IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Loughlean v. Regehr,*
2018 BCSC 1950

Date: 20181107
Docket: E171550
Registry: Vancouver

Between:

Patricia Annette Loughlean

Claimant

And

Scott Regehr

Respondent

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Claimant:	Fanda Wu
Counsel for the Respondent:	Jesse L. Desilets
Place and Dates of Hearing:	Vancouver, B.C. October 23–25, 2018
Place and Date of Judgment:	Vancouver, B.C. November 7, 2018

Table of Contents

Introduction and Overview

[1] By way of a summary trial, the claimant, Ms. Loughlean, seeks child support orders against the respondent, Mr. Regehr, in respect of Ethan James Loughlean, born May 25, 1998.

[2] The facts of the case are rather unusual. Ethan was conceived because of a brief liaison between the parties in the summer of 1997. He has been in the custody of his mother since birth and has no relationship whatever with his father. In the 18 months following Ethan's birth, some communications occurred between the parties respecting paternity issues and support but thereafter no contact of any sort occurred for almost 18 years.

[3] Ethan was brought up by his mother and his maternal grandparents. Although he is now 20 years old, he is a university student and the parties agree he remains a "child" for child support purposes within the meaning of Part 7 of the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*].

[4] These proceedings were issued pursuant to the *FLA* on June 15, 2017. Defence pleadings were filed in July 2017 and "F8" financial statements were exchanged shortly thereafter. No examination for discovery of Mr. Regehr has occurred, however Ms. Loughlean was examined for discovery on May 30, 2018.

[5] The summary trial application was filed June 26, 2018. Ms. Loughlean seeks retroactive child support, including proportionate payment of "section 7 expenses", from the date of Ethan's birth as well as an order requiring Mr. Regehr to pay ongoing child support (including s. 7 expenses) until Ethan is no longer a "child" within the meaning of s. 146 of the *FLA*.

[6] Paternity testing has been conducted, which confirms that Mr. Regehr is Ethan's biological father. Mr. Regehr consents to an order requiring him to pay ongoing child support as claimed, albeit subject to the conditions set out in Part 1 of his Application Response, however he disputes liability to pay child support on any

retroactive basis beyond February 1, 2017, the first month following receipt of Ms. Loughlean's original demand.

[7] I therefore grant the orders sought in paragraphs 3, 4, and 5 of Part 1 of Ms. Loughlean's Notice of Application as amended by paragraphs 3, 4 and 5 of Mr. Regehr's Application Response. And for the reasons that follow, I order Mr. Regehr to pay retroactive *Guidelines* child support and proportionate s. 7 special and extraordinary expenses for the period June 15, 2014 to the date of this judgment.

Arrears or Retroactive Support?

[8] On September 24, 1996, upon the application of Ms. Loughlean, the Provincial Court of British Columbia issued a "Provisional Order",

- declaring Mr. Regehr to be the father of Ethan;
- ordering him to pay child maintenance "in the amount pursuant to the guidelines";
- directing that there be an "accounting for extraordinary expenses in the amount of $800 for childcare", and
- stating that the order "is provisional in nature only and as such has no force or effect until confirmed by a court of competent jurisdiction where [Mr. Regehr] is residing".

[9] Mr. Regehr denies ever receiving notice of the application and the hearing proceeded in his absence. He did, however, receive a copy of the Provisional Order in November 1998.

[10] At the relevant times, Mr. Regehr was residing in Alberta, the Northwest Territories and Yukon, and more recently, in Ontario for the past 10 years. At no time was the Provisional Order ever confirmed by a court of any province or territory in which Mr. Regehr resided. Hence, according to its terms, the order "has no force or effect".

[11] The fact is, however, that a court of competent jurisdiction did make a child support order, albeit on a provisional basis, many years ago. The question therefore arises whether Ms. Loughlean's present claim against Mr. Regehr is properly characterized as a claim for "arrears of child support" or for "retroactive child support". The distinction might be important since different legal considerations may well apply.

[12] A similar situation occurred in *Graves v. Comeau*, 2007 BCSC 789. As a result of the ruling in that case, both parties agree that the present application does not concern the non-payment of any arrears of child support but rather concerns the availability and quantification of retroactive child support. The parties also agree this application is thus to be decided on the law applicable to claims for retroactive child support.

Suitability for Summary Trial

[13] The evidence on this summary trial application was provided by way of eight affidavits. Ms. Loughlean submitted four affidavits, two sworn by herself, one by her mother and another by a legal administrative assistant tendering a copy of certain Provincial Court documents. Mr. Regehr swore one affidavit and also submitted another from one of his sisters and two from his mother. He also relied upon transcript extracts from the examination for discovery of Ms. Loughlean.

[14] Both parties raised objections to some of the transcript evidence tendered by the other. Each sought to strike portions of the affidavit evidence on various grounds including inadmissible hearsay, opinion and speculation. The evidence relates to events during the period July 1997 (when the parties first met) and October 1999 (following which all contact between the parties ceased). The evidence adduced by the parties respecting this period is designed not only to prove relevant facts but also to lay the basis for assertions of blameworthy conduct in any retroactive child support analysis.

[15] As well, the evidence of each party directly contradicts some evidence tendered by the other. This raises questions of credibility. Each party says some of

the conflicts are unimportant because nothing turns on the facts involved, however each also urges that "critical factual inconsistencies" should be resolved in their respective favour.

[16] Supreme Court Family Rule 11-3(15) permits the court to grant judgment by way of summary trial unless,

> (i) the court is unable, on the whole of the evidence before it, to find the facts necessary to decide the relevant issues of fact or law; or
>
> (ii) it would otherwise be unjust to decide the issues in a summary fashion.

[17] In a summary trial, as in other applications, the affidavit evidence is prepared by a party's legal counsel. It is usually crafted by counsel with a view to persuasion rather than simply reciting the witness's evidence in the same language and manner as if presented in a witness box at a traditional trial. In this fashion the affiant's authentic voice can be obscured, particularly if no cross-examination occurs before the court at the hearing of the application or at some earlier time before a court reporter.

