

COURT OF APPEAL OF YUKON

Citation: *NDH v. HNKB*,
2026 YKCA 6

Date: 20260410
Docket: 25-YU927

Between:

N.D.H.

Respondent
(Plaintiff)

And

H.N.K.B.

Appellant
(Defendant)

Before: The Honourable Mr. Justice Abrioux
The Honourable Madam Justice MacPherson
The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of Yukon, dated
January 10, 2025 (*NDH v. HNKB*, 2025 YKSC 4,
Whitehorse Docket 14-B0100).

Counsel for the Appellant: P.B. Ewanchuk

Counsel for the Respondent: M.T. Chandler

Place and Date of Hearing: Whitehorse, Yukon
November 21, 2025

Place and Date of Judgment: Whitehorse, Yukon
April 10, 2026

Written Reasons by:

The Honourable Madam Justice MacPherson

Concurred in by:

The Honourable Mr. Justice Abrioux
The Honourable Justice Gomery

Summary:

This is an appeal from an order granting retroactive child support to the respondent mother. In 2015, the parties entered into a consent order which required the appellant to pay \$1,076 per month in child support based on his then income of \$120,606. The consent order did not contain a clause requiring annual reporting of income. In February 2023, the respondent applied for a retroactive increase in child support. The application was made in response to an application by the appellant for custody of the child. By consent, the appellant was granted primary care of the child in June 2024. The chambers judge granted the respondent's application for retroactive child support, retroactive to February 2020, despite the date of effective notice being February 2023. The appellant appeals this decision.

Held: Appeal dismissed. The chambers judge's decision to order retroactive support was a reasonable decision which considered all of the relevant facts, including the appellant's significant increase in income since the 2015 consent order. Her conclusion that it would be unjust to adjust the support based on the effective date of notice was based on the facts, was intelligible and well-reasoned, and is entitled to deference.

Reasons for Judgment of the Honourable Madam Justice MacPherson:**Background**

[1] The appellant, H.N.K.B., and the respondent, N.D.H., were in a common-law relationship. They have one child of the relationship, who is now 13 years of age. The parties separated in 2014, when the child was just one and a half years old. They entered into a consent order in May 2015 (the "2015 Order") which provided that the respondent would have primary care of the child and the appellant would have regular access. At the time, both parties resided in Whitehorse, Yukon. The 2015 Order also provided that the appellant would pay \$1,076 per month in child support based on his 2014 income of \$120,606.04.

[2] Although the 2015 Order provided that the respondent would have primary care of the child, the parties ended up in a shared parenting arrangement until the appellant moved to Alberta in 2016. After he moved, the appellant continued to have frequent access to the child.

[3] Between 2014 and 2024, the appellant's income increased significantly. In 2018, he earned \$234,616. In 2020, the appellant earned \$154,615. In 2021, he

earned \$438,016; in 2022, he earned \$443,365; and, in 2023, he earned \$421,601. Although his income increased, he did not increase the amount of child support.

[4] In 2023, the appellant initiated court proceedings seeking to have primary care and custody of the child in Alberta. The respondent opposed this application and also commenced proceedings seeking a retroactive increase in child support. The respondent had previously not requested financial disclosure from the appellant nor raised with him the topic of an increase in child support.

[5] On June 1, 2023, the appellant voluntarily increased the amount of child support he was paying to \$2,076 per month. He also voluntarily paid the respondent a lump sum of \$6,000. However, had he paid child support based on his total 2022 income, his monthly payment under the *Yukon Child Support Guidelines*, Y.O.I.C. 2000/63 [*Guidelines*], enacted pursuant to the *Family Property and Support Act*, R.S.Y. 2002, c. 83, would have been \$3,670.

[6] In August 2024, by consent, the child moved to Alberta to live with the appellant. Ongoing child support was no longer payable by the appellant and the only live issue remaining was that of retroactive child support.

[7] During the hearing before the chambers judge, the parties made various concessions. The appellant stated that he was not seeking child support and would help pay for the respondent's access costs. On her part, the respondent limited her request for retroactive support to the three-year period prior to her application, despite the fact that the appellant had earned considerably more than his 2014 income for many of the earlier years. The respondent was also willing to credit the appellant for time he spent with the child during this period and to reduce the amount owed in retroactive child support accordingly.

Reasons of the Chambers Judge

[8] On January 10, 2025, the chambers judge ordered that the appellant pay increased child support to the respondent, based on his increased income, retroactive to February 2020.

