

CANADA / JUDGMENT

M.K. v. British Columbia (Attorney General)

2020 BCCA 261

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 261 M.K. v. British Columbia (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

M.K. v. British Columbia (Attorney General),

2020 BCCA 261

Date: 20200925

Docket: CA45955

Between:

M.K.

Appellant

(Plaintiff)

And

British Columbia (Attorney General)

Respondent

(Defendant)

Corrected Judgment: The case name of the judgment was corrected on
January 12, 2022.

Before:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated February 13, 2019 (M.K. v. British Columbia (Attorney General), 2019 BCSC 166, Victoria Docket S173504).

The Appellant, appearing in person:

M.K.

Counsel for the Respondent:

F. Zaltz

Place and Date of Hearing:

Victoria, British Columbia

December 5, 2019

Place and Date of Judgment:

Vancouver, British Columbia

September 25, 2020

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Abrioux

Summary:

This is an appeal from the chambers judge's order dismissing the appellant's notice of civil claim on the grounds that it is a collateral attack or, alternatively, that the appellant lacks standing. The appellant challenged the constitutionality of various federal and provincial provisions relating to child support, arguing that they infringed ss. 7, 12, and 15(1) of the Charter. The respondent brought the application to dismiss on the basis that the appellant's claim was an attempt to re-litigate her prior unsuccessful claim for child support retroactive to the birth of her daughter. On appeal, the appellant contends that the judge failed to understand the nature of her claim, which was brought to challenge legislation that enabled a harmful and unconstitutional outcome and not to re-litigate prior proceedings. She also contends that, in finding she lacked standing, the judge failed to recognize her direct interest in the matter and that the matter holds transcendent public importance, particularly to other vulnerable custodial parents like her. Held: Appeal dismissed. The judge did not misconstrue the nature of the appellant's claim and did not err in

applying the collateral attack doctrine and striking the claim as an abuse of process. The chambers judge also did not err in concluding that the appellant lacks both private and public standing to challenge the impugned provisions.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

- [1] As Justice Binnie explained in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the law seeks a finality to litigation. For this reason, litigants must put their best foot forward when first called upon to establish a claim. In subsequent proceedings, a litigant may not attack an order pronounced by a court of competent jurisdiction except as provided by law for that express purpose. In other words, generally speaking, litigants are entitled to only one "bite at the cherry" when they bring a claim: *Danyluk* at para. 18.
- [2] This appeal centers on the finality principle. In 2015, the appellant, M.K., obtained a Provincial Court order against K.B. for child support retroactive to their daughter's birthdate 18 years before she brought the application. K.B. successfully appealed the Provincial Court order to the Supreme Court and M.K.'s appeal to this Court and application for leave to appeal to the Supreme Court of Canada were unsuccessful. In the result, K.B. was ordered to pay child support retroactive to M.K.'s notice of application and M.K. was ordered to pay costs of the appeals, with the outcome that M.K. received \$11,380 in child support from K.B. and paid K.B. \$13,011 in appeal costs.
- [3] From M.K.'s perspective, the laws that led to this outcome are unjust for her, for mothers like her and for children like her daughter. After the Supreme Court of Canada denied her leave application she commenced a new action challenging the constitutional validity of the federal and provincial child support regimes. She claimed that, under the Charter, child support awards should always be retroactive to a child's birthdate, the court should have little or no discretion in granting retroactive support, and costs awards in circumstances like hers amount to cruel and unusual punishment. The judge below dismissed her claim as a collateral attack on the appellate decisions in the previous proceedings and an abuse of process, and concluded that she lacked standing to bring the constitutional challenge.
- [4] M.K. appeals the dismissal order. She contends that the judge erred in applying the doctrine of collateral attack, the Charter and the test for standing, and also in assessing the underlying facts of her claim. In her submission, the previous appellate decisions were unpredictable, precedent-setting and harmful, and the legislation that enables such an unjust result is unconstitutional. She also submits that she has private interest standing based on the effects of the previous appellate decisions upon her and that she should be granted public interest standing based on the comprehensive and important nature of the claim.

