

IN THE FAMILY COURT OF NOVA SCOTIA  
**Citation:** J.M.B. v. S.R.P., 2004 NSFC 14

**Date:** 20040921  
**Docket:** F.Y. No. 94SB0038  
**Registry:** Yarmouth

**Between:**

J.M.B.

Applicant

v.

S.R.P.

Respondent

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**Judge:** The Honourable Chief Judge John D. Comeau

**Heard at:** Shelburne, Nova Scotia

**Date:** September 20, 2004

**Decision date:** September 21 2004

**Counsel:** Applicant not present (ISO application to vary)  
Wayne RIDEOUT, Esq. For the Respondent

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DECISION

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**THE APPLICATION:**

- [1] This is an application to vary child support for three children, received from Manitoba under the Inter-jurisdictional Support Orders Act (I.S.O.) Nova Scotia and Manitoba are reciprocating states under the Act.
- [2] There are two orders made by this Court sought to be varied, one dated August 29, 1994 and issued September 8, 1994 requiring the Respondent to pay a total of twenty dollars (\$20.00) a month for the children T., born June [...], 1993 and A., born June [...], 1993. The other order is for the payment of fifty dollars (\$50.00) a month child support for C., born November [...], 1994 and it is dated September 30, 1995 and issued February 17, 1995.
- [3] The Applicant is requesting two items.
1. A change or variation in the amount of support in the current support order or agreement from fifty dollars (\$50.00) per month to one thousand two hundred and twenty-three dollars (\$1,233.00) per month. (This amount is based on the guideline amount for three children with the Applicant anticipating the Respondent's income at seventy-two thousand dollars (\$72,000.00) per annum.

2. The Respondent obtains and maintains medical and/or dental insurance coverage for the children.

**ISSUE:**

- [4] Change in circumstances to warrant a variation and amount of change if any.

**FACTS:**

- [5] The Respondent is self-employed in the trucking/logging business, line 150 of his income tax returns are as follows. It should be noted these are not figures from gross income as indicated.

2001 Gross	\$86,354.48
Net Line 150	\$15,062.04
2002 Gross	\$63,359.24
Net Line 150	\$ 5,993.74
2003 Gross	\$59,078.59
Net Line 150	\$ (87.25)

- [6] The Court requested further disclosure and received a statement of business activities for the Respondent's business called TCA Trucking (no indication that it is incorporated). This covers this fiscal period 2003/01/01 to 2003/12/31 and he is still in this type of work. The statement shows the following:

Income:	\$59,078.59
Cost of goods sold (wood)	<u>\$20,572.33</u>
Gross Profit	\$38,506.26
Expenses:	
Business Tax	\$ 37.17
Insurance	\$ 1,325.00
Interest	\$ 130.63
Maintenance/ Repairs	\$13,403.78
Office Expenses	\$ 579.63
Legal/Accounting	\$ 117.00
Salaries/Wages	\$22,186.02
Silver Culture	\$ 244.66
Misc. Expense	<u>\$ 569.62</u>
	\$38,593.51
Showing a loss of	\$ 87.25

[7] The Respondent's counsel, in a letter to the Court attaching the statement of business activities, advises that the Respondent paid the twenty-two thousand one hundred and eighty-six dollars and two cents (\$22,186.02) in salaries. This was broken down as follows: Fourteen thousand eight hundred and seventy-four dollars and fifty cents (\$14,874.50) to one D.H. (T4 slip provided). Balance of Seven thousand three hundred and eleven dollars and fifty-two cents (\$7,311.52) to the Respondent as wages.

**THE LAW:**

- [8] Evidence of a change in circumstances is required in order for the Court to exercise jurisdiction to vary an order for child support.
- [9] The Nova Scotia Child Maintenance Guidelines came into effect August 5, 1998, which was following to the orders of 1994 and 1995 which are the subject of a variation application. Consequently, the implementation of the Guidelines are a change in circumstance, allowing the Court to exercise its discretion with respect to a variation of child support.
- [10] Flinn J.A. in Wilcox v. Snow (1999) 181 N.S.R. (2d) 92 set out how income of a self-employed payor should be dealt with.
- [11] Reference is made to the Federal Child Support Guidelines and the Court dealing with the Nova Scotia Child Maintenance Guidelines which are similar in all respects.

