. 32; *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), 1997 ABCA 145, 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.

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). [At paras. 134, 136-37; emphasis added.]

(The payor in the case at bar did not seek rescission, at least expressly, in his application.)

[35] Finally, the Court in *Colucci* briefly mentioned other options that might be available when hardship on the payor's part is proven. Where the payor's circumstances "will give rise to difficulties" in paying down arrears, the Court said, it should consider whether a temporary suspension would be appropriate. (Citing *Haisman v. Haisman* (1993) 7 Alta. L.R. (3d) 157 (Q.B.), at paras. 32-3, rev'd on other grounds (1994) 157 A.R. 47 (C.A.)) A "reasonable payment plan" might also be effective where the debtor is struggling to come up with

payments. The Court then continued:

... 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).

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. [At paras. 140-41; emphasis added.]

Chambers Judge's Reasons

[36] The chambers judge began his oral reasons, delivered on February 27, 2024, by reviewing the basic facts of the parties' marriage and children, and the terms of the two Alberta Orders. The result of the Orders, he said, was that as of July 2014 Mr. Hildebrand had been required to pay support for the children and Ms. Goertzen in the amount of \$4,048 per month, which was based on the amount of his 2012 income, or \$131,500. The judge continued:

The clear evidence before me is that at no time since these orders has the claimant made anywhere near \$131,000. His 2014 to 2022 line 150 incomes average over those nine years is somewhere around \$74,730.

There has never been a final determination of income or a final order in regards to child or spousal support obligations. The parties have continued to operate as best they could on the basis of these two interim without prejudice orders. [At paras. 12-13; emphasis added.]

[37] The judge found that the parties had been litigating concerning the children, and in particular Ms. Goertzen's relocations (first within Alberta and then to British Columbia in 2018.) Once these issues had been determined, it was likely the claimant (Mr. Hildebrand) "simply did not have the financial means to bring on this application for review any earlier." With the exception of the year 2016 (in which his income was disputed and in which he had declared bankruptcy), he had in the judge's view "drastically overpaid" both child and spousal support. (At para. 14.) As at January 1, 2024, the interest on his accumulated arrears was \$1,512.89 per month, meaning Mr. Hildebrand would have to pay \$5,560 per month just to remain current with his obligations and pay the interest owing on arrears. With respect to the FMEP, the judge observed:

As for FMEP involvement, the materials disclose a growing level of arrears and interest. Based on the existing order, FMEP has determined that the interest, arrears, and default fees total \$280,789.64. This is despite Mr. Hildebrand on average paying slightly more than \$2,100 per month. That \$280,789.64 is made up of \$254,498 in actual arrears of child and spousal support; \$22,491.63 interest, and \$800 in default fees.

Over the years, the materials suggest that Mr. Hildebrand, as a result of enforcement, has on occasion lost his [driver's] licence, lost his passport, and has been garnisheed. Eventually it appears that he was able to work out a payment schedule with the FMEP, but the current level of the payment schedule does not even result in an ability to keep up with the interest.

Some of the years are more particularly notable than others when one looks at what his income was, what his after-tax income was likely to be, and how much support he paid. For example, in 2019, he earned \$118,885. By my rough estimate, that would mean he would have after-tax income of somewhere between \$90,000 - \$95,000, and with that after-tax income he paid \$46,766.57 against the court orders. In 2020, his income was \$104,245. That gross income likely resulted in him having an after-tax income of between \$85,000 - \$90,000. In that year he paid \$54,109.26 against the order. In 2022, he earned \$83,829. That would get him around \$70,000 in after-tax income, and he paid \$30,654 against the order. [At paras. 19-21; emphasis added.]

"Without Prejudice" Orders

[38] The chambers judge described the first legal issue to be addressed as whether it was open to Mr. Hildebrand to apply as a matter of law for a 'determination' de novo of his support obligations back to the original date of the second Alberta Order "based on the undisputed fact that the parties agreed to a fixing of income and support levels on an interim without prejudice basis." Ms. Goertzen opposed such an approach, submitting that the constraints imposed by D.B.S. and Colucci applied, including in particular the requirement of a material change in circumstances and the presumptive three-year limitation on retroactive variation. (At para. 23.) She placed the date of effective notice at November 2022, when Mr. Hildebrand had provided his tax returns in support of his application, contending that the Court could not go back any further than that date.