[9] The chambers judge accepted that the respondent had not raised the issue of an increase in child support until she filed her application on February 13, 2023. As such, applying the principles at para. 114 of *Colucci v. Colucci*, 2021 SCC 24, the chambers judge held that the presumptive date of retroactivity was February 13, 2023. However, she determined that it would be unjust to impose the presumptive date of retroactivity in the circumstances of this case.

[10] In departing from the presumptive date of retroactivity and ordering support payable from an earlier date, the chambers judge looked at the respondent's delay in seeking an increase in support, the appellant's conduct, the circumstances of the child, and hardship to the appellant.

[11] The chambers judge held that the respondent's delay in seeking an increase in support was explainable, at least in part, because the appellant did not inform the respondent of his increase in pay. She rejected the appellant's assertion that the respondent must have known he was doing well, saying that to accept this argument would be to shift the responsibility for recognizing when support should be increased from the appellant to the respondent.

[12] The chambers judge also found that the appellant's conduct in failing to disclose his increase in income was blameworthy. She rejected the appellant's argument that he did not know that he had to disclose his income, finding that intent is "rarely relevant" and, applying *Michel v. Graydon*, 2020 SCC 24 at para. 118, held that the court's focus should be on whether the appellant's conduct had the effect of privileging his interests. The chambers judge found it significant that the appellant did not tell the respondent of the change in his salary for a period of approximately seven years. The chambers judge also noted that, while the appellant had voluntarily increased his child support payments after the respondent brought her variation application, the increased amount was still not the full amount he should have been paying given his income.

[13] With respect to the child's circumstances, the chambers judge noted that the appellant paid for many of the child's expenses, such as school supplies and

extracurricular activities. However, she also noted that the respondent's financial circumstances were modest and that the failure to pay adequate child support had an effect on both the child and the respondent. She expressly rejected the appellant's submission that the child would not now benefit from a retroactive support order given that the child was no longer living primarily with the respondent. She held that refusing to order retroactive support on that basis would be to send the wrong message to payor spouses with respect to their obligation to disclose. She also rejected the appellant's suggestion that the retroactive child support amount be put into a trust for the child, finding that there was no reason to believe that the respondent would not use the funds for the child's benefit.

[14] On the issue of hardship, the chambers judge noted that the appellant did not assert that paying a retroactive award would pose undue hardship and, consequently, she did not consider that factor.

[15] The chambers judge also recognized that the parties had made various concessions in the litigation and that the ultimate award should be reduced to reflect those concessions. Despite this recognition, the chambers judge rejected the respondent's position to not seek child support for the periods when the appellant had the child in his care, given that the child was with the appellant for less than 40% of the time during the relevant years. The chambers judge held that her role was to determine the date of retroactivity, and that once that date has been determined, child support must be calculated pursuant to the *Guidelines*. Once the retroactive amount of child support was calculated pursuant to the *Guidelines*, the chambers judge held that it was appropriate to reduce the amount owed by \$10,000 in order to reflect the concessions made by both parties.

[16] The chambers judge then calculated what the appellant should have paid from February 2020 to December 2023—the period for which she had accurate income information. From that amount, the chambers judge deducted \$10,000 to reflect the concessions made by the parties. This resulted in a retroactive award of \$81,433.73 for that period. The chambers judge also ordered that the appellant

provide the respondent with proof of his 2024 income and that he pay retroactive child support for January 2024 to May 2024 based on his actual income for 2024, minus the amount he had already paid the respondent during that period.

On Appeal

[17] The appellant asserts that the chambers judge erred in the following ways:

- a) In arriving at the total quantum of support she ordered, or, in the alternative, in granting an award of retroactive support that exceeded the amount sought by the respondent;
- b) With respect to her determination of the appropriate date of retroactivity;
- c) In her determination of the appellant's *Guidelines* income;
- d) In failing to consider the appellant's additional contributions for the benefit of the child;
- e) In failing to give effect to an agreement between the parties with respect to crediting child support for periods when the child was with the appellant;
- f) In failing to consider the benefit to the child of an award for retroactive support given the change in primary parenting.

Standard of Review

[18] The parties agree that support orders attract deference on appeal. Absent an error on an extricable question of law, a palpable and overriding error, or a fundamental mischaracterization or misapprehension of the evidence, an appellate court should not interfere with the chambers judge's exercise of discretion: *Colucci* at para. 115; *Michel* at para. 30.

