FAMILY COURT OF NOVA SCOTIA
Citation: *Toney v. Spencer*, 2014 NSFC 19

Date: 2014-11-16
Docket: FK MCA 025293
Registry: Kentville

Between:

Todd Allan Toney

Applicant
(Hereinafter referred to as "the Applicant)

-and-

Elizabeth Jean Spencer

Respondent
(Hereinafter referred to as "the Respondent")

DECISION

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated February 17, 2015.
Judge:	The Honourable Marci Lin Melvin
Heard:	November 4, 2014
Oral Decision:	November 16, 2014
Counsel:	Donald Fraser, counsel for the applicant Nicole Mahoney, counsel for the respondent

BY THE COURT:

Introduction

[1] This is an application to vary a consent order issued April 30, 2007. According to financial information filed with the court, the Applicant's gross annual income for 2006 was $30,000.00. The parties have two children, one born in 1995 and one in 1998. Child support for the two children was set at the Guideline amount of $453.00 per month. The Applicant also consented to pay retroactive arrears from April 2002 in a lump sum of $10,000.00. This amount is still noted as an "Enforcement Due Amount" and the Applicant does not dispute that this amount is owed over and above whatever arrears may have accrued from 2007 until 2013.

[2] The Applicant applied to vary this order on October 29, 2012, requesting termination of child maintenance payments and a reduction or termination of arrears due to a change in his financial circumstances and the children were no longer residing with the Respondent.

[3] When the consent order of April 2007 was issued, both children resided with the Respondent.

[4] Subsequently, the eldest child moved out of the Respondent's home and in with her paternal grandmother in approximately September 2009. In 2012, the eldest child resided with the Respondent again for approximately sixty days, then lived with the Applicant for approximately three or four months, then "got her own place".

[5] The youngest child left the Respondent's home and moved in with the Applicant in approximately October 2013.

[6] The matter has been adjourned for various reasons and the Director of Maintenance Enforcement has filed an application for enforcement. The Director was involved in this hearing on the consent of the parties in a 'watching brief' capacity. The parties consented to the Director having access to this decision once rendered.

Issues

(1) Has there been a material change in circumstances?

(2) Are there any limitations to preclude the court from imputing income to the Applicant?

(3) Should the court consider more than three years when determining a retroactive award?

(4) What is the amount of child support the Respondent is to pay the Applicant and should it be offset by the arrears owed by the Applicant?

(5) Should the court "gross-up" the child support payments?

Evidence

Applicant's Income from 2007 to 2013

Reduced Income in 2007

[7] The only income listed on the Applicant's T1 General for 2007 is "Employment Insurance and Other Benefits" in the amount of **$12,267.00**. When cross-examined by Ms. Mahoney as to whether he worked in 2007 he responded he "… broke his leg two times" so he was not sure. There is no evidence to corroborate this, but neither is there evidence to refute it.

Statement of Remuneration Paid - T4 Slip 2008 - Status Indian employee (non-taxable)

[8] There was no evidence led as to the meaning of the "T4 Slip" from 2008. The Applicant is a member of AV First Nations. According to this attachment to the Applicant's T1 General for 2008, he received remuneration of **$23,526.53** that was not subject to CRA legislation due to his First Nations status. Therefore it was not reflected as part of his Line 150 for 2008, which is **zero.**

[9] There are no other "T4 Slips" attached to any of the Applicant's yearly income tax returns.

[10] The Applicant testified on cross-examination by Ms. Mahoney that he didn't know how he paid the bills that year testifying: "I must have been on welfare from the Reserve." There is no evidence of whether this entire amount was "welfare from the Reserve" or if this amount was indeed "welfare", but it was apparently remuneration the Applicant received.

Income in 2009

[11] In his T1 General for 2009, the Applicant lists his employment income at $15,445.44. Under "Other Income" he lists his gross fishing income at $39,640.10. The net amount is an apparent loss of $6,899.21, which was subtracted from his employment income leaving his Line 150 at **$8,546.23**. His total apparent loss was $46,539.31.

[12] There were no documents filed as to the Applicant being self-employed that year, his business expenses or the breakdown of the loss. Neither counsel addressed this issue.

