Case Name:
F. v. C.

Between
A.F., Applicant (responding party), and
W.C., Respondent (moving party)

[2008] O.J. No. 486

2008 ONCJ 1

Toronto (North York) Registry No. D2488/98

Ontario Court of Justice
Toronto, Ontario

R.J. Spence J.

Heard: December 18, 2007.
Judgment: January 3, 2008.

(103 paras.)

Family law -- Maintenance and support -- Child support -- Considerations -- Ability to pay -- Variation or termination of obligation -- Practice and procedure -- Orders -- Variation or amendment of orders -- Bars to application -- Enforcement of orders -- Arrears of maintenance -- Variation or rescission of arrears -- Application by the father for leave to apply for termination of child support and rescission of arrears dismissed -- Leave was denied due to non-compliance with prior costs awards, and for lack of merit -- A 2001 order ordered the father to pay $446 per month in child support; he had not paid in five years and owed arrears of $17,113 -- The father was intentionally unemployed since quitting his job in 1999 -- There was no evidence that the mother had alienated the children, although this would not be grounds to vary support.

Application by the father for leave to apply for termination of child support and rescission of arrears -- The parties had two children, aged 13 and 11 -- A 2001 order granted primary custody to the mother and ordered the father to pay $446 per month in child support -- The father claimed support should be terminated because the mother had alienated the children, causing a complete breakdown in his relationship with them -- The children had refused to see the father for access for several years -- The father claimed that he was un-

able to pay child support because he was unemployed and receiving social assistance -- The father also sought rescission of arrears from 2003 onward, totaling $17,113; he had not paid any support for five years -- Four previous applications by the father for termination and rescission had been dismissed; there were five costs orders against the father, dating from 2001 to 2005 -- The father had been ordered to seek leave before bringing further variation applications -- In 1999, when his pay was garnisheed by the family enforcement office, the father quit his employment -- He had been in receipt of social assistance since that time -- The mother denied alienating the father from the children, claiming that he had failed to exercise access and that the children did not wish to see him -- HELD: Application dismissed -- The father's motion for leave was dismissed for failure to comply with multiple costs and other court orders -- The father's claim also failed for lack of merit -- The father was intentionally unemployed -- There was no evidence of medical disability -- The father had not attempted to gain employment although he was perfectly able to do so -- Accordingly, his claim that he was unable to pay failed -- There was no evidence that the mother had alienated the children, although this would not be grounds to vary or terminate support in any event.

Statutes, Regulations and Rules Cited:

Family Law Act, R.S.O. 1990, c. F-3, s. 31(1), s. 31(2), s. 33(7), s. 33(7)(a), s. 33(7)(b), s. 33(11)

Family Orders and Agreements Enforcement Assistance Act, R.S.C. 1985 (2nd Supp.), c. 4,

Family Relations Act, R.S.B.C. 1996, c. 128, s. 96(2), s. 96(3)

Ontario Family Law Rules, Rule 1(8), Rule 1(8)(a), Rule 1(8) (b), Rule 14(21), Rule 14(23), Rule 14(23)(a), Rule 14(23) (b), Rule 14(23)(c), Rule 31(2)

Court Summary:

Access to Child -- Enforcement -- Variation in support payments -- About 6 1/2 years ago, court had made fresh support order against father -- Because he had not seen children for 2 years, court also ordered that access begin as gradual process of re-introduction but father saw no point in regulated and supervised access, was totally blind to psychological implications of his abrupt re-appearance in his children's lives and preferred not to see them at all except on his terms -- In subsequent frivolous proceeding, court had barred him from making any further applications on child support unless he got court's prior permission -- After father had not seen children for about 7 years, parents had consented to interim order for supervised access at supervised access centre, but access centre's observation notes revealed that, by now, children had no interest in seeing their father -- Father claimed that custodial mother had alienated children from him and now sought permission to make his 4th application to terminate child support and to wipe out arrears of child support wiped on two grounds, including alleged alienation of children -- Motions court noted that parent's statutory duty to pay support for child under 16 years of age is absolute and not linked in any way to access -- Nor does statute or *Child Support Guidelines* regard lack of access as factor in court's assessment of quantum of child support -- Ontario case law

agrees that, at least until 16 years of age, parental obligation to provide support in accordance with guidelines is absolute -- Beyond age 16, obligation to pay support will depend upon such factors as whether child has withdrawn from parental control and whether child continues in full-time school attendance -- Even if father were able to prove mother's complicity in alienating children (for which there was no evidence in this case), there was no legal basis for varying previous child support order -- Father's application was without merits and his motion for permission to launch 4th application was refused.

Judgments and orders -- Enforcement -- Final orders -- Stay on further proceedings without court's prior permission - - Grounds for granting permission -- Merits of proposed new proceeding -- Nine years ago, court had made child support order against payor father who chose not to appear at trial, even though personally served with notice -- Few months later, he made his first application to vary child support and rescind support arrears but, when provincial enforcement agency began to garnishee his wages, he deliberately quit job, preferring to live on welfare and shortly thereafter, court dismissed his application -- Within 7 weeks, father began his second application that resulted in 4-day trial where court found that father had made no effort to find new job and had produced no evidence of medical disability or evidence that he was otherwise incapable of gainful employment -- Court imputed income to him on which it based new child support order, fixed arrears and ordered costs against him -- Because he had not seen children for 2 years, court ordered that access begin as gradual process of re-introduction but father saw no point in regulated and supervised access, was totally blind to psychological implications of his abrupt re-appearance in his children's lives and preferred not to see them at all except on his terms -- Since then, father failed at 3rd such application where court also barred him from making any further applications on child support unless he got court's prior permission -- At all these stages and in his appeals and subsequent skirmishes, costs were consistently awarded against him and in all those years, he made no support payments -- After father had not seen children for about 7 years, parents had consented to interim order for supervised access at supervised access centre, but access centre's observation notes revealed that children now had no interest in seeing their father -- Father claimed that custodial mother had alienated children from him and now sought permission to make 4th application to terminate child support and to wipe out arrears of child support wiped on grounds of (1) his alleged inability to pay and (2) alleged alienation of children -- In deciding whether to grant permission, motions court examined merits of father's two claims and found both wanting -- On his alleged inability to pay, father had no new evidence of any change in circumstances since date of his second application where court had imputed income to him -- As for his inability to exercise access, parent's statutory duty to pay support for child under 16 years of age is absolute and not linked in any way to access -- Nor does statute or *Child Support Guidelines* regard lack of access as factor in court's assessment of quantum of child support -- Ontario case law agrees that, at least until 16 years of age, parental obligation to provide support in accordance with guidelines is absolute -- Beyond age 16, obligation to pay support will depend upon such factors as whether child has withdrawn from parental control and whether child continues in full-time school attendance -- Even if father were able to prove mother's complicity in alienating children (for which there was no evidence in this case), there was no legal basis for varying previous child support order -- Father's application was without merits and his motion for permission to launch 4th application was refused.