[39] The judge observed that there were many possible reasons why parties might agree to "without prejudice" orders. Often there may be a "practical" reason -- to ensure that money starts to flow from someone with means to someone without, on the understanding that an adjustment up or down will be made at some later point. Sometimes too -- and in this case, the judge said -- there are more pressing issues to be adjudicated and court time is limited. An interim without prejudice order may be agreed to on the understanding that adjustments will be made later. Such orders do not always result in an overpayment by the payor and indeed experience had shown that payors who agree to interim without prejudice orders in fact underpay. Those persons must recognize that at some future point "finality and some reckoning happen." (At paras. 26-7.)

[40] The judge noted a series of cases that supported the argument that 'without prejudice' interim orders are intended to have no precedential effect. In *Sandhu v. Bhullar*, for example, Pearlman J. had distinguished at para. 43 between interim consent orders and interim without prejudice consent orders. He noted *D.P.G. v. V.M.G.* 2015 BCSC 1038, where the Court had held that the term "without prejudice" in the consent order meant that it was not to be used either as a sword or as a shield in later litigation on the same issue. As Pearlman J. noted:

... A without prejudice JCC order was 'no more than a Band-Aid provision' which did not impede the parties' freedom to argue for a different result without being hampered by 'earlier agreements made extemporaneously for purposes of expediency'. Accordingly, the court [in *D.P.G.*] approached the application as if it were an initial application. [At para. 42; emphasis added.]

Pearlman J. took a similar approach in *Sandhu*, treating the recipient's application for equal parenting time as if it were an initial one. (At para. 44.)

[41] The chambers judge in the case at bar agreed with Pearlman J.'s comments and with those of Horsman J., as she then was, in *Small v. Small* and of Bilawich A.J. in *R.F. v. H.M.* at paras. 75-80, both *supra*. He ruled that Mr. Hildebrand was "prima facie entitled, as is the respondent, to a wholesale review of the 2014 order because that is what [the parties] agreed to when they agreed or it was ordered that the spousal and child support was to be set on an interim without prejudice basis." (At para. 31; my emphasis.) The judge did not consider whether a change in circumstances had taken place, although as counsel for Ms. Goertzen conceded in this court, the deterioration in the respondent's financial situation would clearly have qualified as such.

The Four Factors

[42] At the same time, the chambers judge acknowledged that the factors discussed at para. 113(5) of *Colucci* could "still be looked at to consider the justice of [a] retroactive decrease as is argued here." The first was the reason for the payor's delay in bringing the matter to court. Obviously, the parties had been involved in family litigation, but it related to the relocations that had been initiated by Ms. Goertzen and other parenting issues over the years. The judge found that:

... There was catching up with the children as a result of moves. There was litigation over a number of years related to parenting issues, and a lot of time spent by the parties about that issue. There was, as noted, the contentious relocation application, and clearly this claimant is not a man of means and as such the delay is explainable to some degree by all those factors. [At para. 33; emphasis added.]

[43] With respect to the payor parent's conduct, while Mr. Hildebrand had not paid the amounts he had been ordered to pay, he had "always paid, and overpaid, based on his income." With the exception of 2016, his income level in the years in question was not significantly challenged by Ms. Goertzen, and in many of those years, the chambers judge observed, he

had paid in the \$30,000s, \$40,000s and \$50,000s annually in years when his after-tax income was "nowhere near \$100,000." In 2019, he had paid about 52% of his income against the order; in 2020, about 64%; and in 2021 about 44% of his net income on child and spousal support. (At para. 34.)

[44] The third factor was the circumstances of the children. The judge found that the children had lived modestly but that there was no suggestion they had "done without". In his words:

... It is of note that the boys have played hockey, or at least one of them at a very high level and that is expensive, and clearly the mother has not been doing without as her tax returns note some significant donations to charity, between \$3,000 and \$9,000 each year. In that regard, she is absolutely entitled to do that and that is a noble thing for her to do, but clearly that level of charitable donations suggest that the circumstances of the children are not that bleak and they are not living, so to speak, hand to mouth. [At para. 35.]

