

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Maintenance Enforcement) v. Coolen, 2008 NSSC 182

Date: 20080612

Docket: SFHMEA-050313

Registry: Halifax

Between:

Director of Maintenance Enforcement
for the Province of Nova Scotia

Applicant

v.

Brian Christopher Coolen

Respondent

- and -

Docket: 1201-51058

Registry: Halifax

Between:

Brian Christopher Coolen

Applicant

v.

Marylee Louise Coolen

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

May 22, 2007, December 5 and 6, 2007, January 30 and
31, 2008, and May 7, 2008, in Halifax, Nova Scotia

Counsel:

Nicholas Ann Dorrance
Counsel for the Director of Maintenance Enforcement for
the Province of Nova Scotia

Brian Christopher Coolen, self-represented

Marylee Louise Coolen, self-represented

By the Court:

[1] On December 14, 2006, the Director of Maintenance Enforcement for the Province of Nova Scotia applied for relief under the *Maintenance Enforcement Act*, S.N.S. 1994-95, c. 6.

[2] Specifically, they requested the following:

- an order finding Mr. Coolen in default of maintenance payments;
- an order requiring Mr. Coolen pay the arrears in full by a specified date;
- an order requiring Mr. Coolen to pay all fees to the Director pursuant to the *Maintenance Enforcement Act, supra*, by a specific date;
- an order requiring Mr. Coolen to report to the Director, on a regular basis; and
- any other order the court deems appropriate pursuant to s. 37 of the *Maintenance Enforcement Act, supra*, including an order for imprisonment and an order requiring Mr. Coolen to pay the Director's cost of this application.

[3] The Director was responsible for enforcement of the following orders:

- the interim order issued on October 30, 1996, whereby Mr. Coolen was to pay \$561.00 per month for the support of the children commencing October 15, 1996, and each month thereafter together with costs (Mr. Coolen was present and self-represented for this order); and
- the most recent court order is the corollary relief judgement dated July 12, 2005, where Mr. Coolen was to pay \$461.00 commencing on July 1, 2005. Mr. Coolen was ordered to pay child support arrears set at \$30,016.00, less \$5,000.00 accounting for the transfer of his interest in the matrimonial home.

[4] In the original order, it was clear that Mr. Coolen was not co-operating with the resolution of the family difficulties. He was ordered to transfer property and, in the event he failed to do so, the respondent, Marylee Louise Coolen (hereinafter referred to as “Ms. MacPhee”), was given authority to withdraw money from his share of the proceeds of land to pay towards child support.

[5] At the time of the corollary relief judgement, the court appeared aware of the family dynamics and at least one hospitalization of Mr. Coolen. It is not for this court to go beyond those court orders.

[6] As of December 4, 2007, arrears were \$43,058.27 consisting of current arrears of \$14,136.16 and \$30,016.00 existing at the time of the corollary relief judgement. Outstanding fees are \$1,226.48. According to this decision, arrears will continue to accumulate to and including **June, 2008**.

The RRSP

[7] Ms. MacPhee advised that in the spring of 2001, Mr. Coolen contacted her to advise he was going to collapse his RRSP and wanted to know where to put her half. He would not divulge any details about the location of the RRSP.

[8] On September 17, 2002, Mr. Coolen advised Maintenance Enforcement that he was trying to work out an arrangement for the arrears to be paid out using the proceeds of his RRSP. That never occurred.

[9] After years of unpaid child support, Ms. MacPhee came upon information regarding the whereabouts of this RRSP. Ms. MacPhee advised Maintenance Enforcement that Mr. Coolen had an RRSP coming due in February, 2007.

[10] Maintenance Enforcement accessed those funds, collapsed the RRSP and held the funds in trust pending this proceeding. These funds, **\$20,780.37**, had been put in trust on October 31, 2007, with the Director of Maintenance Enforcement.

[11] Ms. MacPhee seeks to have the proceeds of this RRSP split so that one-half of it goes to her as a result of the property division and the balance goes towards the arrears to support her children in university. Since the property division is not before me and this RRSP did not form part of the corollary relief judgement, I will not assess the division of the RRSP as an aspect of their property division.

