

IN THE FAMILY COURT OF NOVA SCOTIA  
**Citation:** R.S.N. v. D.L.B., 2009 NSFC 6

**Date:** (20090312)  
**Docket:** Y016122  
**Registry:** Yarmouth

**Between:**

R.S.N.

Applicant

v.

D.L.B.

Respondents

**Judge:** Before The Honourable Judge John D. Comeau,  
Chief Judge of the Family Court for Nova Scotia

**Heard:** Heard at Yarmouth, Nova Scotia, January 28, 2009

**Written Decision:** March 12, 2009

**Counsel:** R.S.N., unrepresented  
D.L.B., unrepresented

**DECISION**

**THE APPLICATION:**

[1] This is an application to vary by the payor, applicant for “ a reduction in child support.” The order sought to be varied is dated July 5, 2005 and provides child support for the parties child, Ryan, born September 22, 1995 as follows:

i) from June 1 to November 1 - the amount of three hundred (\$300.00) dollars per month payable on the first day of each month;

ii) from December 1 to May 1 - the amount of four hundred and nineteen (\$419.00) dollars per month payable on the first day of each month.

[2] This was an order made by consent of the parties.

**ISSUE:**

[3] Change in circumstances.

[4] Determination of annual income

**THE FACTS:**

[5] The Applicant is a lobster fisherman who claims that the fishery is on the decline and so is his income. He says that he makes most of his income at the beginning of the lobster season which is the end of November of each year. A letter from his employer forms part of the evidence without objection:

“To Whom it may concern

I have reviewed the year to date (January 24/09) catch and gross stock for my company (3077309 Nova Scotia Limited). At this point in the 2008-2009 season we have a total catch of 39, 879 lbs with a gross stock of \$144, 138.75. By comparison at this point in the 2007-2008 season the company’s catch was 49 161 lbs for a gross stock of \$315, 717.00. The catch is down 23% and the stock is down 54 % . (R.S.N.) to date this season the Applicant has made \$17, 130.54 whereas in the 2007-2008 season he had made \$37, 886.04. That is a 54% drop in wages. Based on past years we have traditionally caught approximately 70% of our seasonal catch by now. With the current conditions affecting our fishing business we anticipate that our revenues will drop by more than the past seasons from now until seasons end more hardship for all my employees.”

[6] The Applicant's Income Tax line 150 total income over the 2005, 2006 and 2007 was consistent from year to year.

2005 - \$61,300.91 (Included E.I. \$11,151.00)

2006 - \$61,438.99 (Included E.I. \$11,900.00 - other \$620.00)

2007 - \$60,340.69 (Included E.I. \$11,744.00 - other \$461.93)

[7] He received \$1,662.35 in January 09 and indicates lobster fishing is sporadic in the winter months and fishing is over in the spring (season over the end of May).

[8] The Applicant asks the Court to determine his 2009 income prospectively and use this figure to take an average to determine his annual income for guideline purposes.

**THE LAW:**

[9] This is an application to vary pursuant to Section 37 of the Maintenance and

**Custody Act:**

“37 (1) The Court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.”

[10] Section 10 referring to the child maintenance guidelines is to be applied.

[11] The child support (maintenance) Guidelines provides a method of determining a payor’s annual income:

“15 (1) Subject to subsection (2) (agreement of the parties) a spouse’s annual income is determined by the court in accordance with section 16 to 20.

16. Subject to Section 17 to 20, a spouse’s annual is determined using the sources of income set out under the heading “Total income” in the TI General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.

[12] In *Lavergne v. Lavergne* (2007) 40 R.F.L. (6<sup>th</sup>) 239 the Alberta Court of Appeal clarified what total income means in the plain wording of s. 16 of the Guidelines:

### Legislative Provisions

“The *Guidelines* have provisions regarding income and income information. The relevant provisions are set out in the appendix to these reasons. Section 16 directs that annual income, the basis upon which child support is payable, is determined “using the sources of income set out under the heading ‘Total Income’ in the T1 General form issued by Canada Customs and Revenue Agency.” There is no reference in s. 16 to any years to be considered.

[15] The appellant’s suggestion, that “total income” means the amount identified in line 150 of the payor’s individual tax return, does not track the plain wording of s. 16. The sources stipulated under the heading of “total income” in the prescribed T1 Form for the purpose of the *Income Tax Act* include commissions, pension and disability benefits, employment insurance, dividends, interest, partnership income, rental income, taxable capital gains, support payments, registered retirement savings plan receipts and self-employment income. Line 150, in contrast, permits credits to reduce the amounts when arriving at a total.”

17. (1) If the court is of the opinion that the determination of a spouse’s annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse’s income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.”

[13] Income information used must be the most current:

“2 (3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.”

“Section 16 of the Guidelines is silent on the period for which the determination of annual income is to be made and whether annual income is the income of the past taxation year, estimated annual income for the current year, or an estimate of likely future annual income: (see *Lavergne*, supra).”

[14] The Court in *Lavergne* supra concluded:

“While using the amount identified at line 150 of the payor’s individual tax return is a certain and simple means to determine annual income, it will not always be fair (as referred to in s. 17). Thus, the *Guidelines* provide alternative methods to determine income where the provisions of s. 16 would not result in a fair determination. These methods are to fulfill the objectives stated in s. 1 (a), that the *Guidelines* are intended to ensure that children “continue to benefit from the financial means of both spouses after separation” The use of the past year’s income tax return, without subsequent adjustment to reflect the actual income, is inconsistent with the *Guidelines*’ multi-step approach to determining income and with the general discretion granted to the court to specify annual income for the purposes of calculating child support obligations. While the *Guidelines* method is more complicated than relying only on historical income information, it better fulfills the objective that children should continue to benefit from the financial means of both parents after separation by providing them with those benefits on a more timely basis.”