[18] Decontextualized affidavit and transcript evidence has the potential for substantive unfairness of the sort that would not likely occur in a full trial where the trial judge sees and hears it all. This is particularly so where critical determinations depend upon an assessment of the credibility and reliability of witnesses' testimony and inferences to be drawn from all of the evidence as a whole.

[19] Accepting all or part of the testimony of any witness involves an assessment of credibility (truthfulness/honesty) and reliability (its accuracy) of both the witness and the evidence. That in turn involves consideration of many different factors, some of which include:

- internal consistency of the witness's account of events;
- consistency with other evidence afforded by witnesses, documents or physical evidence;

- whether the evidence is reliably corroborated or contradicted by other evidence;
- the witness's ability/opportunity to observe and to reliably recall/communicate the events in question;
- the demeanour of the witness and whether questions are answered in a frank and forthright fashion without evasion, speculation or exaggeration; and
- the inherent plausibility of the evidence and its consistency with the probabilities affecting the case as a whole.

Affidavit evidence in the words of counsel adopted by a witness, and which is not tested by cross-examination can pose major challenges for any accurate assessment of credibility and reliability.

[20] The Court raised these concerns with the parties. In response, both parties made it very clear that they were looking for a summary determination of the merits and urged the Court not to put the matter to a full trial with all resulting delay and additional cost. With some misgivings, I will accede to the parties' request. If that results in some "rough justice" insofar as fact finding is concerned, that is a consequence the parties must accept.

Background Facts

[21] For the most part, the dates of various events during the period July 1997 to October 1999 are not controversial. In some instances, the available documentary evidence speaks for itself, *e.g.* letters and the contents of the Provincial Court file. Ms. Loughlean also kept a contemporaneous handwritten journal of events during this time, which I consider to be generally accurate and reliable and which generally corroborates her affidavit evidence.

[22] The parties met in a Vancouver nightclub in July 1997. Mr. Regehr was 29 years old at the time and Ms. Loughlean was 31.

[23] Mr. Regehr had finished one year of a two-year broadcasting program at the Southern Alberta Institute of Technology (SAIT) in Calgary. That summer he was

working as a tree planter in the interior of British Columbia. At the time he met Ms. Loughlean he was in Vancouver for a short break and also to visit one of his sisters who lived in Kitsilano. For her part, Ms. Loughlean lived in Vancouver and was employed by the Vancouver School Board (VSB) as an on-call teacher under a short-term contract position.

[24] The parties had intimate relations before Mr. Regehr returned to the interior to resume tree planting. That employment ended in mid-August 1997, whereupon he returned to Vancouver and again spent time with Ms. Loughlean. Further intimate relations ensued before Mr. Regehr returned to Calgary for his second year at SAIT. At that time the parties decided to attempt a long distance relationship.

[25] In mid-September 1997, Ms. Loughlean found out she was pregnant. She had no doubts that Mr. Regehr was the father of the child. She informed Mr. Regehr of the development over the phone. Her intention was to keep the baby.

[26] Ms. Loughlean flew to Calgary at the end of September and she and Mr. Regehr stayed at his parents' house in Canmore, Alberta. Mr. Regehr's sister, Karen, also lived in Canmore.

[27] Mr. Regehr says he "came from a religious family" where there would be "expectations to do the right thing" if he was the biological father of a baby. The couple had lengthy discussions that weekend and decided to get married in December in the Vancouver area.

[28] Mr. Regehr flew to Vancouver on Thanksgiving weekend, 1997. The couple looked at wedding venues and chose wedding invitations. Despite the initial excitement, both parties say they came to the realization that they did not really know each other, that they might not share the same values, and that rushing into marriage might not be wise.

[29] Both parties relate diametrically opposed versions of their decisions and communications respecting the termination of marriage plans. Ms. Loughlean says Mr. Regehr wanted her to get an abortion (as had occurred with two previous

girlfriends who had become pregnant) and that she refused. Mr. Regehr flatly denies any such demand. Ms. Loughlean says he stated, "He was essentially 'adopting' the baby to me so that he would have no legal obligations". Mr. Regehr denies this and instead says Ms. Loughlean stated, "She wanted to raise the child and I would be 'allowed' to visit". There are no entries in Ms. Loughlean's journal that assist in resolving this conflict.

[30] Mr. Regehr quit the broadcasting program at SAIT in November 1997 and accepted a part-time position with a radio station in Canmore where he worked until January 1999. He stayed with his sister and her husband at their house in Canmore during this time.

[31] Both parties agree some communication occurred between them in November 1997, whether by phone, letter or both. They do not agree on the content of their discussions.

[32] Both parties agree they had a telephone conversation on January 29, 1998. Again, they do not agree on the content of the conversation. However, Ms. Loughlean wrote in her journal at the time stating, among other things:

- "Had the most frustrating talk with Scott. First he pushes me toward adoption which there is no way in hell I'm doing. Then he whines about how he doesn't have much money. He tells me the situation is on his mind every day yet he can't give me an answer about what he wants to do about custody arrangements. He said he needs to talk to his lawyer first ..."

- "I just hope he doesn't want joint custody. I want to protect this baby and Scott's influence on him/her worries me. I want to do what's best for my child and that's the only reason I'm considering visitation in the first place."

[33] Mr. Regehr describes Ms. Loughlean as "demanding that I make very specific choices about visitation and custody" and giving him a one-week deadline to make up his mind. The deadline is reflected in Ms. Loughlean's journal, as is a telephone conversation between the parties on February 9, 1998 as follows:

> Scott ended up phoning. He says he's looking at the situation as a 18-year financial commitment and he wants nothing to do with seeing our child and therefore wants no visitation for himself and the custody agreements. Nice

> guy, he also wants a paternity test done which I'm insisting he pay for since I know he is indeed the father. I certainly wish it wasn't him.

[34] Ms. Loughlean says that during this phone call Mr. Regehr advised he had retained Mary Jo Rotheker, a lawyer in Alberta.