Analysis

a) Overall Quantum of Retroactive Support

[19] The appellant asserts that the chambers judge erred in ordering retroactive child support in an amount greater than that sought by the respondent. In her affidavit, and in submissions before the chambers judge, the respondent sought total retroactive arrears of support of \$53,431.66. The appellant notes that the calculations originally provided by the respondent included credit for periods of time that the child was with the appellant. By not giving effect to what the appellant's counsel termed as an "agreement" with the respondent, the appellant asserts the chambers judge erred.

[20] With respect, this argument must fail. The chambers judge carefully reviewed the appellant's income and calculated the appropriate amount of child support owed under the *Guidelines* based on his total income for the relevant periods of time. The appellant has not pointed to any error in the chambers judge's calculations.

[21] The chambers judge grappled with the issue of whether the appellant should receive credit for periods of time when the child was in his care. She expressly rejected this approach, noting that the child was only with the appellant for about 35% of the relevant time. The appellant had submitted that the child was with him for 40% of the time. Had that been the case, he may have been entitled to a set-off of child support. However, on appeal, the appellant did not point to any evidence which might suggest that the chambers judge was wrong in her assessment of the amount of time that the child spent with each party.

[22] In arriving at the total amount of retroactive support owed, the chambers judge adjusted her calculations to reflect various concessions made by the parties, including the respondent's concession that the time the child spent with the appellant should be accounted for. It was within her discretion to consider all of the evidence, and to arrive at an amount greater than that sought by the respondent.

b) Appropriate Date of Retroactivity

[23] The appellant argues that the chambers judge erred in ordering retroactive support beyond the presumptive date of retroactivity. The appellant points to the uncontroverted evidence that the respondent had not raised the issue of a variation of child support until she filed her application on February 13, 2023. The appellant acknowledges that the chambers judge had the discretion to depart from the presumptive date of retroactivity where it would be unfair to rely on the presumptive date: *Colucci* at para. 96. However, the appellant suggests that the respondent was aware of the appellant's improved financial circumstances and deliberately chose not to apply for a variation of child support earlier. In these circumstances, the appellant suggests that it is unfair to allow the respondent to raise this issue years after she consciously decided not to apply for an increase in support.

[24] The challenge with the appellant's argument is that, while the respondent may have inferred that the appellant's financial circumstances were improved, there was no evidence that the respondent was aware of just how significantly the appellant's income had increased. By 2021, the appellant's income had more than tripled.

[25] A decision to depart from the presumptive date of retroactivity is a discretionary decision attracting deference on review. The chambers judge considered the reasons for the delay in seeking the increase, the payor's conduct, the circumstances of the child and hardship to the payor. She found that the respondent's delay in seeking a variation of child support was explained, at least in part, because the appellant did not inform the respondent of his increase in pay. While the appellant was not under a court-ordered obligation to disclose his income on an annual basis, he had the informational advantage of knowing that his income had increased significantly to warrant a change in support. The failure to disclose this information for a period of approximately seven years was viewed by the chambers judge as "significant". The chambers judge rejected the proposition that the respondent must have known of the appellant's improved circumstances, finding that the appellant was "seek[ing] to shift the responsibility for recognizing when child support needed to increase" (at para. 19). On these facts, given the very significant

increase in income from when child support was first ordered in 2015, and the respondent's lack of knowledge of the specifics of that increase, it was reasonable for the chambers judge to conclude that the delay in seeking a variation was "explainable at least in part" (at para. 19).

[26] The chambers judge rejected the proposition that the appellant did not know that he had an obligation to disclose, and concluded that the appellant's failure to disclose his significant increase in income was blameworthy conduct. She found that the appellant's intent was not relevant to the analysis of blameworthy conduct on these facts.

[27] As noted by Justice Bastarache in *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 106:

Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. ...

[28] The appellant's income had increased from \$120,606.04 in 2014 to \$438,016 in 2021. In 2022, the appellant earned \$443,365. In 2023, he earned \$421,601. As noted by Bastarache J. in *D.B.S.* at para. 108:

On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following. Because the order (and, usually, the agreement) is presumed valid, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay.

[29] Implicit in the chambers judge's reasoning is a conclusion that it was no longer reasonable for the appellant to rely on the 2015 Order given his significant, and prolonged, increase in income. That is a finding she was entitled to make on the evidence.