Judgments and orders -- Enforcement -- Final orders -- Stay on further proceedings without court's prior permission - - Grounds for granting permission -- Presence of extraordinary circumstances -- Nine years ago, court had made child support order against payor father who chose not to appear at trial, even though personally served with notice -- Few months later, he made his first application to vary child support and rescind support arrears but, when provincial enforcement agency began to garnishee his wages, he deliberately quit job, preferring to live on welfare and shortly thereafter, court dismissed his application -- Within 7 weeks, father began his second application that resulted in 4-day trial where court found that father had made no effort to find new job and had produced no evidence of medical disability or evidence that he was otherwise incapable of gainful employment -- Court imputed income to him on which it based new child support order, fixed arrears and ordered costs against him -- Since then, father failed at 3rd such application where court also barred him from making any further applications on child support unless he got court's prior permission -- At all these stages and in his appeals and subsequent skirmishes, costs were consistently awarded against him and in all those years, he made no support payments -- Now, he sought court's permission to make 4th application to terminate child support and to wipe out arrears of child support -- Motions court noted that disregard of court orders is serious matter and, under subrule 1(8) or 14(23) of *Family Law Rules*, it would require extraordinary circumstances for court to tolerate such conduct -- In this case, courts had not only made 5 costs orders against father, totalling $6,500, none of which he paid, but he had refused to pay single dollar on his ever-accumulating child support obligations -- No extraordinary circumstances existed here and motions court was then left with very broad discretion on choice of appropriate remedy under subrule 1(8) or 14(23) -- Court concluded that appropriate remedy was to refuse father's request for permission to launch his 4th attempt at variation.

Support orders -- Assessment of quantum -- Non-economic considerations -- Payor's difficulty in exercising access to child -- About 6 1/2 years ago, court had made fresh support order against father -- Because he had not seen children for 2 years, court also ordered that access begin as gradual process of re-introduction but father saw no point in regulated and supervised access, was totally blind to psychological implications of his abrupt re-appearance in his children's lives and preferred not to see them at all except on his terms -- In subsequent frivolous proceeding, court had barred him from making any further applications on child support unless he got court's prior permission -- After father had not seen children for about 7 years, parents had consented to interim order for supervised access at supervised access centre, but access centre's observation notes revealed that, by now, children had no interest in seeing their father -- Father claimed that custodial mother had alienated children from him and now sought permission to make his 4th application to terminate child support and to wipe out arrears of child support wiped on two grounds, including alleged alienation of children -- Motions court noted that parent's statutory duty to pay support for child under 16 years of age is absolute and not linked in any way to access -- Nor does statute or *Child Support Guidelines* regard lack of access as factor in court's assessment of quantum of child support -- Ontario case law agrees that, at least until 16 years of age, parental obligation to provide support in accordance with guidelines is absolute -- Beyond age 16, obligation to pay support will depend upon such factors as whether child has withdrawn from parental control and whether child continues in full-time school attendance -- Even if father were able to prove mother's complicity in alienating children

(for which there was no evidence in this case), there was no legal basis for varying previous child support order -- Father's application was without merits and his motion for permission to launch 4th application was refused.

For previous proceedings, see:

* variation of support and access orders: *Ferguson v. Charlton*, 2001 CanLII 27954, [2001] O.J. No. 6282, 2001 CarswellOnt 9692 (Ont. C.J.), *per* Justice Russell J. Otter
* dismissal of payor father's appeal: *Charlton v. Ferguson*, 2004 CanLII 10401, 131 A.C.W.S. (3d) 115, [2004] O.J. No. 2155, 2004 CarswellOnt 2049 (Ont. S.C.), *per* Justice J. Stephen O'Neill.

Cases cited:

Brownell v. Brownell (1987), 82 N.B.R. (2d) 91, 208 A.P.R. 91, 9 R.F.L. (3d) 31, [1987] N.B.J. No. 603, 1987 CarswellNB 47 (N.B.Q.B., Fam. Div.).

Carwick v. Carwick (1972), 6 R.F.L. 286, [1972] O.J. No. 355, 1972 CarswellOnt 120 (Ont. C.A.).

Charlton v. Ferguson, 2004 CanLII 10401, 131 A.C.W.S. (3d) 115, [2004] O.J. No. 2155, 2004 CarswellOnt 2049 (Ont. S.C.).

Garland v. Fernguist (1999), 184 Sask. R. 68, [1999] 12 W.W.R. 25, 1999 CanLII 12847, [1999] S.J. No. 507, 1999 CarswellSask 535 (Sask. Q.B., Fam. L. Div.).

Gordon v. Starr, 2007 CanLII 35527, 42 R.F.L. (6th) 366, [2007] O.J. No. 3264, 2007 CarswellOnt 5438 (Ont. Fam. Ct.).

Harrison v. Harrison (1987), 51 Man. R. (2d) 16, 10 R.F.L. (3d) 1, [1987] M.J. No. 447, 1987 CarswellMan 77 (Man. Q.B., Fam. Div.).

Jones v. Anhorn (Stuparyk), 2000 BCCA 213, 136 B.C.A.C. 129, 73 B.C.L.R. (3d) 358, 222 W.A.C. 129, 184 D.L.R. (4th) 522, 6 R.F.L. (5th) 258, [2000] B.C.J. No. 614, 2000 CarswellBC 614 (B.C.C.A.).

Lawrence v. Mortensen (2000), 8 R.F.L. (5th) 133, [2000] O.J. No. 1578, 2000 CarswellOnt 1522 (Ont. S.C.).

Lee v. Lee (1990), 29 R.F.L. (3d) 417, 1990 CanLII 2254, [1990] B.C.J. No. 2277, 1990 CarswellBC 489, 1990 CarswellBC 1641 (B.C.C.A.).

Maida v. Maida (2007), 160 A.C.W.S. (3d) 135, 2007 CanLII 37680, [2007] O.J. No. 3447, 2007 CarswellOnt 5785 (Ont. Fam. Ct.).

Moody v. Moody (1993), 47 R.F.L. (3d) 75, [1993] O.J. No. 785, 1993 CarswellOnt 328 (Ont. Gen. Div.).

Paynter v. Reynolds (1997), 157 Nfld. & P.E.I.R. 336, 486 A.P.R. 336, 34 R.F.L. (4th) 272, [1997] P.E.I.J. No. 114, 1997 CarswellPEI 110 (P.E.I. App. Div.).

