SCC File No: 38808

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

FELICE COLUCCI

APPELLANT
(Respondent)

AND:

LINA COLUCCI

RESPONDENT
(Appellant)

FACTUM OF THE INTERVENER
WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

JENNIFER KLINCK
JOSHUA SEALY-HARRINGTON

Power Law/Juristes Power
401 West Georgia Street, Suite 1660
Vancouver, BC V6B 5A1
Tel: 778-658-0192
Fax: 778-658-0192
Email: jklinck@powerlaw.ca

Counsel for the Interveners, West Coast Legal Education and Action Fund Association and the Women's Legal Education and Action Fund Inc.

MAXINE VINCELETTE

Power Law/Juristes Power
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4
Tel: 613-702-5573
Fax: 613-702-5573
Email: mvincelette@powerlaw.ca

Agent for the Interveners, West Coast Legal Education and Action Fund Association and the Women's Legal Education and Action Fund Inc.

ORIGINAL TO: **SUPREME COURT OF CANADA**
Registrar
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

RICHARD M. GORDNER

Gordner Law Firm
209-380 Pelissier Street
Windsor, ON N9A 6W8
Tel: 519-258-0906
Fax: 519-258-4192
Email: gordnerlaw@gmail.com

Counsel for the Appellant,
Felice Colucci

MOIRA S. DILLON

Supreme Law Group
90-275 Slater Street
Ottawa, ON K1P 5H9
Tel: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Appellant,
Felice Colucci

SURINDER K. MULTANI

Goldhart & Associates
20 Eglinton West, Suite 1305
Toronto, ON M4R 1K8
Tel: 416-967-6111
Fax: 416-967-2778
Email: smultani@goldhartlaw.com

Counsel for the Respondent,
Lina Colucci

DAVID R. ELLIOTT

Dentons Canada LLP
99 Bank Street
Ottawa, ON K1P 1H4
Tel: 613-783-9699
Fax: 613-783-9690
Email: David.elliott@dentons.com

Agent for the Respondent,
Lina Colucci

CEILIDH JOAN HENDERSON

Teshebaeva Henderson
170 Laurier Aevnue West, Suite 606
Ottawa, ON K1P 5V5
Tel: 613-801-0903
Fax: 613-801-0539
Email: henderson@at-law.com

SHAWN DUGUAY

Gowling (WLG) Canada LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-783-8969
Fax: 613-788-3587
Email: shawn.duguay@gowlingwlg.com

Counsel for the Intervener,
Canada Without Poverty

JEFF W. BEEDELL

Gowling (WLG) Canada LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Agent for the Intervener,
Canada Without Poverty

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. The manifest objective of child support under the *Divorce Act*[1] is to promote children's welfare by ensuring that child support is paid; too often it is not. The stark reality of child support in Canada is rampant underpayment, which systemically impoverishes both women and children. The economic destinies of women and children are inseverable as most children continue to live with their mothers. The West Coast Legal Education and Action Fund Association ("West Coast LEAF") and the Women's Legal Education and Action Fund Inc. ("LEAF") jointly submit that, to better achieve the objective of child support, the following principles and framework must guide the exercise of judicial discretion to vary child support orders:

   a. the Court should reaffirm its unambiguous declaration in *DBS* that "[a]ny incentives for payor parents to be deficient in meeting their obligations should be eliminated"[2];

   b. both women and children's substantive equality must be centred; and

   c. these two principles—both independently and collectively—support adopting a simplified framework governing retroactive child support orders.

2. West Coast LEAF and LEAF rely on the facts as summarized by the Court of Appeal.[3]

PART II - QUESTION IN ISSUE

3. These submissions address the fundamental issue on appeal: How should courts exercise their discretion to retroactively vary a child support order under s. 17(1)(a) of the *Divorce Act*?