**Prospective determination of income:**

[15] In *Lee v. Lee*, (1998) 165 D.L.R. (4<sup>th</sup>) 610 the Newfoundland Court of

Appeal held:

“That annual income is determined by looking at projected future income of the payor and not historical income except to make a fair prediction of future income where there is a trend of increasing or decreasing income.” (words used in *Lavergne* in referring to this case.)

[16] The Newfoundland Court of Appeal observed at page 4 of *Lee* supra:

“Support must be paid out of the future income of the payor-spouse. The underlying rationale is still ability to pay. In the sense, the process of setting child support is a prospective one. In engaging in that predictive exercise, however, historical data is obviously important and usually provides the best forecast of current ability to pay.”

[17] The Court of Appeal of Alberta in *Lavergne supra* referred to the decision of the Supreme Court of Canada in *D.B.S.* [2006] 2. S.C.R. 231, 31 R.F.C. (6<sup>th</sup>):

“The Supreme Court of Canada’s most recent decision on child support, *D.B.S.*, does not address this issue directly. However, the decision is clear that other than retroactive awards, child support is prospective and that where the payor’s income levels increase or decrease, so will contributions to the child’s needs, just as if the family had remained together. This objective, to provide for the children as if the family had remained together, implies that the children should benefit from, or be deprived of, income at current, not past, levels.”

**CONCLUSIONS/DECISION:**

[18] The Applicant payor has applied to vary child support which was ordered on July 5, 2005. This award was by agreement of the parties and it does not refer to the child maintenance guidelines nor the amount of income used to arrive at the amount of annual income used to set the monthly payment. Monthly payments from June 1 to November 1 is in the amount of \$300.00 and from December 1 to May 1 the amount of \$419.00. Both payments were due on the first of each month. If this is a departure from the guidelines it is not stated in the order. It



would appear that it is a departure by consent because it would require adjusting annual income every six months to set the table amount.

[19] The evidence does disclose this arrangement was made to accommodate the Applicant payor in accordance to the lobster season in this area which runs from the end of November to the end of May. Applying these amounts to the table do not reflect the annual historical income of Applicant payor going back to 2005. The parties must have intended these amounts to be a departure from the guidelines.

[20] On an application to vary under s. 37 of the *Maintenance and Custody Act* where there is no consent to depart from the guidelines section 10 is applicable:

“10 (1) When determining the amount of maintenance to be paid to a dependant child, or a child of unmarried parents pursuant to section 11, the Court shall do so in accordance with the Guidelines (child maintenance guidelines).

[21] There is no consent to depart from the guidelines.

**CHANGE IN CIRCUMSTANCES:**

[22] The update to the tables under the child maintenance guidelines which came into force May 1, 2006 is an automatic change in circumstances.

[23] The evidence before the court of a change in the Applicant payor's prospective income from his consistent historical income is a change in circumstances providing the court with jurisdiction to vary the order of July 5, 2005.

[24] The change is outlined earlier under the facts. His formal income ranged from approximately \$60,300.00 to \$61,400.00. Evidence from his employer is that his prospective wages have dropped 54% at a time in the lobster season when 70% of their season is earned. He also gets employment insurance as part of his income.

**DETERMINATION OF ANNUAL INCOME:**

The determination of a payor's annual income is prospective. There is evidence before the court that the Respondent payor is a lobster fisherman and the season runs from the end of November to the end of May. It has not been disputed that 70% of a lobster fisherman's income is caught between the end of November and the end of December.

[25] The Court accepts the evidence that his income is down 54% in wages. His historical average income from lobster fishing is determined from T4's for the following years:

2005 - \$50, 149.91

2006 - \$58, 919.99

2007 - \$48, 134.76

Average: \$49, 067.88

[26] In addition in years 2006 and 2007 he had other employment income ranging between \$461.93 and \$620.00.

[27] Employment insurance income average over those three years \$11, 598.33.

[28] The Respondent payors prospective income (2008/2009) is based on the actual money he had received to date \$17, 130.54 from lobstering November 08 to the end of December 2008 and \$1 662.35 he received in January 09.

[29] Calculation of Respondents payor's prospective income (2008/2009).

Actual	\$1,662.25 (in evidence before the Court)
E.I.	\$11, 598.33(average)
Other	\$540.96 (average)
Employment Income	\$49, 496.65 (average)
	-\$26, 496.65 (down 54%)

Total \$36, 372.87 for child support guideline purposes. The table amount is \$319.00 per month for one child.

[30] The Respondent shall pay child support in the amount of \$319.00 a month starting February 1, 2009 through the Maintenance Enforcement Program.

[31] This decision makes three assumptions on a prospective bases. They are that the Respondent will get the same E.I. amount, other income will remain the same

and that the lobster fishery decline will continue at the beginning of the November/December 2009 opening. Either party is at liberty to make an application to the Court to adjust child support if financial circumstances change.  
(see D.B.S. supra)

[32] The Court Reporter shall prepare the order as the parties are self-represented.

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