**FAMILY COURT OF NOVA SCOTIA**
**Citation:** VanderMeer v. Belajac, 2010 NSFC 21

**Date:** 2010 08 16]
**Docket:** FANISOS-069791
**Registry:** Bridgewater

**Between:**

Wendy VanderMeer

Applicant

v.

Paul J. Belajac

Respondent

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| **Judge:** | The Honourable Judge William J. Dyer |
| **Heard:** | August 5, 2010 at Bridgewater, Nova Scotia |
| **Counsel:** | Wendy VanderMeer, the Applicant, not present<br>Timothy A. Reid, for the Respondent |

**By the Court**:

[1] Under the **Interjurisdicitonal Support Orders Act** (**ISO**), Ontario resident Wendy VanderMeer ("VanderMeer") filed a Support Variation Application against Nova Scotia resident Paul J. Belajac ("Belajac").

[2] In her *pro forma* documents, she requested a change in the amount of current child support from $300 per month to $800 per month but did not state an effective date.

**Applicant's Case**

[3] VanderMeer wrote that the parties' two children, now 16 and 13 years old, respectively, are still under her care and that money continues to be needed for their support. She wrote that she is in receipt of disability benefits, but did not elaborate. She said there have been no increases in child support since 2002.

[4] As will appear, VanderMeer had the benefit of legal representation when the last orders were authorized. She did not explain why she did not seek an earlier review of Belajac's financial circumstances. But, she stated a belief that he had recently received an inheritance of about $300,000 from his father's estate. A reasonable inference is that this triggered her application. VanderMeer also stated a belief that Belajac has been working for several years and that he now owns real estate in Nova Scotia.

[5] At the court's suggestion, counsel for Belajac wrote to VanderMeer to inform her of the status of the proceedings and to determine whether or not she was represented by legal counsel. There was a specific request to clarify whether she was seeking retroactive variation. Counsel for Belajac provided VanderMeer with a brief summary of his client's position, provided some income tax disclosure, and asked for a statement of VanderMeer's intentions insofar as the merits of the case were concerned. There was no reply.

**Legal History**

[6] At best, the legal documentation provided by VanderMeer was sparse. She submitted a copy of a "Final Order" dated January 23, 2002, approved by a Justice of the Ontario Superior Court of Justice, Family Court. The order recites that VanderMeer and her lawyer were present in court when the order was made following the reception of evidence and the hearing of submissions. It is unclear from the order whether Belajac attended. His somewhat shaky recollection (with the passage of time) is that he was present, but unrepresented by a lawyer because he could not afford one. He said the support award was summarily imposed by the presiding judge and that he did not protest because he thought the outcome was a foregone conclusion.

[7] The January 2002 order also confirmed custody of the parties' daughter in VanderMeer but does not mention their son. Belajac recalled there may have been earlier court appearances. If so, care of the son may have been addressed already.

[8] In any event, the court ordered support for both children at the rate of $300 monthly based on a "deemed income" of $21,200 for Belajac. Additionally, the court determined that there was $1,800 owing in arrears of support for the period of March 2,000, to and including November 1st, 2001 to be paid at the rate of $50 monthly. Belajac was at a loss to explain the "arrears" component.

[9] There followed an order, dated June 14, 2002, approved by a different justice of the Ontario Court of Justice, Family Court. Again, on the face of it, it appears that only VanderMeer and her lawyer were present at a hearing date of May 22nd, 2002. Again, Belajac thought he may have been present – and unrepresented by counsel.

[10] The June, 2002 order purports to vary the January order so as to specify that support would commence September 1, 2001 at the rate of $201.07 monthly, to continue until April 1st, 2002 when support would be increased to $300 monthly. There was also a provision that the January 23rd, 2002 order would be varied so as to identify the period in question for "arrears" to have been between March 1st, 2000 and August 31st, 2001. In the result, the last order seems to have been a housekeeping one to clarify what was intended previously.

[11] Otherwise, no other court documents were provided by either party. There were no court transcripts. Apparently, there were no written decisions from the respective jurists.

[12] By June, 2002 Belajac's support arrears were already over $7,000 – according to Ontario Family Responsibility Office (FRO) records which were entered at the current hearing. I find there was a more extensive legal history than either parent disclosed because those records date all the way back to 1994. A reasonable inference is that there had been prior court orders or written agreements.

[13] There was no explanation from Belajac about how all of this came to pass and why he did not take any steps to address his plight if his financial situation was as desperate as he portrayed it. He stands on the same footing as the applicant in this regard.