Second Application - Consolidated with Maintenance Enforcement's Application

[12] On May 15, 2007, Mr. Coolen made an application to vary, seeking an order to retroactively vary his obligation to pay child support commencing November 15, 1996, or, in the alternative, August 15, 2005. At the time of his application, he lived in Calgary and was self-employed with Belfield Properties Limited in Enfield, Nova Scotia. Both actions have been consolidated.

[13] There have been a number of historical problems hampering enforcement of the court orders. They are as follows:

- Mr. Coolen has experienced periods of illness;
- He has failed to respond in a timely and accurate fashion to the requests of Maintenance Enforcement respecting the filing of his financial particulars as requested throughout their discussions with him;
- He has failed to keep them informed of his whereabouts;
- When garnishments have been issued, he left the job site. This necessitated another series of enquires and pursuit of information.

The Case of the Director of Maintenance Enforcement

[14] Mr. Coolen failed to attend hearings for the dissolution of their property and to address child support issues. He accumulated significant arrears which were set and incorporated into the corollary relief judgement and continued to today's date.

[15] There was a period of time of voluntary payments. These appeared to cease in 2002. From December, 2002, to the current date, except for some minor contributions while this proceeding was underway, what was received from Mr. Coolen was by way of garnishee.

[16] Ms. Carolyn Reynolds, an Enforcement Officer with Maintenance Enforcement, advised that they have been unable to enforce the order.

[17] The evidence of Ms. Reynolds is of multiple attempts to track Mr. Coolen down and find his place of employment only to have him leave that employment for another. There were many documented promises to provide addresses and financial statements most of which were false promises of compliance.

[18] The maintenance enforcement file indicates that on **December 15, 1997**, Mr. Coolen called the enforcement officer and advised that he had been unemployed since October, 1996, and was living with family and had no income.

[19] On **January 28, 1998**, Mr. Coolen advised that he had no income and that he had not applied to have the court order reviewed because he could not afford it. He advised that he was not on social assistance.

[20] On December 12, 2000, he paid cash to the Maintenance Enforcement Program in the amount of \$560.00 for December 20, 2000. He *talked* to an enforcement officer about making an application to vary.

[21] He dropped off \$560.00 on April 17, 2001, and \$561.00 on April 15, 2002. He dropped off \$561.00 on September 17, 2002, and *again advised* that he was attempting to work out arrangements with the arrears.

[22] A garnishment was issued in April, 2003.

[23] Mr. Coolen failed, despite repeated requests, to provide financial information and keep in contact with Maintenance Enforcement.

[24] In November, 2003, he obtained legal aid for a short period of time. They wrote to Maintenance Enforcement. As a result, on **November 18, 2003**, Maintenance Enforcement put on hold the revocation of his drivers licence.

[25] His counsel advised Maintenance Enforcement that since November, 2003, Mr. Coolen was in hospital.

[26] On **September 29, 2004**, Mr. Coolen went to Maintenance Enforcement. He *finally* dropped off his completed income and expense form and proposed that he pay \$326.00 per month based on earning \$11.00 per hour for a 40 hour week. At that time, he advised that he was self-employed.

[27] Maintenance Enforcement sent a letter to Mr. Coolen indicating that his proposal would be accepted and that he should make court application and that he must also report to them monthly.

[28] Shortly thereafter, on **November 22, 2004**, Maintenance Enforcement lost contact with Mr. Coolen.

[29] In **December, 2004**, Maintenance Enforcement had information suggesting Mr. Coolen was an employee of Doortech and issued a notice of garnishment. They spoke with the owner of Doortech on December 1, 2004, who advised that Mr. Coolen was a subcontractor. They advised that Mr. Coolen had 23 hours of work at 10 hours per day due to him in that week.

[30] Maintenance Enforcement continued to make *unsuccessful* attempts to have a firm agreement for regular payments from Mr. Coolen. He *continued to promise* payment and *sporadically provided some money*, clearly not sufficient to address the arrears or his ongoing responsibilities.

[31] Mr. Coolen advised on **August 3rd** that he was not functioning well and that he was under medical care. On August 16th, he was contacted. The woman who answered his phone advised *he was working in Halifax*.

[32] On August 17th, Mr. Coolen advised that he had been working for Mr. Raymond Green. He did not know what he would be earning or how many hours he would get. He promised he would advise.

[33] On **September 7th**, he attended Maintenance Enforcement with another updated income and expense form and a letter from his treating psychiatrist, Dr. Feltham.