[45] Finally, there was the issue of "hardship to the payor, if retroactivity is not lengthened beyond the presumptive date." Although this test did not necessarily apply here given the judge's ruling about orders made without prejudice, he observed that if no adjustment were made, Mr. Hildebrand would as of January 31, 2024 owe \$280,789, the amount FMEP had identified as owing. Over the nine years since the Alberta Orders, he had paid \$237,631. The judge continued:

... Having paid that amount, and then noting the amount FMEP has determined is owing, (\$280,789), that would mean that Mr. Hildebrand has a total obligation of \$518,420, when with modest adjustment for his 2016 income his entire earnings over those nine years totals only about \$850,000. That is, of course, gross earnings, not net. It is hard to imagine a greater scenario of hardship here. [At para. 36; emphasis added.]

[46] Having carried out this analysis, the judge reiterated his view that Colucci was nevertheless not applicable to this case and that both parties were entitled to a "review de novo" based on the 'without prejudice' nature of the Alberta Orders. (At para. 37.) He emphasized that the purpose of the child and spousal Guidelines is to create a system in which there is some level of financial fairness between the parties and some consistency as between payors in the same province. Given these objectives, the judge found that the only fair and reasonable thing to do was to "retroactively adjust this interim without prejudice order back to the date of its inception." (At para. 38.)

[47] The judge then made findings of the parties' respective incomes for each of the years 2014 to 2023 and determined the amount of support (in accordance with the Guidelines) that Mr. Hildebrand should have paid for each of those years. (See paras. 39-50.) The Court imputed income of \$85,505 to him for 2016. His actual income in each of the ten years, the amounts of child support and spousal support he should have paid based on actual income were found to be as set out in the third and fourth columns in Schedule A hereto.

- [48] Using these calculations, the judge found that Mr. Hildebrand had "overpaid", as well as having lost his driver's license (at least temporarily) and passport and having experienced other enforcement remedies imposed by the FMEP. He had not accumulated any assets over the years and had declared bankruptcy "at some point". Much of the responsibility for the delay, the judge said, lay at Mr. Hildebrand's own feet "because this application could have been brought on sooner, though I understand the reasons why it was not." Over the 111 months since the second Alberta Order was made, however, he had paid a total of \$237,631 in support -- an average of \$2,141 per month. Mr. Hildebrand was not a "serial malingerer" of the kind often seen in cases involving retroactive variation applications. (At paras. 51-2.)
- [49] The judge's "rough estimate" was that having paid \$237,631 over the period in question, Mr. Hildebrand had overpaid some \$27,300. (At para. 53.) When the amount paid (\$237,631) was added to the amounts said by FMEP to be owing (\$280,789) he would have paid or was owing a total of \$518,420. Given that his total pre-tax income over the period was about \$940,000, the \$518,420 amount was obviously "excessive". (At para. 54.) Since the judge was unwilling to order Ms. Goertzen to repay any overpaid amount, he ordered that the FMEP adjust its records to show that as of February 29, 2024, there were "no monies owing, no arrears of child support, no arrears of spousal support, no arrears of s. 7 expenses, no interest owing, and no default fees owing." (At para. 56.) In other words, the arrears were cancelled in their entirety.
- [50] Going forward, Mr. Hildebrand was ordered to pay \$1,388 per month in child support effective March 1, 2024 based on an income figure of \$90,000. As mentioned earlier, spousal support was terminated effective December 31, 2022.
- [51] With respect to s. 7 expenses, the judge declined to make any order in respect of the expensive "hockey academy" that B.H. had hoped to attend. The judge fixed s. 7 expenses at \$1,200 per child per year. Again based on income of \$90,000 estimated for Mr. Hildebrand and \$30,000 for Ms. Goertzen, Mr. Hildebrand was ordered to pay 75% of the \$2,400 annually, or \$150 per month beginning March 1, 2024.
- [52] Finally, the parties were to exchange their income tax returns annually beginning June 1, 2025, so that s. 7 expenses could be adjusted yearly.
- [53] Counsel for the parties made brief arguments regarding costs. Counsel for Mr. Hildebrand told the Court that his client had made a settlement offer but that the result reached by the chambers judge was better from his point of view. Counsel for Ms. Goertzen suggested that because of the significant delay in the bringing of the application, the parties should bear their own costs. The judge estimated that costs of approximately \$3,000 would normally be awarded in an application of this kind. He ordered that Mr. Hildebrand was entitled to costs of \$1,000 and directed that he would be entitled to deduct that amount from the amount scheduled to be paid on March 1 for child support.

