**SUPREME COURT OF NOVA SCOTIA**
**FAMILY DIVISION**
**Citation:** *Marsh v. Manuel*, 2015 NSSC 315

**Date:** 20151208
**Docket:** *SFSNMCA* No. 11994
**Registry:** Sydney, Nova Scotia

**Between:**

Corey Darrell Marsh

Applicant

v.

Kerri Lee Manuel

Respondent

| | |
|---|---|
| Judge: | The Honourable Justice Lee Anne MacLeod-Archer |
| Heard: | July 9 and October 20, 2015, in Sydney, Nova Scotia |
| Written Release: | December 8, 2015 |
| Counsel: | Corey Marsh, Not Present & Not Represented by Counsel<br>Kerri Manuel, Respondent, Self-Represented |

**By this Court:**

[1] Separated or divorce parents are expected to pursue and obtain employment where possible, in order to reasonably maintain their children. Sometimes parents are disabled and unable to work. Parents who are not disabled, but who choose not to work, may have income imputed to them for purposes of child support.

## ISSUES

1. Has there been a change in circumstances since the support order was issued in 2005?
2. Should Mr. Marsh's variation application be granted to reduce his prospective child maintenance obligation to nil?
3. Should there be a retroactive adjustment of child maintenance and recalculation/forgiveness of arrears owing?

## POSITION OF THE PARTIES

[2] Mr. Marsh filed an Application under the ***Interjurisdictional Support Orders Act,*** S.O. 2002, c. 13 and S.N.S. 2002, c. 9 on January 16, 2015. He seeks retroactive variation of a child maintenance order, forgiveness of arrears, and adjustment of his prospective child support obligation. He says:

- he is disabled;
- he is unable to work;
- he has limited income;
- he is unable to pay ongoing support, and;
- he is unable to pay arrears.

[3] Ms. Manuel disputes his claim. She seeks payment of arrears and ongoing support. She asks that support be set a level higher than previously ordered.

## HISTORY OF PROCEEDINGS

[4] The parties are the parents of one child, Kristina Marie Manuel, born August *, 1998. She now lives with her mother in Nova Scotia. Mr. Marsh lives in Ontario.

[5] In 1999 Ms. Manuel applied for, and was granted, child maintenance in Newfoundland. In September, 2004 she applied in Nova Scotia through the ***Interjurisdictional Support Orders Act***, S.N.S. 2002, c. 9 to vary the child support order. Her application was sent to Ontario, and a hearing was held on December 9, 2005. Mr. Marsh did not appear. Dunn, J., of the Ontario Court of Justice, imputed income of $40,000.00 and granted an order requiring Mr. Marsh to pay child support in the amount of $345.00 per month, commencing September 20, 2004.

[6] The court also calculated arrears as of September 20, 2004, at $4,784.00. The order directs that post-judgement interest will accumulate at the rate of four percent (4%) per annum on arrears. It also contains a provision requiring Mr. Marsh to provide updated income information to Ms. Manuel each year.

[7] This order was registered in Nova Scotia on March 15, 2011 and is being enforced through the Director of Maintenance Enforcement in Nova Scotia.

[8] Mr. Marsh's application was originally scheduled for hearing in Sydney on May 13, 2015. In accordance with the Court of Appeal decision in ***Waterman v. Waterman,*** 2014 NSCA 110, Mr. Marsh was sent notice of the hearing date by registered mail from the court. The Notice to Appear advised Mr. Marsh of his right to appear at the hearing, or to be represented by counsel.

[9] For personal reasons relating to the child, Ms. Manuel requested, and was granted, an adjournment of the May 13th date. She was directed to provide Mr. Marsh with notice of the rescheduled hearing date of July 9, 2015. She sent a Notice to Appear by registered mail and provided the court with a copy of the online tracking receipt for delivery with signature, showing it was retrieved on June 22, 2015.

[10] On June 29, 2015, Ms. Manuel filed an affidavit and brief in response to Mr. Marsh's application. She did not send those documents to Mr. Marsh. The hearing commenced on July 9th, but was adjourned to October 20, 2015 for completion. Ms. Manuel was directed to send her responding documents to Mr. Marsh, along with a Notice to Appear which reiterated his right to appear or participate in the

hearing, or file further documents with the court. The adjourned date was set far enough ahead to allow Mr. Marsh sufficient time to receive and respond to those documents if he wished.