[35] Mr. Regehr confirms in his affidavit that before the February 9, 1998 telephone conversation he met with Ms. Rotheker for a one-hour free consultation "to discuss my situation". He acknowledges he thereafter told Ms. Loughlean that he "wanted a paternity test, and only after determining paternity could we begin to discuss custody arrangements". I infer from this that Mr. Regehr was advised by the lawyer of the child support obligations that would ensue if he was the biological father of the child and that a paternity test would decide any contest in that regard.

[36] On April 30, 1998, Ms. Loughlean wrote a letter to Mr. Regehr. Among other things, she advised:

- she had obtained information regarding paternity testing at VGH;
- "as per our last conversation [February 9, 1998], I will pay the entire amount if the test is negative"; [Her emphasis.]
- she was speaking to "her lawyer" but it would be best if matters could be resolved amicably outside the courts;
- if she did not hear from Mr. Regehr by May 18, she will "initiate an order for paternity test through the courts" but she hopes "it doesn't come down to that";
- "Another option, if you believe you are the only person I was with while we were dating, is for me to send you a copy of the ultrasound report. This confirms the date of conception. However, I do understand that given the long term financial commitment, it may be worth it to you to invest the $750 [paternity testing cost] now for peace of mind. ... I honestly wouldn't put either one of us through this if there was even a shadow of a doubt about the paternity."

[37] In her letter, Ms. Loughlean provided her address and telephone number in Vancouver and asked Mr. Regehr, "Let me know if your address has changed so VGH can send their materials directly to you."

[38] Mr. Regehr did not respond to the letter. In his affidavit he says it was sent to his old address in Calgary and not his sister's house in Canmore where he was staying. He acknowledges that "some time during the summer of 1998", his former roommate from Calgary delivered the letter to him in Canmore. He says he "did not understand why she would send the letter to my address in Calgary" and with respect to her threat to go to court to get an order for a paternity test, "This made no sense to me, as I was the one who wanted the test. I waited to hear from her."

[39] In the meantime, Ethan was born on May 25, 1998. Ms. Loughlean says she left a voice mail with Mr. Regehr advising him of the event. Mr. Regehr denies receiving the message.

[40] With the assistance of a lawyer, Ms. Loughlean filed an application in the Provincial Court of B.C. on June 12, 1998 seeking a "Provisional Order for maintenance". Mr. Regehr is named as the respondent to the application, at his sister's address in Canmore. However, the document also identifies Ms. Rotheker as the respondent's lawyer and Ms. Loughlean says she was advised by her lawyer that the application was sent to Ms. Rotheker in Alberta.

[41] Ms. Loughlean was represented by Mr. Friesen. The Ministry of Attorney General with the province of British Columbia operated a "Family Justice Programs Division" for the purpose of obtaining and enforcing "reciprocal maintenance orders". For the purposes of the provincial court application, Mr. Friesen was identified as "counsel for the Attorney General's office for the benefit of Ms. Loughlean".

[42] The hearing in provincial court occurred on September 24, 1998. Ms. Loughlean gave testimony under oath. She had also filed a financial statement. No one attended on behalf of Mr. Regehr. The Provisional Order was issued by Judge Borowicz and was filed with the provincial court on October 27, 1998.

[43] The provincial court forwarded a copy of the order to the "Administrator of the Reciprocal's Program" in Victoria together with an application for reciprocal enforcement of same pursuant to the *FLA*. Mr. Regehr's address in Canmore was

identified in the materials along with an Alberta phone number, some physical detail and a photograph, and a date of birth "September 20". The Ministry rejected the application package stating, "Date of birth – incomplete for respondent (year not specified)". That was the end of the matter as far as the Ministry of Attorney General was concerned.

[44] Mr. Regehr acknowledges that he received a copy of the Provisional Order when it was sent to his sister's residence in Canmore in November 1998 where he was living at the time.

[45] Ms. Loughlean deposes that she called Mr. Regehr's parents and informed them of the court order. She says she asked for his address and also for his date of birth but the parents refused to provide the information. She says she asked if they would give Mr. Regehr a message that she needed to speak with him and the parents advised that they were not sure when they would next be communicating with Mr. Regehr.

[46] On January 11, 1999, Mr. Regehr wrote a letter to Ms. Loughlean in which he acknowledged receipt of the April 30, 1999 letter and the Provisional Order. He says he was "keenly interested" in having Ethan's paternity resolved by way of DNA testing, however "my part-time employment at the radio station in Canmore has not made it possible to do so". He states that he "foresees the opportunity of borrowing funds for DNA testing by the end of February 1999 from family sources" and he then states that he "will be in contact with you again in February to pursue this matter".

[47] By the time he wrote his January 11, 1999 letter, Mr. Regehr knew that he had received and accepted a job offer the previous month from CBC North in Yellowknife, NWT, to work as a radio reporter on a three-month contract. He did not inform Ms. Loughlean of this in his January 11, 1999 letter, nor at any time thereafter. He did move to Yellowknife and following the temporary contract, he received a permanent position at CBC North in Yellowknife during the summer of 1999.

[48] Mr. Regehr offers no explanation why he did not advise Ms. Loughlean of his move to Yellowknife for employment purposes nor why he did not get in contact with her again in February about DNA testing as he stated in his January 11, 1999 letter.

[49] Ms. Loughlean says that she made several attempts to contact Mr. Regehr by way of "additional letters", although she cannot remember if they were mailed to his last known address in Calgary or his parents' address in Canmore. She says she also phoned his parents on several occasions as she no longer had any operable phone number for Mr. Regehr. His parents were obstructive and uncooperative.

[50] On October 18, 1999, Ms. Loughlean wrote an entry in her journal detailing a decision she made at that time to stop efforts to obtain child support from Mr. Regehr. She describes a conversation she had with Mr. Regehr's father the previous week where he refused to provide the additional information she had been requesting. I find that the contents of this journal entry were truthful and accurately reflected Ms. Loughlean's actions and decision-making at the time.