- [5] M.K. is a self-represented litigant. She presented her arguments on appeal in a thorough and articulate way. As *Michel v. Graydon*, 2020 SCC 24 highlights, the underlying concern M.K. seeks to address is valid and pressing, namely, the links between child poverty and historically unmet child support obligations. However, in my view, the hurdles she faces in attempting to do so at this juncture via this claim are insurmountable: the judge plainly did not err in applying the collateral attack doctrine and striking the claim as an abuse of process. Nor did he err in assessing the facts or concluding that M.K. lacked standing to challenge the impugned legislation.
- [6] For the reasons that follow, I would dismiss the appeal.

Background

- [7] M.K. is a registered nurse by profession. She suffers from a serious autoimmune disease and a significant eye injury, and she supports herself on a disability pension.
- [8] M.K. and K.B. lived together in 1994, but they did not marry. In 1995, K.B. terminated the relationship when M.K. told him she was pregnant, which distressed her in a deep and long-lasting way. Their daughter, C.K., was born on September 1, 1995 and M.K. raised C.K. without contact or assistance from K.B. Over the years, their financial circumstances were often limited and strained.
- [9] Although she knew where K.B. lived and worked, M.K. did not pursue him for child support throughout most of C.K.'s childhood. However, in July 2013 C.K. told M.K. that she had found her father on social media, she wanted to meet him and she thought he should live up to his responsibilities. In October 2013, when C.K. was 18 years old, M.K. applied to the Provincial Court for an order for retroactive and prospective child support pursuant to s. 149 of the Family Law Act, S.B.C. 2011, c. 25. In response, K.B. agreed to pay prospective support in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines], and to contribute to C.K.'s education, but argued that a support order should be retroactive only to October 23, 2013, when he first received notice of M.K.'s application.
- [10] The trial judge in the Provincial Court allowed M.K.'s application and ordered K.B. to pay child support retroactive to C.K.'s birth date, which she calculated as \$70,320 ((18 February 2015), Victoria 19503 (B.C.P.C.)). K.B. appealed the order to the Supreme Court, where Justice Fisher, as she then was, allowed the appeal based on the principles articulated in *D.B.S. v. S.R.G.*, 2006 SCC 37, (2015 BCSC 1258) and awarded costs against M.K. (2016 BCSC 194). M.K. appealed Justice Fisher's order allowing the appeal of the retroactive support order to this Court, but she did not appeal the costs order. On June 15, 2016, this Court dismissed M.K.'s appeal (2016 BCCA 267) and awarded costs of the appeal against her (2016 BCCA 354).

- [11] Justice Newbury delivered this Court's judgment. After reviewing the background, the decisions below and the standard of review, she addressed the arguments advanced on appeal on behalf of M.K. She found that Justice Fisher applied the appropriate standards of review in overturning the trial judge's order for retroactive child support and commented on the trial judge's erroneous approach to assessing M.K.'s reason for the 18-year delay in seeking support from K.B. Then she said this:
- [31] It is because of the trial judge's characterization of [K.B.'s] conduct, however, that this appeal must in my view fail. The Court's ruling that [K.B.'s] 'doing nothing' for 18 years amounted to misconduct "at the high end of the scale of blameworthiness" constitutes in my respectful opinion a misapprehension of the relevant law. The authorities before the Court illustrated various other types of active misconduct that rank far worse on the scale of blameworthiness - active deception, hiding from the payee parent, creating false records of income - these are all far worse than [K.B.'s] conduct; yet Mr. Horn was not able to refer us to any case that sanctioned an award that went back anywhere near 19 years, even where the conduct was "active". (The longest period was 7 years in *Swiderski v. Dussault*, 2009 BCCA 461, a case that is obviously distinguishable from this; see also *DBS* itself at para. 141.) In my opinion, it was erroneous in law for the trial judge to rank [K.B.'s] 'waiting in the weeds' as more egregious than such active misconduct. Unfortunately, this error tainted the balance of the trial judge's consideration of [K.B.'s] financial circumstances and the final question of the appropriate date for the retroactive award. An award retroactive to a child's birthdate might conceivably be appropriate where the payor's conduct is at the high end of moral blameworthiness and where the child is considerably younger, but this was not such a case.
- [32] In the result, the chambers judge did not err in setting aside the trial judge's order and making the order she did.
- [Emphasis in original.]
- [12] On February 16, 2017, M.K.'s application for leave to appeal this Court's decision to the Supreme Court of Canada was dismissed ([2016] S.C.C.A. No. 381).

