SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Locke v. Bramwell*, 2016 NSSC 300

Date: 2016-11-14
Docket: *SFSNMCA* No. 87528
Registry: Sydney

Between:

Todd Pius Locke

Applicant

v.

Tracey Dawn Bramwell

Respondent

Revised Decision:	The text of the decision has been corrected on November 17, 2016.
Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	October 25, 2016, in Sydney, Nova Scotia
Written Release:	November 14, 2016
Counsel:	Jennifer Anderson for the Applicant Alan Stanwick for the Respondent

By the Court:

[1] This is Mr. Locke's application to vary the child and spousal support provisions of a court order in which the court imputed income to him. Mr. Locke asks the court to reduce his support obligations, and to forgive arrears accumulated since he filed his variation application on November 12, 2015. The governing legislation is the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160.

FACTS:

[2] The court rendered its decision in **Bramwell v. Locke,** 2015 NSSC 140 on May 12, 2015. The order arising from that decision was issued by the court on June 15, 2015. Mr. Locke applied to vary on November 12, 2015.

[3] Since the order was issued, Mr. Locke has worked as a truck driver for a local company. Ms. Bramwell continues to exercise primary care of the remaining child of the marriage, who is ten years of age.

[4] The parties have agreed that the older child is no longer a dependent child of the marriage. They agree that Mr. Locke will be obliged to pay child support for only one child as of January, 2016.

[5] The following issues are to be determined:

1. Has there been a material change in circumstances since the hearing in March, 2015?
2. Can the court take judicial notice of the economic conditions in Alberta, as they impact job prospects for welders and/or pipefitters?
3. What is Mr. Locke's income for support purposes?
4. What are Mr. Locke's child support obligations, prospectively and retroactive to the date of his application?
5. Should Mr. Locke be required to continue to pay spousal support and, if so, in what amount?
6. Should there be forgiveness of any arrears accumulated since the last order?
7. Should Mr. Locke be required to provide coverage under his health plan for the child of the marriage?

Issue #1 – Has there been a material change in circumstances since the hearing in March, 2015?

[6] Mr. Locke argues that material changes have occurred since the hearing in March, 2015. He argues that two of these impact his ability to earn an income in the range imputed. The changes include: 1) his oldest daughter is no longer a dependent child for purposes of child support; 2) the economy in Alberta has faltered, and 3) he obtained employment driving a truck locally.

[7] Ms. Bramwell agrees that a material change in circumstances occurred when the older child became independent in December, 2015. The fact that Mr. Locke is now employed also constitutes a material change. Both changes are sufficient to justify review and variation of the June 15, 2015 order.

Issue #2: Can the court take judicial notice of the economic conditions in Alberta, as they impact job prospects for welders and/or pipefitters?

[8] In advancing the argument that income should no longer be imputed to him, Mr. Locke asks the court to take judicial notice of the poor economic conditions in Alberta. He relies on the decision in **Basso v. Rees or (Basso)**, 2015 SKQB 316, in which Justice Sandomirsky took judicial notice of the "dire economic conditions of the oil production and oil service industry in this past year". The court in **Basso** (*supra*) declined to impute income to the applicant. He previously worked in the oil industry earning a six digit income, but now earned only $34,000.00. The court was not satisfied he was intentionally under-employed.

[9] Mr. Locke also relies on the decision of Justice Burrows of the Alberta Court of Queen's Bench in **El-Hayouni v. Charef,** 2015 ABQB 416. In that case, the court took judicial notice that a "dramatic fall in the price of oil occurred in late 2014". However, Justice Burrows went on to state "I am not prepared to accept the suggestion that activity in the oil sector in Fort MacMurray declined during 2014 to the extent Mr. Charef suggests without evidence beyond his testimony". Mr. Charef had testified that his income declined sharply after the price of oil fell, because overtime work was no longer available.