[51] Ms. Loughlean says that by this time she was "reaching my breaking point" but nonetheless decided to make one last effort to get in touch with Mr. Regehr. She phoned his mother in mid-October 1999 to ask Mr. Regehr to get in touch. The latter advised she would pass on the message if she heard from Mr. Regehr. In her examination for discovery, Ms. Loughlean acknowledged she told Mrs. Regehr at the time, "This would be the last time I would phone".

[52] In his affidavit Mr. Regehr says that after he received his permanent position with CBC North in Yellowknife [in the summer of 1999], he "received a call from my parents saying the claimant called them and informed them that 'you will never hear from us again'". He then provides the following rationale for not thereafter contacting Ms. Loughlean:

> When I learned this, I believed that the claimant was acknowledging that the baby was not mine, and that she was raising the baby with another man, possibly her former boyfriend.

> From that point on, I believed I was not the baby's father until I received a letter from the claimant's lawyer in January 2017, almost 18 years after the claimant had last contacted me or my family.

[53] I cannot and do not accept Mr. Regehr's evidence in this regard. It is illogical and implausible. Rather, I find the evidence is compelling, and I find as a fact, that he knew full well that he was likely the biological father of Ethan and that, with the assistance of his parents, he engaged in an ultimately successful campaign designed to evade both DNA testing and acceptance of financial responsibility for Ethan's support.

[54] I accept Ms. Loughlean's evidence respecting her certainty of Mr. Regehr's paternity of Ethan as well as her evidence respecting early attempts to secure a commitment from Mr. Regehr respecting financial support for his son. I also find as a fact, however, that by the end of October 1999 Ms. Loughlean gave up in frustration and made a conscious decision to raise Ethan from that point without any financial support from Mr. Regehr.

[55] I turn now to the legal implications of these findings for the claim for retroactive child support made some 18 years later.

The Law re Retroactive Child Support

[56] Ms. Loughlean and Mr. Regehr were never married. Hence the *Divorce Act*, R.S.C. 1995, c. 3 (2nd Supp.), has no application to these proceedings and child support issues fall to be determined by the *FLA*.

[57] Under the *FLA*,

- "on the birth of a child ... the child's parents are the birth mother and the child's biological father" (s. 26(1));
- "each parent ... has a duty to provide support for the children ..." (s. 147(1));
- "the child, a person acting on behalf of the child, and a child's parent or guardian may apply to court for an order requiring a child's parent to pay child support (s. 149(1) and (2));

- for the purposes of any such order, "the amount of child support must be determined in accordance with the child support guidelines" although some exceptions apply (s. 150(1) and (2));

- departures from the child support guidelines are permitted if, among other things "reasonable arrangements have been made for the support of the child" (s. 150(2)(b)); and

- while there is no provision expressly authorizing a retroactive child support order at first instance, such jurisdiction is inherent in the general authority granted by s. 149 of the *Act*.

[58] Whether child support jurisdiction is governed by the *Divorce Act* or the *FLA* (or both), Supreme Court of Canada cases *D.B.S. v. S.R.G.*, 2006 SCC 37, *Kerr v. Baranow*, 2011 SCC 10, and their progeny, have articulated certain fundamental principles of law applicable to all child support matters:

1. a parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to provide financial support for the child automatically arises at birth;

2. parents have a joint and ongoing legal obligation to provide financial support for their children in a way that is commensurate to their income;

3. this obligation and the children's concomitant right to support exists independently of any statute or court order;

4. child support is the right of the child, not of the parent seeking support on the child's behalf;

5. support payments are based on earning capacity and not just on what a parent actually earns – as a result, parents have a legal obligation to earn as much as they reasonably are capable of earning so that the children receive an appropriate level of support; and

6. both parents must put their child's interests ahead of their own in negotiating and litigating child support.

[59] *D.B.S.* is the seminal case respecting claims for retroactive child support. The four cases involved in the decision all sought retroactive variation of child support set out in an earlier court order. Nonetheless, the principles apply to

applications for retroactive child support at first instance, albeit with some modification.

General Principles

[60] The *D.B.S.* case establishes three discrete steps for the determination of retroactive child support claims:

1. Step 1: a determination whether the court should exercise its discretion to order child support retroactively in the circumstances of the case (a four-factor analysis, see below);

2. Step 2: if a retroactive award is warranted, a determination of the date to which the award should be retroactive; and

3. Step 3: the quantum of the retroactive award must then be determined in accordance with the applicable statutory scheme.

[61] The *D.B.S.* case identified four factors that a court should consider before awarding retroactive child support:

1. whether the payee parent has a reasonable excuse for not seeking child support earlier ("crucial in determining whether a retroactive award is justified")?

2. whether the payor parent has engaged in blameworthy conduct ("anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support)?

3. the past and present circumstances of the child (past hardship warranting compensation, standard of living)? and

4. any hardship occasioned by a retroactive award.

[62] The Court stressed that "none of these factors is decisive ... at all times, a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix" (para. 99). The Court recognized that "little can be done to remedy the fact that the child did not receive the [appropriate] support payments when (s)he was entitled to them" and stressed that such situations should be resolved "in the fairest way possible, with utmost sensitivity to the situation at hand" (para. 135).

Unreasonable Delay

[63] The Court in *D.B.S.* emphasized that child support is the right of the child and cannot be waived by the recipient parent. It noted:

> ... that recipient parents [must] not be encouraged to delay in seeking the appropriate amount of support for their children. From a child's perspective, a retroactive award is a poor substitute for past obligations not met. Recipient parents must act promptly and responsibly in monitoring the amount of child support paid ... Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of *both* parents to fulfill their obligations to their children. (Para. 103, emphasis in original, citations omitted.)

[64] The Court stressed the need for "sensitivity to the practical concerns". A reasonable excuse will exist where there are "justifiable fears that the payor parent would react vindictively", or where "the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice". On the other hand, a reasonable excuse will be lacking if the decision not to pursue child support earlier was "voluntary and informed" or otherwise an "arbitrary decision" (para. 101).