PART III - ARGUMENT

A. The Reality of Child Support in Canada

4. The core issue on appeal is framed by two realities of child support in Canada.

5. First, child support is dramatically underpaid. There are billions of dollars of unpaid child support in Canada.[4] Sometimes, child support obligations are known to recipients, but payors are delinquent in paying. Other times, the obligations are unknown to recipients because payors

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[1] RSC 1985, c 3 (2nd supp) [*Divorce Act*].
[2] *DBS v SRG*, 2006 SCC 37 at para 4 [*DBS*].
[3] *Colucci v Colucci*, 2019 ONCA 561 at paras 4-12 [Court of Appeal Reasons].
[4] *House of Commons Debates*, 42-1, Vol 148, No 326 (26 September 2018) at 21867 (Hon Jody Wilson-Raybould).

conceal increases to their income—the basis for quantifying child support.[5] Indeed, financial non-disclosure has been described as the "cancer" of family law litigation.[6]

6. Second, child support is gendered. Post-separation, women most often have custody.[7] In turn, overwhelmingly, fathers are payors and mothers are recipients. Indeed, in 96% of cases registered in a maintenance enforcement program, child support is to be paid by the father.[8] Existing gender inequalities aggravate this dynamic. Women are, as a group, poorer than men.[9] And recipients—often, mothers—typically have fewer resources than payors,[10] a fact exacerbated by the exclusion of child support applications from many provincial legal aid schemes.[11] In contrast, payors—often, fathers—benefit from informational asymmetry. Because the amount of support owed is based on the payor's income,[12] "only the payor parent knows" when child support must be adjusted.[13] Three systemic consequences follow: (1) the underpayment of child support compounds the "feminization of poverty"[14]—"When payors fail to pay or underpay support, women are impoverished";[15] (2) the economic destinies of women and children are linked—in fact, the low-income rate for children living with their mother

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[5] *Federal Child Support Guidelines*, SOR/97-175, s 3(1)(a).
[6] *Smith v Smith*, 2017 BCCA 319 at para 24 [*Smith*].
[7] Statistics Canada, *Census in Brief: Portrait of children's family life in Canada in 2016* Catalogue No 98-200-X201606 (Ottawa: Statistic Canada, 2 August 2017), online: <https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016006/98-200-x2016006-eng.cfm>.
[8] Statistics Canada, *Payment patterns of child and spousal support: Juristat*, by Mary Bess Kelly (Ottawa: Statistics Canada, 24 April 2013) at 5, online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11780-eng.pdf?st=eRcodICf>.
[9] Statistics Canada, *The Economic Well-Being of Women in Canada:Women in Canada: A Gender-based Statistical Report*, by Dan Fox & Melissa Moyser (Ottawa: Statistics Canada, 16 May 2018) at Chart 1, online: <https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54930-eng.pdf >.
[10] Hugh Neilson, "Tax Implications of Marriage Breakdown" (2004) 29:1 Law Now 29 at 34.
[11] House of Commons, *Access to Justice Part 2: Legal Aid: Report of the Standing Committee on Justice and Human Rights* (October 2017) (Chair: Anthony Housefather) at 32-40.
[12] *Federal Child Support Guidelines*, SOR/97-175 s 3(1)(a).
[13] *DBS*, *supra* note 2 at para 161 (per Abella J, concurring).
[14] *Moge v Moge*, [1992] 2 SCR 813 at 853 [*Moge*]; *Willick v Willick* [1994] 3 SCR 670 at 704-705 (L'Heureux-Dubé J, concurring) [*Willick*].
[15] Natasha Bakht et al, "D.B.S. v. S.G.R.: Promoting Women's Equality through the Automatic Recalculation of Child Support" (2006) 18:2 CJWL 535 at 557.

(42.0%) is much higher than that for children living with their father (25.5%);[16] and (3) intimate partner violence—a similarly gendered phenomenon, where women represent the vast majority of victims[17]—is too often used to evade paying child support.