[10] The Nova Scotia Court of Appeal in **Dean v. Brown**, 2002 NSCA 124 addressed the issue of judicial notice in the context of a child support claim involving imputed income. Delivering the decision of the court, Roscoe J.A. stated:

> **13** In Angelucci v. Dartmouth Cable T.V. Ltd. (1996), 155 N.S.R. (2d) 81, this court said:
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> > [28] As indicated by this court in R. v. MacDonald (R.A.) (1988), 83 N.S.R. (2d) 293; 210 A.P.R. 293 (C.A.), a trial judge cannot take judicial notice of a fact unless:
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> > > ... (a) the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy.
> >
> > [29] In Cross on Evidence (6th Ed.), the authors say at p. 69:
> >
> > > The general rule is that neither a judge nor a juror may act on his personal knowledge of facts. Nor may the court take steps to acquire such knowledge in private, for example, by applying a scientific instrument to an exhibit in the absence of a party. This rule has reference to particular facts.
> >
> > Caution must be exercised in resorting to the doctrine of judicial notice, particularly where such is done without notice to the parties or their counsel. In R. v. Quinn (1975), 27 C.C.C. (2d) 543, MacDonald, J., of the Alberta Supreme Court said (p. 550):
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> > > ... I note that there is a difference between the taking of judicial notice on the basis of information not referred to by counsel at the trial, and doing so on the basis of sources referred to by counsel. Where the former is the case, the trial judge should proceed with the utmost of caution, where the fact which he is tempted to notice is one vital to the resolution of the case...
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> **14** In this case, the matters of which the trial judge took judicial notice do not meet the requisite test. **No notice was given to the parties that he intended to impute income or that he would take judicial notice of economic factors**. **There was no evidence before the court from which any inference or conclusion could be drawn relating to any increased earning capacity of the appellant. Furthermore the trial judge took judicial notice in order to contradict the evidence before him which was unchallenged. (emphasis added)**

[11] The circumstances in the **Dean** (supra) case are different. Here, Ms. Bramwell was aware of Mr. Locke's request that the court take judicial notice of Alberta's economic conditions. Her counsel cross-examined Mr. Locke on that subject, and argued the issue in closing submissions. It was very much a live issue at the hearing.

[12] In the **Children's Aid Society and Family Services of Colchester County v. E.Z.**, 2007 NSCA 99 the Court of Appeal more fully outlined the test for judicial notice:

> **40** To address what he perceived to be a gap in the evidence on this issue the judge turned to the text **Intervention for Children of Divorce, Custody, Access and Psychotherapy** (2nd ed.) by Dr. William Hodges.
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> …
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> **43** The judge's resort to the **Hodges** text is not supportable here. It clearly does not fit within the test for judicial notice as set out by the Supreme Court of Canada in **R. v. Find**, [2001] 1 S.C.R. 863 at para. 48, per McLachlin C.J.:
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> > 48 ... Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy ...
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> **44** This formulation of judicial notice was originally posited by Professor E. M. Morgan in "Judicial Notice" (1943-1944), 57 Harv. L. Rev. 269.
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> **45** This is a strict test for judicial notice which does not apply in all cases in which a court takes judicial notice. As Binnie J. put in **R. v. Spence** [2005] 3 SCR 458:
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> > para. 60 Professor Davis' useful distinction between adjudicative facts and legislative facts is part of his larger insight, highly relevant for present purposes, that the permissible scope of judicial notice should vary according to the nature of the issue under consideration. For example, more stringent proof may be called for of facts that are close to the center of the controversy between the parties (whether social, legislative or adjudicative) as distinguished from background facts at or near the periphery.
> >
> > para. 61 To put it another way, the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria.
> >
> > … a review of our jurisprudence suggests that the Court will start with the Morgan criteria, whatever may be the type of "fact" that is sought to be judicially noticed. The Morgan criteria represent the gold standard and, if satisfied, the "fact" will be judicially noticed, and that is the end of the matter.

> para. 62 If the Morgan criteria are not satisfied, and the fact is "adjudicative" in nature, the fact will not be judicially recognized, and that too is the end of the matter.
>
> para. 63 It is when dealing with social facts and legislative facts that the Morgan criteria, while relevant, are not necessarily conclusive. There are levels of notoriety and indisputability. Some legislative "facts" are necessarily laced with supposition, prediction, presumption, perception and wishful thinking. Outside the realm of adjudicative fact, the limits of judicial notice are inevitably [page 491] somewhat elastic. ...
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> **46** The "facts" which the judge judicially noticed here were, for him, dispositive of the issue he had to address and therefore the strict test set out in **R. v. Find, supra** should have been applied.