**The Respondent's Case**

[14] Belajac submitted an affidavit and a set of financial statements. He resides at a rural cottage he acquired several years ago. He did not explain how he managed to make the purchase while still owing money for child support. I infer this may be connected to an inheritance. [See below.] To his knowledge, the children are still under VanderMeer's care and custody near Orillia. He believes she may now be married.

[15] Belajac confirmed a history of making child support payments through the FRO, including those required by the last of the two Superior Court orders.

[16] From the FRO Director's Statement and the accompanying correspondence I find that there were no child support arrears as of June 22, 2010.

[17] In passing, however, I observe that Belajac's payments between 1994 and 2006 were irregular, at best. Indeed, the records show that he made few, if any, payments during several of the intervening years.

[18] Belajac submitted proof of his income since the last orders by way of Notices of Assessment obtained from the Canada Revenue Agency. A summary of his disclosed (Line 150) income is as follows : **2002** – 0; **2003** – 0; **2004** - $9,768; **2005** - $18,314; **2006** - $40,928; **2007** - $37,885; **2008** - $44,158; **2009** - $30,914.

[19] Importantly, for our purposes, his "Line 150" income was nil when the last Ontario court orders were imposed. The same may be said for the following year. (As mentioned, I do not have the benefit of the stated reasons for the 2002 awards.) And, it was not until 2006 that his actual income exceeded that attributed to him in 2002.

[20] Belajac did not appeal the 2002 outcomes; nor did he make any applications to vary. So, his account continued to be charged at the rate imposed by the Superior Court. And, the arrears continued to pile up.

[21] Belajac's evidence was that he had been seasonally employed in Ontario as a carpenter but his income earning capacity was hampered by chronic back problems. He left for Nova Scotia in early 2003 but his income situation did not improve until 2004 when his health finally improved. By the end of 2003, FRO records show that support arrears had climbed to over $13,000.

[22] Belajac relocated to British Columbia in 2005 or 2006 to find better-paying work. He had not filed any personal income tax returns for several years for unstated reasons. He finally did so while in British Columbia. His income improved significantly. He said he got back on track with his current child support and started to reduce the large arrears balance.

[23] I accept Belajac's evidence that he entered into a payment scheme with FRO officials who were aware of his employment situation and whereabouts. FRO records show regular, resumed payments in 2006. There were several "balloon" payments, perhaps as a result of garnishee action. All of this tends to corroborate his version of events – at least for that time frame.

[24] By November, 2009 Belajac had paid everything off.

[25] Belajac returned to Nova Scotia in late 2009 when the recession took hold and his job prospects and income dried up. He qualified for e.i. benefits. They are now exhausted. He has no significant income at this time – just some cash from odd jobs - while he looks for full-time employment as a carpenter.

[26] VanderMeer's original application was signed in mid-December, 2009. On Belajac's testimony, I find that he became aware of a pending court support application *via* the FRO before his departure for Nova Scotia – even if he did not have full particulars. I find this was when he had "effective notice" (discussed below in more detail). To his credit, he informed FRO officials of his pending relocation. This, I find, resulted in commencement of ISO proceedings soon after in Nova Scotia.

[27] As mentioned, VanderMeer learned of Belajac's possible inheritance in or about 2006, but this did not result in any action by her for about three years. The estate was administered near the community where she has resided for many years. She knew the identity of the Executor. She professed knowledge of at least a couple of real estate transactions linked to the estate. I infer VanderMeer could have obtained information about the estate, and Belajac's legal interest in it, from the local probate court office and acted sooner than she did if she thought this was relevant to child support issues.

[28] When pressed, Belajac disclosed that he received one third of the residue of his father's estate. Payments were received by installments. He did not provide a copy of the Will or any estate documents. However, he said he received a total of about $210,000. An unspecified amount has been invested.

[29] From his income tax information, I find Belajac has been reporting the income on his investments for tax purposes. I can only speculate on whether some of the inheritance helped with his cottage purchase or with the accelerated support arrears retirement - because he did not elaborate. Both seem likely, however.

[30] Belajac insisted he has never been asked by VanderMeer, directly, or indirectly via the FRO, to provide copies of his income tax returns or Notices of Assessment. As a self-represented individual during past court appearances, he stated that he was unaware that he might have disclosure duties if nothing was said in court orders.