7. The intersection of child support and intimate partner violence warrants elaboration. *Divorce Act* child support is application based; the recipient parent bears the onus of engaging the legal process.[18] As such, physically and emotionally abusive payor-fathers can intimidate recipient-mothers from seeking and enforcing child support. Disputes over child support "give batterers another opportunity to try to exert control over their victims." Consequently, "[m]any victims, out of fear of the batterer, are afraid to file for the child support that their children need", especially since abusers are less likely to pay than non-abusers.[19] Further, withholding child support can itself be a form of financial abuse.[20] Such abuse places children "at increased risk for a wide range of psychological, emotional, behavioural, social, and academic problems."[21]

8. The facts of this appeal reflect many of these trends. Mr. Colucci is the payor.[22] He only once disclosed—and never substantiated—his income fluctuations.[23] He made few voluntary

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[16] Statistics Canada, *Census in Brief: Children living in low-income households*, Catalogue No 98-200-X2016012 (Ottawa: Statistics Canada, 13 September 2017) at 2, online: <https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016012/98-200-x2016012-eng.cfm>.

[17] See Statistics Canada, *Family violence in Canada: A statistical profile, 2018*, by Shana Conroy, Marta Burczycka & Laura Savage, Catalogue No 85-002-X (Ottawa: Statistics Canada, 12 December 2018) at 24 and Table 2.1, online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00018-eng.pdf?st=YGodouJW>; See also Sarah Romans et al, "Who Is Most at Risk for Intimate Partner Violence? A Canadian Population-Based Study" (2007) 22:12 Journal of Interpersonal Violence 1495 at 1502.

[18] *Divorce Act*, *supra* note 1 at s 15.1(1); *DBS*, *supra* note 2 at para 56.

[19] Emmaline Campbell, "How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It" (2017) 24:1 UCLA Women's LJ 41 at 63-65.

[20] For commentary, see Heather Douglas & Rachna Nagesh, "Domestic and family violence, child support and 'the exemption'" (2019) Journal of Family Studies at 2; See also Campbell, *ibid*. For caselaw, see e.g. *GC v AVS*, 2019 BCSC 2242 at paras 72-74.

[21] Andrea Gonzalez et al, "Subtypes of exposure to intimate partner violence within a Canadian child welfare sample: Associated risks and child maladjustment" (2014) 38 Child Abuse & Neglect at 1935.

[22] Court of Appeal Reasons, *supra* note 3 at para 5.

[23] *Ibid* at para 34.

support payments.[24] Ms. Colucci is the recipient, had custody of their two daughters,[25] and suffered—with those daughters—from Mr. Colucci's non-payment.[26] Mr. Colucci all but abandoned his child support obligations for 16 years.[27] Nevertheless, he had those obligations substantially and retroactively reduced at first instance.[28] This is the reality of child support in Canada. Non-payment is rampant. Women and children systemically suffer. And fathers are, too often, let off the hook. This social context must inform child support law.

B. The Principles and Framework that Must Guide the Exercise of Judicial Discretion to Vary Child Support

1. Eliminate Pernicious Payor Incentives

9. *DBS* is categorical: "Any incentives for payor parents to be deficient in meeting their obligations should be eliminated."[29] While *DBS* sought to eliminate pernicious payor incentives, subsequent applications of its framework have fallen short of this goal. For example, *DBS* instructs that, "in the case of arrears" (i.e. where a known child support debt accumulates), certainty favours enforcement.[30] But multiple arrears cases post-*DBS* have disregarded this passage and unjustifiably granted substantial reductions in arrears.[31] In consequence, fathers, like Mr. Colucci, still have a clear incentive for non-payment and non-disclosure. That is, despite fathers knowing they have a support obligation and taking no contemporaneous steps to satisfy or modify that obligation, courts may nevertheless cancel arrears down the line. It is a straightforward calculus: Why pay in full up front, when you can pay in part later on?