[65] While a "delay in seeking child support is not presumptively justifiable", it does not "have the effect of eliminating the payor parent's obligation" (paras. 101, 104).

Conduct of the Payor Parent

[66] The Court in *D.B.S.* emphasized that one should take "an expansive view of what constitutes blameworthy conduct" and that:

> No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct. (Para. 107, citations omitted.)

Circumstances of the Child

[67] The Court should consider "the child's needs at the time the support should have been paid" and recognize that "a child who underwent hardship in the past may

be compensated for this unfortunate circumstance through a retroactive award" (para. 113). However, if the child enjoyed all the advantage (s)he would have received had both parents been supporting him/her, and if the child "is currently enjoying a relatively high standard of living", then (s)he "may benefit less from a retroactive award than a child who is currently in need" and the argument in favour of retroactive child support is "less convincing" in such circumstances (paras. 111, 113).

Hardship Occasioned by a Retroactive Award

[68] Retroactive awards can lead to hardship. They are usually based on "past income rather than present income" and thus are "not intrinsically linked to what the payor parent can currently afford". As well, "payor parents may have new families, along with new family obligations to meet" and a retroactive award may "disrupt payor parents' management of their financial affairs" and thereby cause meaningful hardship (para. 115).

[69] Hardship can sometimes be alleviated to some degree by mechanisms such as a lump sum award, a series of periodic payments, or a combination of the two. Still, it is not always possible to avoid hardship to the payor parent, and "while this is much less of a concern where it is the product of [the latter's] own blameworthy conduct", it remains a strong consideration where this is not the case (para. 116).

Date of Retroactivity

[70] The Court in *D.B.S.* recognized four alternative dates to which an award for child support might be made retroactive. In order of recency they are:

- the date the application for child support is made to the court;
- the date when "formal notice" was given to the payor parent, *i.e.* initiation of legal proceedings;
- the date when "effective notice" was given to the parent ("any indication by the recipient parent that child support should be paid, whether at first instance or in an increased amount"); and, lastly

- the date when the support should have been paid (whether at first instance or on an increased basis).

[71] The Supreme Court of Canada adopted the date of "effective notice" as the general rule for retroactive child support awards, provided it is not followed by "a prolonged period of inactivity". If such inactivity occurs, "it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent", *i.e.* the institution of legal proceedings (para. 123).

[72] Notwithstanding the general rule, the Court acknowledged that there may be circumstances warranting that the date of retroactivity should be the date on which "support should have been paid", whether at first instance or as increased support. "This situation can most notably arise where the payor parent engages in blameworthy conduct", in which case the court may wish to emphasize the principle that "a payor parent should not be permitted to profit from his/her wrongdoing" (paras. 124, 125).

Quantum of the Retroactive Award

[73] The starting point here is the *Federal Child Support Guidelines*, SOR/97-175 [*Guidelines*], application of which is mandatory under the *Divorce Act* and the *FLA*. However, "blind adherence" is neither required nor recommended. Rather, the court must ensure that the quantum of the award fits the circumstances.

[74] The Court in *D.B.S.* noted that the *Guidelines* permitted the exercise of discretion in determining quantum. It expressly referred to s. 10 of the *Guidelines* referencing "undue hardship", noting that the categories of undue hardship "are not closed". It referenced other circumstances of discretion in ss. 3(2), 4 and 9 of the *Guidelines*, all of which permit a "condition, means and needs" analysis as well as a consideration of the financial ability to pay.

[75] *D.B.S.* also recognized a second way in which quantum of retroactive awards can be adjusted, *i.e.* altering the time period that the retroactive award captures.

The Court did not articulate precise criteria for any such adjustment, presumably leaving it as a factor for the Court's holistic determination as part of "Step 2" of the process.

A Review of *Brown v. Kucher*

[76] There are surprisingly few cases involving claims for lengthy retroactive child support at first instance, *i.e.* where one parent refused or otherwise failed to pay support at the outset and enforcement litigation was delayed for many years. One such case, involving facts very similar to the present case and which is thus relied on heavily by Mr. Regehr, is *Brown v. Kucher*, 2015 BCSC 1258, aff'd 2016 BCCA 267, leave to appeal to SCC ref'd 2017 CanLII 6741 (SCC).

[77] The parties had a relationship for less than a year and it was terminated by Mr. Brown when he was informed that Ms. Kucher was pregnant. He already had two daughters and he did not want the responsibility of another child.

[78] The child was born after Mr. Brown had terminated the relationship and refused responsibility. Ms. Kucher raised the child without any assistance from Mr. Brown. She struggled financially but never sought child support from Mr. Brown for 18 years.

[79] Mr. Brown did not hide his whereabouts and continued to live in the same community. The child eventually made contact with him on Facebook and it was at that point Mr. Brown agreed to pay prospective child support in accordance with the *Guidelines* and also made some contribution to the child's education costs.

[80] Ms. Kucher made application in the provincial court for *Guidelines* support retroactive to the child's date of birth. As it turns out the date of the application was also the date of both formal and effective notice. Hence, the provincial court judge was confronting two choices – the date of the application or the child's date of birth for retroactive support purposes. She chose the latter, concluding that Mr. Brown's "total failure to honour his child support obligation" was "blameworthy conduct of a very high order". She noted that the retroactive order would be a hardship for

Mr. Brown, one that might necessitate the sale of his residence, however "it is one he has to a very great extent brought upon himself by this blameworthy conduct".

[81] The decision was appealed to the Supreme Court of British Columbia. Madam Justice Fisher (now Fisher J.A.) allowed the appeal. She concluded that Ms. Kucher had not provided any "objectively sufficient" reason for the 18-year delay in applying for support. She accepted the proposition that "the reasons for delay must be objectively reasonable and the longer the delay, the more robust the excuse must be to qualify it as reasonable". Ms. Kucher's "devastation and humiliation" arising from Mr. Brown's abandonment of her at first instance was not sufficient to "ground as reasonable a delay of this length" (18 years).

