

Family

Alberta court interprets 'judicial refresh' of principles governing retroactive child support

By **Barb Cotton and Christine Silverberg**



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(March 26, 2021, 11:21 AM EDT) -- In a series of important cases, the Alberta Court of Appeal and the Supreme Court of Canada have been engaged in a dialectic on the issue of retroactive child support, signalling a paradigm shift towards the more holistic and less anachronistic: *DBS v. SRG* 2005 ABCA 2; *DBS v. SRG* 2006 SCC 37; *Michel v. Graydon* 2020 SCC 24 and *Henderson v. Micetich* 2021 ABCA 103.

In the recently released decision of *Henderson v. Micetich*, the Alberta Court of Appeal has conducted the first substantive appellate level judicial interpretation of the "judicial refresh" of the principles governing the award of retroactive child support set out by the Supreme Court of Canada in *Michel v. Graydon*, an appeal from a judgment of the British Columbia Court of Appeal setting aside an order requiring the father to pay substantial retroactive child support.



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When *Michel v. Graydon* was released by the Supreme Court of Canada, there was some discussion as to whether the statutory scheme relevant to retroactive child support variation orders would be given a narrow or a broad application, with the Supreme Court recognizing retroactive awards as a "continuing obligation."

A "contextual and purposive reading" of the legislation at issue required the court to look "to its wider legislative purposes, societal implications, and actual impacts," included within which was a consideration of the best interests of the child.

The approach by the Alberta Court of Appeal in *Henderson v. Micetich* is decidedly broad. Indeed, the Alberta Court of Appeal states that the following broad principles can be extracted from *Michel v. Graydon*:

- child support is the right of the child, which right can not be bargained away by the parents;
- child support owed will vary based upon the income of the payor parent;
- retroactive child support is not exceptional relief;
- retroactive child support awards will commonly be appropriate where payor parents fail to disclose increases in their income;
- retroactive child support simply holds payor parents to their existing (and unfulfilled) legal obligations.

These broad principles are in addition to the narrow *ratio* in *Michel* that retroactive child support is also available to children who are no longer "children of the marriage".

The Alberta court in *Henderson v. Micetich* was anchored by senior Justice Marina Paperny, who had authored the strong Alberta Court of Appeal judgment in *DBS v. SRG* 2005 ABCA 2. In *Henderson*, the *per curiam* appellate court stated that, upon appeal, *DBS v. SRG* 2006 SCC 37 was decided at a time when the *Child Support Guidelines* were relatively new and the decision "was informed by legal constructs from traditional child support jurisprudence that stood in stark contrast to the new system

being implemented in the guidelines" (para. 31). Further, "[t]he interpretation of the guidelines by the majority in *DBS* was not entirely compatible with their purpose and ultimate goal" (para. 31).

In the view of Justice Paperny in *DBS v. SRG* 2005 ABCA 2, the guidelines were a marked departure from the previous approach to child support and introduced a new regime. In *Henderson*, the appellate court observed again that, in 1997, the guidelines "represented a profound and fundamental change in child support rights and obligations" (para. 30).

In the view of the majority of the Supreme Court of Canada in *DBS*, however, the guidelines were not a complete departure from the principles of child support that existed in the past (para. 47) wherein the exercise of judicial discretion was paramount, with the judge considering the means, needs and other circumstances to award support.

Henderson, however, interprets the Supreme Court decision in *Michel v. Graydon*, released some 14 years after *DBS*, as adhering more to the view that the guidelines were a new regime — a clear sign of a certain paradigm shift in any analysis of child support determinations.

The delineation of the history and context of the guidelines in *Henderson* is, in itself, valuable and creates a helpful backdrop to understanding and interpreting child support matters and the transition in judicial thinking. Per *Henderson*:

[37] The *Guidelines* effectively eliminate the relativity of income test, or the dueling budget wars that existed under the prior system. Child support is based on the payor's guideline income — not on the judicial perception of what a child's needs ought to be, the payor's priorities, the relative prosperity of the households, or their respective household budgets.

The concepts of means, needs and other circumstances that were the overarching considerations in pre-*Guideline* child support applications, and the subjective view of individual judges as to what constitutes adequate support, have been supplanted by the certainty provided by the *Guideline* table amounts, based on the income of the payor parent. Parents know that guideline income is to be assessed on an annual basis and that current and reliable financial disclosure is generally required to facilitate that assessment.

This is part one of a two-part series. This case comment will be continued in part two.

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