[30] The chambers judge also appropriately considered the child's circumstances, noting that the respondent had a very modest income and that there were a number of ways in which the respondent's finances affected the child. She noted that while the appellant contributed directly to the child through the purchase of various items, such as toys and computer equipment, and funding extracurricular activities, these purchases had the effect of highlighting the differences in the lifestyles of the appellant and respondent and that, had the appellant paid appropriate support, the respondent could have spent those additional funds on the child.

[31] Given that the appellant did not make a claim of hardship, the chambers judge did not have to address that factor in her analysis.

[32] In my view, in finding that it would be unjust to rely on the presumptive date of retroactivity, the chambers judge considered all of the evidence and appropriately weighed the factors identified in *D.B.S.* In the circumstances of this case, it was reasonable to conclude that child support should be varied retroactively for a period of three years prior to the presumptive date. This is particularly so given that the increase in income spanned a period considerably greater than three years.

c) Determination of Income

[33] The appellant asserts that the chambers judge erred in her determination of the appellant's *Guidelines* income or, alternatively, in failing to consider s. 4 of the *Guidelines*.

[34] The evidence was that the appellant received discretionary bonuses and also had the benefit of his employer making Registered Retirement Saving Plan ("RRSP") contributions on his behalf. In written submissions to the chambers judge, the appellant suggested that it was inappropriate to include RRSP contributions in his

income when assessing retroactive support, as those RRSP contributions did not increase his ability to pay support. The appellant also suggested that the child directly benefited from his additional bonus income given that this income allowed him to make direct contributions for the benefit of the child, in the form of gifts and being able to save for the child's education.

[35] With respect, the *Guidelines* set out what comprises a parent's total income and this includes bonuses and RRSP contributions made on an employee's behalf: s. 14 of the *Guidelines*. This is not a case where the appellant's receipt of bonus income was extraordinary, and not reflective of his typical income. Had that been the case, a different approach in assessing income might have been merited, such as looking at his three-year pattern of income: s. 15(1) of the *Guidelines*. Indeed, notwithstanding the discretionary nature of the appellant's bonuses, his income remained remarkably consistent over the years covered by the retroactive support award.

[36] The appellant also takes issue with the chambers judge's failure to consider whether a different quantum of support might be appropriate, given that the appellant's income exceeded \$150,000. Where a payor's income exceeds \$150,000, a court may depart from the *Guidelines* amount for the portion of the income in excess of \$150,000, and order an amount of support that the court considers appropriate having regard to the means, needs and circumstances of the child, and the financial ability of each parent to contribute to the support of the child: s. 4(b) of the *Guidelines*.

[37] The challenge with the appellant's argument is that the chambers judge found that the appellant had not put forward evidence that a different approach for assessing the quantum of child support was appropriate in the circumstances. The appellant made various arguments as to why his entire income, including bonuses and RRSP contributions, should not be included in setting child support. He also argued that the child already had the direct benefit of his additional income. He further argued that the effect of applying the table amount was, in essence, to

transfer wealth to the respondent and not to provide for the needs of the child. While these arguments were made, no evidence which would support a different *Guidelines* amount was presented. As the chambers judge correctly noted, the presumption is that the table amount is appropriate and the onus is on the payor to provide clear and compelling evidence that child support should be different than the table amount: *Francis v. Baker*, [1999] S.C.R. 250 at paras. 42–43, 1999 CanLII 659. In the absence of clear and compelling evidence as to why the table amount was not appropriate, the chambers judge was entitled to reject the arguments made by the appellant and conclude that the table amount was appropriate.

d) Appellant's Additional Contributions for the Benefit of the Child

[38] The appellant's argument on this ground of appeal is linked to his argument with respect to the appropriate amount of support. Essentially, the appellant argues that he made direct contributions to the child in the form of gifts, toys, holidays and other similar expenses, and that the chambers judge did not take this into consideration in awarding retroactive support. He suggests that, once those arguments were advanced, the respondent had an obligation to demonstrate how the needs of the child were *not* being met with the lower amount of support that had been paid. With respect, this ignores the presumption that the *Guidelines* amount of support is the appropriate amount of support to order, absent evidence to the contrary, and inappropriately seeks to shift the burden to the respondent.

e) Alleged Agreement Between the Parties

[39] The appellant asserts that the parties had an agreement that the appellant was to be credited for time spent with the child. He asserts that agreement was reflected in the evidence that the respondent only sought \$53,431.66 in retroactive support. A review of the record reveals that there was no agreement between the parties. Had there been an agreement, a consent order could have been presented for consideration. The chambers judge was not bound by the submissions of counsel

and was not limited to ordering no more than the respondent sought, where the facts and the *Guidelines* dictated a more robust award.