[31] VanderMeer had the benefit of counsel who apparently did not ask for ongoing disclosure. On their own initiative, the presiding judges did not impose anything. So, according to Belajac, he thought he had been compliant with the terms of the last court order and that he was doing what was expected of him by the court, by VanderMeer, and by the FRO incidental to an agreed settlement.

[32] Unfortunately, Belajac has had no recent contact with VanderMeer or with his children. He said the last time he saw VanderMeer was at his father's funeral in Ontario in 2006. He said the parties exchanged telephone numbers so that arrangements could be made for him to see the

children. However, his evidence was that the visits did not materialize and he returned to his then home (British Columbia) soon after. He lays the blame for this situation at VanderMeer's doorstep. However, the possible link between her conduct and his track record on child support, with respect, seems to have eluded him.

[33] Belajac continues to work in his chosen trade – carpentry. Although unemployed at the present time, he is prepared to stipulate that his 2010 income be in the range of $20,000. On that basis, he believes that basic support could be imposed at the rate of $292 monthly for his two children. He would like his obligations to be reviewed and adjusted [upward or downward] by the parties, or by the court if need be, in 2011 when his actual income is known. He is agreeable to annual disclosure of his personal income tax returns [by June 1st] and Assessment Notices from the Canada Revenue Agency [when received]; and I will so order. I will also order that he keep the other party informed of his employment status, including his return to full-time work when that occurs.

**Discussion/Decision**

[34] Belajac's counsel submitted that in all of the circumstances, the court should not impose a retroactive award.

[35] Under **CMG** section 3, unless otherwise provided, the amount of child support is the amount set out in the applicable table, plus the amount, if any, determined under **CMG** section 7. There is no section 7 claim before the court. The Nova Scotia Tables apply because of Belajac's residency here. 1Belajac does not dispute his duty to pay child support. Current support has been awarded. Belajac agreed that his financial situation has changed considerably since 2002.

[36] It is common ground that the court must apply the **CMG** whose objectives are to establish a fair standard of maintenance for children that ensures that they benefit from the financial means of both parents, to reduce conflict and tension between parents by making the calculation of child maintenance orders more objective, to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child maintenance orders and encouraging settlement, and to ensure consistent treatment of parents and children who are in similar circumstances.

[37] Belajac has a statutory duty to support his children. Notwithstanding the applicant's failure to spell out when she wants any variation order to start – or perhaps because she did not do so - I have decided she, and more importantly the children, should have the benefit of a full analysis.

[38] Regarding retroactive support, the leading authority is **D.B.S. v. S.R.G.; L.J.W. *v.* T.A.R.; Henry *v.* Henry; Hiemstra *v.* Hiemstra** 2006 SCC 37.

[39] Bastarache, J., writing for the majority, noted the trilogy concerned the enforceability and quantification of support that was neither paid nor claimed when it was supposedly due. He

emphasized that the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it; and that any incentives for payor parents to be deficient in meeting their obligations should be eliminated.

[40] Importantly for our purposes, it was said that unreasonable delay by the recipient parent in seeking an increase in support will militate against a retroactive award, that blameworthy conduct by the payor parent will have the opposite effect, that an award should generally be retroactive to the date when the recipient parent gave the payor parent effective notice of his/her intention to seek an increase in support payments and that this date represents a fair balance between certainty and flexibility.

[41] The Supreme Court decision directed that no child support analysis should ever lose sight of the fact that support is the right of the child and that where one or both parents fail to vigilantly monitor child support payment amounts, the child should not be left to suffer without a remedy. As a result, although an application is needed to trigger the court's jurisdiction, the court may still retain the power to make a retroactive order once it is properly seized of a matter.

[42] I propose to develop my own analysis along the lines suggested in the trilogy. All relevant circumstances should be considered. No single factor is decisive. In the Court's words:

> At all times, a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix.

[43] The circumstances that surround the recipient's choice not to apply for support earlier is crucial in determining whether a retroactive award is justified. The recipient, unlike Belajac, had the benefit of legal representation in the past and knew or ought to have known her remedies should she want child support reviewed and/or adjusted. His whereabouts were known by the FRO or could have been determined.

[44] There is no evidence that VanderMeer held justifiable fears that Belajac would react vindictively to the application to the detriment of the family. They were estranged - he had no contact with them and there is no evidence they wanted contact with him.