The Claim

- [13] On September 19, 2017, M.K. filed a notice of civil claim in the action below, together with a notice of constitutional question. On January 3, 2018, she filed an amended notice of civil claim. The defendant in the action, now respondent, is the Attorney General of British Columbia (the "Attorney General").
- [14] In her action, M.K. sought declarations that ss. 147(1) and 149(1) of the Family Law Act; ss. 15.1(1) and 26.1(2) of the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3; ss. 3(2)(b), 4(b)(ii), 9(c) and 25(1)(a) of the Guidelines; and R. 16-1(7) of the Supreme Court Family Rules unjustifiably infringed the Charter and were of no force and effect. She summarized the nature of the claim in the first paragraph of the amended notice of civil claim:

1. This claim challenges the constitutional validity of the denial of a child's entitlement to retroactive child support from a father who abandoned the mother and his unborn child shortly after learning of the pregnancy, under the application-based discretionary child support regime as set forth in the Divorce Act (Guidelines) and the British Columbia Family Law Act; and the subsequent awarding of costs to the payor parent in judicial proceedings for which the purpose was to secure child support, under the British Columbia Court Rules Act.
- [15] M.K. described the constitutional questions for determination like this in her notice of constitutional question:
 1. Are the application-based discretionary child support regimes as set down in ss. 15.1(1), 26.1(2) of the Divorce Act; Part 7, Div. 2 ss. 147(1), 149(1) of the British Columbia Family Law Act; and ss. 3(2)(b), 4(b)(ii), 9(c), 25(1)(a) of the Federal Child Support Guidelines unconstitutional on the basis that they deny a child's entitlement to support from the day of birth and Charter rights of both the child and custodial parent to security (s. 7), equality, the protection of, and benefit of the law (s. 15(1))?
 2. As well, is the British Columbia Supreme Court's awarding of costs as set forth in Rule 16-1(7) of the Supreme Court Family Rules, under the Court Rules Act, in child support judicial proceedings unconstitutional on the basis that it infringes Charter rights as stated above, and thereby inhibits the seeking and obtaining of support for a child?
- [16] The amended notice of civil claim is lengthy. In summary, in Part 1 M.K. pleads numerous facts in connection with the previous proceedings, together with general allegations regarding the negative effects of child poverty and the challenges faced by custodial parents in connection with obtaining and enforcing child support orders. In Part 3, she pleads that "[t]he impugned legal schemes unjustifiably infringe ss. 7, 12 and 15(1) [of the Charter]" (at para. 5) and that "[t]he very framework of discretionary fact-based retroactive support orders engages and infringes Charter rights of both the child and custodial parent" (at para. 28). Among other things, she also pleads:
106. The failure of the impugned regimes as set forth in the Guidelines and Supreme Court Family Rules to protect Charter rights is clearly visible in the appellate decisions in [K.B.]. A woman who was abandoned and received no support over the course of her child's life applied to the court for child support after failed attempts to secure support through mediation. This emotionally and psychologically compromised woman persisted, on behalf of her child, and in conformity to the law. She was ultimately further victimized by the court system, and discriminated against. She was degraded and made to pay all the money she received as child support back to the man who violated her, and then some. The child therefore received no child support whatsoever, and the man who committed the criminal act of abandonment was legitimized and rewarded by the judiciary, opening the door for others so inclined.