[54] The Court's order did not use the words "vary" or "variation" but instead "found" the amounts of child support I have mentioned and ordered the FMEP to "adjust" its records to reflect zero owing by Mr. Hildebrand to Ms. Goertzen.

On Appeal

Grounds of Appeal

[55] In this court, Ms. Goertzen asserts two grounds of appeal, each of which simply describes a conclusion of the chambers judge's order as erroneous without any explanation of any particular error of fact, law or mixed fact and law. The stated grounds are that the chambers judge erred:

- (a) By ordering a retroactive variation of child support to April 1, 2014 and a retroactive variation of spousal support to July 2014; and
- (b) By fixing the amount of section 7 expenses at \$1,200 per child per year.

[56] I infer from Ms. Goertzen's factum, however, that she asserts the following errors as implicit in the first ground:

- a) The judge erred in fact in finding that Ms. Goertzen's income for 2022 had been \$43,260 and should have deducted therefrom spousal support of \$8,469, for a final figure of \$34,791;
- b) The chambers judge erred in utilizing a three-year average to estimate Mr. Hildebrand's 2023 income, in the face of Mr. Hildebrand's evidence that he had earned \$88,073 from Flint Energy Services Ltd. and \$8,400 from Hightech Oilfield Services LP;
- c) The judge erred in treating the "interim without prejudice consent" orders of the Alberta Court of Queen's Bench as different from interim orders generally, and consequently approaching Mr. Hildebrand's application as seeking a "hearing de novo" of the second Alberta Order, as opposed to seeking a variation thereof;
- d) The judge erred in accepting the reasons offered by Mr. Hildebrand for his delay in applying for a retroactive order concerning spousal and child support; and
- e) Alternatively, the judge erred in not applying the date of effective notice (which Ms. Goertzen says was November 2022) as the presumptive date of retroactivity.

[57] With respect to the second ground stated in her factum, Ms. Goertzen says the judge should not have made any order concerning s. 7 expenses, since such relief was not sought by either party below. Counsel for Mr. Hildebrand conceded in this court that such expenses should therefore not have been addressed by the chambers judge. I would allow this ground of appeal and thus delete references to s. 7 expenses from para. 8 of the order appealed from.

- [58] Ms. Goertzen seeks an order setting aside what is described as the chambers judge's "retroactive variation" of Mr. Hildebrand's child and spousal support obligations from 2014 onwards; setting aside the orders that \$43,260 be used for her income for 2022 and \$90,000 be used for Mr. Hildebrand's income for "2023 and ongoing"; and setting aside the costs award. (Although the appellant did not refer expressly to the rescission of Mr. Hildebrand's arrears, it would presumably follow from a setting aside of the "retroactive variation" orders that the rescission order would also be set aside.) In addition, the appellant seeks the costs of the application below and of her appeal.
- [59] Finally, Ms. Goertzen submits that given the need for finality in this matter, this court should substitute its own judgment concerning the application before the Court.

Standards of Review

- [60] Ms. Goertzen's written argument began with a description of the standards of review applicable to findings of fact, law and mixed fact and law. These are well-known and I need not recite them here: see *Housen v. Nikolaisen* [2002] 2 S.C.R. 235 at paras. 26-37 and *Hickey v. Hickey* [1999] 2 S.C.R. 518 at paras. 11-13. Counsel also quoted from the reasons of Chief Justice Finch in *Stone v. Ellerman* 2009 BCCA 294, concerning the appellate review of the exercise of discretion by a lower court:

... [A]n appellate court will not interfere with an exercise of judicial discretion unless it can come to the clear conclusion that it was wrongly exercised in that no weight or insufficient weight has been given to relevant considerations (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-77, 88 D.L.R. (4th) 1, [1992] 2 W.W.R. 193) or that on other grounds it appears that the decision may result in injustice (*Taylor v. Vancouver General Hospital*, [1945] 4 D.L.R. 737 at 743, [1945] 3 W.W.R. 510, 62 B.C.R. 42 at 50 (C.A.)). [At para. 94.]

All of these standards are of course deferential.