[11] Ms. Manuel sent the new Notice to Appear, along with her brief and affidavit, to Mr. Marsh by registered mail. According to Canada Post's online tracking system, he did not retrieve the package sent by Ms. Manuel.

## PRELIMINARY MATTERS

[12] A number of paragraphs from Ms. Manuel's affidavit were struck on motion of the court, as they do not comply with ***Civil Procedure Rule 39*** in relation to affidavits. Some of the content was argument, while other portions contained opinion evidence, which she was not qualified to offer. The balance of her affidavit, plus her *viva voce* evidence was considered by the court in reaching a decision.

[13] There was a similar problem with Mr. Marsh's affidavit. He attached a letter from Dr. Darren Merker dated October 9, 2013. This letter contains opinion evidence with respect to Mr. Marsh's injury, prognosis, treatment and his ability to work.

[14] ***Nova Scotia Civil Procedure Rule 55*** states*:*

> **Content of expert's report**
>
> 55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
>
> (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
>
> (b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
>
> (c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
>
> (d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;
>
> (e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared

and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

(2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:

(a) details of the steps taken by the expert in formulating or confirming the opinion;

(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

(c) the degree of certainty with which the expert holds the opinion;

(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

(a) the expert's relevant qualifications, which may be provided in an attached resumé;

(b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;

(c) reference to all publications of the expert on the subject of the opinion;

(d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;

(e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

…

**Treating physician's narrative**

**55.14 (1)** A party who wishes to present evidence from a physician who treats a party may,
instead of filing an expert's report, deliver to each other party the physician's narrative, or initial and supplementary narratives, of the relevant facts observed, and the findings made, by the physician during treatment.
**(2)** A narrative, or initial and supplementary narratives, must be delivered within the

following times:

(a) no more than thirty days after the day pleadings close in an action, if the treatment occurs before the action is started;

(b) within a reasonable time after treatment is provided during the course of an action and no later than the finish date;

(c) as directed by a judge in an application.

**(3)** A party who receives a narrative, initial narrative, or supplementary narrative expressing a finding may, within a reasonable time, file a rebuttal report that conforms with Rule 55.05.

**(4)** A party may not obtain a discovery subpoena for, deliver interrogatories to, deliver written questions to, or obtain an order for discovery of a treating physician who provides a narrative rather than an expert's report.

**(5)** A party who calls a treating physician at a trial, or presents the affidavit of a treating physician on an application, may not advance evidence from the physician about a fact, finding, or treatment not summarized in a narrative or covered in an expert's report.

**(6)** A judge who presides at the trial of an action, or the hearing of an application, or who makes a determination under Rule 55.15 must exclude expert opinion evidence of a treating physician who provides a narrative instead of an expert's report, unless the party offering the evidence satisfies the judge that the other party received information about the opinion, and about the material facts upon which it is based, sufficient for the party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician.

[15] There is no evidence Dr. Merker is Mr. Marsh's treating physician, nor that he is qualified to provide opinion evidence on the several medical specialties he addresses. There are several other reasons why the letter fails to comply with ***Rule 55;*** as such it is neither an expert report nor a treating physician's narrative admissible under ***Rule 55*** (reference ***Russell v. Goswell***, 2013 NSSC 383).

[16] The letter also constitutes hearsay evidence. In her brief, Ms. Manuel takes issue with the opinions expressed, but she had no opportunity to test those opinions, because Dr. Merker was not made available for cross-examination. The rules of evidence exclude hearsay evidence for this very reason.

[17] I am mindful that the Nova Scotia Court of Appeal in ***Waterman*** (*supra*) makes it clear that while the ***ISO*** procedure is meant to simplify interjurisdictional support applications, but not at the expense of procedural fairness. In the same vein, it would be unfair to a party responding to an ***ISO*** application to allow into evidence untested, unqualified medical evidence which goes to the very issue to be

determined, namely whether Mr. Marsh is unable to work due to disability and, therefore, unable to pay child support.

[18] For all of these reasons, I decline to admit and consider the letter from Dr. Merker.

## MR. MARSH'S APPLICATION

[19] Mr. Marsh seeks a reduction of the amount of child support payable, from $345.00 per month to nil. He also seeks a reduction in the arrears owing. Based on his reported income since 2006, he calculates arrears of $16,923.00 as of December 1, 2014. The income reported on his tax returns from the Workplace Safety and Insurance Board of Ontario (WSIB) arises from a 2004 hand injury.