Phiroz v. Mottiar, 1995 CanLII 7037, 16 R.F.L. (4th) 354, [1995] O.J. No. 2324, 1995 CarswellOnt 894 (Ont. Prov. Div.).

Twaddle v. Twaddle (1985), 68 N.S.R. (2d) 230, 159 A.P.R. 230, 20 D.L.R. (4th) 459, 46 R.F.L. (2d) 337, [1985] N.S.J. No. 316, 1985 CarswellNS 58 (N.S. App. Div.).

Welstead v. Bainbridge, 1995 CanLII 7038, 10 R.F.L. (4th) 410, [1995] O.J. No. 93, 1995 CarswellOnt 76 (Ont. Gen. Div.); reversing *Welstead v. Bainbridge*, 1994 CanLII 7213, 2 R.F.L. (4th) 419, [1994] O.J. No. 352, 1994 CarswellOnt 377 (Ont. Prov. Div.).

Statues and Regulations cited:

Child Support Guidelines, O. Reg. 391/97 [as amended], section 7.

Family Law Act, R.S.O. 1990, c. F-3 [as amended], subsection 31(1), subsection 31(2), subsection 33(7) and subsection 33(11).

Family Law Rules, O. Reg. 114/99 [as amended], subrule 1(8), subrule 14(21), subrule 14(23) and subrule 31(2).

Family Orders and Agreements Enforcement Assistance Act, R.S.C. 1985 (2nd Supp.), c. 4 [as amended].

Family Relations Act, R.S.B.C. 1996, c. 128 [as amended], subsection 96(2) and subsection 96(3).

Works cited:

McLeod, James G.: "Annotation to *Lee v. Lee*" at (1991), 29 R.F.L. (3d) at 417.

Counsel:

Steven D. Benmor: counsel for the applicant mother.

Dionysios (Dennis) Apostolides: counsel for the respondent father.

R.J. SPENCE J.:--

1: NATURE OF CASE

1 Mr. C. (the "father") seeks to change the order of Justice Russell J. Otter, dated 19 July 2001, whereby the father was ordered to pay $446 per month to Ms. F. (the "mother"), for the support of the parties' two children, now ages 11 and 13 years. Specifically, the father seeks a termination of his ongoing child support obligation, as well as a rescission of that portion of the arrears of support that have accumulated since 14 January 2003.

2 The father cites two grounds as the basis for his requested relief. First, the father alleges that the mother has alienated the children from him, thereby causing a breakdown in their relationship. Second, the father claims to have no ability to pay child support as he is in receipt of public assistance.

3 Prior to the commencement of argument, Mr. Benmor submitted that this court had no jurisdiction to entertain the father's change motion, as the father had failed first to obtain

leave to bring that motion, as required by my order dated 14 January 2003. I asked Mr. Apostolides whether he required an adjournment to address that oversight. He indicated he was prepared to make argument without adjourning the matter further. Both counsel then proceeded to make submissions on the sole issue whether leave ought to be granted.

2: HISTORY OF PROCEEDINGS

4 The parties were in an intimate relationship for about four years, between 1994 and 1998. There are two children of the relationship, namely B. (DOB) and K. (DOB).

5 In 1998, the mother commenced an application in the Ontario Court of Justice (Provincial Division), seeking custody and child support. The father failed to respond to the application, despite personal service on him.

6 On 5 October 1998, Provincial Judge James P. Nevins (as he was then styled) granted sole custody to mother.

7 On 7 December 1998, Judge Nevins ordered the father to pay child support to mother in the amount of $570 per month for the two children.

8 In May 1999, the father commenced an application, requesting blood tests to confirm paternity, as well as an order varying child support and rescinding arrears of support. He also sought a refraining order to prevent the Director of the Family Responsibility Office (the "FRO") from suspending his driver's licence. On 8 June 1999, Justice Nevins granted leave for blood tests, as well as the refraining order.

9 On 14 June 1999, the FRO began to garnishee the father's income from his place of employment, M. S. Inc. ("M.S.").

10 On 20 August 1999, father quit his employment with M.S. He began to collect social assistance.

11 On 14 October 1999, the father's application, commenced in May 1999, was dismissed by Justice Nevins.

12 On 30 November 1999, the father commenced his second application to vary child support and rescind arrears. This application resulted in a four-day trial before Justice Otter, who released his decision, together with comprehensive reasons, on 19 July 2001.

13 Among other findings, Justice Otter noted that the father had a lengthy history of employment that came to an end after the first child support deduction was made from his remuneration at his last place of employment, Motion Supply.

14 Justice Otter also found that, from the time that he quit his employment at Motion Supply until the date of trial, the father had made no efforts to secure employment; he produced no job search records; he produced no evidence of medical disability; nor did he produce any evidence that he was otherwise incapable of being gainfully employed.

15 Justice Otter varied the order of 7 December 1998 of Judge Nevins as follows:

1. he ordered the father to pay $446 per month as child support for two children, based on imputed income of $30,000 per year;

2. he fixed arrears of support in the amount of $11,637.71, as at 1 July 2001;
3. he ordered mother to foster "gradual contact" between the father and the children, with access to be "as arranged between the parties, to include birthday cards, Christmas cards, gifts and other correspondence" from the father to the children; and
4. he ordered costs payable by father to mother in the amount of $1,000.

16 The father has never paid that costs order.

17 It is important to note that, by the time that the trial before Justice Otter took place, the father had had almost no contact with the children for approximately two years. Doubtless, it was for that reason that Justice Otter ordered father's access to commence on a "gradual" basis.

18 No access occurred for a number of years following Justice Otter's order.[1]

19 On 26 October 2001, the FRO issued a "notice of default hearing" against the father, seeking to enforce the ongoing support, as well as the accumulated arrears of support.

20 From that point forward, I became the case management judge in respect of all present and ongoing issues between the parties.

21 On 30 May 2002, the FRO and the father agreed to an interim order, whereby the enforcement proceeding would be adjourned, on condition that the father forthwith commence a motion to change the support order and, further, that the father pay the ongoing support in the amount of $446 per month, as well as an additional $100 per month on account of arrears of support. In default of any payment, the father agreed that he would be committed to jail for 45 days and that the FRO could move *ex parte* for a warrant of committal.

22 The enforcement proceeding was adjourned to 19 September 2002. On that date, the matter was further adjourned to 12 November 2002.

23 On 12 November 2002, the case returned to court. By then the father was in default of two months' of the agreed-upon payments, specifically, $1,092, in respect of the consent order dated 30 May 2002.

24 I ordered the father to cure his default within 7 days, failing which a warrant of committal would issue. The father made the payment within 7 days, as ordered.