10. The need to eliminate pernicious payor incentives, by itself, warrants adopting the simplified framework set out below. This framework will better promote the overarching

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[24] *Ibid* at paras 7-8.
[25] *Ibid* at para 5.
[26] *Ibid* at para 30.
[27] *Ibid* at paras 8 and 34.
[28] *Colucci v Colucci*, 2018 ONSC 6627 at paras 18-19 [Motion Decision].
[29] *DBS*, *supra* note 2 at para 4 [emphasis added]. Eliminating such incentives is necessary to pursue a "child-centred objective" (Courtney Palmer, "Child Support and Shared Parenting in Canada: A Reality Cheque" (2013) 22 Dal J Leg Stud 101 at 108-109 [Palmer]).
[30] *DBS*, *supra* note 2 at para 98.
[31] *Houston v McAdam*, 2008 NLUFC 39 at paras 109-115 [*Houston*]; *DD v JG*, 2018 BCCA 435 at paras 14, 20 and 97 [*DD v JG*]; *Cole v Freiwald and Freiwald*, 2011 ONCJ 395 at paras 5, 131 and 148 [*Cole*].

objectives of the child support regime (timely income disclosure and support payments) and better comply with the Court's directive in *DBS* (to eliminate incentives for non-payment).[32]

2. Women and Children's Substantive Equality

11. Women and children's substantive equality must guide the exercise of discretion to vary child support orders because (1) this furthers the legislative objective of child support, i.e., providing for children's welfare (an objective which is inseparable from women's welfare); and (2) these *Charter* values necessarily structure the broad discretion the *Divorce Act* confers.

12. To promote substantive equality, courts must be "concerned with ensuring that laws or policies do not impose subordinating treatment on groups already suffering social, political, or economic disadvantage in Canadian society."[33] Courts must also recognize "that some groups may need to be treated differently to achieve equality of results."[34] In the family law context, "substantive equality demands a consideration of equality as between mothers and fathers"[35] and as between recipients and payors—who, as explained above, have unequal power, information, and resources. Thus, a concern for substantive equality supports an approach to child support variations that addresses the disparities that continue to disadvantage women and children.

(a) Legislative Objective

13. The legislative objective of child support under the *Divorce Act*—i.e., children's welfare—demands consideration of both women and children's substantive equality. In *Willick*, Justice Sopinka stressed that courts should adopt a "child-centred approach" and that "the children of the marriage should be sheltered from the economic consequences of divorce."[36] And as Justice L'Heureux-Dubé noted in her concurring reasons, "[w]omen and children have a common economic reality,"[37] a hallmark of which is "the link between low child support and the

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[32] *DBS*, *supra* note 2 at para 4.
[33] Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev of Const Stud 191 at 194-195. For caselaw, see e.g. *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 39.
[34] Hamilton & Koshan, *supra* note 33 at 195.
[35] Palmer, *supra* note 29 at 122.
[36] *Willick*, *supra* note 14 at 689-690.
[37] *Ibid* at 714, citing Zweibel E.B., "Child Support Guidelines: An Ineffective and Potentially Gender-Biased Response to Child Support Issues" in *Feminist Analysis II: Family Law: Voodoo*

severe economic circumstances of many custodial mothers and their children."[38] Promoting the welfare of children post-separation requires courts to account for how underpaid child support impoverishes children by impoverishing their mothers.

(b) Broad Discretion

14. The discretion governing child support under the *Divorce Act*—i.e., that judges "may" make variation orders[39]—likewise demands consideration of women and children's substantive equality. As this Court held in *R v Williams*,[40] "where Parliament confers a discretion on a judge, it is presumed that Parliament intended the judge to exercise that discretion in accordance with the *Charter*."[41] This is so, even if "the validity of the legislation is not at issue."[42] Moreover, s. 17(1)(a) grants broad discretion—there are no statutory criteria explicitly limiting its exercise. Because constitutional values should be considered when interpreting ambiguous legislation,[43] and wide discretion is inherently ambiguous with respect to the principles that guide its exercise, it follows that the substantive equality of women (s. 15, and most unequivocally, s. 28) and children (s. 15) should be considered by judges exercising discretion to vary child support.