Income in 2010

[13] The Applicant claimed $6,281.97, and gross fishing income of $14,218.28 with a net of $10,435.7. Attached to the T1 General for 2010 is a statement of Motor Vehicle Expenses, and a statement of fishing activities. His total Line 150 was **$16,717.69**.

Income in 2011

[14] The Applicant had a net fishing income of **$26,150.92,** in 2011**.** There is not a gross fishing income listed and no noted loss.

Income in 2012

[15] The Applicant's T1 General Line 150 notes his total income in 2012 to be **$12,300.35**. The evidence is he worked for his common-law girlfriend with her company AJP Shellfish and the T4 indicates he made $6,300.35, as well as with Scott Ritchie Properties Inc. for $6,000.00.

[16] The Respondent called Ashlee Pynch, the Applicant's common law partner, who had started a fishing company in approximately 2012, using Band licenses and subsequently had the licenses revoked.

[17] Ms. Pynch hired the Applicant; the evidence was he was to have worked lobstering, scallop dragging and long-lining with her company. This did not come to fruition due to circumstances beyond his control. He did work with her as a lobsterman, however.

[18] The evidence is Ms. Pynch purchased a company truck and the Applicant was one of the employees who drove it. The truck has been subsequently sold.

Income in 2013

[19] The only evidence of the Applicant's income for 2013 is a T4 from Scott Ritchie Properties Inc. in the amount of **$20,875.69.**

Living Expenses Paid by the Band

[20] The Applicant testified his "house was paid off fifteen years ago," and the Band paid all of his living expenses except cable and Internet.

Applicant's Education

[21] The Applicant has been a lobsterman since he was sixteen years old and has a grade eight education.

Applicant's Work Routine and Entitlement to Employment Insurance

[22] He works four to five months of the year lobstering, but testified he did not get employment insurance the other seven or eight months of the year, as he is being penalized because he "overdrew" in 2005 - 2006, and required twelve hundred hours employment before he could file a claim. The Respondent filed an attachment to her brief, which was not objected to, from Service Canada stating a person needs ***"… between 420 and 700 hours of insurable employment during the qualifying period to be entitled to receive EI regular benefits…"*** The court questions the Applicant's evidence as his 2007 T1 General states his sole source of income for 2007 was employment insurance.

[23] The Applicant testified that as a lobsterman, even if he worked one hundred hours a week, he would only be paid for forty hours a week. When cross-examined if he was paid under the table for any hours he worked over forty hours a week, he testified: "There ain't no lobster buyers in Nova Scotia that would pay you cash."

[24] His evidence is that his yearly income is conditional on the price of lobsters: when the price per pound is high so is his income; when the price per pound is low, then his income reflects that as well.

[25] He also has experience fishing scallops and long-lining.

Applicant's Reason for Not Making Application to Vary Sooner

[26] When asked in cross-examination why the Applicant had not made the application to vary earlier, the court found his answer to be vague, testifying he has had $50,000.00 garnisheed by Maintenance Enforcement from his wages with $38,000.00 going to support a child of another relationship and $14,000.00 to the Respondent. In documents filed by the Respondent it is confirmed that the Applicant indeed paid $13,465.58 in child support since May 15, 2007. There is no evidence disputing that the Applicant paid $38,000.00 for the support of another child. His evidence was that he had no say in how this money was divided.

Respondent's Evidence

[27] The Respondent also testified. Aside from wanting the Court to impute the Applicant's income at $30,000.00 for each year since the original order was made, she wants to pay less than Guideline support to the Applicant for their child who now resides with him, because she has two other children (not his).

[28] She receives child support from their father in the amount of $700.00 per month.

[29] She also seeks to have any child support she must pay be offset against the arrears the Applicant owes to her. Her evidence is that her income for 2014 is approximately $25,000.00.

Analysis

(1) Has there been a material change in circumstances since the previous order was issued?

[30] The evidence is that the two children of the parties no longer live with the Respondent. One lives with the Applicant; another is on her own. Further, the income of the Applicant, even at the imputed level is less than $30,000.00.

(2) **Are there any limitations to preclude the court from imputing income to the Applicant?**

[31] The Respondent seeks an order imputing the Applicant's income at $30,000.00 per year from 2007 until 2013, and submits the Applicant has not provided an adequate reason to explain the dramatic reduction in his income since 2007.

