

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Gould v. Julian, 2010 NSSC 123

**Date:** 20100401

**Docket:** SFSNMCA11163

**Registry:** Sydney, NS

**Between:**

Hubert Gould

Applicant

v.

Anne Julian

Respondent

**Judge:**

Justice Darryl W. Wilson  
Justice of the Supreme Court of Nova Scotia  
(Family Division)

**Heard:**

November 24, 2009, December 14, 2009 and January 19,  
2010, in Sydney, Nova Scotia

**Counsel:**

Alan Stanwick - Counsel for the Applicant  
Gus Postlewaite - Counsel for the Respondent

**By the Court:**

[1] Hubert Gould, the Applicant, is the father of five children who reside with their mother, Anna Julian, in Eskasoni, a Mi'kmaw First Nations Community. The parties were never married. The children's ages range from 10 to 18. The mother has been solely responsible for their care.

[2] By Consent Order dated April 19, 2002, the father was ordered to pay child maintenance of \$389.00 per month, beginning May 1, 2002. The father's gross annual income in 2001 was \$16,119.00. Since his income was not subject to income taxation, the parties agreed to impute an annual income of \$17,000.00 for purposes of determining the amount of child maintenance payable pursuant to the provincial *Child Maintenance Guidelines*.

[3] The father filed a Variation Application dated March 31, 2005, seeking a reduction in the amount of ongoing child maintenance and requesting a determination and forgiveness of accumulated arrears.

[4] The father alleges the following material change in his circumstances: (1) he has not earned \$17,000.00 a year since the Order was issued; (2) he has worked sporadically since 2003; (3) his annual income for the years 2004 through 2009 has been below the amount that would require him to pay child maintenance pursuant to the *Child Maintenance Tables*; and (4) he is currently in receipt of Social Assistance Benefits of \$160.00 a month.

[5] The mother opposes the father's application. She states that he is capable of working and is intentionally under-employed so that he does not have to pay child maintenance.

[6] The mother filed an application on October 27, 2008 seeking a variation in the *Table* amount of maintenance plus a contribution for Section 7 extraordinary expenses for extracurricular activities of the children.

**THE APPLICANT'S INCOME**

[7] Income earned by the father since the Order of April, 2002 has been difficult to determine. Proceedings have been adjourned on a number of occasions because the Respondent was not satisfied with the father's financial disclosure. The passage of time has made recollection of employment circumstances vague.

[8] The father believes he was employed with R & M Windows when the Consent Order was issued. R & M Windows went bankrupt, ceased operations and the father's employment was terminated. In 2003, he obtained employment with the Eskasoni Tribal Police, but this employment ended when the police force disbanded. Since 2003, he has not had any regular full-time employment.

[9] The father has a Grade 12 education. He acquired some carpentry skills working with his brother-in-law, but does not have any formal carpentry training or schooling. He does not have a driver's license.

[10] In 2003/2004, he married Connie Gould, who is employed with Victim Services on a full-time basis. The father and his wife have been foster parents since 2005 and received money from Mi'kmaw Family and Children's Services to care for the children.

[11] In support of his assertion that he has not earned sufficient income to pay child maintenance, the father filed various documents, including Notices of Assessment for the years 2002-2007, T4's, pay-stubs and disbursement records. He was also questioned about money received from friends and neighbours for services provided and about the money received from Mi'kmaw Family and Children's Services for foster parenting. At times, it was difficult to reconcile the father's testimony with the records he provided.

[12] The Respondent's 2002, 2003 and 2004 annual income based on Revenue Canada's Notices of Assessment are:

2002	\$8,960.00
2003	\$13,897.00
2004	\$3,216.00

The 2002 income of \$8,960.00 was Employment Insurance Benefits according to Revenue Canada's Notice of Assessment. The father believed he was also working with R & M Windows in that year. In 2003, the father believed he was employed by the Eskasoni Tribal Police. A T4 was not provided. The father said he worked as a substitute janitor for the Eskasoni School Board in 2004. A T4 was not

provided for this employment. The father also received \$200.00 in 2003 and \$950.00 in 2004 from the Eskasoni Housing Development. These amounts were not included with his Income Tax filings for those years. I have adjusted his 2003 annual income to \$14,067.00 and his 2004 annual income to \$4,166.00.

[13] In 2005, the father received employment income of \$4,848.15 from the Eskasoni School Board. A T4 was supplied but Revenue Canada assessed the father's income at \$0.00.