[20] Mr. Marsh filed a financial statement in Form K, which outlines his current annual income of $9,251.84, from WSIB. The financial disclosure shows a start date for benefits in May, 2006 at the rate of $426.41 weekly. The benefits appear to have been indexed over the years, and by January, 2009 he was receiving $466.06 per week. Then in September, 2009, his weekly benefits were reduced to $142.77. Mr. Marsh offered no explanation for the reduction in benefits.

[21] He filed notices of assessments from Revenue Canada which show the following income from WSIB:

| YEAR | INCOME |
|---|---|
| 2013 | $9,150.00 |
| 2012 | $8,866.00 |
| 2011 | $7,445.00 |
| 2010 | $7,615.00 |
| 2009 | $19,702.00 |
| 2008 | $24,518.00 |
| 2007 | $22,947.00 |
| 2006 | $22,161.00 |

[22] Mr. Marsh's statement of expenses shows very few expenses. He indicates in his affidavit that he lives with his mother because he cannot afford his own home. However, he lists a loan payment of $900.00 per month to Ford credit for a 2013 Ford 150 XLT truck. In his materials, he indicates this truck is valued at

$40,000.00, and the balance on the loan is shown at $40,000.00. He lists no other assets, other than a chequing account which is overdrawn.

[23] He further states in his affidavit that he purchased the Ford F150 truck while in a common-law relationship with a former partner, whose financial resources allowed him to obtain the loan. He says they separated but he "cannot get out of this arrangement". Presumably, he has continued to pay the loan and operated the truck since separation.

[24] In his affidavit, Mr. Marsh describes the 2004 hand injury he sustained while working as a cable installer. He says he was off work through 2004 and tried to return to work in 2005-2006. He says the injury became too painful and he stopped work in the summer of 2006. He says he suffers chronic pain and depression, which has prevented him from working since.

[25] Mr. Marsh also attached to his affidavit a letter from the Family Responsibility Office in Ontario, which confirms that the Order dated September 12, 2005, has not been changed by the court or by agreement of the parties since it was filed with the Director for Enforcement. The total amount of arrears calculated by that office is $44,023.45. There is no interest calculated on the arrears, despite a clause in the order setting an interest rate.

[26] Mr. Marsh claims in his affidavit that he did not get notice of the 2005 hearing in Ontario in which income was imputed at $40,000.00 and child support was set at $345.00 per month. Under the Ontario ***ISO*** procedures, a respondent would normally be served with a copy of the application, though not necessarily the court date. It is not clear what documents were served on Mr. Marsh when Ms. Manuel applied to vary, and I am not compelled to seek that information from the reciprocating jurisdiction (***Waterman*** (*supra*)). In any event, Mr. Marsh did not appeal the 2005 decision, and did not file a motion to vary until January, 2015.

[27] The notices sent by the Nova Scotia court to Mr. Marsh advise of his right to participate in or attend the hearing, either personally or through counsel. The notices include a recommendation that he seek legal advice, and advises of the right to file additional information.

[28] Mr. Marsh did not participate in the hearing held July 9, 2015. I am satisfied he received notice of the date via registered mail in accordance with ***Waterman*** (*supra*). He did not participate in the adjourned court date on October 20th, though

he did not retrieve the registered letter enclosing notice of that adjourned date. I am satisfied the notice was sent to the address shown in his documents.

[29] With a court proceeding initiated by him underway, the onus is on Mr. Marsh to ensure he retrieves such mailings. His failure to do so means he had, but lost, the opportunity to respond to Ms. Manuel's materials. I find the requirements of procedural fairness have been met in these circumstances.

***Issue 1: Has there been a change in circumstances to justify variation of the support order issued in 2005?***

[30] Mr. Marsh says his circumstances have changed since the 2005 order was issued. He says he has been disabled and unable to work since 2006. He has provided income tax returns from 2006 - 2010 and WSIB printouts showing his weekly payments from May, 2006 to August, 2014. This is the first income information to which Ms. Manuel has been privy to since at least 2004. Mr. Marsh did not make ongoing disclosure as required under the 2005 order.

[31] Section 37(1) of the ***Maintenance and Custody Act***, Chapter 160 of the Revised Statutes, 1989 *as amended by* 1990, c. 5, s. 107; 1994-95, c. 6, s. 63; 1997 (2nd Sess.), c. 3, 1998, c. 12, s. 2; 2000, c. 29, ss. 2-8; 2012, cc. 7, 25; 2014, c. 19 states as follows:

> 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.