[34] Once again, Mr. Coolen worked sporadically for different businesses, although he did not keep Maintenance Enforcement advised of same.

Application to Vary

[35] The parties had three children. The corollary relief judgment indicates two of these children, Leslie, born April 19, 1985, and Michele, born March 27, 1988,

were the subject matter of the corollary relief judgment.

[36] Ms. MacPhee advised that she has been fighting for child support for 11 years. She advised that she has earned an average of \$24,000.00 and most of her income had gone, and continues to go, towards the care of her children.

[37] Ms. MacPhee testified *she was blessed* with three children who have worked hard to become self-sufficient. *The lack of contribution from Mr. Coolen and her own depleted resources caused her credit rating to fall and her savings to deplete.* She has relied on credit cards and overdraft to get by this far.

[38] She advised that Christopher graduated from high school in 2001 and earned his Heavy Duty Equipment Mechanics Diploma after two years at the Nova Scotia Community College.

[39] Leslie graduated high school in 2003. In June, 2008, she graduates with her Social Work Degree from university. Michelle graduated high school in 2006, completed her Emergency Medical Responder Certification and stopped to earn money to go towards her Emergency Medical Technician Certification. She will finish in June, 2008.

[40] By the time Mr. Coolen presented himself before the court ready to address his chronic nonpayment of child support, the children were soon to be independent. He will simply be left paying down arrears.

[41] At the time of the application, Mr. Coolen's last known address was P.O. Box 84035, 3625 Shaganappi Trail North West, Calgary, Alberta, T3A 0E2. Mr. Coolen's current address is 701-401 Athabasca Avenue, Fort McMurray, Alberta, T9J 1H3.

Disclosure

[42] Obtaining full and accurate disclosure has been difficult. The court does not have sufficient independent evidence to accurately conclude what Mr. Coolen actually earns.

[43] In December, 1997, Mr. Coolen advised Maintenance Enforcement that he had been unemployed since October, 1997 (the date the corollary relief judgment required support payments to continue).

[44] As of December, 1997, Maintenance Enforcement made numerous demands to Mr. Coolen to provide his financial documentation. He promised to file; occasionally stopped by to pay one payment; moved; worked sporadically; on one occasion retained counsel with Nova Scotia Legal Aid; was subsequently hospitalized; and finally, on September 29, 2004, dropped off his completed income and expense form with no attachments.

[45] At the time, he was self-employed. He advised in 2004 he intended to make application to vary and he proposed an interim payment pending his application.

[46] His application to vary was not perfected until 2007.

[47] His statement of income filed on May 15, 2007, shows annual income of \$8,184.96. The 'corporate financial statement' is in his own handwriting. He does confirm the figures are only estimates.

[48] However, on the last day of the hearing, May 7, 2008, Mr. Coolen filed with the court an undated affidavit and attached to that affidavit was an Income Tax and Benefit Return for 2007 which was signed by Mr. Coolen and dated April 30, 2008. This shows his line 150 income at \$42,883.98. Without the RRSP income, his total income from all other sources would be \$13,197.74.

[49] Mr. Coolen has worked for others and has also been self-employed. There are a number of employers mentioned in the enforcement officer's affidavits, all of who were no longer his employers by the time Maintenance Enforcement became aware of their existence.

[50] Mr. Coolen was not forthright with Maintenance Enforcement when he was employed. He left each place before a garnishee order could be substantially effective.

[51] He reactivated his company, Belfield Properties Limited, in February, 2007. His assets consisted of a laptop computer, a 1998 Jeep, hand tools and equipment for a total estimated value of \$1,400.00.

[52] The documentation he has provided shows the following *reported* income on line 150:

1997 - \$4,333.00

1998 - \$10,560.00

1999 - \$10,435.00 (net)

2000 - \$21,038.24 (net)

2001 - \$20,533.00

2002 - \$30,133.00

2003 - \$4,973.00

2004 - \$10,020.00

2005 - \$5,419.00

2006 - \$11,696.00

2007 - \$42,883.98 (RRSP income included in this figure)

[53] Mr. Coolen also provided proof of employment from Ms. Thompson on November, 2006, for employment between January, 2006, and November, 2006, of \$7,460.00. He was hired on a full-time basis on November 13, 2006, with an anticipate income from this employment of \$ 11,000.00.