[14] In 2006 the father's income was \$6,729.55, consisting of \$4,125.00 from the Eskasoni Band Council's E.I. project, \$725.00 from North Eastern Seasonal Harvesters for blueberry harvesting in Maine, \$1,089.55 from the Eskasoni School Board and \$790.00 from the Eskasoni Housing Development Authority.

[15] In 2007, the father's income was \$3,416.10 consisting of \$1,735.25 from the Eskasoni Housing Development, \$1,664.04 from the Eskasoni Work Project (boat house), and \$16.85 from E.I. Benefits.

[16] The father said he did not earn any income in 2008. However, on cross-examination he acknowledged borrowing \$1,500.00 from a friend, Alden Paul, and re-paid this loan by doing repairs to his home. Therefore, I calculated his income for 2008 at \$1,500.00. The father said he provided full-time child care for the youngest foster child during 2008.

[17] Carlene Johnson Sylliboy is employed by Mi'kmaw Family and Children's Services. She testified:

- (a) MFCS' first placement of children with the father and his wife as foster parents was April 8, 2005;
- (b) MFCS has reimbursed Connie Gould, the father's wife, \$151,298.74 for expenses relating to the care of foster children from April 2005 to April, 2009 when the father left the home;
- (c) MFCS reimbursed the father one payment of \$200.00 in 2006;
- (d) MFCS currently pays foster parents a *per diem* of \$14.40 for children under 10 and \$21.02 for children 10 and over for board,

which is intended to cover food, shelter and personal care items. No receipts are required for these reimbursements;

(e) Foster parents are also reimbursed the actual costs, with receipts, of such expenditures as child care, children's activities and allowances, furnishings, equipment, clothing, vacations, gifts and contact with birth families;

(f) Foster parents' expenses for vacations with foster children are not reimbursed;

(g) Child care expenses are not paid if a foster parent provides the child care;

(h) Foster parents are not paid to care for children other than reimbursements for expenses in accordance with provincial government regulations.

[18] From January, 2009 to May, 2009, he received \$700.00 from the Eskasoni Housing Authority and earned \$2,250.00 as a crisis counsellor with the Band Council for 150 hours of work. He left his employment as a crisis counsellor because he threatened to take his own life. At the time, he was under a great deal of stress because of the existing court proceedings and difficulties in his marriage. He felt he could no longer continue as a crisis counsellor since he threatened to take his own life.

### **THE APPLICANT'S CIRCUMSTANCES**

[19] The father separated from his wife in May, 2009. Currently he is residing with his sister and is receiving Social Assistance Benefits of approximately \$160.00 per month.

[20] The father said he currently does not have his name on a call-out list for work as a part-time janitor because the Band Council does not want to hire people who are subject to garnishee. Any work he obtains through the Eskasoni Housing Authority is on a contract basis. He does not work for the Housing Authority because the income he receives from this employment, which is minimal, is garnisheed, leaving him without any income or very little income when he does work. He did not receive any income or personal benefits for being a foster parent.

Any monies paid by Mi'kmaw Family and Children's Services were reimbursements for expenses in relation to the foster children. Most of these payments were sent to his wife and not himself. He has tried to find work in Eskasoni but there is very little work available. He has not considered relocating to obtain employment because he does not have a driver's license. In an effort to resolve the issue of child maintenance arrears, he offered to build a home for the mother, which she could rent. However, she would have to agree not to enforce the Order while he worked so he could earn an income to obtain the material to build the home.

[21] Attached to the mother's Affidavit, sworn April 2, 2009, was a Record of Payments from the Maintenance Enforcement Program of Nova Scotia for the period May 24, 2002 to March 16, 2009. This record indicates that \$31,898.00 was due and \$12,007.83 was received during this period, leaving arrears as of March 16, 2009 of \$19,890.17.

#### **THE RESPONDENT'S CIRCUMSTANCES**

[22] The mother receives Social Assistance Benefits and the Child Tax Credit. The oldest child, Ethan, is now attending university in Sydney. The Band Council provides him with \$800.00 a month to cover the costs of transportation to university, lunches at university, and books. Ethan gives \$50.00 every two weeks to his mother for board. The mother said it has been a struggle to support the children without maintenance from the father.