[82] Justice Fisher noted that Mr. Brown's blameworthy conduct over the years was passive in nature and did not warrant placement at "the high end of the scale of blameworthiness". It might have been "substantial" blameworthiness, however Mr. Brown did not do anything to lull Ms. Kucher into believing he was meeting his obligations. He knew that he had a daughter and that he had a support obligation, but he was just "waiting to see" whether Ms. Kucher would take the initiative to enforce that obligation.

[83] The provincial court judge did not consider what benefit the child would receive from a retroactive award given that she was almost 20 years old and would soon no longer be a "child" as defined in s. 146 of the *FLA*. In these circumstances, Fisher J. was concerned that "such an award would constitute a redistribution of capital in the guise of child support".

[84] Justice Fisher was also critical of the provincial court's failure to give greater significance to the hardship that would be occasioned by the award. It was an award that exceeded Mr. Brown's annual income as well as the small amount of equity he had in his home.

[85] Justice Fisher accepted that, while only two of the *D.B.S.* factors supported entitlement to a retroactive award (the conduct of Mr. Brown and the past

circumstances of the child), the "real issue" in the case was the date of retroactivity. She concluded it was an error in principle for the provincial court to consider Mr. Brown's blameworthy conduct in isolation and that the provincial court had failed to take the required holistic view of the case. No consideration was given to Ms. Kucher's responsibility to pursue child support for so many years, nor was hardship arising from the award factored into consideration.

[86] Justice Fisher agreed that a retroactive award greater than the three-year guideline established in *D.B.S.* should only be done when there is clear evidence of hardship suffered by the children, reason to believe that the support will benefit them, and where the nature of the blameworthy conduct supports such an approach. She stated that "a lengthy retroactive award as was the case here should only be made in circumstances where all four *D.B.S.* factors favour retroactivity in a sufficient magnitude to justify a date going back that far." She concluded, at para. 73:

> An order retroactive to no more than three years prior to October 23, 2013 (the date of both formal and effective notice) would impose less of a hardship on Mr. Brown. However, given the unreasonable and extremely lengthy delay, the fact that Mr. Brown has committed to paying for [the child's] full education costs, and the other factors reviewed above, it is my view that the date of effective notice is the appropriate date of retroactivity, in accordance with the general rule established in *D.B.S.*

[87] The Court of Appeal held that Justice Fisher had applied the appropriate standards of review and the appeal was dismissed. The Court commented only on two of the four *D.B.S.* factors, namely a reasonable excuse for the 18-year delay and the payor parent's misconduct. With respect to the former, the Court held that it was "surely an error in logic" for the provincial court judge to move from a finding that Ms. Kucher was traumatized from Mr. Brown's walking out at first instance, to the conclusion that she remained unable because of emotional fragility, to seek financial assistance for the following 18 years. Such a finding would "almost certainly have required psychiatric evidence" from an expert of some kind, particularly because Ms. Kucher was a competent individual.

[88] With respect to blameworthy conduct on the part of Mr. Brown, the Court stated:

> [31] ... The Court's ruling that Mr. Brown'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 Mr. Brown's conduct; yet [counsel for Ms. Kucher] 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 Mr. Brown'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 Mr. Brown'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. [Emphasis in original.]

[89] In the above passage, the Court of Appeal noted the absence of any case sanctioning an award retroactive anywhere near 19 years even where the blameworthy conduct was "active" as opposed to passive. The longest period found in that regard was seven years.

[90] There has, however, been at least one subsequent case imposing a child support order for a retroactive period of 12 years in circumstances where the payor parent did not disclose a dramatic increase in income nor did he voluntarily increase the amount of child support he was paying pursuant to a separation agreement between the parties: *A.J.D. v. C.D.*, 2017 BCSC 1559, varied as to quantum only *sub nom Dunnett v. Dunnett*, 2018 BCCA 262. The respondent parent did not appear at the hearing of the application. The only case referred to with respect to entitlement to retroactive child support was *D.B.S.* The chambers judge found the recipient parent had a reasonable excuse for failing to make any earlier request for support variation: she was under the mistaken impression that child support was fixed and could not be varied and she was unaware of the obligation on the part her spouse to provide ongoing financial disclosure.

[91] The chambers judge specifically referenced para. 123 of *D.B.S.* in which the Supreme Court of Canada had stated that it would "usually be inappropriate to make a support order award retroactive to a date more than three years before formal notice was given to the payor parent". Reference was then made to para. 124 of *D.B.S.*, which noted the possibility of a lengthier retroactive period "where the payor parent engages in blameworthy conduct" such as failure to disclose an increase in income. The chambers judge continued:

> [56] It is clear to me that the respondent in this case is guilty of blameworthy conduct in the extreme. He provided misleading information about what his income was at the time the Separation Agreement was entered into in 2003 and he never corrected that misinformation. His income has always been dramatically higher than that which he disclosed in the Separation Agreement.

[92] The respondent father retained counsel to prosecute an appeal and an application for stay of execution. The appeal on the merits did not challenge the judge's retroactive order but was limited to the question of quantum and, in particular, whether the receipt of capital gains should have been excluded in the determination of the payor parent's annual income. The appeal succeeded on this narrow point. However, Fisher J.A. (who was the author of *Brown v. Kucher* in the Supreme Court) also commented for the unanimous panel:

> ... I am mindful of the extent of Mr. Dunnett's blameworthy conduct as found by the chambers judge. There is no question that his failure to disclose his income, compounded with his unilateral reduction of child support in 2015, was blameworthy conduct of a high order. His conduct affected his children, who were deprived of benefiting from his income-earning ability over a long period of time. ... this justified a retroactive award going back to the date of the material change of circumstances, 12 years in Mr. Dunnett's case... (para. 40)

Analysis: Application of the Law to the Facts of this Case

Step 1: Entitlement to a Retroactive Award

[93] Mr. Regehr became aware of the child support claim in November 1998 after receiving the Provisional Order filed in the Provincial Court of British Columbia on October 27, 1998. He acknowledged receipt of that Order in his January 11, 1999

letter to Ms. Loughlean, at which time he again raised the issue of DNA testing to confirm paternity. He also promised to be back in contact with Ms. Loughlean in that regard by the end of February 1999, a promise he did not keep.