[54] By the time Maintenance Enforcement spoke to her, he was no longer employed there.

[55] In the course of this proceeding, Mr. Coolen provided a letter from his brother in Calgary promising him a temporary job starting February 5, 2007, to April 15, 2007, earning \$400.00 to \$600.00 a week.

[56] Mr. Coolen's explanation as to why that did not work out was not corroborated. He decided to recommence his own operation.

[57] He provided information concerning 2001 and 2002 income tax arrears of \$20,326.82. Canada Customs and Revenue Agency (hereinafter called "Revenue Canada") required additional information from him before they would agree to a repayment schedule. The court is unaware of the results of these negotiations.

[58] Mr. Coolen provided a collection of documents which appears to reference payments from daily trip sheets kept for Belfield Properties Limited, Delivery Operations, as directed by 4-Point Delivery. 4-Point Delivery advised the delivery fees are paid directly by delivery customers. Drivers are responsible for their own payments. The greater part of ex. 12 appears to be a collection of handwritten documents which are not really very helpful.

[59] The owner of 4-Point Delivery, Ms. Brenda Bamford, confirmed in writing that Mr. Coolen and/or Belfield Properties Limited worked in association with 4-Point Delivery in March and April, 2007. They collected a monthly radio fee and a fee for each trip assigned, but at no point did they pay him.

[60] I cannot rely on either his income tax returns or his own financial statements as an accurate account of his income.

Medical History

[61] Mr. Coolen was born on April 27, 1959. He is 49 years old.

[62] For a period of time, Mr. Coolen was under psychiatric care due to several grave attempts to take his own life. His emotional and mental health difficulties were apparent on separation.

[63] Mr. Coolen has a fairly extensive medical history which he believes has interfered with his ability to retain employment and pay child support. He argues that his inability to connect with an appropriate psychologist and therapeutic medical advisor impairs his ability to earn an appropriate level of income.

[64] Dr. Buffett, a specialist in psychiatry working at the Nova Scotia Hospital, advised he treated Mr. Coolen from **February, 1997, to April, 1998.**

[65] He reported that Mr. Coolen's psychiatric history began in **1994** when he was diagnosed as suffering from bipolar disorder - manic type. He was treated out of hospital by another psychiatrist.

[66] Mr. Coolen was hospitalized from **November 5 to 7, 1996**, for a depressive episode and again hospitalized from **November 28, 1996, to January 30, 1997**, for continued depression with a major suicide attempt by carbon monoxide poisoning on **November 26, 1996**.

[67] He received outpatient care until he moved to Alberta in **April, 1998**.

[68] Mr. Coolen had been prescribed medication on a regular basis. Dr. Buffett advised that medication had not had a significant positive impact on his illness.

[69] Mr. Coolen discontinued his psychiatric medication between February and March, 1998. He is not currently taking prescribed medication for these historical difficulties.

[70] From **February, 1997, to April, 1998**, Dr. Buffett advised that Mr. Coolen functioned on a marginal basis because of depression. He eventually began to work with his father and began to improve. Dr. Buffett advised that he decided to move to Alberta for greater work activities. Since that time, he has no first hand information.

[71] Dr. Feltham, a psychiatrist with the Abbie J. Lane Memorial Building, advised on August 8, 2005, that while Mr. Coolen was first diagnosed with depression and type II bipolar disorder in 1994 and treated out of hospital, he was subsequently hospitalized from **November 5 to 7, 1996, and again from November 28, 1996, to January 30, 1997**.

[72] Dr. Feltham advised that he had no record of Mr. Coolen's psychiatric condition from **April, 1998, until his return on January 25, 2001**. He noted that it was reported that he had remained mentally well with no evidence of recurrence of psychiatric disorder and, when seen by Dr. Buffett, the records indicated *that he was well with insight into his past difficulties and would reach out for help in any return of psychiatric symptoms*.

[73] Dr. Feltham advised that Mr. Coolen was again hospitalized **in February, 2003**, for a depressive episode and then discharged. He was seen as an outpatient until his admission to the Abbie J. Lane Memorial Building in **November, 2003**, at which time he was seriously physically and psychiatrically ill due to a very serious suicide attempt.

[74] When found, he was suffering from exposure, as well as the effects of attempted strangulation and a knife wound. He may have been released in March or April, 2004.