[23] In addition to opposing the father's application to reduce child maintenance, the mother seeks a contribution from the father towards the expenses of Ethan's 2009 high school graduation and a school trip to Los Angeles. She is not sure of the cost of the trip and no receipts were provided. The mother assisted Ethan with the cost of the school trip through fundraising and contributing \$600.00 herself. The father promised to pay one-half of the cost of the school trip. He gave Ethan \$400.00. When he did not live up to his commitment, Ethan used some of his own savings to pay for the cost of the trip, which left him with less spending money. The mother's request for a contribution toward the cost of Tae Kwon Do lessons for all five children was withdrawn.

[24] It is the mother's position that the father was content with his wife working full-time and he staying at home to care for foster children rather than working to support his own children. She asked the court to impute income to the father.

## **IMPUTATION OF INCOME**

[25] The father's reported annual income for the years 2004 through 2009 is less than the amount that would require him to pay child maintenance pursuant to the *Child Maintenance Guidelines*, N.S. Reg. 53/98 as amended, made pursuant to Section 55 of the *Maintenance and Custody Act*, R.S.N.S., 1989 c. 160. However, an assessment of a parent's annual income for purposes of fixing his/her child maintenance obligation is determined in accordance with Sections 16 - 20 of the *Guidelines* including Section 19, which provides:

**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;**

**(b) the parent is exempt from paying federal or provincial income tax;**

**(f) the parent has failed to provide income information when under a legal obligation to do so;**

[26] In determining a parent's child maintenance obligation, a parent's capacity to earn an income and not just his actual income can be considered.

[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". (Van Gool at para. 30).**

**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 unremunerative 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.**

[28] Section 19 of the *Guidelines*, like its' counterpart Section 19 of the *Federal Child Support Guidelines*, is a discretionary authority which must be exercised judicially and not arbitrarily.

[29] There must be a rational and evidentiary base in order to impute income and not a mere suspicion that the parent intentionally reduced his/her income to avoid their child maintenance obligation.

[30] The burden of proof is with the mother on the balance of probabilities since she submits the father is intentionally unemployed or under-employed.

[31] The mother states the father earns an income doing construction work on homes in Eskasoni and receives income/money from Mi'kmaw Family and Children's Services as a foster parent to three children. The mother also states the father has a nice home, two vehicles and was able to vacation in Florida with his wife and foster children in 2008. She believes he would not be able to maintain this lifestyle if he did not have the income to support it.



[32] The father's reasons for his unemployment or under-employment include:

- (1) His employment was terminated in 2002 and 2003;
- (2) He was caring for the youngest foster child in 2008;
- (3) He has looked for work but there is no work available in Eskasoni;
- (4) He does not work as a janitor or a contractor because any income he does earn is garnisheed to pay his Child Maintenance Order;
- (5) He is unable to relocate because he has no driver's license, was married, a foster parent in the community and has limited work skills;
- (6) Mental health concerns brought on by the stress of the court proceeding and separation from his wife.

[33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[34] The first issue to determine is whether the father is intentionally unemployed or under-employed in circumstances, other than when the under-employment or unemployment is required by the needs of a child of the marriage, or any child under the age of majority, or by reasonable educational or health needs of the spouse. The issue of whether the father is intentionally unemployed due to his health needs will be discussed later.

## **CONCLUSION**

[35] The father has established a material change in circumstances since the last Order. He has been without regular full-time employment since 2003 and the level of his annual income from 2004 to date has been less than the *Table* amount that would require him to pay child maintenance.

[36] The father's education, job skills and work history indicate that available employment would likely be at lower wage rates.

[37] The father has benefited personally from his marriage. I attribute his improved lifestyle, including a nice home and a vacation in Florida to the financial means of his spouse and not his income earning capacity. The father does not have a driver's license and vehicles referred to by the mother are owned by the father's spouse.

[38] The money received by the father's household as a foster parent is not an income of the father for purposes of determining his child maintenance obligation, but rather reimbursement of expenditures for caring for foster children.

[39] However, the father is not prevented from seeking employment because of his responsibilities as a foster parent, since MFCS will pay for childcare expenses for foster parents who are employed. Therefore, it is not a reasonable excuse for the father to say he was not looking for work because he was providing childcare for a foster child.

[40] The father has had part-time employment and seasonal employment as a janitor with the Eskasoni School Board and as a contractor for the housing authority in Eskasoni. He also has done home renovations for friends and neighbours in the area. While it may be frustrating for the father to work and have his wages and income garnisheed, it is not a reasonable excuse to not seek employment because his wages were being garnisheed to pay his child maintenance obligation.