25 On the access issue, the father acknowledged not having seen the children since May 1999. I ordered the Office of the Children's Lawyer (the "OCL") to investigate and report to the court as to what access, if any, might be in the best interests of the children, having regard to the lengthy period of time that the children had not seen their father.

26 The matter next returned to court on 14 January 2003. Once again, the father was in default of his agreed-upon-support payments. The father was represented by counsel, who submitted that father had been in receipt of social assistance for 3 years and, accordingly, could no longer afford to make support payments.

27 I found as a fact that the father was capable of obtaining employment and that he had made little or no effort to do so. For that reason and because the father continued to be in default of the consent order dated 30 May 2002 and because of the length of time this matter had been dragging on, I dismissed the father's change motion with respect to the issue of support only.

28 As at 8 January 2003, the unpaid arrears of support had accumulated to $17,113.39.

29 I permitted the change motion on the issue of the father's access to the children to remain alive.

30 As this was the third time in less than four years that the father had brought an unsuccessful change motion on the issue of child support, pursuant to subrule 14(21) of the *Family Law Rules*, O. Reg. 114/99, as amended (the "rules"), I ordered the father to obtain leave before bringing any future change motions in respect of the child support issues.

31 The father appealed my order to the Superior Court of Justice.

32 Prior to the hearing of the appeal, on 15 April 2003, the OCL released its report on the issue of the proposed access by the father to the children. I cite two brief portions from that report, as follows:

> [The mother said] that Mr. C. had many opportunities to visit with his children and recalled how he "just walked away" from them after his brief encounter with the children in the mall in 1999. Ms. F. does not want any visitation between Mr. C. and the children and advises that they have grown to view the man she has been dating as a "father figure".

According to the OCL report, the father believed that the mother had told the children that "he was dead". The OCL social worker who prepared the report stated:

> Mr. C. demonstrated no empathy in what this can do to the children's sensibility and insists on seeing them now. Although the children do not know him as a father and may view him as a stranger, Mr. C. insists that he wants to see them unsupervised and scoffs at any suggestion that he begin this reunification process in an access centre. He sees no purpose in that and is totally oblivious to the psychological implications of this for the children.

33 The father's appeal was subsequently heard by Justice J. Stephen O'Neill, whose decision was released on 10 May 2004. See *Charlton v. Ferguson*, 2004 CanLII 10401, 131 A.C.W.S. (3d) 115, [2004] O.J. No. 2155, 2004 CarswellOnt 2049 (Ont. S.C.). In part, Justice O'Neill found:

> **[8]** The written materials supporting the application to vary before Justice Spence do not outline or suggest any new changes in circumstances since July 2001 [referring to the date of Justice Otter's order], or indeed August of 1999. The appellant was taking the position that he had been on social assistance since 1999 and that he had lost his job. The appellant had consented to making ongoing payments of $546 commencing

> August 1, 2002, but he was in arrears of at least one month on January 14, 2003. He had also been made aware on November 12, 2002 that if his payments were not made on time, his change proceedings would be struck out.
>
> **...**
>
> **[13]** In my view, Justice Spence correctly determined on January 14, 2003, that the appellant had had ample opportunity, by due diligence, to produce the evidence which he required for his motion to change and the default hearing. In addition, I agree with counsel for the respondent that even though the present appeal relates to the order dated January 14, 2003, by virtue of the materials filed in 2002, and the submissions made on January 14, 2003, the appellant is in fact attempting to appeal the trial decision of Justice Otter dated July 19, 2001.

Justice O'Neill ordered costs against the father in the amount of $3,500, payable forthwith as follows: $1,750 to the mother, and $1,750 to the FRO.

34 The father has never paid that costs order.

35 The father appealed the order of Justice O'Neill to the Ontario Court of Appeal. However, he failed to perfect the appeal and, on 4 August 2006, that court dismissed his appeal for delay and fixed costs payable by the father in the amount of $750.

36 The father has never paid that costs order.

37 On 27 January 2005, the father brought a motion seeking leave to serve a contempt motion on the mother's solicitor, rather than personally serving the mother. The father alleged that the mother was intentionally disobeying the access order of Justice Otter dated 19 July 2001.

38 After reviewing the evidence, I held that the father's claim appeared to lack merit. I noted as well that the father's arrears of support were continuing to accumulate and, further, that he had failed to pay prior costs orders. As a result, I concluded that it would be inappropriate to grant the requested concession to the father and I ordered him to comply with the subrule 31(2) [notice of contempt motion] of the rules, which requires special service of a contempt motion.[2]

39 I also ordered the father to pay costs to the mother of that leave motion, in the amount of $250.

40 The father has never paid that costs order.

41 The contempt motion was subsequently served and heard by me on 5 May 2005. I dismissed the father's motion and ordered costs payable by the father to the mother in the amount of $1,000.

42 The father has never paid that costs order.

43 The FRO brought another default proceeding for non-payment of child support and, on 29 September 2005, I signed a warrant of committal.

44 On 15 March 2006, the father brought a motion requesting that the aforementioned warrant of committal be set aside, that the father be released from prison, and that the father be relieved of his obligation to pay support until such time as he was no longer in receipt of public assistance.

45 I heard that motion on 4 April 2006 and endorsed the record as follows:

> This is the payor's motion to be released from prison because he is in receipt of social assistance. However, income had previously been imputed to the payor [by the order of Justice Otter] and there is no evidence before the court suggesting that the basis for the imputation of income has now changed. The payor has taken no steps to bring a motion to change the current [Justice Otter's] support order, or sought leave to bring that motion. There is no evidentiary basis for granting the relief sought. Motion is dismissed, with costs in the amount of $250.

46 The father has never paid that costs order.

47 On 24 May 2006, the father brought a motion seeking to vary the access provisions in Justice Otter's order, to permit access at specific times and at specific locations.

48 On 17 October 2006, the parties consented to a temporary order for supervised access at a supervised access centre, for two hours once every two weeks. By then, the father had had no contact with the children for about 7 years.

49 When the matter next returned to court on 11 April 2007, it appeared that the first supervised access visit had not occurred until 18 March 2007. I ordered the access to continue and requested that father's counsel obtain the access centre's observation notes in advance of the next court date.

50 In the meantime, the FRO sought and obtained another warrant of committal against the father for continued non-payment of support. He was subsequently arrested, and then released from jail just prior to the court date set for 10 September 2007. Accordingly, that court date was adjourned to 12 October 2007.

51 On 12 October 2007, the parties appeared and the court was provided with the access centre's observation notes. Those notes indicated that the children had no interest in continuing to see their father. The father alleged that the children were being alienated by the mother. He advised that he wished to bring a motion for the suspension or termination of child support on the basis of that alleged alienation.