[75] Prior to the corollary relief judgment, Mental Health Services advised Ms. MacPhee's counsel that the episode had been developing over a *two month period*.

[76] He was reassessed when admitted to hospital, in particular, with regard to the failure of psychotherapeutic interventions. Dr. Feltham decided Mr. Coolen was suffering from 'characterologically driven serious depressive difficulties'. Dr Feltham doubted the diagnosis of bipolar disorder.

[77] Dr. Feltham sought and obtained opinions from two world class experts, Dr. Martin Alda of McGill, Dalhousie and University of Pennsylvania, a world expert in bipolar disorder and mood disorders, and Dr. Lorna Smith-Benjamin of the Universities of Utah and Wisconsin. Both these experts indicated Mr. Coolen did not suffer from bipolar disorder but had ongoing/recurrent depressive episodes related to characterologically driven issues.

[78] Mr. Coolen continued with Dr. Feltham with intensive short-term dynamic psychotherapy to deal with the underlining mechanisms that produced his issues. After some therapy, he felt well enough and busy enough with his job such that for a few months, there was no contact. Contact was reinstated for intensive short-term dynamic therapy sessions. Dr. Feltham said that he was not seen from January 21, 2005, to July, 2005.

[79] Mr. Coolen believes he has suffered a decade of diagnosed psychiatric difficulties with an incorrect diagnosis. Dr. Feltham has indicated that incorrect diagnosis has interfered with maximum care. However, despite interventions by other psychiatrists, there were many periods when he was suffering from serious depressions and unable to be helped despite the best efforts of many well-trained psychiatrists.

[80] Dr. Feltham suggested there was significant evidence that the work completed in the time of his admission in 2005 made a significant difference in his life, but it requires concentrated and completed work for a full change and full remission to be achieved.

[81] Henry Laltoo, a Clinical Social Worker with the Mental Health Outpatient Department of the Abbie J. Lane Memorial Building, advised by letter dated November 9, 2006, that Mr. Coolen's situation remained unchanged. His mental status precludes his ability to be employed on a continuous basis.

[82] Thus, clinician decided that his earnings are sporadic and unpredictable and his ability to address any outstanding family maintenance responsibilities are limited in the extreme. He continued to be considered a patient in the Mental Health Outpatient Department but with Dr. Feltham's absence, Mr. Coolen was placed on a waiting list for specialized psychological intervention.

[83] On December 11, 2006, Mr. Coolen was advised he had an appointment for September 4, 2007. Mr. Coolen made it clear that he was not interested in other options or accessing other clinicians providing similar therapeutic modalities.

[84] No further intervention has taken place.

[85] The documentation and transcript of earlier proceedings depict, without doubt, that Ms. MacPhee was left at separation with no assistance from Mr. Coolen. They separated in July, 1996. Mr. Coolen was employed for 16 years with the Ultramar refinery until it shut down in 1994 and, thereafter, he was self-employed as a general contractor with Belfield Properties Limited, in Hants County. In September, 1996, he was on employment insurance.

[86] Ms. MacPhee was left with significant personal debt and Mr. Coolen's business debts. She was required to obtain court orders to sell the property and apply the proceeds to loans to address what she could.

[87] With her own diligent efforts to continue to work, the assistance of the province at times, and her family and his, she raised their children without emotional or financial assistance from the father. She has reason to be very proud of their accomplishments and their work ethic.

[88] Mr. Coolen has worked on a number of jobs, many of them under the table. He has left his employment when discovered by Maintenance Enforcement.

[89] Ms. MacPhee believes that Mr. Coolen simply refused at times to abide by a court order. The evidence supports this.

[90] Mr. Coolen was ordered to give ownership of one of five vehicles that he had owned at the time of separation to Ms. MacPhee. He did not follow the court order.

[91] He was ordered to provide financial information on several occasions and did not do so.

[92] He was ordered to pay child support, yet for the majority of time that he was employed, he did not despite evidence that he was working sporadically.

[93] Maintenance Enforcement appeared before the court on May 22, 2007, wherein they were informed that Mr. Coolen would be returning to Alberta where he would be employed selling vegetables.

[94] He was advised to maintain contact with Maintenance Enforcement. Mr. Coolen advised Maintenance Enforcement he would be renting a mobile home when he got back to Alberta.