[32] The jurisdiction of this court to impute income is found in s. 19(1) of the Child Maintenance Guidelines, made pursuant to s. 55 of the *Maintenance and Custody Act*, as follows**:**

> 19(1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;
>
> (b) the parent is exempt from paying federal or provincial income tax…

[33] In *Coadic v. Coadic*, 2005 NSSC 291 (CanLII), Forgeron, J., notes: "The imputation of income pursuant to s. 19 of the Guidelines requires the exercise of judicial discretion."

[34] Forgeron, J., refers to *MacIsaac v. MacIsaac*, 1996 CanLII 5612 NSCA), in which Bateman, J.A., reviewed the meaning of judicial discretion, stating it was not to be unfettered, must be exercised judicially, and be exercised within acceptable limits.

[35] Bateman, J.A., quoting from *Sharp v. Wakefield et al* [1891] A.C. 173, on a ruling by Lord Halsbury, states that discretion means:

> …that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

[36] Forgeron, J., holds (paras. 11 and 12):

> The court cannot impute income on an arbitrary basis, rather there must be a rational and a solid evidentiary foundation in order to do so. Imputation of income must be governed by principles of reasonableness and fairness in keeping with the case law which has developed.
>
> The burden of proof lies with Ms. Coadic as she is the party who is seeking to have income imputed. The standard is proof on a balance of probabilities…

[37] Similarly the burden of proof in this matter lies with the Respondent. She must show the court that the Applicant is capable of earning $30,000.00 a year, or at least more than he claimed in his income tax returns, and that on a balance of probabilities an income in that amount is more likely than not.

[38] The court accepts the Applicant's evidence that his income as a lobsterman is dictated by the market price during the four or five months he is lobstering.

[39] In *Coadic*, *supra,* at para. 14, the court notes:

> In making my determination as to the amount of income to be attributed to Mr. Coadic, I am not restricted to the actual income which he earned or earns, rather I am permitted to review Mr. Coadic's income earning capacity having regard to his age, health, education, skills and

employment history.

[40] The principles to be considered when determining the capacity to earn income for child support purposes are outlined in *Hanson v. Hanson*, 1999 CanLII 6307 (BCSC), by Martinson, J.:

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (*Van Gool* at para 30).

2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

4. Persistence in unremunerative employment may entitle the court to impute income.

5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[41] Income for child support purposes must be viewed as the amount of income which a parent can earn if working to their capacity. Imputing income gives effect to the legal obligation to which all parents must be mindful: the financial support of their children.

[42] When looking to impute income on the basis of intentional unemployment the court considers what is reasonable under the circumstances, including the following:

1. How many months of the year was the payor earning work-related income?

2. Did the payor receive any other type of income for the months he/she may not have been employed?

3. Did the payor apply for other employment in the months he/she was not employed?

4. Did the payor apply for employment insurance and if not is there evidence of a valid reason as to why he/she did not?

5. Are there any restrictions on the payor's ability to relocate for employment purposes?

6. Is the payor unemployed or under-employed for health reasons?

7. Is the payor unemployed or under-employed for reasons of his age?

8. What work-related experience does the payor have?

9. What are the payor's skills?

10. Is the payor available to work?

11. Has the payor returned to school for retraining or upgrading thus affecting his income?

12. Does the payor have other obligations, which for instance might entail caring for a sick family member or paying support to other children?

13. Has the payor chosen to work on a voluntary basis or in some capacity where he/she does not receive income?

14. Has the payor embarked on a career (for instance starting a new business) that consistently loses money, with little hope of earning income in the future?

15. Any other factors the court considers relevant given the facts of each case.

[43] There is no significant evidence before the court that the Applicant worked at anything other than lobstering in the last five to seven years, for four to five months each year. Although the evidence of the Applicant is that he does not qualify for Employment Insurance due to over-drawing in 2005 - 2006, and has not applied for it, there is no significant evidence that he has applied for any other jobs during the seven to eight months he was not lobstering.

[44] There is no significant evidence of the Applicant having health problems, having returned to school for upgrading, having restrictions on his ability to relocate, having applied for employment other than lobstering, being available to work, is retirement age and has retired, or having obligations of caring for a family member who is ill and requires care. There is no significant evidence that the Applicant cannot be hired to scallop or long-line or pick apples or pump gas or do anything to which he chooses to apply himself.