(c) Accounting for Child Support Inequities

15. Women and children's substantive equality must therefore be central when varying child support. Simply put, the *Divorce Act*'s objectives cannot be realized unless the disadvantages of recipients vis-à-vis payors—mothers vis-à-vis fathers—are accounted for and addressed.[44]

16. Despite the goal of child support (children's welfare) being uncontroversial, the reality of child support is chronic underpayment,[45] exacerbated by the feminization of poverty[46] and

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Economics for Women (Ontario: Institute of Continuing Legal Education – Canadian Bar Association, 1993) at 1.
[38] *Ibid* at 714.
[39] *Divorce Act*, *supra* note 1, s 17(1)(a).
[40] [1998] 1 SCR 1128.
[41] *Ibid* at para 44.
[42] Ruth Sullivan, *Construction of Statutes*, 6th ed (Lexis Nexis, September 2014) at §16.12.
[43] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at paras 28, 62-64; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 35; *R v Tse*, 2012 SCC 16 at para 20; *Hincks v Gallardo*, 2014 ONCA 494 at para 32.
[44] *Moge*, *supra* note 14 at 857, 874.
[45] *Supra* notes 4-6 and accompanying text.
[46] *Supra* notes 14-15 and accompanying text.

intimate partner violence.[47] Just as labour law is guided by the "fundamental power imbalance" between employees and employers,[48] family law must be guided by the fundamental power imbalance between recipients and payors, overwhelmingly mothers and fathers.

3. Simplify the Child Support Variation Framework

17. *DBS* set out a framework for retroactive variations of child support orders, which was described as weighing four factors: the child's circumstances; the recipient's blame; and the payor's blame and hardship.[49] Read carefully, that framework in fact addressed three discrete scenarios, each governed by distinct presumptions concerning the appropriateness and timing of a retroactive variation. Those three scenarios are: (1) where the prior order corresponds with the payor's later income; (2) where the prior order underestimates the payor's later income; and (3) where the prior order overestimates the payor's later income. Rearticulating the *DBS* framework in terms of these three scenarios will simplify it; clarify how it is in harmony with subsequent doctrinal developments (particularly the Ontario Court of Appeal's decision in *Gray v Rizzi*);[50] eliminate pernicious payor incentives; and promote women and children's substantive equality.

18. *DBS* articulated apt principles for child support variations. However, its complex, multi-variable framework is susceptible to being misapplied.[51] This appeal is illustrative. The motion judge rescinded Mr. Colucci's arrears with respect to the entire 16 years of his delinquency,[52] despite *DBS* instructing that, "where arrears have accumulated" (like here), certainty and predictability militate in favour of enforcement.[53] The Court of Appeal properly applied *DBS*[54] and reversed the motion judge's rescission of arrears.[55] But to do so, the Court of Appeal had to subject the *DBS* framework to "appropriate adaptation."[56] A uniform set of principles anchored in the three scenarios listed above would be simpler to follow and apply.

19. The proposed re-articulation does not overturn *DBS* and *Gray*. Rather, it reconciles them,

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[47] *Supra* note 17 and accompanying text.
[48] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 56.
[49] *DBS*, *supra* note 2 at paras 100-116.
[50] 2016 ONCA 152 [*Gray*].
[51] *Houston*, *DD v JG* and *Cole*, s*upra* note 31 and accompanying text.
[52] Motion Decision, *supra* note 28 at paras 18-19.
[53] *DBS*, *supra* note 2 at para 98.
[54] Court of Appeal Reasons, *supra* note 3 at paras 14-16.
[55] *Ibid* at paras 27 and 36.
[56] *Ibid* at para 15.

and maintains their central logic. *DBS* identified "fairness" as animating retroactive variations,[57] variations which "implicate the delicate balance between certainty and flexibility."[58] That is, sometimes fairness favours certainty, and sometimes fairness favours flexibility. The framework below maintains this balanced approach, while more simply and effectively eliminating pernicious payor incentives and promoting women and children's substantive equality.