[32] What constitutes a change of circumstances for the purposes of a s. 37 variation is found in s. 14 of the *Guidelines*, which reads in part:

> **14** For the purposes of Section 37 of the Act, any one of the following constitutes a change in circumstances that gives rise to the making of a variation order in respect of a child maintenance order:
>
> > (a) in the case where the amount of child maintenance includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child maintenance order or any provision thereof;
>
> **13** Section 19 of the *Guidelines* allows the court to impute income, as it considers appropriate, in certain circumstances. It reads in part:

> **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;

[33] As Justice Forgeron stated in ***Clarke v. Gale,*** 2009 NSSC 170:

> **16** An application to vary is not an appeal of an original order, nor is it an opportunity to retry a prior proceeding. The existing order must be treated as correct as of the time the order was made. The existing order can only be varied if a party proves that a material change in the circumstances exist, and as a result of that change, the current order no longer meets Adrianna's best interests: **Gordon v. Goertz,** [1996] 2 S.C.R. 27.
>
> **17** A material change has been described as one where, had the facts existed at the time the order was made, the judge likely would have made a different order. A material change includes circumstances where something unexpected happens or where something that was expected to happen does not. A material change must be more than a minor or temporary change. The change must be a substantial, continuing change which impacts upon the foundation upon which the existing order was made and which affects the child or the ability of the parents to meet the needs of the child.

[34] The burden is on the party seeking variation to prove that circumstances have changed. The onus is not on the support recipient to prove that circumstances have **not** changed.

[35] I am not aware of the circumstances under which the court imputed income to Mr. Marsh in 2005. What a judge is to consider in doing so was summarized in ***Gould v. Julian***, 2010 NSSC 123, where Justice Darryl W. Wilson stated:

> [27] Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in **Hanson v. Hanson**, [1999] B.C.J. No. 2532, as follows:
>
> > **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". ...
> >
> > **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 un-remunerative 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.

[36] I am also guided by the following principles from the cases dealing with this issue:

- Orders are presumed to be correct when issued (***Power v. Power,*** 2015 NSSC 234);
- The decision to impute is a determination of fact (***Trang v. Trang,*** 2013 ONSC 1980);
- Imputed income is not an interim or temporary figure which is subject to correction when the payor gets around to disclosing their income;
- There is no point imputing income in cases where a payor fails or refuses to appear and make income disclosure, if the court is going to vary the order to reflect declared income after the fact (***Trang*** (*supra*));

[37] As Justice Jollimore suggested in ***Power*** (*supra*), the first question is "Why was income imputed in the first place ?" In the case before me, Mr. Marsh did not appear at the 2005 hearing, nor provide income disclosure. So the reason why income was imputed is clear. The second question is "How did the court determine the appropriate sum to impute ?" The answer to this question is less clear. Mr. Marsh did not provide an explanation. No transcript of the 2005 hearing was filed. Ms. Manuel did not address this in her evidence.

[38] However, I do know from his affidavit that Mr. Marsh was working as a cable installer until his hand injury in 2004, then was off work for a period of time

collecting employment insurance benefits. He attempted to return to work in 2005, but stopped work in May, 2006 and began receiving WSIB benefits.

[39] The Ontario court imputed income on December 9, 2005. At that time, Mr. Marsh was earning employment income as a cable installer. It was a few months after the hearing that Mr. Marsh stopped work. Even relying on WSIB benefits, his income remained relatively stable until 2009. It was only in 2010 that his reported income dropped by more than half to $7,615.00.

[40] I am satisfied there was a change in Mr. Marsh's financial situation in September, 2009 when his WSIB benefits reduced from $466.06 weekly to $142.77 weekly. However, that is not the end of the inquiry. Mr. Marsh has not explained the reduction in benefits. There is no admissible medical or credible other evidence to persuade me that Mr. Marsh's income reduction is related to an ongoing disability.

[41] Further, Mr. Marsh appears to be making a payment of $900.00 per month on a truck loan. Since he has not sold the truck to pay out the loan, it is safe to assume he continues to operate it. He would incur (at a minimum) $200.00 per month to cover the cost of running, insuring and registering the truck. In order to cover these costs, I conclude Mr. Marsh must be earning more than what he reports for tax purposes from WSIB. The Court of Appeal decision in ***Snow v. Wilcox***, 1999 NSCA 163 applies to this situation as readily as it does to a self-employed businessman.