[45] A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job.

[46] There is evidence that he has a child support obligation for another child.

[47] His evidence is that he is a lobsterman, but also has the skills to work on a scallop dragger or be a long-liner. There is no evidence that he has worked scalloping or long-lining since 2007.

[48] If the court considers the Applicant's income from 2007 until 2013, the amounts – at least from 2009 until 2013 – are employment income only, for the four to five months the Applicant worked and was paid. As his evidence is that he does not qualify for employment insurance, the court has not considered an imputed income based on that source. However, had the Applicant worked at a minimum wage job for the remaining

months of the year he would have made – given the variances of minimum age rates from 2009 until now – approximately $1,000.00 more per month.

(3) Should the court consider more than three years when determining a retroactive award?

[49] The Respondent argues that that court should afford a strict interpretation to *D.B.S. v. S.R.G*. et al [2006] 2 SCR 231, 2006 SCC 37 (CanLII), and if the award is varied, the variation should only apply for three years prior to the date of the application. The Applicant made the variation application in October 2012, and the Respondent deems this date as effective notice.

[50] The Applicant argues the court should revisit 2007 and award child support retroactively from his actual reported income from 2007 to 2013.

[51] In *Staples v. Callender*, 2010 NSCA 49 (CanLII), the court noted:

> In D.B.S. the Court considered three circumstances in which a request for retroactive support can arise - where there is an existing child support order; where there is a previous agreement between the parties; where there has never been an order for child support.
>
> There is no restriction in the *Maintenance and Custody Act* on the date from which a court may order support. It was open to the judge here to make a retroactive award (see D.B.S. at paras. 80 to 84) . . .

[52] In order to determine the duration by which the court can retroactively vary the award, the court must review the relevant circumstances in each case, including appropriateness, benefit to the child, and hardship to the payor parent. In *D.B.S*., the court commented on the appropriateness of a retroactive child support order. Would there be a discernable benefit to the child? Would a retroactive award cause hardship to the payor parent? The court notes at paras. 95 and 96:

> Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.
>
> Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them.

[53] In *D.B.S*. (et al), *supra,* the court notes that the application for child support (or a variation) could have been made earlier but was not.

[54] The Applicant's case is the reverse of *D.B.S*. He does not seek a variation in the order to be granted a variation in child support, increasing the original award, for his children's benefit. Rather he seeks to decrease it, as the income he reported as earned is less than the income he believed he would make when he agreed to pay in 2007.

[55] However, as in *D.B.S*., the variation application could have been made sooner,

but was not. Should the Applicant be penalized for not recognizing the application should have been made sooner? The court addresses some degree of penalization in *D.B.S*., stating: "If parents are to be encouraged to resolve child support matters efficiently, courts must ensure that parents are not penalized for treating judicial recourse as a last resort."

[56] It is noted in the Respondent's affidavit (para. 23) that at one point the Applicant offered the Respondent a motorbike in exchange for the child support arrears. The Applicant confirms this in his affidavit. There is no date as to when this occurred. However, it is evidence that the Applicant was attempting to resolve the child support matter without the "last resort" of judicial recourse as noted in *D.B.S.*

[57] In *Staples v. Callender*, *supra*, the court states:

> In assessing the propriety of a retroactive order a judge's discretion is guided by the following factors (D.B.S. paras. 94 to 116):
>
> - The reasons for the custodial parent's delay in seeking child support;
> - Blameworthy conduct by the payor parent;
> - The child's circumstances;
> - Hardship caused to the payor parent by a retroactive award.

[58] The SCC states that retroactive awards need not be seen as exceptional … and the court must strive for a holistic view.

[59] In *D.B.S*., the court holds, at para. 118:

> Having established that a retroactive award is due, a court will have four choices for the date to which the award should be retroactive: the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of child support should have increased. For the reasons that follow, I would adopt the date of effective notice as a general rule.

[60] It must be noted in *D.B.S.* the court was considering an "increase" in child support; however, it is fair and appropriate that the court may also consider a "decrease" in the award. Further, as noted in the above paragraph, the court is given four choices for the date to which the award should be retroactive, adopting in *D.B.S*. the date of effective notice for reasons the learned Justice sets out in the body of the decision.