[13] The Nova Scotia Court of Appeal dealt with the issue again in **Cape Breton & Central Nova Scotia Railway Ltd. (Re),** 2003 NSCA 18, where Oland, J.A. in chambers declined to take judicial notice of the claim that the loss of railway service on the Sydney line would have a negative impact on the municipality's economic strategy or its development. The court held that such matters are relatively complex, and involve multiple economic and other factors, so they are neither "so notorious as not to be the subject of dispute among reasonable men" nor "capable of immediate accurate demonstration".

[14] I might be persuaded that it's appropriate to take judicial notice of the fact that the Canadian economy has slowed, partly due to a drop in the price of oil, which impacts the Alberta economy. However, I was not asked to take judicial notice of that fact. I am asked to take judicial notice of the fact that the Alberta economy has slowed, resulting in less opportunities for welders and pipefitters like Mr. Locke. I am not satisfied that I can do so.

[15] I am not satisfied that the strict test in **R v. Find**, [2001] 1 S.C.R. 863 has been met. The impact of a weak Alberta economy on skilled tradesmen, and in particular welders and/or pipefitters is a socio-economic fact. This is also a fact central to the decision I have to make. So a strict test is appropriate. I find this is not a fact so "notorious" as to be indisputable among reasonable persons. Nor is it "capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy". This is an issue on which evidence is required.

[16] I have considered whether there is evidence to support Mr. Locke's argument, and I find there is none. Mr. Locke purported to advance evidence through his own testimony that there is little work for welders in Nova Scotia or

Alberta. However, he based this claim on conversations with others. Counsel for Ms. Bramwell properly objected, as this constitutes inadmissible hearsay evidence. There was no direct and admissible evidence to show that there is a shortage of work in the field of welding and/or pipefitting anywhere in Canada.

[17] Mr. Locke could have called evidence from union representatives, to indicate whether there are welders and/or pipe fitters on its roll who are out of work. He did not subpoena any other welders, and in particular any red seal welders who are more highly qualified than him, who are out of work. No employers were called to testify about the availability of jobs in Mr. Locke's trade. And no evidence from government sources was tendered to support the claim that jobs for welders and pipefitters are scarce, or that they have been negatively impacted by the state of Canada's economy in general.

[18] I, therefore, decline to take judicial notice of the fact that there is little or no work for welders and/or pipefitters in Alberta or Nova Scotia. And Mr. Locke has not met the onus of proving that as a fact, through clear, convincing and cogent evidence, on a balance of probabilities.

Issue #3 – What is Mr. Locke's income for support purposes?

[19] Mr. Locke worked in Alberta for a period of nine months between December, 2013 and August, 2014. Income of $79,900.00 was imputed in 2015 to reflect his 2014 income. He argues that income should not be imputed to him now because:

- He should not be required to move out west to pursue work;
- He does not want to leave Cape Breton to seek work; and
- He has secured a job locally.

[20] My decision of May 12, 2015 does not require Mr. Locke to move to obtain work in his trade. Income was imputed based on his welding income from Alberta, but he is free to pursue his trade anywhere, or to secure other work commensurate with his experience and skills.

[21] Mr. Locke testified that part of the reason he doesn't want to leave Cape Breton is that he wants to stay near his elderly parents. He lived with them for a short time after he separated from his new wife in May, 2016, but he recently acquired his own apartment. There is no evidence that his parents require his daily

assistance. And although he said they are in poor health, no details were offered. It is not reasonable to infer from the fact that his parents are elderly that Mr. Locke must stay in Cape Breton to meet their needs. There is simply no evidence to support that claim.

[22] Mr. Locke had hernia surgery shortly after the hearing in 2015. He started work as a truck driver in August, 2015, earning around $27,000.00 per annum. He states in his affidavit filed February 8, 2016 that his current job allows him to stay in Cape Breton "with my wife and children", but he acknowledged at the hearing that his is currently separated, and he has no child care obligations.