[95] He provided the following address for himself: P.O. Box 84035, 3625 Shaganappi Trail North West, Calgary, Alberta, T3A 0E2. He did not provide a telephone number to Maintenance Enforcement or to the Department of Justice.

[96] Despite being told by the court in both February and May, 2007, that he was going to Alberta because he was able to work there, Mr. Coolen made few voluntary payments against arrears of maintenance.

[97] As the result of his stated commitment to continue to pay, Maintenance Enforcement reinstated his drivers licence. After failure to make payments, they commenced proceedings to revoke it.

[98] Mr. Coolen was ordered to provide complete disclosure each year from Revenue Canada. He has not complied.

[99] In 2007, his brother working in Alberta as a construction subcontractor offered him a temporary job starting February 5, 2007, and ending April 15, 2007. While other workers were unavailable, Mr. Coolen was able to earn \$400.00 to \$600.00 per week, weather and health permitting. Because he would have to drive a vehicle, this letter was offered to support his request to have Maintenance Enforcement reinstate his vehicle.

[100] His brother promised to assist him in reinstating himself in his trade. He agreed to monitor his ability to function while he was in Alberta.

[101] Since the matter has been before the court, Mr. Coolen has worked in Alberta independently. He has not worked with his brother as originally stated. His financial documentation is sufficiently devoid of particulars as to render them useless. He is able to live, feed himself and sustain some sort of employment related income.

[102] I would be unable to conclude what his annual income is without more accurate documentation and I would not rely on his returns as an accurate depiction of his income.

Entitlement of the Department of Community Services to Receive Arrears

[103] Ms. MacPhee required the assistance of the Department of Social Assistance for a period of time starting on **June 1, 1997**, with municipal assistance and then provincial assistance on **September 24, 1999**. In order to receive assistance, they demanded she sign *an Agreement to Sign Maintenance Income over to the Department of Community Services* on March 21, 1997.

[104] The total of arrears for the period up to May, 2008, is \$44,152.16 with fees of \$1,226.48.

[105] The total arrears owing to Ms. MacPhee for the support of her children under the current order is \$28,333.64. The amount currently available for payment against arrears is \$20,780.37.

[106] During the period of her receipt of assistance from June, 1997, to November, 1999, inclusive, arrears accumulated in the amount of **\$15,818.52**. That amount is owed to the Nova Scotia Department of Community Service.

[107] According to para. 11(a) of the agreement she entered into with the Department of Social Services, when the agreement ends, maintenance money will no longer be sent to the Department. This paragraph reads as follows:

10. I understand this Agreement ends the same day as my Family benefits ends.

11. (a) **After this Agreement ends, maintenance money will no longer be sent to the Department. All maintenance money will be paid directly to me unless I work out something different with the Court. Any money which is owed to me, from a time that this Agreement does not cover, belongs to me.** However, from March 21, 1997 to present the payor did not pay the maintenance money he owed me. The Department paid me additional in Family Benefits to make up what the payor did not pay in those months. If the payor pays the maintenance money for those months, I agree that the Department can keep the amount of maintenance that it paid to me for those months.

(b) Any maintenance money that the payor pays will be used to pay maintenance for the month in which the payment is received. Any money that is left over will be used to pay the maintenance that the payor owes for the earlier months. From the left over money, any money that is owed for a month that was covered by this Agreement belongs to the Department. Any money that is owed for a month that was not covered by this Agreement belongs to me.

[108] Both the Department of Community Services and Ms. MacPhee are signatures to this agreement.

[109] **None the less**, the Director of Maintenance Enforcement **continued to send** what they received from the garnishee, or from the payor, directly to the Department of Community Services to have them determine what if anything was owed from that payment to themselves before releasing the money to the recipient.

[110] After Ms. Baker testified, the court was advised Ms. Baker unilaterally and without authority placed a hold on any money currently being garnished from Mr. Coolen, received by Maintenance Enforcement and transferred to the Department

of Community Services, **thereby delaying the payment to Ms. MacPhee at a time when her two children were still in school.**

[111] At the time that Ms. MacPhee entered into the agreement to sign maintenance over, the agreement **did not stipulate** that Maintenance Enforcement was authorized to continue to forward to the Department of Community Services any monies pursuant to garnishment or otherwise.