- [17] The Attorney General applied pursuant to R. 9-5(1)(d) of the Supreme Court Civil Rules for an order dismissing the action on the grounds that it was a collateral attack on this Court's decision in the previous proceedings and thus an abuse of process and that M.K. had no standing to bring the claims.

Reasons of the Chambers Judge

- [18] The judge began his reasons by outlining the background, the nature of the claim and the impugned provisions. Then he summarized the issues for determination and the principles that govern the collateral attack doctrine. With those principles in mind, he turned to a detailed review of M.K.'s submissions particularizing her claim:
- [34] The plaintiff's written submission provides further particulars of her claim and I summarize them here:
- (a) The conclusion by the Court of Appeal that the behavior of KB is highly blameworthy was correct. However, the appeal court failed to consider that it was contrary to s. 215 of the Criminal Code which makes it a criminal offence not to provide the necessities of life to a child. The failure by the Court of Appeal to consider the Criminal Code was an error of law...
 - (b) The Court of Appeal and Supreme Court of Canada decisions in her case are in breach of statute and are unlawful. ... Moreover, the circumstances surrounding the courts' decisions on costs give rise to an "alleged" violation of s. 12 of the Charter
 - (c) Charter rights are engaged by "the BCCA's upholding of the BCSC decision, creating a situation whereby a payor need only abandon, 'do nothing' and not only be relieved of past failed obligation but profit again by the awarding of costs."...
 - (d) There is a lack of specification in the Divorce Act and the FLA of a child's right to support from the date of birth, "the effect of which is seen here in the appellate courts' disregard of the legal obligation of the father to provide support." This allowed a violation of the Charter
 - (e) The appellate decisions (on the appeal and on costs) are capricious to the extent as to appear to be ungoverned by law, transgressing the principle of the rule of law...
 - (f) If not for the appellate decisions, CK would have had the opportunity to continue her postsecondary education, and would possibly now be in her final year of study. If this path had remained open she would have been a "child" under the FLA. This prejudice against CK continues because of her age and is being used as a means to strike the claim...
 - (g) [T]he statutory body governing divorce, which includes the Guidelines, has not been substantially updated in over 20 years...

- (h) It is the ability of the courts to exercise discretion of defaulted child support that forms a vital part of the claim a regime that permits loss of support is in contradiction of the fundamental principle that support is the right of the child and cannot be lost, thus denying human and civil rights...
 - (i) Holding the custodial parent responsible for the failure of the payor parent to fulfil the support obligation is unconstitutional...
 - (j) The plaintiff acknowledges the leading case on retroactive child support (D.B.S. v. S.R.G., 2006 SCC 37) and she provides lengthy quotes from that judgment.
- [19] The judge characterized the claim as "very much directed" at this Court's decision in the previous proceedings and, to a lesser extent, the decision of the Supreme Court of Canada (at para. 35). In substance, he stated, M.K. sought "to change the law of British Columbia and Canada so that child support is payable from the date of birth of a child in all cases" and "to restore the decision she received from the Provincial Court, albeit for all children" (at para. 36). He also stated there was "not much doubt" that M.K. was seeking a very different decision from those of this Court and the Supreme Court of Canada in the previous proceedings and the reversal of those previous appellate decisions (at para. 39).
- [20] The judge noted that M.K. did not raise the Charter in the previous proceedings. However, he stated, the collateral attack doctrine applies where issues should have been raised in previous proceedings (at para. 40), which he found was true in this case:
- [41] The problem for the plaintiff is that she has not explained why she did not raise Charter issues in the previous proceeding. This could have been done at the Provincial Court or Supreme Court levels and perhaps at the level of the Court of Appeal. She now seeks to recast her entire case as Charter litigation with, again, the objective of overturning the previous appeal decisions and restoring the decision of the Provincial Court.
- [42] However, the place and time to raise a constitutional challenge to, for example, the Guidelines is before the court hearing the claim for child support; "it is too late and inappropriate to challenge the Guidelines in a collateral proceeding, commenced after the support order is made (unless the order contemplates the challenge)" (Strickland v. Canada (Attorney General), 2013 FC 475 at para. 47). Similarly, such issues "need to be raised by a litigant at the first opportunity in the litigation so that the issue can be dealt with in a timely manner and with a minimum of court proceedings" (Premi, at para. 28).
- [43] Another objective of the plaintiff's claim must be to overturn D.B.S.; in particular, the direction to trial judges to use three years as a rough guideline for the calculation of retroactive child support. She is entitled to do that but the time to challenge D.B.S. was during the previous proceedings. And the usual way to challenge previous authority is to persuade a court of the merits of a different approach. I do not agree with the plaintiff that she can raise that challenge now after going through all levels of the court system previously. Those other proceedings were the time and place to raise her concerns.