[61] In the Child Maintenance Guidelines for Nova Scotia, s. 25 provides a continuing obligation to provide income information for the three most recent taxation years. In *D.B.S*., although the Federal Guidelines were used, the court notes, at para. 123:

> The federal regime appears to have contemplated this issue by limiting a recipient parent's request for historical income information to a three-year period: see s. 25(1)(a) of the Guidelines. In general, I believe the same rough guideline can be followed for retroactive awards: it will usually be inappropriate to make a support award retroactive to a date more than

three years before formal notice was given to the payor parent.

[62] The court concludes this line of reasoning at para. 125:

> In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past.

[63] There is an existing order for child support. It is open for this court to vary that order retroactively. There is no restriction under the *Maintenance and Custody Act* to prohibit the court from ordering a retroactive child support order as sought by the Applicant. According to *D.B.S*. the court may go back three years from the date of effective notice "…as a general rule", but the court has discretion to go back further if the payor parent has acted responsibly, if the children will actually benefit from the award, taking into account the children's current circumstances, and if there would be hardship caused to the payor parent. The court must also consider the children's needs at the time the support should have been paid.

[64] At paragraph 113, Bastarache, J., in *D.B.S.,* supra., wrote:

> Because the awards contemplated are retroactive, it is also worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her:[L.S. v. E.P., 1999 BCCA 393 (CanLII), leave to appeal to SCC refused...]. This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit.

[65] There is little to no evidence that the children suffered hardship due to the child support not being paid pursuant to the terms of the order. Even if there were evidence of hardship to the other family members, it is irrelevant in determining whether retroactive support – or the amount of the support - should be owed for the support of the children.

[66] The matter before the court is fact specific and it would not be appropriate to adopt a "cookie-cutter" approach with a three-year cut-off point used "in the majority of circumstances…."

[67] Although the explanation given by the Applicant - when asked why he did not apply to vary the order sooner - was vague, the court does recognize the Applicant has grade eight education and the nuances of the law of child support pursuant to a

Supreme Court of Canada ruling may well have been lost on him. That does not affect his responsibility, but it does affect his understanding.

[68] Has the Applicant acted responsibly with respect to paying his child support? The Applicant's evidence is that he was garnisheed by Maintenance Enforcement, and made no voluntary payments: "They always deducted me." This cannot be seen as a responsible act.

[69] Will the children benefit from retroactive child support paid to the Respondent? Likely not. Neither of the children reside with her at this time.

[70] Would there be hardship to the Applicant to pay child support based on an income of $30,000.00 when his Line 150 income for the past seven years was less than that? There is no evidence that he has money or investments. There is no evidence to support the Respondent's allegations that he has a new Ford F150 Supercrew truck (it was owned by his common-law girlfriend's company and subsequently sold) and the 4 wheelers and snow mobile the Applicant owns were purchased in 2003 and 2004. The court accepts the Applicant's evidence that he is a deck hand on a lobster boat. The court finds, especially now that his youngest child is living with him that it would be a hardship for him to pay as suggested by the Applicant.

[71] In *Staples v. Challener*, supra, the court notes:

> In L.S. v. E.P., cited in D.B.S, above, Rowles J.A. writing for the court, undertakes an insightful and thorough discussion of the analysis relevant to a retroactive award of child support. On the question of hardship, she observes that a court is less likely to award retroactive maintenance where it believes that such an award would prejudice the non-custodial parent's ability to make ongoing support payments as they become due (at para. 76). Rowles, J.A. quoted with approval the reasons of Esson, J.A. in E.T. v. K.H.T., [1996] B.C.J. No. 2208 (Q.L.)(C.A.), the full court concurring on this issue, where he said:
>
> > 22 In deciding whether to exercise the discretion to order payment of maintenance for a period prior to the hearing, a judge should consider whether such an order will have an impact on the defendant which will make it less likely that the order for future payments can or will be complied with. Where the defendant's means are limited, it will often be right to not create "instant arrears".

[72] In the matter before the court, the youngest child is living with the Applicant at this time and has been since October 2013. It now falls on him to support her as the primary caregiver. Although this is not a case where an award would prejudice the Applicant's ability to make ongoing payments, it could prejudice and impact his ability to provide for the child now in his care.