[40] Further, notwithstanding the respondent's position that she would not seek child support for the times when the child was with the appellant, the chambers judge carefully reviewed the evidence and determined that the time the child spent with the appellant fell below the percentage required for a shared parenting situation. As such, the chambers judge found that a set-off arrangement would not be appropriate and chose to apply the *Guidelines*. That factual finding is entitled to deference. Moreover, the chambers judge reflected the concessions made by both parties in ultimately reducing the arrears owed by the appellant. She was entitled to approach the matter in this way.

f) Benefit to the Child Given the Change in Primary Parenting

[41] The appellant asserts that the retroactive order for child support would not benefit the child, given that the child is now residing with the appellant. The appellant argues that the chambers judge erred in failing to consider the benefit of the order given the change in primary parenting. In the alternative, the appellant submits that the chambers judge erred in declining to order that any retroactive support be held in trust for the child, instead of being payable to the respondent, as is permitted under the *Family Property and Support Act*. He relies on *Michel* as authority for the proposition that a relevant factor to consider is whether the child will benefit from a retroactive support award.

[42] In *Michel*, Justice Martin, in concurring reasons, held:

[132] ... Historical child support can be awarded in part or in whole to either or both the child or their parent, given findings of fact and depending on whom the hardship — if there was any — was visited upon. Sometimes the recipient parent bears the bulk of the hardship by making financial sacrifices to support the child beneficiary (see *Cornelissen*, at paras. 9 and 38). In other cases, both the recipient parent and the child beneficiary experience significant hardship (see *Warwoda*, at para. 12). It is also conceivable that in certain cases the recipient parent may experience no hardship but the child beneficiary will have undergone hardship. Courts should be flexible and respond to these realities when determining how to apportion the award

between the recipient parent and the child beneficiary. However, there should be no general reluctance to put monies into the hands of the recipient parent.

[43] The chambers judge's reasons demonstrate that she grappled with this issue of the benefit to the child, and rejected the submission that no retroactive support should be payable given the change in parenting. The chambers judge noted that, at the time the application was brought, the child was still living with the respondent. She further noted that the appellant had failed to disclose his change of income for seven years. She held that to accede to the appellant's argument would send the wrong message to those who choose not to disclose income changes. It was within her discretion to reach this conclusion on the evidence.

[44] Similarly, the chambers judge rejected the submission that any retroactive order should be held in trust. She found that there was no evidence that these funds would not be used for the benefit of the child, noting that the respondent may wish to spend this money on the child in ways she could not before. While not expressly mentioned by the chambers judge, it is particularly noteworthy that there is a significant income difference between the parties. In 2023, the respondent earned \$37,384 while the Appellant earned \$421,601. Given the respondent's modest income, one can reasonably assume that she did not have the same ability to make discretionary expenditures for the child as did the appellant.

[45] The onus was on the appellant to satisfy the court that the funds should be held in trust for the benefit of the child. This is a high onus and one which is not lightly discharged: *Debora v. Debora* (2006), 83 O.R. (3d) 81 at para. 70, 2006 CanLII 40663 (C.A.); *Simon v. Simon* (1999), 46 O.R. (3d) 349 at para. 38, 1999 CanLII 381 (C.A.). In submissions before us, the appellant argued that there was no evidence that the child would benefit from a retroactive award. In my view, this position inappropriately transfers the onus to the respondent to justify how the child would benefit. That is not the law. A parent in receipt of child support is presumed to be acting in the best interests of the child when spending those funds.

[46] Moreover, the Court in *Michel* noted that the failure to pay adequate child support will often have resulted in hardship to both the recipient and the child, and that reality must be taken into consideration when ordering retroactive child support: at paras. 31, 126. While the appellant did not argue hardship to him as a reason to not make a retroactive award, it was open to the chambers judge to consider the hardship posed to the respondent as a result of receiving inadequate child support payments for a number of years.

Disposition and Costs

[47] For these reasons, I would dismiss the appeal.

[48] The respondent, N.D.H., is entitled to her costs of this appeal.

“The Honourable Madam Justice MacPherson”

I AGREE:

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Justice Gomery”