(a) Context #1: Correspondence – Presume Enforced Obligation

20. If the prior support order corresponds with the payor's later income, the only realistic retroactive application is one by the payor to rescind valid arrears. In such a case, the payor should be permitted to rescind his arrears only if he can prove that, even with a flexible payment plan,[59] "he cannot and will not ever be able to pay the arrears"[60] (e.g., a catastrophic injury permanently diminishing earning capacity[61]). When arrears simply accumulate, fairness demands that the order be enforced. Certainty supports enforcement because both parents knew the obligations and expected them to be paid. Indeed, "the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability."[62] Flexibility, too, supports enforcement. Flexibility favours deviating from a prior order when it does not match the payor's income. Thus, where the income did not fluctuate, no flexibility is warranted. Consistent with this lack of flexibility, child support arrears are not released by an order of discharge under the *Bankruptcy and Insolvency Act*[63] precisely because such debts are, from a policy standpoint, prioritized, even where providing a bankrupt with a "clean slate" is otherwise desirable.[64]

(b) Context #2: Overestimation – Presume Decreased Obligation to Effective Notice

21. If there is reliable evidence that the prior support order overestimated the payor's later income, then there should be a presumption that the support obligation is retroactively decreased

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[57] *DBS*, *supra* note 2 at para 96.
[58] *Ibid* at para 2.
[59] *Ibid* at para 116.
[60] *Gray*, *supra* note 50 at para 58.
[61] *Ibid* at paras 53-54.
[62] *DBS*, *supra* note 2 at para 98.
[63] RSC 1985, c B-3 s 178(1)(c).
[64] *St-Jules v St-Jules*, 2012 NSCA 97 at para 50; *Watson v Schellenberger*, 2002 ABQB 655 at paras 31, 37, 38; *Shea v Fraser*, 2007 ONCA 224 at para 41.

to the date of "effective notice" (i.e., notice short of filing a legal claim).[65] However, there are two caveats. First, the presumed decrease can only date back as far as three years before the payor's formal notice (i.e., filing a legal claim). This provides a grace period for negotiation, while ensuring that payors cannot claw back excessive periods of support due to their own lack of diligence (which would undermine certainty). Second, notice—effective or formal—must include full financial disclosure to preserve the payor's interests.[66] Only the payor has the evidence needed to quantify support, and that evidence must be shared to prevent payor manipulation of these time periods. As *Gray* clarified, "effective notice […] entails providing reasonable proof to support the claim for a change to the order, so that the recipient can independently assess the situation in a meaningful way and respond appropriately."[67]

22. If, as in this case, the payor never provided reliable income information,[68] and thus failed to provide effective notice, he should not benefit from the above presumption. As the majority held in *DBS*, a payor parent "cannot use [his] informational advantage to justify [his] deficient child support payments."[69] It follows that, until full financial disclosure is provided, a "child support recipient is entitled to expect that the existing order will be complied with, and to arrange their financial affairs respecting their children accordingly."[70]

(c) Context #3: Underestimation – Presume Increased Obligation to Material Change

23. If the prior support order underestimated the payor's later income, there should be a presumption that support is retroactively increased dating back to the material change that made support inadequate. In *DBS*, this presumption is phrased as only arising "sometimes."[71] However, that "sometimes" related to "blameworthy conduct" (such as failing to disclose income increases).[72] As set out above, this is the typical case, not the exception.[73] Further, even if a