[73] Taking all of the above into account, the court finds there is some discretion to consider more than three years in making a retroactive award, considering all of the circumstances of the case, and applying balance to the appropriateness of the award, any benefit to the children, blameworthy conduct, undue hardship to the payor, and any

other issue that might arise and warrant consideration.

(4) What is the amount of child support the Respondent is to pay the Applicant?

[74] Counsel for the Respondent argues the court should award the Applicant less than Guideline child support from her client. There is no significant evidence to warrant this request. The Respondent must pay Guideline child support to the Applicant.

(5) Should the Court "gross-up" the child support payments due to the Applicant's status and benefits potentially accrued?

[75] In her submissions counsel for the Respondent argued that the income of the Applicant should be "grossed-up" for child support purposes, as he has no living expenses.

[76] In *D.A.M. v. J.A.F.*, 2008 NSFC 14 (CanLII), Derrick, J., in considering a similar issue, noted upon reviewing the case of *Dahlgren v. Hodgson* 1999 ABCA 23 (CanLII):

> The Alberta Court of Appeal noted that it is essential to gross-up a non-taxable income to take into account what the income would have been had it been taxed. Observing that: "The [Child Support] Guidelines are premised on division of financial responsibility based on gross before tax income", the Court held that the purpose of "grossing up" is to ensure that "the apportionment of responsibility between the parents for child support is based on the same approach for both parents.

[77] When cross-examined by the Respondent, the Applicant says that he files his income tax every year. The documents reveal that while tax is deducted he has received a refund of that amount.

Conclusion

[78] The court has considered all of the evidence and reviewed the jurisprudence relating to the issues in this matter.

[79] This is an application to vary and the court must find a material change in circumstances to vary the order. The court finds the material changes in circumstances to be the primary care and residence of the children, and the change in the income of the Applicant.

[80] The court finds that the Applicant's obligation to pay the Respondent child support for the eldest child ceased on or about September 1, 2009, (except for two months subsequently where the child resided with the Respondent). Given that the oldest child resided with the Applicant for approximately three or four months for which the Respondent did not pay him child support, the court is prepared to offset both periods and find that for the two months the child was with the Respondent and the three or four months she was with the Applicant, there is no support owing from one to the other.

[81] Further, the Applicant's obligation to pay child support to the Respondent for the youngest child ceased on or about October 1, 2013.

[82] The jurisdiction to impute income is set out in s. 19(1) of the *Child Maintenance Guidelines*. The court cannot impute income on an arbitrary basis but is governed by principles of reasonableness and fairness. Having reviewed the evidence in light of the factors the court must consider, the court finds there was no significant evidence of limitations that would interfere with the Applicant's ability to work further in the fishing industry or to seek employment in other labor related fields, either in this jurisdiction or another, and neither was there satisfactory evidence as to why the Applicant apparently did nothing to earn income for seven or eight months of the year when he had a court ordered obligation to support his children.

[83] As such the court finds there are no known limitations to preclude the court from imputing income to the Applicant and finds the Applicant to have been under-employed.

[84] The court imputes the income of the Applicant as if he had a minimum wage job in the seven to eight months he was not working for an average of $1,000.00 a month, and averaging it, adding $7,500.00 to each year's income from 2009 to 2013.

[85] Respondent counsel in summation requested the court to consider "grossing-up" the Applicant's child support. The court finds this is a reasonable request. It is appropriate and fair to take into account all forms of income, whether taxable or not, for child support purposes. The court is basing the "gross-up" on the refunds afforded the Applicant from CRA, rather than pertaining to his living-status on the Reserve. The refunds as afforded to the Applicant's income by CRA are to be added to his annual income: in 2009 - $4,266.77, in 2010 -$1,491.13, in 2011 – $1,854.13, 2012 – $2,966.77. There is no information for 2013 as the Applicant's evidence is he has not filed his return.

[86] The Applicant's imputed income, including $7,500.00 a year over and above what he has claimed, and the "gross-up" is:

2009 $20,313.00

2010 $25,708.82

2011 $35,505.05

2012 $22,767.12

2013 $28,375.69 (plus any CRA credit).