52 The matter was adjourned to 18 December 2007 for argument.

53 On 18 December 2007, the parties attended, both represented by counsel. They made full argument on the issue whether leave ought to be granted to proceed with the motion to suspend or terminate child support.[3]

54 At the conclusion of argument, I dismissed the father's leave motion, with reasons to follow. These are my reasons.

3: ANALYSIS

55 The father's leave motion fails for two reasons.

3.1: Reason 1 - Non-Compliance with Prior Court Orders

56 Subrule 1(8) of the rules provides:

> (8) *Failure to follow rules or obey order.-* The court may deal with a failure to follow these rules, or a failure to obey an order in the case or a related case, by making any order that it considers necessary for a just determination of the matter, on any conditions that the court considers appropriate, including,
>
> (*a*) an order for costs;
>
> *(b)* an order dismissing a claim made by a party who has wilfully failed to follow the rules or obey the order.

Subrule 14(23) of the rules provides:

> (23) *Failure to obey order made on motion.-* A party who does not obey an order that was made on motion is not entitled to any further order from the court unless the court orders that this subrule does not apply, and the court may on motion, in addition to any other remedy allowed under these rules,
>
> *(a)* dismiss the party's case or strike out the party's answer or any other document filed by the party;
> *(b)* postpone the trial or any other step in the case;
> *(c)* make any other order that is appropriate, including an order for costs.

57 Between 2001 and 2005, five costs orders were made against the father, totalling $6,500. The first, made by Justice Otter in 2001, following a trial, was in the amount of $1,000. The second, made by Justice O'Neill, dismissing the father's appeal, was in the amount of $3,500. The third, made by the Court of Appeal, dismissing the father's appeal, was in the amount of $750. The fourth, made by me in January 2005, dismissing the father's motion to serve his contempt motion on the mother's solicitor, was in the amount of $250. And the fifth, made by me in May 2005, dismissing the substantive contempt motion, was in the amount of $1,000.

58 As I noted earlier, none of these costs orders has been paid by the father.

59 *Gordon v. Starr*, 2007 CanLII 35527, 42 R.F.L. (6th) 366, [2007] O.J. No. 3264, 2007 CarswellOnt 5438 (Ont. Fam. Ct.), is a decision of Justice Joseph W. Quinn. In that case, Gordon failed to pay a $2,500 costs order. Starr brought a motion seeking a dismissal of

Gordon's application, relying on the provisions of subrule 14(23). Gordon argued, *inter alia*, that subrule 14(23) ought not to be applied to dismiss her application, as she had no ability to satisfy the costs order. At paragraphs [15] and [16], Justice Quinn had the following to say about the applicability of subrule 14(23) (my emphasis added):

> **[15]** Where a party has not complied with an order that was made on motion, relief under subrule 14(23) is ***mandatory,*** "unless the court orders that this subrule does not apply." **...**
>
> **[16]** The onus is on Gordon to show, on a balance of probabilities, that subrule 14(23) is not applicable ... it would take an ***extraordinary event to trigger the "unless"*** provisions of subrule 14(23). Why should any litigant be spared from obeying a court order?

At paragraph [23], Justice Quinn continued (my emphasis added):

> **[23]** Subrule 14(23) should not be taken lightly. It means what it says. It recognizes the offensiveness of allowing a party to obtain relief while in breach of a court order. Court orders are not made as a form of judicial exercise. An order is an order, not a suggestion. Non-compliance must have consequences. One of the reasons that many family proceedings degenerate into an expensive merry-go-round ride is the ***all-too-common casual approach to compliance with court orders*****.**

60 *Maida v. Maida* (2007), 160 A.C.W.S. (3d) 135, 2007 CanLII 37680, [2007] O.J. No. 3447, 2007 CarswellOnt 5785 (Ont. Fam. Ct.), is a decision of Justice Julie A. Thorburn. In that case, the respondent father brought a motion seeking to vary downward an existing child support order. The father had been ordered to pay child support, as well as costs to the mother, following the trial of an application before Justice Nancy L. Backhouse. The respondent acknowledged that the support was in arrears and the costs remained unpaid.

61 The applicant mother brought a motion under subrule 14(23), seeking to dismiss the father's variation motion until the court orders were brought into full compliance. At paragraphs [12] and [13] and Justice Thorburn stated (my emphasis added):

> **[12]** [Subrule] 14(23) ... provides that a party who has not obeyed a court order[4] is not entitled to any further order of the court unless the court orders otherwise. The Supreme Court of Canada in *Dickie v. Dickie*, [2007] S.C.J. No. 8, held that the court has the authority to refuse to entertain an appeal, based on the record showing continuing disobedience of court orders.
>
> **[13]** I find that, ***while there may be merit to the Respondent's claim*** **...**, the Respondent has not complied with the order of Backhouse, J. and he agrees those sums are outstanding and payable. As such I deny the Respondent's request to vary his child support payments without prejudice to his right to bring his motion, once he pays the arrears he agrees are outstanding.

62 In the present case, father has a lengthy history of non-compliance with court orders. He has ignored five costs orders made over a four-year period of time.

63 In addition, *for the past five years*, the father has refused to pay a single dollar toward his ever-accumulating child support obligations, which, as at December 2007, had ballooned to more than ***$39,000***. The only thing that has kept those ever-accumulating arrears from increasing even further has been the enforced diversions by the FRO, which are permitted by statute.[5]

64 As may be apparent from the foregoing, I have approached the non-compliance issue by following a three-step process:

* First, the court must ask whether there a triggering event that would allow it to consider the wording of either subrule 1(8) or subrule 14(23). That triggering event would be non-compliance with a court order "in the case or a related case" [subrule 1(8)] or an order "made on motion" [subrule 14(23)].
* Second, if the triggering event exists, the court should then ask whether it is appropriate to exercise its discretion in favour of the non-complying party by not sanctioning that party under subrule 1(8), or by ordering that subrule 14(23) does not apply. My review of the foregoing case law suggests that this discretion will only be granted in exceptional circumstances. In my view, the court's decision whether or not to exercise its discretion in favour of a non-complying party, ought to take into account all relevant history in the course of the litigation and, more specifically, the conduct of the non-complying party.
* Third, in the event that the court determines that it will not exercise its discretion in favour of the non-complying party, it is then left with a very broad discretion as to the appropriate remedy pursuant to the provisions of either subrule 1(8) or subrule 14(23).

65 Having regard to all of the foregoing, on the facts of this case I have concluded that the appropriate remedy is to dismiss the father's leave motion.

3.2: Reason 2 - The Father's Claim Is Lacking in Merit

66 The two grounds upon which father claims his relief are, first, that he cannot pay support as he is in receipt of social assistance and, second, that the mother has alienated the children from the father, thereby causing a breakdown in the relationship between the children and the father.