Analysis

- [61] I note at the outset that Ms. Goertzen was apparently content with the chambers judge's use of the approximate figures, averages and "rough estimates" appearing in his reasons. She did not object to most of the figures that appear in the Schedule A table, or to the judge's calculations of the Guideline amounts of child and spousal support in each of the years 2014 to 2023. The two exceptions to this give rise to grounds (a) and (b) described above. First, in calculating Mr. Hildebrand's income the judge used a "high three-year average" (of the figures for 2020 to 2022) for 2023, i.e., \$90,000 rather than the \$100,000 estimated by Mr. Hildebrand in his affidavit of November 8, 2023. In a later affidavit, Mr. Hildebrand had explained that his work for "Flint" had not materialized in November, so that his expected income for the year was \$96,473, although he did not have written records to this effect. Given the precarious nature of Mr. Hildebrand's work history, I see no error in the judge's using an average of \$90,000 for the three years ending in 2023. I also agree that the figure for

Ms. Goertzen's income in 2022 should have been net of spousal support as it was in other years.

- [62] Thus I would not accede to ground (b) but would allow the appeal on ground (a) set out above, and substitute \$34,791 for Ms. Goertzen's income in 2022 in the table attached as Schedule A -- although this adjustment will not affect the amount of child support payable by Mr. Hildebrand.

De Novo Determination?

- [63] I turn to the more difficult issues raised by grounds (c), (d) and (e) set out above. With respect to ground (c) -- that the judge erred in ruling that a "review de novo" (see para. 37 of the reasons) of the 2014 Alberta Orders was appropriate -- the chambers judge reasoned that "language in orders" (here the words "without prejudice") must "mean something". It is difficult to argue with this truism, or with the authorities he cited to the effect that such orders are intended to be 'Band-Aid' measures. Nevertheless, there are two substantive problems with the judge's conclusion that the respondent was entitled to a review de novo.
- [64] First, the cases relied upon by the chambers judge -- including *Small v. Small* and *Sandhu v. Bhullar* -- involved applications to replace interim 'without prejudice' orders with different interim orders (i.e., orders to be made before a decree of divorce). I set out here for convenience a passage from *R.F. v. H.M.*, supra, which Mr. Hildebrand reproduced in his application:

The parties agree [this] is an application de novo rather than an application to vary the Blok Order. In *Small v. Small*, 2020 BCSC 707 at para. 229, Madam Justice Horsman found that where an earlier interim without prejudice order had been made, the applicant respondent could seek a determination of interim support without showing a material change in circumstances:

- [229] I accept the respondent's submission that because the interim support order was made on a without prejudice basis, he is entitled to seek a determination of support in the pre-trial period without showing a material change in circumstance. A without prejudice order has been described as a form of "Band-Aid provision", often agreed to for expediency, which should not later impede a party's ability to argue for a different result: *Sandhu v. Bhullar*, 2016 BCSC 59 at para. 42; *Burchhardt v. Geismayr*, 2019 BCSC 1850 at para. 30-32. [At para. 75; emphasis added.]

In the case at bar, a decree of divorce was granted to the parties many years ago. It is simply no longer possible for Mr. Hildebrand to seek a determination of interim support. The "pre-trial period" referred to in *Small v. Small* expired with the divorce decree in 2015. The only means by which the chambers judge could make the order he did was as a variation, suspension or cancellation under s. 17 of the Divorce Act.

- [65] In functional terms, moreover, the second Alberta Order served the same purpose and had the same effect as any interim support order. It required Mr. Hildebrand to pay support for the children and for Ms. Goertzen. He was obligated to pay, and his children were entitled to

be supported, to the extent provided -- just as if the words "without prejudice" had not been present. Although the Alberta Court likely intended that the order would be easier to displace than an ordinary interim order, the question of more permanent support never did come to trial. Many years went by without any final order or variation being sought, notwithstanding the change in Mr. Hildebrand's finances. When he did come forward in 2023, he was a "former spouse" and the principles (as explained in *D.B.S. and Colucci*) governing the variation, suspension or cancellation of support orders under s. 17 applied.

[66] In circumstances somewhat similar to those of the case at bar, it has been said that an interim order may "through the passage of time" become "tantamount to a final order": see *Rouleau v. Fawkes* 2009 BCSC 257 at para. 35, per Hinkson C.J.S.C. In my respectful view, the second Alberta Order in this case qualified as a "support order" under s. 17 or had become tantamount to one for purposes of the Divorce Act by the time Mr. Hildebrand filed his application. Again, the appropriate analysis to be carried out at this stage involved the four *D.B.S.* factors, as modified by *Colucci* at para. 113. Fortunately for our purposes, the judge himself considered the four factors, notwithstanding his doubts that *Colucci* was applicable, and counsel for Ms. Goertzen did not suggest any other factors that should have been considered but were not. Nor did she contend that a change in circumstances had not occurred.