[87] There is no restriction under the *Maintenance and Custody Act* to prevent the court making a retroactive variation. The case of *D.B.S.* affords the court a guideline of three years from the date of effective notice "as a general rule", although there is discretion to go back further depending on the circumstances. Given the matter is fact-specific, a cookie-cutter approach must be avoided. In making a retroactive award, the court must consider the child's needs at the time, the reason for the parent's delay in seeking the variation, blameworthy conduct on behalf of the payor parent, the child's circumstances, and hardship to the payor parent. The court has considered all of the above.

[88] Based on the evidence – although limited - the court finds it would be a hardship to the Applicant and not likely a benefit to the children to order impute the award in 2007 at $30,000.00, therefore the court accepts and retroactively imputes the Applicant's income for 2007 at $12,267.00 and orders he pay child support on that amount. The court further orders that child support be paid on the 2008 non-reported income of $23,526.53. Although this may or may not have been "welfare from the Band" it is still an income that lends itself to Guideline child support payments. As noted above all forms of income taxable or not should be taken into account for child support purposes.

[89] As the court has imputed income retroactively, it is only common sense that the arrears be adjusted accordingly.

[90] The court's child support calculations for each year are as follows, noting that the 2006 Guidelines were in effect until December 31, 2011:

2007 - $12,267.00 - $156.00 x 12 for a total of **$1,872.00**

2008 - $23,526.53 - $346 x 12 for a total child support payment of **$4,152.00**

2009 - $20,313.00 - two children until September 1, at $296.00 per month, and for one child thereafter, at $164.00 per month for a total of: **$3,024.00**

2010 – $25.708.82 - $224.00 a month for one child, for a total of: **$2,688.00**

2011 - $35,505.05 - $312.00 a month for one child for a total of **$3,744.00**

2012 - $22,767.12 - $171.00 a month for one child for a total of **$2,052.00**

2013 - $28,375.69 (plus any CRA credit) - He is to pay child support on those amounts. Interim amount: $236.00 a month for the nine months the youngest child was in the primary care of the Respondent, for a total of **$2,124.00**.

[91] The lump sum arrears – in the amount of $10,000.00 - as ordered by the court as payment for arrears from 2002 until 2007 remain in full unless and until paid.

[92] The total maintenance award from 2007 until 2013 would have been $19,656.00. As the MEP Record of Payments state the Applicant has paid $13,465.58, the court finds the remaining arrears to be paid to the Respondent in total is $16,190.42 ($10,000.00 lump sum plus $6,190.42).

[93] The court must balance the hardship that may now affect the Applicant's ability to support the child in his care, with the finding that he was under-employed for the time he was obliged to pay child support to the Respondent. The end result must be and is a fair and appropriate rendering of the facts and the findings.

[94] The Respondent is in receipt of $700.00 a month child support from the father of her two other children. Her income for 2013 was $16,900.00 approximately and for 2014 is $25,000.00. There is no valid reason why she should pay less child support for the child now in the Applicant's care. She must pay Guideline amount. The total owed from October 1, 2013 until December 31, 2014 would be $2,655.00.

[95] Given the circumstances of the case, the Respondent's child maintenance payments may be off-set against the arrears owed to her by the Applicant. There is no requirement for her to pay any support to the Applicant for the support of their child until

the Applicant's arrears have been paid and or off-set in full.

[96] Therefore as of the end of December 2014, the Applicant's arrears will be reduced by this amount and he will owe $13,535.42 in total arrears.

Judge Marci Lin Melvin

FAMILY COURT OF NOVA SCOTIA
Citation: *Toney v. Spencer*, 2014 NSFC 19

Date: 2015-02-12
Docket: FK MCA 025293
Registry: Kentville

Between:

Todd Allan Toney

Applicant
(Hereinafter referred to as
"the Applicant)

-and-

Elizabeth Jean Spencer

Respondent
(Hereinafter referred to as
"the Respondent")

ERRATUM

Date of Erratum: February 17, 2015

Judge: The Honourable Marci Lin Melvin

Heard:	November 4, 2014
Oral Decision:	November 16, 2014
Counsel:	Donald Fraser, counsel for the applicant Nicole Mahoney, counsel for the respondent

ERRATUM:
Change the date in the top right corner from 2015-02-12 to 2014-11-16.