- [21] Citing *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.), the judge also recognized that there are exceptions to the collateral attack rule. For example, he stated, the rule may be relaxed where a challenge can be made without harm to the repute of the administration of justice, the rule is not intended to immunize court orders from review and there should always be a court of competent jurisdiction for the purposes of s. 24(1) of the Charter (at para. 45). However, he found, the exceptions did not apply to M.K.'s claim. He went on to conclude that it must be dismissed because it was a collateral attack on the previous appellate decisions and an abuse of process:
- [46] I conclude that considerable harm to the repute of justice would occur if the plaintiff's claim proceeds. It expressly challenges the previous court decisions and permitting her claim would essentially void the previous proceedings before this court, the Court of Appeal, and the Supreme Court of Canada. Moreover, it is very clear that the economic use of court services is not well served by re-litigating the family law issues that were before this court, the Court of Appeal, and the Supreme Court of Canada.
- [47] According to the plaintiff, her claim is not an appeal or retrial. On the basis of her claim, her constitutional questions, and her argument, I disagree; she expressly seeks a different decision than the one she received before. A related matter is that, in light of the extensive proceedings before the previous courts, it cannot be said that somehow the plaintiff was denied an appeal. Her appeals have ended without success from her point of view, but that does not justify the re-litigation of the issues before the previous courts, albeit with the addition of constitutional issues. And I do not agree with the plaintiff that this result leads to unfairness and discrimination (para. 90). Generally, it is the appeal system that provides checks and balances on judgments and the concerns of the plaintiff have been amply considered.
- [48] In conclusion, I can find no basis for any exception to the rule against collateral attack in this case. I conclude the plaintiff's claim is a collateral attack on those earlier decisions and, as discussed above, it is therefore an abuse of process. It was the previous legal proceedings where the plaintiff's concerns should have been raised (*Strickland*, at para. 47). Her claim must be dismissed.
- [22] Although the dismissal of the claim as a collateral attack was sufficient to dispose of the Attorney General's application, the judge also addressed the standing issue. He outlined the governing principles from the leading cases, including *Canada (Justice) v. Borowski*, [1981] 2 S.C.R. 575; *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 [Downtown Eastside BCCA]; and *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [Downtown Eastside SCC]. Then, he analyzed whether M.K. was entitled to private interest standing and public interest standing to bring the claim.

- [23] The judge began this part of his analysis by noting that M.K. and K.B. were not married and, therefore, not governed by s. 26.1(2) of the Divorce Act or ss. 4(b)(ii) and 9(c) of the Guidelines. For that reason, he struck those aspects of the claim as bound to fail (at paras. 51-56). Turning to private interest standing, he noted that M.K. was no longer in a position to claim child support because C.K. was an adult and stated that this "create[d] some difficulty in accepting that her claim would have an immediate effect on the plaintiff" (at para. 59). After describing the claim as "essentially res judicata", he found that it was about "righting a wrong" or "upholding a principle", that a more immediate effect was required and that, while M.K.'s interests and C.K.'s interests were linked, "some causative relationship between the challenged legislation and the claimed prejudice" was necessary. In the result, he concluded, M.K. did not have private interest standing to bring the claim (at paras. 59-61).
- [24] As to public interest standing, the judge accepted that M.K.'s claim raised a serious justiciable issue. However, he found her situation was unusual in that the claim for child support was not pursued for 18 years and C.K. was now an adult. In all of the circumstances, the judge was not satisfied the claim would have significant value for other parents or that allowing it to proceed would be an economical use of judicial resources. For these reasons, he declined to grant M.K. public interest standing to bring the claim (at paras. 67-68, 70-72).