[23] Ms. Bramwell argues that there is no good reason for Mr. Locke's failure to pursue work that pays more than his current income. I agree. There is no evidence that employment commensurate with Mr. Locke's training and experience is unavailable, locally or elsewhere. In fact, Mr. Locke testified that his son, who is a new trade school graduate, obtained welding work with the Halifax Shipyard very recently. Despite applying and having experience, Mr. Locke was not hired. He says this company prefers to hire apprentices, but aside from that assertion (which constitutes hearsay and is given no weight) he offered no evidence to support that claim.

[24] Further, there is no evidence that Mr. Locke applied at the Highland Fisheries fish plant, where he worked and earned more than $27,000.00 for several years prior to separation. That is another area of experience which he has not explored, according to the evidence.

[25] In the decision of **Sugg v. MacNeil**, 2016 NSSC 54 Justice Jollimore reviewed the test to be applied when a payor files a variation application for a support obligation which is based on imputed income. She said:

> **43** In *Trang*, 2013 ONSC 1980, Justice Pazaratz addressed the question of whether a payor could simply rely on his or her current income (shown on line 150 of his or her tax return) in a variation application where the order sought to be varied was based on imputed income. He said, at paragraph 51:
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> When the court imputes income, that's a determination of a fact. It's not an estimate. It's not a guess. It's not a provisional order awaiting better disclosure, or further review. It's a determination that the court had to calculate a number, because it didn't feel it was appropriate to rely on - or wait for - - representations from the payor.

> **44** At paragraphs 43 to 60 in *Trang*, 2013 ONSC 1980, and Justice Pazaratz considered whether all variation applications involve the same analysis. At paragraph 46, he concluded that where support is based on imputed income, "a more comprehensive analysis is required" in variation applications. This analysis compels me to consider:
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> > a. *Why* did income have to be imputed in the first instance? Have those circumstances changed? Is it still appropriate or necessary to impute income to achieve a fair result?
> >
> > b. *How* exactly did the court quantify the imputed income? What were the calculations, and are they still applicable?
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> **45** Justice Pazaratz said, at paragraph 52 in *Trang*, 2013 ONSC 1980, when a payor argues that an imputed income level is no longer appropriate, the payor must "go beyond establishing [his or her] subsequent "declared" income". The payor must offer evidence of changed circumstances that establishes either:
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> > a. It's no longer necessary or appropriate to impute income and the payor's representations as to income should now be accepted, even if they weren't before; or
> >
> > b. Even if income should still be imputed, a different amount is more appropriate, given changed circumstances.
>
> **46** I accept this is the correct approach to adopt in deciding Mr. MacNeil's variation application. As Justice Pazaratz said, at paragraphs 53 to 60 in *Trang*, 2013 ONSC 1980, allowing a payor to vary child support based on declared income, after income has been imputed, defeats the purpose of imputing income. The burden is on the party seeking the variation to prove that circumstances have changed, not for the support recipient to prove that income should still be imputed to the payor.
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> **47** At paragraph 55 of *Trang*, 2013 ONSC 1980, Justice Pazaratz made clear that, "The onus is on the support payor to establish that there should be a change in the way their income is to be calculated." Where the payor doesn't show the circumstances which prompted income to be imputed to him have changed, it will remain appropriate and necessary to impute income to achieve a fair result.

[26] I accept this approach and would answer the questions posed as follows: WHY was income imputed at first instance? Because Mr. Locke is a qualified welder and high pressure pipe fitter, but had let his licenses (also known as his “tickets”) lapse. Before the 2015 hearing, he had worked in the oil industry in Alberta for nine months, earning significantly more than prior years. He was able to do so even without an updated ticket. At the time of the hearing, he was unemployed and not actively searching for work. Based on those facts, I determined that he was intentionally unemployed, and was not using his skills,

experience and resources to the fullest extent possible in order to support his family.

[27] The next question is HOW income was imputed? I set the amount of income at $79,900.00 to reflect what Mr. Locke earned the year prior to the hearing, during which he worked as a welder and collected Employment Insurance benefits after being laid off.