[67] I accede, then, to the ground of appeal at (c) above that the chambers judge erred in treating the respondent's application as one for a review *de novo* concerning support, as opposed to a variation of the second Alberta Order. However, since the Court went on to consider the 'four factors', this error may not be fatal to the judge's ultimate order.

Explanation for Delay

[68] I turn next to ground (d), which concerns the reason for Mr. Hildebrand's long delay in coming to court concerning his support amounts. Ms. Goertzen relies in particular on the Court's statement in *Colucci* that:

... 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). [At para. 63; emphasis added.]

[69] Respectfully, it cannot be said that Mr. Hildebrand was guilty of "an initial lack of disclosure", given his ready acknowledgement in 2012 that he was earning some \$131,500 and given his consent to the "without prejudice interim" order in 2014. Nor could his delay act as a "disincentive" for payors to participate in the initial court process; obviously he did

not benefit personally from the delay, as his bankruptcy demonstrates. Nevertheless, his delay in pursuing a new order or a variation because of the drop in his income certainly called for an explanation.

- [70] As we have seen, the chambers judge accepted, at least to a large degree, Mr. Hildebrand's explanation that he had neither the time nor the money to pursue a reduction in his support obligations because he was dealing with even more important issues relating to parenting over the years. (See paras. 14, 33.) It seems to me that the judge's conclusion that Mr. Hildebrand had an "understandable reason" (see para. 114(4) of Colucci) for his delay might be viewed either as one of fact or of discretion, and that the standard of review precludes our interfering with it on either basis. Viewed as a matter of fact, the decline in Mr. Hildebrand's income between 2014 and 2023 is indeed not challenged and the chambers judge had before him all his tax returns and assessments relating to those years. There was copious evidence of the parties' conflicts concerning the children, their moves from one location to the next, their failure to communicate, and the attempts, though not pursued aggressively, made by Mr. Hildebrand to inform the courts in which he was appearing that his income had deteriorated substantially since 2013. I am unable to say that the judge was clearly and palpably wrong in holding that an explanation was provided.
- [71] If on the other hand one characterizes the judge's holding as a matter of discretion, it would be difficult to say that he considered a wrong principle, failed to give effect to any relevant consideration, or gave no or insufficient weight to relevant factors: see *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3 at 76-7; *Parminter v. Parminter* 2011 BCCA 347 at para. 16; *Kooner v. Sangha* 2016 BCCA 147 at paras. 26-9.
- [72] As far as the policy underlying the Divorce Act support system is concerned, Mr. Hildebrand was not, as the judge noted, a malingerer who was keeping secret an increase in income. It cannot be said that he failed to seek employment actively in the relevant period. He was not 'hoarding' or living an expensive lifestyle -- again, as his bankruptcy and income figures indicate. What he was not disclosing, at least formally, was the decline in his means, while nevertheless paying amounts of support that were not inconsiderable. Obviously, he should have come to court sooner. The children ultimately suffered not because Mr. Hildebrand did not make support payments: indeed he was found to have "overpaid" by some \$27,000. However, the amount of interest and penalties charged by the FMEP mounted up, making it impossible for him to make a dent in the growing amount of arrears from 2014 on. In the words of Martin J. in *Colucci*, enforcement options became "of no practical benefit." (At para. 140.) The adage about blood from a stone does come to mind.
- [73] I would not accede to the ground of appeal at (d) above.

Retroactivity

[74] The final ground of appeal, (e) above, is that the judge erred in failing to use the date of effective notice, which Ms. Goertzen says was November 2022, as the presumptive date of retroactivity. There are of course many compelling policy reasons for the usual rule that a retroactive reduction in a support order should go back no farther than the date of "effective notice" (see Colucci at paras. 86-90) and for the presumptive three-year rule, which in cases of retroactive reductions, recognizes the "informational asymmetry" between payor and recipient. (See Colucci at paras. 91-94.) In the case at bar, it is difficult to fix on one particular date as the date of "effective" notice, given that Ms. Goertzen was aware of Mr. Hildebrand's bankruptcy no later than April 2018 and perhaps earlier; she was likely aware of his various changes in employment over the years; and even she recalled that Mr. Hildebrand had attempted in June 2018 to broach the subject in court. Perhaps not surprisingly, Ms. Goertzen did not pursue the subject in whatever communications she had with Mr. Hildebrand, leaving it to the FMEP to enforce his support obligations.