[45] I find that VanderMeer knew of an inheritance in 2006 and that this might warrant a review of child support. The better part of three years went by. Child support was flowing again *via* FRO by early 2009. FRO had negotiated an arrears repayment scheme so my finding that Belajac's whereabouts were known is reinforced. VanderMeer finally took action in December, 2009.

[46] I find VanderMeer's unexplained delay runs afoul of the admonition recipient parents must act promptly and responsibly in monitoring the amount of child support paid and take timely action. Unreasonable delay does not eliminate any payor's duties, but it is one factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award.

[47] Belajac's conduct is also relevant. A payor parent's interest in certainty is said to be the least compelling where (s)he engaged in blameworthy conduct. Such conduct is seen as anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. Examples include hiding income increases from the recipient parent in the hopes of avoiding larger child support payments, intimidation, deliberate misrepresentation of one's financial situation, etc. There is no direct evidence along these lines. And, the evidence before me was not so strong that I might reasonably infer his failure to file tax returns for several years was geared toward support avoidance.

[48] Indeed, with the benefit of hindsight, and based on his (now) available tax returns, it is possible Belajac could have achieved outright respite from payment or reduction of support for several years during which arrears were accumulating. I find that he may not have been aware of the remedies possibly available to him. The flip side, of course, is that he likely underpaid in some other years. One thing is certain, although it may have taken a long time, he did pay everything he was ordered to pay.

[49] A payor such as Belajac who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. So too may it be said that a payor who does not automatically decrease payments is necessarily engaging in praiseworthy conduct. Conduct is a value judgment. As the Supreme Court wrote, "the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct". I find that Belajac is an individual who held such a belief.

[50] There is virtually no evidence about the past and present circumstances of the children – save for generalized comments that their financial needs have increased over time. Belajac does not challenge this except by implying that they may derive some benefit from the mother's current partner or spouse. I am unable to make findings, one way or the other, about the hardship, if any, which the children or their mother may have experienced as a result of the father's payment record.

[51] As far as potential hardship to Belajac is concerned (should there be a retroactive award), the evidence is that he is not supporting anyone else at this time. He does own some realty. He apparently has some money left from his inheritance. He is out of work, at least for now. Otherwise, not much else has been disclosed.

[52] I am mindful that the court could order payment of a retroactive award as a lump sum, a series of periodic payments, or a combination of the two.

[53] If a court decides that a retroactive child support award should be made, it must decide the amount of that award. There are two elements to this decision: first, the court must decide the date to which the award should be retroactive, and second, the court must decide the amount of support that would adequately quantify the payor parent's deficient obligations during that time.

[54] The Supreme Court endorsed the "effective notice" date as a default option - that is, the date there was any indication by the recipient parent (in this case, VanderMeer) that child support needed to be re-negotiated. Once that has occurred, the Court said, the payor can no longer assume that the *status quo* is fair, and his/her interest in certainty becomes less compelling. Moreover, the court wrote:

> … 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.

[55] It was also said that the date when increased support should have been paid will sometimes be a more appropriate date from which the retroactive order should start – most notably where the payor parent engages in blameworthy conduct:

> Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances — including an increase in income that one would expect to alter the amount of child support payable — is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

[56] The court said:

> The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. 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. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

[57] While not condoning the length of time it took Belajac to bring himself into full compliance with the last orders, I find he had a simplified understanding of his responsibilities at all material times, exacerbated by the absence of legal advice and the absence of disclosure provisions in past orders. The evidence stops short of supporting a "blameworthy" determination. Accordingly, I find that retroactive review should be constrained by the effective notice date which I fix as December 1, 2009.

[58] Lastly, the amount of the retroactive award must be decided. This normally invokes the **CMG** Tables but "blind adherence to the amounts set out in the applicable Tables is not required — nor is it recommended". In the present case, Belajac, did not advance an undue hardship or other defence which would merit avoidance of a conventional award. I am also mindful there is over-riding discretion which can affect the quantum of a retroactive award – that is, to alter the

time period that the retroactive award captures. However, a court should not impose a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case.

[59] Given that I have ordered "current" support starting effective January 1, 2010, the retroactive component is reduced to one month in 2009 (December). Belajac's income was $30,914 last year. I order that he forthwith pay to VanderMeer the sum of $465, being 1/12 of the Nova Scotia Table amount for two children.

[60] All payments under this decision shall be accomplished as directed by the maintenance enforcement authorities.

[61] No costs are awarded.

[62] Counsel for Mr. Belajac shall submit an appropriate order.

**Dyer, J.F.C.**