“While s. 16 of the **Guidelines** provides that a spouse’s annual income is determined using the sources of income set out under the heading “Total Income” in the T1 General Form issued by Revenue Canada, that reference is clearly subject to ss. 17 to 20 of the **Guidelines**, and is also subject to being adjusted “in accordance with Schedule III:

Schedule III to the **Guidelines** is entitled “Adjustments to Income”. Section 9 of Schedule III is particularly relevant to this case, where the respondent is a self-employed businessman:

9. Where the spouses's net self-employment income is determined by deducting an amount of salaries, benefits, wages or management fees, or other payments, aid to or on behalf of persons with whom the spouse does not deal at arm's length, include that amount, unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.

Further, ss 17 to 20 of the **Guidelines** provide for cases where the Court may determine the spouses's income other than by reference, solely, to the spouse's income tax return. Section 19(1), for example, permits the Court to impute income to a spouse in circumstances where the spouse is intentionally under employed or unemployed (s.19(1)(a); where it appears that income has been diverted which would affect the level of child support to be determined under a legal obligation to do so (s. 19(1)(f); where the spouse unreasonably deducts expenses from income (s. 19(1)(g).

Section 19(2) provides that the reasonableness of an expense deduction, for the purposes of s. 19(1)(g), is not solely governed by whether the deduction is permitted under the **Income Tax Act**.

In the case of a self-employed businessman, like the respondent, there is very good reason why the Court must look beyond the bare tax return to determine the self-employed businessman's income for the purposes of the **Guidelines**. The net business income for income tax purposes of a self employed businessman, is not necessarily a true reflection of his income, for the purpose of determining his ability to pay child support. The tax department may permit the self-employed businessman to make certain deductions from the gross income of the business in the calculation of his net business income for income tax purposes. However, in the determination of the income of that same self-employed businessman, for the purpose of assessing his ability to pay child support, those same deductions may not be reasonable.

In the recent case of **Vermeulen v. Vermeulen**, [1999] N.S.J. No. 193 (C.A.), this Court upheld the decision of a trial judge who went beyond the self-employed spouse's income, as declared in his tax return. Chief Justice Glube, writing for the Court, said the following:

‘In my opinion, the decision of Justice Hall to impute the sum of \$30,000 as income is quite reasonable. It is one thing to deal with your income tax to provide the most favourable conclusion, but it is another matter if that affects the person’s ability to make support payments.’”

**CONCLUSION/REASON:**

[12] The Respondent has a wood cutting/trucking business which is being operated at a loss or so it was in 2003. A statement of business activities does not indicate any unreasonable expenses except for twenty-two thousand one hundred and eight-six dollars and two cents (\$22,186.02) for wages, salaries and benefits, which there is an indication the Respondent received Seven thousand three hundred and eleven dollars and fifty-two cents (\$7,311.52). A reasonable person would be wondering why he is operating this business if he does not get the larger split of wages. His efforts would only be for his employees.

[13] The financial information before the Court is unreasonable. It is a case where income should be imputed. Salary paid out is unreasonably disproportionate for the owner of a business. The Respondent should not be in business if he cannot take the larger salary. At this point in time, with the

amounts before it, the Court will impute income to the Respondent in the amount of Ten thousand dollars (\$10,000.00). A larger amount will be warranted in the future if the Respondent continues to underpay himself. The guideline amount for three children is One hundred and twenty-eight dollars (\$128.00) a month. There has been a considerable delay in dealing with this application and the Court has considered a retroactive order, however the conclusion is that this should not be done, because it would entail considerable arrears. It is in the children's best interest that the Respondent start payments on October 1, 2004 and thereafter on the first of each month, through Maintenance Enforcement.

- [14] The Respondent shall supply the Family Court Officer with a copy of his personal and his business income tax return when each is filed in any given year. Judicial support will prepare the order as the applicant has not counsel.



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JOHN D. COMEAU  
Chief Judge of the Family Court for the  
Province of Nova Scotia