[75] But the three-year rule is only a presumptive one -- it is not imposed by statute. The Supreme Court in Colucci acknowledged at para. 96 that "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." (My emphasis.) It was in this connection that Martin J. referred to the "adapted" D.B.S. factors which can:

... 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 and certainty. There is no fixed formula; none of the factors is determinative and they must be viewed holistically ... [At para. 96; emphasis added.]

Under the heading "Understandable Reason for the Delay", Martin J. went on to reason that:

... 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.

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). [At paras. 97-98; emphasis added.]

[76] With respect to the second factor, namely the payor's conduct, the Court in Colucci noted that where that conduct has the effect of "privileging" the payor's interests over the child's right to support, it is "blameworthy". The chambers judge in this case did not make any finding of blameworthy conduct on Mr. Hildebrand's part and it is difficult to imagine how the respondent could be regarded as having preferred to improve his own standard of living

over that of his children, even though his children clearly did not grow up in prosperous circumstances.

- [77] Under this heading, Martin J. also emphasized the payor's efforts to disclose and communicate his or her financial situation to the other parent and 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." (At paras. 102-3.) Again, Mr. Hildebrand continued to make payments during the ten-year period, but the court below found that the inexorable accrual of interest and penalties became such that he is not able to keep current, even with the arrears.
- [78] With respect to the children's circumstances, if the children experienced hardship or were currently in need, this might militate in favour of a shorter period of retroactivity: see para. 104 of Colucci. There is no doubt that the children and Ms. Goertzen have lived a modest lifestyle compared to what they would have enjoyed had Mr. Hildebrand continued to earn \$130,000 or more throughout the ten-year period. The reality, however, is that he did not and that Ms. Goertzen and the children have had to 'get by', and have done so with the assistance of friends and family. Ms. Goertzen has now managed to acquire some marketable skills in the environmental industry. Because Mr. Hildebrand is unable to pay or even reduce the arrears, the chambers judge concluded that the only fair thing to do was to cancel the arrears in their entirety and specify a "new" rate of support for the children that was realistic given Mr. Hildebrand's income. Assuming he continues to make the payments fixed by the chambers judge, the children will be supported going forward at a rate commensurate with his actual ability to pay.
- [79] The final factor to be considered is hardship, which is to be "viewed in the context of hardship to the recipient and child if the court were to extend the period of the retroactive decrease. It is a holistic and relative assessment." (Colucci at para. 108.) In my respectful view, the chambers judge did carry out a "holistic assessment" that recognized the reality of the situation before the Court. In the unusual circumstances of this case, the chambers judge's solution seems to me to have been a fair and practical one.
- [80] For these reasons, I would dismiss the final ground of appeal.

Disposition

- [81] In the result, I would allow the appeal only to the extent of substituting \$34,791 for Ms. Goertzen's income in 2022 set forth in the table in Schedule A, and deleting para. 8 appearing on the third page of the judge's order. I understand that the parties will attempt to deal with s. 7 expenses by agreement or will appear promptly in the Supreme Court to resolve the matter by order.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

Schedule A

Year

Mr. Hildebrand's

income (actual)

found by chambers judge

Ms. Goertzen's

income (actual)

found by chambers judge

Child Support

(monthly) based

on Guidelines

Spousal Support

(monthly) based

on Guidelines

2014

\$106,749

\$1,565

(as of April 1, 2014)

\$1,948

(commencing July 2014)

2015

\$85,505

\$19,206

\$1,285

\$696

2016

\$85,505

(imputed)

\$15,977

\$1,285

\$705

2017

\$68,429

\$15,451

\$1,062

\$11

2018

\$54,556

\$26,747

\$847

\$1

2019

\$118,885

\$39,150

\$1,767

\$877

2020

\$104,245

\$36,087

\$1,578

\$296

2021

\$47,259

\$36,969

\$742

\$1

2022

\$83,829

\$43,260

(before deduction of spousal support)

net \$36,445

\$1,311

(January-July)

\$404

(August-December)

\$1

(January-July)

\$222

(August-December)

2023

\$90,000

(estimated on three-year average)

\$1,388

Terminated as of January 1, 2023

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