Issues

[25] The issues for determination are:

- a) Did the judge err in applying the collateral attack doctrine and striking the claim as an abuse of process?
- b) Did the judge err in concluding that M.K. lacked standing to bring the claim?

Discussion

Standard of Review

- [26] The applicable standard of review depends on the nature of the issue under consideration. On this appeal, different standards apply to different issues.
- [27] The judge's decision to strike M.K.'s claim as a collateral attack on the previous appellate decisions and an abuse of process involved the exercise of discretion. The same is true of his decision not to grant M.K. standing. On appeal, discretionary decisions are accorded deference. To establish a reversible error in the exercise of judicial discretion an appellant must show the judge erred in principle, ignored or misapplied a relevant factor, or made a decision that is so clearly wrong that it amounts to an injustice: *Lamb v. Canada (Attorney General)*, 2018 BCCA 266 at paras. 46-47; *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at para. 60.

[28] The judge's decision also involved finding facts and applying legal principles to those findings. As to the former, a deferential standard also applies. Appellate intervention with respect to factual findings is only appropriate where the judge has made a palpable (obvious) and overriding (material) error. On the other hand, the standard of review is correctness where the judge made extricable errors of law in identifying or applying the relevant legal criteria: *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214 at paras. 24-25; *Krist v. British Columbia*, 2017 BCCA 78 at paras. 23-26.

Did the Judge Err in Applying the Collateral Attack Doctrine and Striking the Claim as an Abuse of Process?

[29] M.K. contends that the judge erred in applying the collateral attack doctrine by misconstruing the nature of her claim and her reasons for bringing it forward. Contrary to his finding, M.K. says, she did not seek the reversal of the previous appellate decisions; she sought to challenge the legislative schemes that allowed the appellate courts to reach those decisions, which resulted in an unjust and harmful denial of support for C.K. contrary to the fundamental principle that support is the unalterable right of the child. In M.K.'s submission, the judge failed to appreciate that this was the thrust of her claim, which led him to apply the collateral attack doctrine in error when the object of her claim was not to invalidate a previous court order. Rather, she says, the object of her claim was to ask two critical questions: a) is it constitutional for the state to deny a child support?; and b) is it constitutional to force a custodial parent into court proceedings in order to obtain child support with all of the risks that court proceedings entail?

[30] In support of her submission, M.K. relies on several authorities. For example, she argues this Court affirmed in *Lamb* that the collateral attack doctrine does not apply when the specific object of the appellant's action is not to invalidate a previous order, and in *Greengen* that a civil action does not constitute a collateral attack only because it alleges that a government decision is unlawful. She also argues that her claim pleads a valid cause of action given the devastating consequences for her of the previous appellate decisions, which, she says, engage rights under ss. 7, 12 and 15(1) of the Charter. She argues further that the judge erred in finding she failed to explain why she did not raise Charter issues in the previous proceedings when the constitutional implications of the previous appellate decisions were unforeseeable until the decisions, which manifested the harm, were handed down.

[31] M.K. goes on to submit that the judge misapplied the exception principle in *Domm* when he found it would harm the repute of justice to permit her claim to proceed and, therefore, struck it as an abuse of process. In fact, she contends, the judge's refusal to permit the claim to proceed harmed the repute of justice because the result of the previous appellate decisions violated social norms, the constitution and the rule of law. In addition, she says, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, and *R. v. Boudreault*, 2018 SCC 58, the law has developed such that the Charter rights of impoverished custodial parents and

their children, such as herself and C.K., are engaged by the results of the previous appellate decisions and those rights should be determined. According to M.K., as this Court affirmed in *Tangerine Financial Products Limited Partnership v. The Reeves Family Trust*, 2015 BCCA 359, the correct forum for the resolution of such important and complex matters is a trial.