67 I am able to dispose of the first ground quickly. The claimed inability to pay, based upon the receipt of public assistance, is no different than the claim the father made at his four-day trial before Justice Otter, and the claim the father has continued to make in the

succeeding years during which he has attempted to change Justice Otter's support order. Essentially, nothing has changed since Justice Otter made his findings in July 2001.

68 Specifically, the father has made little or no effort to secure gainful employment; he has produced no job search records; he has produced no evidence of medical disability; nor has he produced any evidence that he is otherwise incapable of securing gainful employment.

69 All of that must be viewed against the backdrop of Justice Otter's finding at trial - specifically, that the father had a lengthy history of employment, until he suddenly quit his job at Motion Supply immediately following the first child support garnishment of his remuneration from that employer.

70 The hurdles that the father faces in this proceeding are virtually identical to the hurdles that he faced in his four-day trial in 2001. And yet, despite the findings of Justice Otter, the father persists in pressing the same claim, with no better evidence to support that claim than the evidence that he adduced at his 2001 trial.

71 Accordingly, I have concluded that there is no reason to disturb Justice Otter's imputation of $30,000 per year of income to the father.

72 I now turn to the second ground for the claimed relief, namely, the alleged alienation by the mother.

73 The father's statutory obligation to pay child support arises from subsections 31(1) and 31(2) of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended (the "Act"), which provide:

> **31. Obligation of parent to support child.-**(1) Every parent has an obligation to provide support, for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so.
>
> (2) *Idem.-* The obligation under subsection (1) does not extend to a child who is sixteen years of age or older and has withdrawn from parental control.

The foregoing suggests that the obligation to pay child support up to the age of sixteen years is unconditional, in that it is not linked in any way to access.

74 Subsection 33(7) of the Act provides:

> (7) *Purposes of order for support of child.-* An order for the support of a child should,
>
> *(a)* recognize that each parent has an obligation to provide support for the child;
> *(b)* apportion the obligation according to the child support guidelines.

Again, there is nothing in this subsection that in any way links the issue of child support to the issue of access.

75 Subsection 33(11) of the Act provides:

> (11) *Application of child support guidelines.*- A court making an order for the support of a child shall do so in accordance with the child support guidelines.

There is nothing in this subsection that in any way links the ***amount*** of child support to the issue of access.[6]

76 The question then arises whether there is anything in the case law that modifies or expands on the statutory provisions that would either permit or require a court to link the issues of access and child support.

77 It appears that there are two lines of cases dealing with the intersection of these two issues. The case law in Ontario differs from the law in other provinces.[7] I will examine the non-Ontario case law first.

78 *Garland v. Fernquist* (1999), 184 Sask. R. 68, [1999] 12 W.W.R. 25, 1999 CanLII 12847, [1999] S.J. No. 507, 1999 CarswellSask 535 (Sask. Q.B., Fam. L. Div.), is a decision of Justice Gene A. Smith of the Saskatchewan Court of Queen's Bench. In that case, despite repeated court orders for access between the father and the four children, aged 9 through 15, access was not taking place. The mother alleged that she herself was doing nothing to prevent access. Instead, she argued, it was the children who were refusing to see their father. The court rejected this argument and found that the mother was either actively discouraging access or, at least, "passively permitting it".

79 Justice Smith considered the decision of the Appeal Division of the Prince Edward Island Supreme Court in *Paynter v. Reynolds* (1997), 157 Nfld. & P.E.I.R. 336, 486 A.P.R. 336, 34 R.F.L. (4th) 272, [1997] P.E.I.J. No. 114, 1997 CarswellPEI 110, wherein that Court commented (cited at paragraph [34] of *Garland v. Fernquist*, *supra*):

> The court is not without recourse in cases like this where the custodial parent does not take all the necessary steps to see that the terms of an order are complied with properly. Such remedies as contempt, cancellation of child support, a change in the custodial parent are some of the real possibilities.

80 A similar viewpoint was expressed in *Harrison v. Harrison* (1987), 51 Man. R. (2d) 16, 10 R.F.L. (3d) 1, [1987] M.J. No. 447, 1987 CarswellMan 77 (Man. Q.B., Fam. Div.), wherein the Manitoba court of Queen's Bench made the following order (cited at paragraph [35] of *Garland v. Fernquist*, *supra*):

> In the event the children are not delivered to the father on any occasion when access is to take place ... Mr. Harrison will be forgiven payment on the maintenance payment next following due. While it is unusual to tie maintenance and access together in this way, I feel it is necessary in order to provide sufficient motivation to Mrs. Harrison, and I am satisfied

> from the evidence ... that the children will suffer no deprivation if maintenance is not paid by the father.

81 Again, in *Brownell v. Brownell* (1987), 82 N.B.R. (2d) 91, 208 A.P.R. 91, 9 R.F.L. (3d) 31, [1987] N.B.J. No. 603, 1987 CarswellNB 47 (N.B.Q.B., Fam. Div.), the New Brunswick Court of Queen's Bench also suspended child support when access was denied by the custodial parent. That court stated (cited at paragraph [37] of *Garland v. Fernquist*, *supra*):

> There is no serious dispute that the legal system must retain its integrity. The respondent's open defiance must be met with appropriate action. The one readily available option is to terminate the maintenance payments - an altogether appropriate measure in certain circumstances ...

82 Finally, a similar remedy was found to be appropriate by the British Columbia Court of Appeal in *Jones v. Anhorn (Stuparyk)*, 2000 BCCA 213, 136 B.C.A.C. 129, 73 B.C.L.R. (3d) 358, 222 W.A.C. 129, 184 D.L.R. (4th) 522, 6 R.F.L. (5th) 258, [2000] B.C.J. No. 614, 2000 CarswellBC 614. At paragraph 14, the court quoted from the trial judge:

> In the case at bar, [the mother's actions] were done with the intention of denying Mr. Jones reasonable access to Jessica to which he was entitled by court order. This was inequitable conduct that would meet the test of "gross unfairness"[8] not to cancel or reduce arrears of maintenance ...

83 The foregoing does not purport to be a complete or comprehensive recitation of the case law outside Ontario that permits child support to be cancelled or reduced where the custodial parent is interfering with access. Rather, it is intended as a representative sampling of the way in which, at least some non-Ontario courts have linked the issues of child support and access, and the courts' rationale for doing so.

84 I now turn to the Ontario case law.

85 In *Carwick v. Carwick* (1972), 6 R.F.L. 286, [1972] O.J. No. 355, 1972 CarswellOnt 120, the Ontario Court of Appeal issued a very short oral judgment, wherein Appeal Justice Frederick G. MacKay had the following to say (at paragraph 3):

> However improper the conduct of the wife in refusing access, such conduct did not justify non-payment of maintenance for the children, or a defence to the action for arrears of those payments.