[94] Following that date, Ms. Loughlean had no further direct communications with Mr. Regehr but did have various conversations with his parents through October 1999 in an attempt to pursue matters further with him. I have found as a fact that by the end of that month, Ms. Loughlean gave up in frustration and made a conscious decision to raise Ethan from that point without any financial support from Mr. Regehr. As she says in her affidavit, she instead "decided to put my efforts into raising Ethan to the best of my ability".

[95] As an explanation for the ensuing delay in prosecuting any child support claim, Ms. Loughlean states:

> Over the next 16 years, there were times I thought about trying to track down Mr. Regehr. A friend of mine ... told me about four or five years ago that she had found some information about Mr. Regehr online. However, I remember how overwhelmed and emotionally exhausting it was throughout the two years I did try and contact Mr. Regehr. I also thought about how Mr. Regehr had never once reached out to me in the last 18 years asking about Ethan.
>
> My focus was on keeping Ethan's emotional needs at the forefront, which in my view was more important than financial needs. I never got married and raised solely on my own, with some assistance from my parents.

[96] It was only in December 2016, when Ethan was 18 years old, that Ms. Loughlean did track down Mr. Regehr. It occurred at the insistence of Ethan who had told her that he wished to meet his father. A Google search immediately located Mr. Regehr in Toronto.

[97] I do not doubt for a moment the frustration and exhaustion experienced by Ms. Loughlean, which caused her to "give up on chasing Mr. Regehr for support". I accept her evidence that she found the experience "overwhelming and emotionally exhausting" and I have no doubt that, from her perspective, her decision to focus efforts on raising Ethan as a single mother seemed rational at the time.

[98] Nonetheless, the fact remains that Ms. Loughlean's deliberate decision not to pursue child support from Mr. Regehr in the ensuing 16 years amounted to a breach of her legal obligation to secure financial support for Ethan's benefit from Mr. Regehr and to compel Mr. Regehr to fulfil his legal obligation to the child. While Ms. Loughlean's decision is perhaps understandable, it does not constitute the sort of "reasonable excuse" contemplated by *D.B.S.* for the delay in enforcing Mr. Regehr's obligations. The first *D.B.S.* factor thus militates against an award of retroactive child support in this case.

[99] There is no doubt that Mr. Regehr's conduct in evading paternity testing and thereby avoiding payment of child support constitutes "blameworthy conduct" of a sort contemplated by *D.B.S.* For someone who claims he was brought up to "do the right thing", he completely failed that standard. He did not accept Ms. Loughlean's offer to provide the ultrasound results but, as was his legal right, insisted on DNA testing to confirm paternity before recognizing any financial obligation respecting the child. He then avoided that DNA testing and in doing so breached his promise in that regard. The inference is compelling, and I find as a fact, that he was well aware he was likely Ethan's father and he deliberately avoided further contact with Ms. Loughlean to avoid any resulting responsibilities.

[100] I recognize that our Court of Appeal endorses the concept of a "scale of blameworthiness" and draws distinctions between "passive" (*e.g.* doing nothing) as opposed to "active" misconduct (*e.g.* fraud or deceit). Reasonable persons (including judges) can reasonably disagree on the characterization of blameworthiness in any particular circumstances, but I would note that Mr. Regehr's conduct (just like Mr. Brown in *Brown v. Kucher*) had the effect of depriving Ethan and his mother of any financial support whatsoever over the years, a result with a potential to cause loss or hardship much more than a situation where at least some support was paid albeit not in the appropriate amount.

[101] According to *Brown v. Kucher* it is an error in law to rank "waiting in the weeds" as more egregious than active misconduct such as deceit or fraud. If that is

so, then Mr. Regehr's conduct must be deemed less egregious than that of some of the other parents who have been before the court in retroactive support cases. In my view, however, Mr. Regehr's misconduct is nonetheless substantial and, indeed, is compounded by the completely illogical and implausible excuse he now provides, *i.e.* an implied acknowledgement by Ms. Loughlean that he was not the father.

[102] The factor of payor misconduct militates strongly in favour of a retroactive award.

[103] The third *D.B.S.* factor involves a consideration of the past and present circumstances of the child. This includes an assessment of the child's needs, both past and present, and whether the child underwent any hardship in the past. *D.B.S.* makes it clear that hardship suffered by other family members (like a recipient parent forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child.

[104] In the present case it is clear that Ethan's needs were fully met by his mother with some assistance from his grandparents, and there is no evidence of any meaningful hardship experienced by him. Ms. Loughlean enjoyed a steadily increasing level of income over the years and she managed to pay for food, clothing, accommodation, medical expenses not covered by insurance, recreational sports and hobbies, school activities, and travel to California.

[105] Ethan continues to live at home and his mother gives him half of the child support payments currently received from Mr. Regehr to cover his personal expenses and to also make a small contribution into an investment account.

[106] It is probably true that, had Mr. Regehr made child support payments throughout the years, any financial challenges confronted by Ms. Loughlean would have been ameliorated to some degree and this might possibly have been reflected in a somewhat higher standard of living enjoyed by Ethan. There is, however, no compelling evidence of hardship for which compensation is warranted. On balance, the "circumstances of the child" factor is a relatively neutral consideration.

[107] Mr. Regehr claims that any retroactive award beyond the period for which he has already been paying would result in hardship. He says, "The emotional hardship around these proceedings has been immense", which, if so, is unfortunate but attracts little sympathy from the Court in the circumstances. More to the point, however, he claims there has been a "financial toll on my family" inasmuch as he had to remortgage his house at a much higher rate of interest to pay for Ethan's child support payments and schooling as well as his legal fees. His current wife had to return to work earlier than planned after the birth of their youngest child and childcare costs have been substantial. His only meaningful financial asset is the equity in his house and he worries that liability for any significant retroactive child support will force him to sell his home.