[28] Next, I must consider whether it's still appropriate to impute income, or whether Mr. Locke's current income of $27,000.00 as a truck driver should be accepted for purposes of support. In this, I must be mindful of the limits to my discretion in imputing income. As Justice Forgeron noted in **Coadic v. Coadic**, 2005 NSSC 291:

> **10** The imputation of income pursuant to s. 19 of the Guidelines requires the exercise of judicial discretion. In MacIsaac v. MacIsaac, [1996] N.S.J. No. 185, 1996 CarswellNS 177 (C.A.), Bateman J.A. reviewed the meaning of judicial discretion at paras. 19 and 20:
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> > 19 In making a finding under s. 13 a judge is called upon to exercise a measure of discretion. That discretion is not unfettered. It must be exercised judicially. Provided the discretion is exercised within acceptable limits, and not arbitrarily, this court will not interfere.
> >
> > 20 In R. v. Casey (1987), 80 N.S.R. (2d) 247 (C.A.), at p. 248, Macdonald J.A. referred to a statement of Lord Halsbury to explain what is meant by the judicial exercise of a discretionary power:
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> > > In Sharp v. Wakefield et al., [1891] A.C. 173, Lord Halsbury expressed what is meant by the judicial exercise of discretionary power in the following terms (p. 191):
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> > > > An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.
>
> **11** The court cannot impute income on an arbitrary basis, rather there must be a rational and a solid evidentiary foundation in order to do so. Imputation of

> income must be governed by principles of reasonableness and fairness in keeping with the case law which has developed.

[29] Mr. Locke called no witnesses, and produced no letters from employers, to confirm that he applied for work, and to explain why he wasn't offered any interviews or a job. Was it because there were more qualified people available? Was it because he did not have valid welding tickets at the time? Or was there another reason? I simply don't know. I can't infer that there are no jobs available for workers with Mr. Locke's skills and experience from the evidence before me.

[30] The onus is on Mr. Locke to show that income should no longer be imputed. He has not done so. I am satisfied that it is still reasonable to impute income where he has skills, qualifications and experience that he is not using in his current position.

[31] This is much the same reason I imputed income in 2015. However, since my decision of May 12, 2015 Mr. Locke says he has searched for work as a welder. The evidence is unclear whether he continued to submit applications and make inquiries about welding jobs after he secured his current job. There is no evidence that he pursued other job opportunities, such as a fish plant worker. The email from the YMCA Career Centre does not specify the type of work Mr. Locke was pursuing. That email is the only piece of evidence to support Mr. Locke's assertion that he has made great efforts to secure employment since 2015.

[32] I find that Mr. Locke is still intentionally underemployed, and that income should be imputed.

[33] Having found that income should be imputed to Mr. Locke, I must determine whether the amount imputed in 2015 is still appropriate. The figure of $79,900.00 was used because it reflected the income actually earned by Mr. Locke the year prior to the hearing, during which he worked as a welder in Alberta and then collected EI benefits.

[34] In **Rideout v. Woodman**, 2016 NSSC 205, Justice Forgeron outlined a number of factors which must be considered in cases where imputation is an issue:

> 29 … In **Smith v. Helppi**, 2011 NSCA 65 (N.S. C.A.), para 16, Oland J.A. approved the factors outlined by Dr. Julien D. Payne, in *Imputing Income, "Determination of Income; Disclosure of Income", Child Support in Canada*, Danrab Inc., August 3, 1999 as quoted by Martinson, J. in **Hanson**

v. Hanson, [1999] B.C.J. No. 2532 and by Wilson J. in **Gould v. Julian**, 2010 NSSC 123 (N.S.S.C.). These factors are as follows:

> * 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." (*V. (J.A.) v. V. (M.C.)* at para 30.)
>
> * 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 of work, freedom to relocate and other obligations.
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> * 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 the 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.
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> * Persistence in unremunerative employment may entitle the court to impute income.
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> * A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> * As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[35] Mr. Locke must seek appropriate employment in order to fulfill his support obligations. He is a trained and experienced welder and high pressure pipefitter. He also worked in a fish plant. He has skills that are not being utilized as a truck driver. He is only 47 years of age, and although he had hernia surgery in 2015, there is no evidence that he suffers any ongoing health issues that would impact his ability to work.