[41] The father's offer to build an apartment for the mother if enforcement of his child maintenance obligation was suspended indicates the father believes work is available for him in the Eskasoni area. I am satisfied the father has done cash jobs for friends and family.

[42] I find the father is currently intentionally unemployed and has been intentionally under-employed since 2004. I am not prepared to vary the Order for 2002 and 2003 based on a reduced annual income because the father has not satisfied the court that his actual income was less than \$17,000.00 in each of those years. The father's 2002 income included Employment Insurance Benefits and

employment income. The court was not provided with documentation on his employment income for that year. Likewise, in 2003, the court is not satisfied the father has provided information on his income from all income sources in that year.

[43] The father's full-time employment ended in 2003. From 2004 onward, he was earning an income through part-time employment from several sources and self-employment. However, the income documentation provided by the father cannot be relied upon as an accurate reflection of his total annual income from 2004 onward. It has been difficult to reconcile T4 slips with his assessed income and some income has not been reported.

[44] Although the court has concluded that work is available to the father in the Eskasoni area, and he is not working to his capacity, it must be remembered that he has basic carpentry skills. The court is not satisfied that any income from employment with the school board as a janitor or the housing authority as a contractor or working for friends and neighbours would be substantial. There was no evidence of other job opportunities available to the father in Eskasoni.

[45] It was not unreasonable for the father to continue to seek work in Eskasoni and not relocate to look for work since he has lived there all his life, he has no driver's license and limited work skills.

[46] In determining an amount of income to be imputed, I have considered the father's income when he was employed on a regular full-time basis and the type of work currently available to him given his job skills, experience and education. I have also considered the father's status as a First Nation individual, whose income is exempt from taxation when earned on the Reserve. Pursuant to Section 19(1)(a) and (b) of the *Child Maintenance Guidelines*, I impute an annual income of \$12,000.00 to the father and order child maintenance of \$167.00 per month for five children based on that amount, with the first payment due April 1<sup>st</sup>, 2010 and on the 1<sup>st</sup> day of every month thereafter.

[47] Based on an imputed annual income of \$12,000.00, I order the amount of child maintenance payable for five children be varied to \$217.00 a month for the period January 1, 2004 to April 30, 2006, when the new *Child Maintenance Guidelines* came into effect. From May, 2006 onward, until March 31, 2010, child

maintenance of \$167.00 per month is ordered, based on an imputed annual income of \$12,000.00 per year, for five children.

[48] In fixing the amount of accumulated arrears, I have calculated the amount owing by the father, as follows:

2002 (8 X \$389.00)	\$3112.00
2003 (12 X \$389.00)	\$4668.00
January 1, 2004 to April 30, 2006 (28 X \$217.00)	\$6076.00
May 1, 2006 to March 31, 2010 (47 X \$167.00)	\$7849.00
TOTAL	\$21,675.00

The Maintenance Enforcement Program records indicate the father paid \$12,007.83 as of March 16, 2009. That leaves accumulated arrears of \$9,667.17. Any payments received by the Maintenance Enforcement Program since March 16, 2009, will be credited towards the outstanding arrears balance.

[49] The mother withdrew her request for a contribution towards the cost of Tae Kwon Do lessons. She continues to seek a contribution from the father for the cost of his eldest son's high school graduation and school trip to Los Angeles. No receipts were provided, which would enable the court to measure the amount of these expenses. Also, I am satisfied the father contributed \$400.00 towards the cost of his son's trip. According to Section 7(1) of the *Child Maintenance Guidelines*, it is in the court's discretion to decide whether to order the father to contribute to these types of an expense. I am mindful the mother made a considerable sacrifice herself to assist her son with the cost of the trip. However, considering the means of the father, the lack of information on the cost of the trip and the school graduation, and the contribution he has already made, I am not prepared to order him to pay an additional amount to cover these expenses.

[50] The father was employed briefly in 2009 as a crisis counsellor. He is no longer employed as a crisis counsellor because he threatened to harm himself. The court was not provided with any medical evidence or reports. However, the mother did not contest this statement. Therefore, I am satisfied the father is unable to continue as a crisis counsellor, given the circumstances. However, I have not

been persuaded that he is unable to work at other positions such as contractor work or janitorial work. Therefore, the father does not have any current health issues which prevent him from seeking employment.

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J.