86 *Welstead v. Bainbridge*, 1995 CanLII 7038, 10 R.F.L. (4th) 410, [1995] O.J. No. 93, 1995 CarswellOnt 76 (Ont. Gen. Div.); reversing *Welstead v. Bainbridge*, 1994 CanLII 7213, 2 R.F.L. (4th) 419, [1994] O.J. No. 352, 1994 CarswellOnt 377 (Ont. Prov. Div.), was an appeal heard by Justice John H. Jenkins. In that case, the trial judge found that the mother had actively thwarted reasonable access by the father. The trial judge concluded that the mother's conduct was so manipulative as to warrant a "major departure from the usual method of assessing quantum and method of payment of child support".

87 On appeal, at paragraph [15], citing the decision in *Carwick v. Carwick, supra*, Justice Jenkins stated (my emphasis added):

> I am satisfied that the ***conduct of the custodial parent respecting access is not relevant to the determination of child support*.** Reprehensible conduct by the custodial parent of a child respecting access may be the subject matter of removing the child from the custody of the offending parent, but it ***cannot be the basis of causing the child to suffer financially because of the interference of access rights by the custodial parent*.**

Referring to cases such as *Brownell v. Brownell, supra*, and *Harrison v. Harrison, supra*, Justice Jenkins held that the law in Ontario does not link access to child support. He also noted that even outside Ontario, the case law is far from unanimous in its opinion that the two issues ought to be linked. In the case of *Twaddle v. Twaddle* (1985), 68 N.S.R. (2d) 230, 159 A.P.R. 230, 20 D.L.R. (4th) 459, 46 R.F.L. (2d) 337, [1985] N.S.J. No. 316, 1985 CarswellNS 58 (N.S. App. Div.),[9] Appeal Justice Angus L. Macdonald stated:

> Those cases, however, are in obvious conflict with the greater weight or authority, which is to the effect that a husband is not relieved of the obligation of paying maintenance for his children if, as is frequently the case, he were denied access to those children by the wilful act of his wife or by order of the court.

And at paragraph [18] of *Welstead v. Bainbridge*, Justice Jenkins cited from the case of *Lee v. Lee* (1990), 29 R.F.L. (3d) 417, 1990 CanLII 2254, [1990] B.C.J. No. 2277, 1990 CarswellBC 489, 1990 CarswellBC 1641 (B.C.C.A.), wherein Appeal Justice Anderson stated (my emphasis):

> I do not consider that even this custodial parent's reprehensible conduct, in pursuing her personal objective, contrary to the best interests of the child, justifies a diminution of the responsibility of the non-custodial parent for the proper maintenance of the child of the marriage. Accordingly, in my view, the ***misconduct of the custodial parent does not provide a proper reason for directing that the non-custodial parent pay less than the appropriate amount of maintenance for his child***.

88 Finally, before I leave *Welstead v. Bainbridge*, *supra*, I wish to refer to a comment that Justice Jenkins made (at paragraph [22]) in *obiter*, in reference to an annotation to *Lee v. Lee*, *supra*, by the late Professor James G. McLeod:[10]

> I am attracted by the logic contained in Professor McLeod's annotation to *Lee v. Lee*. I am of the opinion that, under the right circumstances, a misbehaving custodial parent who deprives the non-custodial parent of access, can be and ought to be deprived of maintenance for the child or children of the marriage. This however would only occur in unique circumstances, such as when the custodial parent has sufficient assets and income so that the child or children of the marriage will not be deprived of appropriate support.

For reasons contained in footnote 10, it is my respectful opinion that a court would have to tread very cautiously before implementing Professor McLeod's proposal, particularly as *Lee v. Lee*, *supra*, was decided prior to the enactment of the *Child Support Guidelines* in 1997.[11]

89 The case of *Lawrence v. Mortensen* (2000), 8 R.F.L. (5th) 133, [2000] O.J. No. 1578, 2000 CarswellOnt 1522, is a decision of Justice Lorna-Lee Snowie of the Ontario Superior Court of Justice. At paragraph [14], Justice Snowie stated:

> The law is clear that, while a child's right to support is independent of a child's right to access, the court does have the power to deny or reduce support if the custodial parent persistently interferes with access. However, this is an extreme step. The court is unlikely to do so if the child has need of financial support.

It would appear that Justice Snowie clarified this potential linking of the two issues by what she subsequently had to say, at paragraph [17] (my emphasis):

> This child has reached the age of majority ... [she] and the respondent are total strangers ... Having said that, however, the respondent has had an ***obligation to support his child until she reached an age where she was old enough to accept the consequences of her actions*** ... Should the child and her father develop a relationship in the future and should the child be in full-time attendance at school, this matter may come back before the court for further consideration of the issue of support.

90 Further authority for the absolute obligation to pay support for children under the age of majority is found in *Phiroz v. Mottiar*, 1995 CanLII 7037, 16 R.F.L. (4th) 354, [1995] O.J. No. 2324, 1995 CarswellOnt 894 (Ont. Prov. Div.), a decision of Provincial Judge James D. Karswick of the Ontario Court of Justice (Provincial Division). In that case, the father was claiming a reduction in his support obligation owing to the child's refusal to have access with his father. Judge Karswick reviewed the law and concluded, at paragraphs [47] and [48] (my emphasis added):

> **[47]** I now reach the conclusions that, pursuant to subsections 31(1) and (2) [of the *Family Law Act*], the ***obligation of a parent to support a child under the age of sixteen is absolute*****.** The parental obligation to provide child support continues so long as the child remains a minor, that is under the age of eighteen, and thereafter so long as the child is enrolled in a full-time programme of education, provided that the child has not withdrawn from parental control.
>
> **[48]** Zal is still under the age of sixteen and, in my opinion, his ***father's obligation to provide child support is absolute*****.** Even when Zal is over the age of sixteen, so long as he remains under the control of his mother, the father must pay proper child support. After Zal reaches the age of eighteen, there may be some moot issue as to whether support should continue if Zal refuses to have contact with his father.

91 In arriving at his conclusion, Judge Karswick relied in part on another pre-guideline case, *Moody v. Moody* (1993), 47 R.F.L. (3d) 75, [1993] O.J. No. 785, 1993 CarswellOnt 328 (Ont. Gen. Div.), where Justice Anthony E. Cusinato stated, at paragraphs [10] and [11] (my emphasis added):

> **[10]** In my examination of s. 31 of the *Family Law Act*, the inescapable conclusion is that fault is not a consideration as to minors under the age of 16. Accordingly, where parents have an ability to pay they *must provide support to the minor, the provisions for support being absolute*.
>
> **[11]** The legislature, in my reading of s. 31(2) of the *Family Law Act*, provides ***no discretion to the court*** in the situation as identified.