- [32] I am not persuaded by these submissions. In my view, M.K.'s claim was plainly a collateral attack on the previous appellate decisions and an abuse of process.
- [33] A collateral attack is "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment": *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599. To determine whether a claim constitutes such an attack, the court should ask whether the claim, or any part of it, amounts in effect to an appeal of an existing order: *Krist* at para. 47. A claim will amount "in effect" to an appeal of an existing order if it seeks to invalidate, or otherwise challenge the legal force of, the order: *Lamb* at para. 94.
- [34] The rule that an order made by a court having jurisdiction to make it is binding and conclusive unless set aside on appeal or lawfully quashed is well-established in our jurisprudence. This rule extends to collateral attacks advanced on constitutional grounds: *Carpenter Fishing Corp. v. Canada*, 2002 BCCA 611 at para. 8. In particular, where a party could have raised a constitutional issue in previous litigation but did not, a subsequent attempt to do so in fresh proceedings is impermissible. As Justice Mackenzie held in *Carpenter Fishing*, "parties to litigation must bring forward their whole case and will not (except under special circumstances) be permitted to bring forward an issue that was omitted but that could have been raised with reasonable diligence": at para. 13. As he also held, disappointed litigants who have had an opportunity to raise a constitutional issue in previous litigation and have exhausted their appeal rights should not expect "more judicial time and attention to pursue their grievance and to attempt to undermine the legitimacy of [the previous order] that is beyond further direct challenge": at para. 16 (see also *Premi v. Khodeir*, 2009 CanLII 42307 at paras. 22-30 (Ont. S.C.J.)).
- [35] Rooted in public policy, the collateral attack doctrine is intended to advance the interests of justice by avoiding duplicative or inconclusive litigation, potential inconsistent results and undue costs, and by preventing a party from avoiding the consequences of an unfavourable decision: *Krist* at para. 46; *Danyluk* at para. 18. As Justice Iacobucci explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25:
- [71] The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *D. J. Lange, The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review).

- [72] The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the reputation of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.
- [36] The rule against collateral attack may be properly viewed as an application of the broad and flexible doctrine of abuse of process, which is subject to the same underlying policy objectives: *Strickland v. Canada (Attorney General)*, 2013 FC 475 at para. 51, citing *British Columbia (Workers' Compensation Board v. Figliola*, 2011 SCC 52; *Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 at para. 71. The focus of the abuse of process doctrine is the integrity of the administration of justice, not the interests of any particular party. The doctrine stems from the court's inherent jurisdiction to control its own process. It should be exercised to avoid proceedings that are oppressive or vexatious and that violate fundamental principles of justice: *Lamb* at para. 48.
- [37] In some cases, re-litigation undermines the adjudicative process and is, therefore, abusive. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, Justice Arbour observed that re-litigation is expensive, presents a risk of inconsistent outcomes and, as a general rule, should not be allowed to proceed: at paras. 51-52. Nevertheless, she went on to state that:
- [52] There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context.
- [38] It follows that neither the collateral attack doctrine nor the abuse of process doctrine should be applied categorically. Rather, as Justice Gleason recognized in *Strickland*, citing *Domm and Shams v. MacDonald*, [2009] O.J. No. 226 (S.C.J.), where the underlying interests of these doctrines would not be served by adhering to them or where the fair administration of justice would not be harmed, exceptions to their application may be appropriately made: at para. 52.
- [39] In my view, based on these principles it is apparent that the judge did not err in applying the collateral attack doctrine and striking M.K.'s claim as an abuse of process. The time and place for her to challenge the constitutional validity of the child support regime and the D.B.S. framework was in the previous proceedings when she sought the order for retroactive child support against K.B. While the results of the appellate decisions were undoubtedly disappointing for M.K., they were far from unpredictable given the nature and extent of judicial discretion contemplated by the legislative regime and related jurisprudence, including D.B.S. and the framework it established. When she brought her application for retroactive child support, M.K. was exposed to the exercise of that discretion and, with

reasonable diligence, could and should have raised her challenge to the regime, but she did not.