[42] Further, Mr. Marsh erroneously states in his affidavit that there are no tax implications on the benefits he receives. In fact, the figure should be grossed up because he receives these benefits free of tax. At 23%, his grossed up income from WSIB would be approximately $11,922.00. Added to that is the income he must be earning to pay his vehicle costs, grossed up to $1,428.00/month or $17,136.00 per annum.

[43] In total, I find he is earning <u>at a minimum</u> $29,058.00 per annum (gross) for purposes of child support, and has been earning at least that much since 2013, when he incurred the truck loan.

[44] The Supreme Court in ***Gordon v. Goertz,*** [1996] 2 SCR 27 was clear that in order to find a material change in circumstances which merits adjustment of a child support award, the court must be satisfied that 4 factors exist:

- The change is real and not contrived;

- The change is of a substantial and continuing nature;
- The change impacts the ability of a parent to meet the child's needs;
- If the changed circumstances had existed at the time the earlier order was issued, the result would have been different.

[45] I am not satisfied Mr. Marsh has met this test. He has provided no admissible medical evidence to support his claim of ongoing disability. I find it difficult to accept that due to a 2004 hand injury, he is disabled from any and all occupations. I note that less than six months after income was imputed to him by the Ontario court, he went off work on disability benefits. The reason why WSIB reduced his benefits in 2009 remains unexplained. Simply put, he has not satisfied the court that he does not choose to remain unemployed.

[46] And finally, if Dunn, J. had known of Mr. Marsh's injury, the order would not necessarily have been different. Mr. Marsh was working in December, 2005. Given the nature of the injury and his work status at the time, the court would not likely expect he would be off work with a permanent disability six (6) months later. And even if that possibility was contemplated, Mr. Marsh's income did not decline significantly until 2009. I doubt the court would have gazed into its crystal ball that far ahead.

[47] For all of these reasons, Mr. Marsh has failed to satisfy this court, on a balance of probabilities, that a material change of circumstances justifying a reduction in child support has occurred.

***Issue 2: Should Mr. Marsh's variation ISO application be granted to reduce his prospective child maintenance obligation to nil?***

[48] There is insufficient evidence to support Mr. Marsh's application to vary his child support to nil. He must advance clear and convincing evidence to persuade the court that he is unable to pay support because his income falls below the cut off under the *Guidelines*. He has not done so.

[49] Mr. Marsh is required to pay the *Table* amount (Ontario) for an annual gross income of $40,000.00 in accordance with the order issued in 2005. That obligation will continue for so long as Kristina is a child of the marriage, or until varied by a court of competent jurisdiction.

[50] In her brief, Ms. Manuel asks the court to impute a higher income to Mr. Marsh and increase his child support payments. In 2005, income was imputed to

him at the level of $40,000.00. Ms. Manuel asks that income be imputed to him now at $50,000.00, which reflects Statistics Canada income information for a male worker in Ontario in the same age bracket as Mr. Marsh.

[51] There is no application before me by Ms. Manuel to increase the child support payable. In the circumstances, I am not prepared to do so.

***Issue 3: Should there be a retroactive adjustment of child maintenance and recalculation/forgiveness of arrears owing?***

[52] Mr. Marsh says irrespective of the amount of arrears, he cannot pay ongoing support or make payments towards the arrears at this time.

[53] He completed his own calculation of child support arrears and attached it to his affidavit as Exhibit "F". It reflects the amount of child support payable for one (1) child under the Ontario *Tables*, for the amounts of income reported on his tax returns since 2006. His calculation shows $16,923.00 owing, which is less than half the sum calculated by the Ontario Responsibility Office.

[54] Ms. Manuel opposes any reduction in arrears. She says she has received little financial assistance from Mr. Marsh since their separation. Since 2010 she has received some money through garnishee. She says she has paid for all her daughter's needs since separation herself, including tutoring and recreational fees. She also says she would not have been able to make ends meet without her family's assistance.

[55] When asked by the court, Ms. Manuel testified that if she receives the arrears, she will set the money aside for her daughter's education. She has been saving $50.00 per month, but she says the monies owed would greatly assist her daughter in pursuing her post-secondary education. Kristina is now in grade 11 and starting to make plans for her future.