[112] Counsel for the Director advised by brief that the authority to direct these payments from Maintenance Enforcement to the Department of Community Services arises out of s. 18(4)(b) of the *Maintenance Enforcement Act, supra*, as follows:

- (4) Money received by the Director may be paid to
 - (a) the recipient or to the beneficiaries under the order to the extent of the recipient or the beneficiaries' entitlement *or otherwise pursuant to the maintenance order; or*
 - (b) the Department of Community Services where money is owed to that Department *pursuant to an assignment of maintenance rights agreement* entered into between the recipient and a representative of the Department,and then to cover the costs and fees of the Director and then to the payor, where a balance remains.

[113] This section appears to contain an order of priority for payments once money is collected.

[114] The order being enforced and the entitlement of the children continues as long as they remain dependant in accordance with the law. The order is retroactive, current and prospective. **The children's entitlement is continuous.**

[115] Pursuant to the agreement between Ms. MacPhee and the Department, the right to direct payments **to the Department ceased as of the date the contract ceased.**

[116] I understand the contracts now being issued contain a provision that the right to direct the funds continues after the contract expires. This contract did not allow for that and the direction was without authority.

[117] Ms. MacPhee was grateful for the contribution of the Department to the stability of her family during those early years. She was financially vulnerable and continue to be so even after the agreement terminated.

[118] In this situation, while an order is ongoing it appears that the Department preferred itself as a creditor over the mother in the collection of child support intended to consistently maintain these children currently and prospectively.

[119] The Director is taken to know that the children continued to be entitled to support as they pursued their education. The direction of monies to the Department in order to facilitate paying down the debt owed to the Department of Community Services caused delays in directing the child support to the mother. This was already a stressful financial situation.

[120] The Department was preferred in priority to the children's current and future entitlement to support. This **seems to be at cross purposes to the duty of the Director to pay first what is owed to the children** and then to the Department and then to the Director as fees and finally to the payor should anything be left.

[121] Ms. Nichola Baker, Manager of the Prevention, Detection and Recovery Unit, Income and Employment Support Services at the Department of Community Services, testified as to **another risk Ms. MacPhee and others face.**

[122] She advised of the possibility that **if the court retroactively reduces Mr. Coolen's court order, Ms. MacPhee could be required to pay back the Department of Community Services the difference.** In a retroactive variation in a situation like this one, the Department could seek repayment from Ms. MacPhee for any arrears that were still owed to the Department.

[123] Ms. Baker advised the court that if the court retroactively adjusted the arrears and reduced the amount owing for the period of time the Department of Community Services carried Ms. MacPhee on their books, they would readjust their records and could require Ms. MacPhee to pay back some monies advanced by them to her to cover the original court order.

[124] The explanation provided did not satisfy me that they had an entitlement to do so or that they understood a retroactive analysis would be based on Mr. Coolen's ability to pay and not Ms. MacPhee's need or entitlement according to their benefit plan. Nor would a retroactive analysis of Mr. Coolen's obligation necessarily have anything to do with Ms. MacPhee's need for child support.

[125] For example: If the court reduced Mr. Coolen's monthly obligation to \$300.00 per month, in this case, both Ms. MacPhee and the Department would still be owed money and there would have been no overpayment.

[126] **If, however,** the court reduced the maintenance to \$200.00 because of the payor's financial ability to pay (which has nothing to do with the recipient's entitlement and need), according to the Department, the recipient would have received more than her entitlement and the Department would seek repayment from the recipient.

[127] Anything lower would likewise create an overpayment and the recipient would owe to the Department that overpayment.

[128] Presumably, a client's entitlement to social assistance rests on certain criteria. An assignment allows the Department to collect that which the payor owes in accordance with court order.

[129] The assignment provides reliable periodic support according to the recipient's entitlement from the payor.

[130] Nowhere is it suggested the Department pays in excess of the amount of the ceiling created by the evaluation of the recipient's entitlement even if the payor was order to pay greater than the recipient's entitlement.

[131] The calculation of the possible overpayment in a retroactive variation does not address the fact that the retroactive variation **does not address the recipient's need, it simply addresses circumstances about the payor's ability to pay.**

[132] A court could be expected to understand that a retroactive variation downward would negate the possibility a recipient or the Department may no longer have an enforceable debt.

[133] However, a court would not be aware of the effects of a retroactive variation on a recipient of social assistance. In this case, the effect of a retroactive variation would indeed cause considerable hardship to the recipient.