- [40] I do not accept that the judge misconstrued M.K.'s claim, its thrust or its objective. As noted above, he outlined the particulars of the claim in considerable detail and recognized, correctly, that the result she seeks is to invalidate the legal force of the previous appellate decisions and undermine their legitimacy now that they are beyond further direct appeal. Nor do I accept that M.K. has a valid cause of action based on the effects of the previous appellate decisions upon her. A court order, regardless of how negative or unsatisfactory from a litigant's perspective, does not constitute government action for the purposes of founding a new Charter claim: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 600-01.
- [41] Further, in my view, the judge was entitled to conclude that the repute of justice would be harmed by permitting M.K.'s claim to proceed given the foregoing factors. Re-litigation of issues that have been, or should have been, determined in previous proceedings offends the finality principle and undermines the orderly administration of justice, whereas respect for the finality of judicial decisions increases fairness and the integrity of the justice system. As Justice Abella put it in *Figliola*, access to justice does not mean serial access to multiple forums and more adjudication does not necessarily mean more justice: at para. 35. I see no error in the judge's conclusion that more adjudication of retroactive child support issues that were, or should have been, previously and finally litigated in this case would be unjust.

Did the Judge Err in Concluding that M.K. Lacked Standing to Bring the Claim?

- [42] M.K. also contends the judge erred in concluding that she lacked standing to bring her constitutional challenge. In her submission, she was more particularly affected than other people by the effects of the previous appellate decisions and thus entitled to private interest standing, which he erroneously failed to find. In addition, she says, the judge ignored her claim for s. 24(1) Charter relief and failed to recognize the inextricable link between her interests and those of C.K. Both of these errors led him to deny her private interest standing to bring the claim.
- [43] I would not accede to these submissions. The judge stated and applied the principles related to private interest standing correctly. As Justice Saunders explained in *Downtown Eastside BCCA*, to establish a right to private interest standing to challenge legislation the plaintiff must show a direct, personal interest in the impugned provision and show that she "is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest" or to "suffer some disadvantage, other than a sense of grievance or debt for costs": at paras. 23, 29. M.K. did not and could not.
- [44] As to public interest standing, M.K. repeats her assertion that the judge failed to grasp the nature of the claim, which, she says, led him to err in assessing the second and third factors for consideration on public interest standing. In her submission, her constitutional challenge is comprehensive and systemic in nature and it raises issues of transcendent public importance, particularly for disadvantaged and vulnerable custodial parents who

require access to justice to vindicate their Charter rights. However, M.K. argues, the judge focused instead on conserving judicial resources, the focus of which was inappropriate and unjustified. She argues further that he also failed to consider whether there were other realistic alternate means to bring these issues before the court, as required by the Downtown Eastside SCC test.

- [45] I have already rejected M.K.'s assertion that the judge failed to grasp the nature of her claim in conducting his analysis. I also reject her submission that he erred in assessing the second and third factors of the test for public interest standing, namely, whether the plaintiff has a real stake or a genuine interest in the issue raised and whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. As it is unnecessary for present purposes to analyze whether the claim met the first factor of the public interest standing test, I will not address that question.
- [46] I see no reversible error in the judge's exercise of his judicial discretion to decline to grant M.K. public interest standing based on the second and third factors of the test. In my view, contrary to M.K.'s submission, he did not err in focusing on conserving judicial resources or fail to consider whether there were other realistic alternate means to bring these issues before the court. The need to conserve judicial resources is an appropriate consideration in an assessment of whether to grant public interest standing: Downtown Eastside SCC at para. 34. Further, and importantly, as the judge recognized, there is (and, in this case, was) an entirely realistic alternate means for these issues to be brought before the court: in a first instance claim for retroactive child support.

Conclusion

- [47] For all of the foregoing reasons, I would dismiss the appeal.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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