92 What I take from the wording of the relevant subsections of the Act and the case law in Ontario to which I have referred is that, at least until the age of sixteen years, the obligation of a parent to provide support in accordance with the guidelines, is absolute. Beyond age sixteen, the obligation to pay support will depend upon such factors as whether the child has withdrawn from parental control and whether the child continues in full-time attendance at school.

93 In my view, the prevailing case law in Ontario is the law of this province. Not only is it entirely consistent with the previously-mentioned sections of the Act, it is also child-focussed, being the very essence of what child support is about.

94 In the absence of binding authority, I am unable to accede to the proposition advanced by some courts that the child should be penalized for the improper conduct of his or her custodial parent. Although it is doubtful that ***any*** court in Canada would make an order that would have the effect of depriving a child of the most basic necessities of life - food, shelter and clothing - it takes much more than those basic necessities to enable a child to thrive and to fully develop to his or her potential. The soul requires nourishment beyond simply three squares a day. And by making orders for reduced child support owing to the improper conduct of a parent, no matter how well-intentioned the court may be, no matter how well-grounded in "fairness" that order may sound, it is the child who will bear much of the brunt of the diminished child support.

95 Finally, even if another court were to decide that the obligation to pay support for children under the age of sixteen years is not absolute, in the circumstances of this case, I would not deprive these children of their support entitlement. The mother did not file a financial statement in this proceeding.[12] However, father's counsel stated during argument that the mother's income was "in the 40's" on an annual basis. For a parent living in Toronto, with two children to support, it can hardly be said that she is sufficiently well-off to assume the entire burden of supporting her children on an annual income "in the 40's".

4: CONCLUSION

96 In my view, the father's non-compliance with prior court orders is reason enough to deny him leave to proceed with his motion to change, vary or rescind his support obligation, or his accumulated arrears of support.

97 Similarly, the father's unmeritorious claim for a change in the support order, based either on his receipt of social assistance, or on the alleged alienation by the mother, is also reason enough to deny him leave to proceed with his motion.

98 Although each of the foregoing reasons is sufficient, on its own, to deny the father leave to proceed with his motion to change, when taken together the reasons overwhelmingly persuade me that I have no alternative but to dismiss the father's leave motion,

99 It should be noted that, in assessing the father's claim on its merits, I have done so on the hypothetical basis that the father would be able to prove alienation by the mother. However, it is far from clear that, in fact, the evidence would lead to such a finding, on a balance of probabilities.

100 In view of my analysis and my conclusions, it is not necessary for me to weigh the evidence of alienation. However, I do wish to make the following observation. Notwithstanding Justice Otter's order dated 19 July 2001, that the access begin with "gradual contact" (birthday cards, Christmas cards, correspondence, and so on), the father failed to pursue contact with his children in anything resembling a timely manner. In his own affidavit, sworn on 14 September 2006, to which the father appends copies of cards and correspondence that he says he sent to the children, the ***earliest*** correspondence is dated 16 May 2005, almost ***four full years*** following Justice Otter's order.

101 In the face of such protracted delay following Justice Otter's order, it is difficult to believe that the father was sincere in his wish to begin to build a lasting relationship with his children in the years leading up to those initial cards and letters.

102 The father's leave motion is dismissed in its entirety. As this is the fourth dismissal of a child support change motion brought by the father, he is prohibited from bringing any further change motions in respect of the support issues without leave of the court, on notice to the mother.

103 At the conclusion of argument, Mr. Benmor advised the court that he would be seeking costs in the amount of $1,000, payable by the father to the mother. I did not rule on that request, as Mr. Apostolides made no submissions and I had not yet released my reasons. Should Mr. Apostolides wish to oppose the requested costs, he shall provide written submissions, no longer than two pages, double-spaced, within 14 days of the date of these reasons. Thereafter, should he choose to make any reply, Mr. Benmor is to submit his argument within 7 days, with the same restrictions as to format.

1 In the concluding section of these reasons, I will have more to say about the lack of contact between the father and the children in the years following Justice Otter's order.

2 "Unless the court orders otherwise", *per* subrule 31(2).

3 Pursuant to my order dated 14 January 2003, the father was obliged to obtain leave before bringing any further change motions.

4 It should be noted that subrule 14(23) refers specifically to court orders "made on motion". In fact, in *Maida v. Maida*, *supra*, the orders with which the respondent had failed to comply were made by Justice Backhouse following a trial, on an application, rather than orders made on a motion. Accordingly, although it is not clear to me that Justice Thorburn was properly able to rely on the wording of subrule 14(23) to arrive at her decision, subrule 1(8) would have led Justice Thorburn to the same result.

5 See Part II of the *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985 (2nd Supp.), c. 4, as amended.

6 Subsection 33(11) is followed by a number of subsections that set out the exceptions to ordering child support strictly in accordance with the guidelines, but those subsections are not relevant to this case, as they make no reference to the issue of access.

7 It would be an over-simplification to suggest that there is a fine dividing line between the case law in Ontario and the case law in all the rest of Canada. Rather, what the courts are more ***uniformly*** saying in Ontario differs from what ***many*** courts are saying outside of Ontario as to the intersection of these two issues.

8 This case was decided under the wording of subsections 96(2) and 96(3) of the *Family Relations Act*, R.S.B.C. 1996, c. 128, as amended, which allows a court to reduce or cancel arrears of support if it is satisfied that it would be "grossly unfair not to do so".

9 Cited at paragraph [17] of *Welstead v. Bainbridge, supra*.

10 Professor McLeod's annotation characterized the decision in *Lee v. Lee*, *supra*, (a pre-guidelines case) to de-link access and child support as "technically sound and legally correct". However, Professor McLeod was of the view that "fairness" between the adults might require that these issues be linked "so long as the child's reasonable needs are met" and he proposed that, in such circumstances, "a court should consider removing the child support burden in whole or part and shifting it to the custodial parent in the face of a consistent and wilful refusal to facilitate access". Although, on some level, Professor McLeod's proposal may have a certain appeal, I question the legal soundness of such a proposal in Ontario, particularly given the wording of the aforementioned provisions of the Act, including the implementation of the *Child Support Guidelines*, O. Reg. 391/97, as amended, in 1997.

11 As I noted earlier, subsection 33(11) of the Act ***mandates*** the court to make an order for child support "in accordance with the child support guidelines".

12 Generally, unless expenses under section 7 of the *Child Support Guidelines* are being claimed, the custodial parent has no obligation to file a financial statement, the table amount of support being dependent solely upon the income of the non-custodial parent.