[134] The calculation, as explained to the court, confused the calculation of entitlement to social assistance with the calculation of entitlement by a dependant child from a parent according to the law respecting child support. They are clearly not the same.

[135] The re-calculation of historical payments in this manner can clearly work a **significant injustice** on the recipient without a court even becoming aware of the potential effects of this variation.

[136] I have been advised that the Department will accept direction from the court and the Director of Maintenance Enforcement in relation to the priority of payment of arrears between the Department and the client consistent with the best interests of the children.

[137] However, Ms. MacPhee would be left in a position of hardship should they retroactively assess her as to her entitlement to receive benefits due to a retroactive variation of Mr. Coolen's child support obligations. The criteria for the court's retroactive evaluation is separate from the criteria for assessing Ms. MacPhee's entitlement.

Conclusion

[138] From 1994 to 2008, Mr. Coolen has been incapacitated with significant mental health difficulties for a documented period in total of 23 months. He has also been employed and avoided disclosure for other periods of time. Other than the letters documenting his stay in hospital, I could not clearly determine when he was working although it is clear he was working until discovered by Maintenance Enforcement and thereafter would once again fall from view.

[139] He represented himself throughout these lengthy proceedings. He has the ability to bring his mental health witness to court, question him extensively, draft affidavits and cross-examine witnesses to ensure his position was known to the court.

[140] Between court dates, he returned to Alberta and continued to work and support himself. He has not attended for his medical appointments here because he wants to continue his work in Alberta. He is not currently being treated by any doctor or taking any medication.

[141] He appears to have stabilized his personal life sufficiently to work and live without medical intervention.

[142] The burden of proof on the application to vary rests with Mr. Coolen. On the totality of the evidence, I am satisfied that while he suffered some disability for portions of his life, he has now the capacity to address some of the past arrears that accumulated while he was disabled.

[143] Ms. MacPhee was left for a considerable period of time wholly responsible with the onerous task of raising her children working and struggling with the significant financial burden left her on separation. During some periods of time while these arrears accumulated, she bore the burden of carrying Mr. Coolen's obligation. It has had a negative effect on her ability to support herself and to obtain credit.

[144] The evidence convinces me Mr. Coolen may, at times, have been unable to contribute due to health. He also avoided the responsibility for other periods when he was able to work. Now he can address some of the arrears that have accumulated, arrears which resulted in affecting Ms. MacPhee's credit rating.

[145] Mr. Coolen's issues appear to have been addressed such that he can work. I cannot determine the reason his income appears artificially low. The burden of providing financial documentation is his and it has not been met.

[146] As of June 31, 2008, Mr. Coolen has no future obligation to pay ongoing child support.

[147] The sum held in trust with Maintenance Enforcement shall be paid in total to Ms. MacPhee to satisfy some of the outstanding arrears owing to her for that period of time she was not on assistance. There is a balance owing to her up to and including June, 2008.

[148] Mr. Coolen shall make monthly payments as arranged through Maintenance Enforcement towards those arrears.

[149] I place a moratorium against collection on the \$15,818.53 owing to the Department of Community Services. I prohibit any reassessment against Ms. MacPhee as a result of this decision.

[150] Mr. Coolen shall provide to Ms. MacPhee on an annual basis a copy of his income tax return complete with income statements and notices of assessment and reassessment.

[151] While this lengthy proceeding was hampered by Mr. Coolen's and Ms. MacPhee's self-representation, both Maintenance Enforcement and the Minister of Community Services were represented. This left both Mr. Coolen and Ms. MacPhee disadvantaged in addressing the testimony of Ms. Baker and the explanation for their accounting.

[152] Ms. MacPhee would be seriously disadvantaged by any attempt of the Department of Community Services to reassess her due to a retroactive variation. Until such time as this issue is fully reviewed either by their internal auditors, external review or court order, the moratorium shall continue with respect to the collection of their arrears.

[153] Should the Department of Community Services seek reimbursement of their outstanding arrears they should first apply to the court and both the recipient and the payor or the affected party may apply for a reevaluation of those arrears and a determination as to his ongoing ability to pay.

[154] Counsel for the Department of Maintenance Enforcement shall draft the order.

Legere Sers, J.

June 12, 2008
Halifax, Nova Scotia