[108] Mr. Regehr says that he has recently gone on stress leave because he is unable to sleep and has been unable to do his job. Presumably this has resulted in a temporary reduction of his income but the details are not clear.

[109] It must be noted, however, that according to his August 2017 financial statement, Mr. Regehr has at least $1 million equity in his house. He likely has the wherewithal to fund a payment of retroactive child support but this would likely entail an increased debt load.

[110] Mr. Regehr has a spouse and a new family. Imposing a significant financial award against him at this time will inevitably cause some hardship and I am mindful of the irony referred to in *D.B.S.* about justifying a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children.

[111] However, I am not satisfied that the hardship factor militates against any award of retroactive child support. *D.B.S.* recognizes that it is not always possible to avoid hardship in these cases and that this is less of a concern where it is the product of the payor parent's own blameworthy conduct. Nevertheless, hardship can, and in this case should, be given meaningful weight when determining the date of retroactivity and the overall quantum of the award.

[112] In the result, after due consideration of the *D.B.S.* factors in a holistic manner, I find that entitlement to a retroactive award of child support has been established in this case.

Step 2: Date of Retroactivity

[113] There are some unusual circumstances in this case.

[114] First, there was no marriage or spousal relationship between the parties and no order or agreement for child support was issued after the parties' brief relationship came ended. Second, while legal proceedings were instituted in British Columbia in 1998, the order that was issued at the time was provisional and was "of no force and effect" until confirmed by a court in the jurisdiction where Mr. Regehr was residing. And third, although confirmation did not occur, Mr. Regehr was served with the Provisional Order almost immediately and thus learned that he had been declared to be Ethan's father and that he was required to pay child support, albeit on a provisional basis.

[115] *D.B.S.* established a regime respecting date of retroactivity in the context of the more usual scenario of a payor parent failing to disclose a material change in circumstances resulting in an entitlement to an increased award beyond that mandated in either a court order or a separation agreement. The case did not address the scenario with which we are confronted here and the principles established in *D.B.S.* must be tailored to resolve the present dispute "in the fairest way possible, and with utmost sensitivity to the situation at hand".

[116] Ms. Loughlean claims that both the "effective" and "formal" notice of a child support obligation occurred back in 1998 and that, accordingly, it is entirely appropriate to award child support retroactive to Ethan's date of birth. Based on the parties' incomes over the years and the relevant *Guidelines* tables, a retroactive award of "basic" child support for that period would be approximately $128,000 together with a proportionate amount of special and extraordinary expenses over the same period (calculated to be approximately $47,000), *i.e.* an aggregate award of some $175,000.

[117] For his part, Mr. Regehr says any blameworthy conduct on his part does not justify a 18-year retroactive award for child support. He points to *Brown v. Kucher* where, in approximately similar circumstances, the date of retroactivity was the date of "effective notice" (in this case, claimed to be January 30, 2017). He also emphasizes the Court of Appeal's statement:

> [31] ... An award retroactive to a child's birth date 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. [Emphasis in original.]

[118] I agree with Ms. Loughlean that both effective and formal notice of a child support obligation was given to Mr. Regehr in 1998. However, she made a deliberate decision not to pursue enforcement of support shortly thereafter and there was a very prolonged period of inactivity following the effective/formal notice. This delay offsets to a large degree, although not entirely, the blameworthy conduct on the part of Mr. Regehr, which I consider to have been substantial. While Mr. Regehr "should not be permitted to profit from his wrongdoing", this consideration is counterbalanced to some degree by the economic hardship he will encounter as a result of any substantial judgment against him.

[119] In *D.B.S.* the Court noted that, absent blameworthy conduct, it would be inappropriate to make a retroactive award for more than three years before formal notice was given to the payor parent. It also suggested that periods of unreasonable delay in enforcing child support can be excluded in the calculation of any award.

[120] In the result, I find that the date of retroactivity in this case should be three years before the "second" formal notice, the Notice of Family Claim in the present proceedings, was issued on June 15, 2017. This excludes a substantial portion of the delay by Ms. Loughlean in seeking enforcement while at the same time expressing disapproval of Mr. Regehr's blameworthy conduct in a manner sensitive to both Ethan's deprivation of financial support in the past and to the hardship that may be caused in Mr. Regehr's new household.

Quantum of the Retroactive Award

[121] In *D.B.S.* the Supreme Court of Canada declared that "the *Guidelines* must be followed in determining the quantum of support owed". It noted the discretion permitted by the *Guidelines* in respect of undue hardship as well as the ability of the court to exclude any period of unreasonable delay from the calculation of quantum.

[122] I have already factored these discretionary considerations into the determination of the retroactivity date. It is thus not appropriate to make any further "discounts" in Mr. Regehr's favour.

[123] The quantum of the retroactive award will be the *Guidelines* amounts payable for both basic table child support and his proportionate amount of s. 7 special or extraordinary expenses based on the parties' income determinations for the period June 15, 2014 (three years before the suit issued), forward after giving due credit for all payments made by Mr. Regehr from February 1, 2017 to the effective date of the orders referred to in para. [7] of these Reasons for Judgment.

SUMMARY AND CONCLUSION

[124] For the reasons given, I grant the orders sought in paragraphs 3, 4 and 5 of Part 1 of Ms. Loughlean's Notice of Application as amended by paragraphs 3, 4 and 5 of Mr. Regehr's Application Response. I also order that Mr. Regehr pay retroactive *Guidelines* table child support and proportionate s. 7 special and extraordinary expenses for the period commencing June 15, 2014 with all due credit for payments made in that regard to the date of this order. The calculations are to be based on income and expenses reflected in the schedule attached to Ms. Loughlean's written submissions, however if the parties are unable to agree on the arithmetic, the determination of quantum will be referred to the Registrar.

[125] Costs will follow the event unless there are additional matters that should be brought to my attention that regard. If so, the parties are granted liberty to seek a further hearing on the matter within 30 days.

"KENT J."