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[65] *DBS*, *supra* note 2 at paras 121-123; *Gray*, *supra* note 50 at para 45; See also *Buckingham v Buckingham*, 2013 ABQB 155 at para 56.
[66] *Gray*, *supra* note 50 at para 62; See also *Rosemary Leonor Corcios v Edgar Zenon Alfaro Burgos*, 2011 ONSC 3326 at para 55(7) [*Burgos*].
[67] *Cole*, *supra* note 31 at para 131.
[68] Motion Decision, *supra* note 28 at para 31.
[69] *Ibid* at para 124.
[70] *Burgos*, *supra* note 66 at para 55(7).
[71] *DBS*, *supra* note 2 at para 124.
[72] *Ibid*.
[73] They are a "cancer" in family law litigation (*Smith*, *supra* note 6 at para 24).

payor discloses his income promptly, when he nevertheless knowingly underpays support, fairness favours flexibly enforcing the obligation. Payors bear "the major responsibility for ensuring that a child benefits from the change as soon as reasonably possible."[74] As recipients already hold primary responsibility for child-rearing, the primary responsibility for updating their support obligations is properly on payors.[75]

24. Certainty, too, favours enforcement. Payors, more than anyone, know their current income and that support obligations track that income.[76] Payors can eliminate any purported uncertainty flowing from the prospect of a retroactive increase by updating their obligations in line with their income. Both the obligation and the income are known to the payor throughout. In *DBS*, the majority observed that a payor's "reasonably held belief that [they are] meeting [their] support obligations" is a "good indicator" of whether there is blame. [77] Quietly waiting for a recipient to demand higher payment following a substantial increase in income is no such belief. For this reason, expecting that payors take the initiative to update their support obligations is consistent with *DBS*'s direction that blameworthy conduct—like willful neglect of apparent obligations[78]—warrants an increase dating back to the material change.[79]

PART IV - SUBMISSION ON COSTS

25. West Coast LEAF and LEAF seek no costs and ask that none be awarded against them.

PART V - ORDER SOUGHT

26. West Coast LEAF and LEAF do not request any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10 day of August, 2020.

Jennifer Klinck
Joshua Sealy-Harrington
Counsel for the Interveners

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[74] *DBS*, *supra* note 2 at para 161 (per Abella J, concurring).
[75] *Ibid* at paras 163, 166 (per Abella J, concurring).
[76] *Ibid* at paras 165-166 (per Abella J, concurring).
[77] *Ibid* at para 108.
[78] *Ibid* at para 107.
[79] *Ibid* at para 124.

PART VI - TABLE OF AUTHORITIES

Jonnette Watson Hamilton and Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Review of Constitutional Studies 191	12
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Statistics Canada, *Family violence in Canada: A statistical profile, 2018*, by Shana Conroy, Marta Burczycka & Laura Savage, Catalogue No 85-002-X (Ottawa: Statistics Canada, 12 December 2018) at 24 and Table 2.1, online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00018-eng.pdf?st=YGodouJW>	6
Statistics Canada, *Payment patterns of child and spousal support: Juristat*, by Mary Bess Kelly (Ottawa: Statistics Canada, 24 April 2013), online:<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11780-eng.pdf?st=eRcodICf>	6
Statistics Canada, *The Economic Well-Being of Women in Canada:Women in Canada: A Gender-based Statistical Report*, by Dan Fox & Melissa Moyser (Ottawa: Statistics Canada, 16 May 2018) at Chart 1, online: <https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54930-eng.pdf >	6
LEGISLATION, PARLIAMENTARY DEBATE, AND OTHER LEGAL INSTRUMENTS	**PARA(S)**
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 15, 28	*passim*
Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)	*passim*
Federal Child Support Guidelines, SOR/97-175	5, 6
House of Commons, *Access to Justice Part 2: Legal Aid: Report of the Standing Committee on Justice and Human Rights* (October 2017) (Chair: Anthony Housefather).	6
Parliament, House of Commons Debates, 42nd Parl., 1st Sess., Vol. 148, No. 326 (26 September 2018)	5