[56] The Nova Scotia Court of Appeal in ***Smith v. Helppi,*** 2011 NS**C**A 65 noted the distinction between retroactive child support awards and retroactive reductions. In the case of a new support award, the factors set out in ***D.B.S. v. S.R.G.,*** 2006 SCC 37 apply. On the other hand, retroactive reductions often involve a request that arrears accumulated under the Order be forgiven (***Smith v. Helppi*****),** (*supra*) and ***Brown v. Brown,*** 2010 NBCA 5, so different considerations apply.

[57] Mr. Marsh's reported income remained steady after 2006 but declined by half in 2010. He does not state in his affidavit when he purchased the 2013 Ford

F150 truck, nor how long he has been paying vehicle expenses. If he bought the truck new, these expenses date back to at least 2013.

[58] He does not say how long he was in a common-law relationship and shared expenses with a partner. However, he says his partner had expectations that he met by buying the 2013 Ford F150. He also says the purchase was made possible by his partner's resources, which speaks to the lifestyle they shared.

[59] I have found Mr. Marsh is currently earning (at a minimum) $29,058.00. He did not file his tax returns for 2004 or 2005 with the court, but according to his affidavit, he had income in 2005 of $23,430.00. His income in 2006 was $22,161.00 from all sources. He relied solely on WSIB benefits in 2007 and 2008, but in those years his income increased marginally. His WSIB benefits were reduced in September, 2009.

[60] In considering this ***ISO*** application, I must balance the competing principles of certainty and flexibility, while respecting the core principles of child support which include the following:

- child support is a right of the child;
- a child's right to support survives the breakdown of a parent's relationship;
- child support should, as much as possible, allow the child to continue living the same standard of living experienced before the relationship broke down;
- the amount of child support will vary based upon the payor's income;

[61] I also endorse the view that a payor parent has an obligation to earn an income commensurate with their education, training, experience and opportunities to support a dependent child, where possible.

[62] In this case, Mr. Marsh has not met his child support obligations for many years. He did not provide Ms. Manuel with his tax returns, so she could assess whether his income had changed, and whether the child support should be varied. He delayed filing an application to vary until January 16, 2015, all the while allowing arrears to accumulate and refusing to provide income disclosure. The only monies Ms. Manuel has received in past years are from a garnishee. Mr. Marsh has not explained the delay in filing his application, and has engaged in blameworthy conduct. The child has ongoing needs and he has contributed little to her support.

[63] I recognize that a refusal to adjust the arrears could result in hardship to Mr. Marsh, and could impair his ability to pay prospective support (***Conrad v. Skerry***, 2012 NSSC 77; ***Kelly v. Anthis,*** 2012 NSSC 88; and ***Korol v. O'Dwyer,*** 2013 NSSC 48.

[64] However, as noted above, I am satisfied he has more disposable income available to him than $765.00 per month from WSIB. I also note that rather than pay his ongoing child support obligation, or any amount towards his arrears, he chose to incur a significant loan payment for a 2013 truck while living common-law with a partner whose financial position enabled him to obtain the truck loan. Mr. Marsh's affidavit makes it clear that he bought the truck to meet his partner's expectations. This suggests a lifestyle where new vehicles are given priority over child support obligations. Mr. Marsh has clearly placed his own interests above those of his daughter.

[65] Further, there is no medical evidence before the court to prove that the injury to his hand constitutes a total disability, nor that the disability continues at present. There is no evidence of whether he has sought re-training to perform other work. There is insufficient evidence to support his claim that he is completely disabled and unable to work to pay his obligations.

[66] Finally, there is little likelihood Mr. Marsh will ever pay the arrears in full. However, even a small amount collected towards arrears is better than none, and would directly benefit the child, for whom post-secondary education costs are looming.

[67] Having considered all of the evidence, the caselaw and the onus on Mr. Marsh, I decline to forgive or adjust the arrears of child support owed by Mr. Marsh under the 2005 Ontario order.

[68] I would add that even if I was inclined to adjust the arrears, I would not accept Mr. Marsh's figures. He calculated those figures based on his reported income from 2006-to-date. I have found his income did not change significantly until September, 2009. I have also found he is earning a higher income than he reports from WSIB since 2010. If the arrears were to be recalculated, I would limit the recalculation to the past three (3) years and impute income of $29,058.00 per annum to Mr. Marsh since January 1, 2013.

## CONCLUSION

[69] Mr. Marsh's variation application under the ***ISO Act*** is dismissed.

MacLeod-Archer, J.