[36] Ms. Bramwell urges the court to impute income of at least $50,000.00 to Mr. Locke. She advanced no evidence to support that figure. I do not know if that is the average income available to welders in Nova Scotia or elsewhere. I cannot simply pull a figure out of the air and use it. Imputed income must be based on “a solid evidentiary basis, grounded in fairness and reasonableness” [see **Coadic** (*supra*)].

[37] Mr. Locke works between 30-40 hours per week, earning $14/hour. He is eligible to work overtime when extra work is available. He acknowledged that with a recent flooding event in Cape Breton, the company he works for has been very busy, and he expects to work more overtime in the coming months. He earns 1.5 his hourly rate after 48 hours, so he could earn as much as $30,000.00 in 2016.

[38] He would likely earn more as tradesman, given the hourly rate he was paid in 2014. However, he testified that as a tradesman, he would only work on contract part of the year, and then rely on Employment Insurance benefits during lay-offs. Why this would present a problem was left unexplained. This was his exact situation at the time of the hearing in 2015, at which time he had earned $79,900.00 the year prior. Presumably, a higher income is one of the mains reason he trained as a welder.

[39] I am satisfied that income should be imputed to Mr. Locke in the amount of $36,000.00 to reflect his qualifications, skills, experience, age and health. This is well within the range of what a welder can earn, even if they choose not to leave Cape Breton. I base the figure of $36,000.00 on full-time work at the hourly rate as Mr. Locke earned as a welder at Highland Fisheries in 2013. This sum is also in line with what Mr. Locke earned at the fish plant before he trained as a welder.

Issue #4 – What are Mr. Locke's child support obligations, prospectively and retroactive to the date of his application?

[40] Having determined that income should be imputed to Mr. Locke in the amount of $36,000.00 per annum, the question becomes whether that income should be imputed retroactively. If so, Mr. Locke would be entitled to adjustment of the arrears calculated under the 2015 order. Irrespective of that calculation, Mr. Locke seeks forgiveness of all arrears accumulated under the 2015 order based on undue hardship.

[41] The order which Mr. Locke seeks to vary was issued on June 15, 2015. It is based on a written decision released on May 12, 2015. So only six months passed (at most) between the time the court imputed income, and when Mr. Locke applied to vary.

[42] Ms. Bramwell agrees that child support should be varied as of January, 2016. She concedes that the older child was no longer dependent after December, 2015 and she accepts that some adjustment should be made to Mr. Locke's income, though she proposes that income still be imputed at $50,000.00.

[43] Orders are presumed correct when made. Mr. Locke rightly declines to seek forgiveness of arrears accumulated before the 2015 order. And the income provisions of the June 15, 2015 order must be respected for a reasonable period of time after being issued. Otherwise, there's little point imputing income at the outset.

[44] On the issue of retroactive adjustment, Justice Jollimore noted in **Sugg (***supra*) that:

> **62** In *Smith v. Helppi*, 2011 NSCA 65 at paragraph 22, our Court of Appeal endorsed the decision of the New Brunswick Court of Appeal in *PMB v. MLB*, 2010 NBCA 5. At paragraph 2 of that decision Justice Robertson said that the "jurisdiction to issue retroactive variation orders that reduce or cancel arrears of support has been carefully circumscribed" both federally and provincially and when deciding whether to retroactively vary a payor's obligation where this reduces or cancels arrears, I must "rule on two discrete questions":
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> > a. Was there a material change in circumstances during the period of retroactivity?
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> > b. Having regard to all other relevant circumstances during this period, would the applicant have been granted a reduction in his or her support obligation but for his or her untimely application?
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> **63** The period of retroactivity is the period from the date of Associate Chief Justice O'Neil's order to the date Mr. MacNeil filed his application, a period of four months. During that period, Mr. MacNeil ceased his employment. He has failed to explain why this occurred. As Justice Robertson said in *PMB v. MLB*, 2010 NBCA 5 at paragraph 2, the burden is on Mr. MacNeil to prove that this change was "real and not one of choice". Mr. MacNeil has not discharged this burden. Neither in his affidavit nor in his testimony did Mr. MacNeil explain why he left his employment at Midwest Pipeline.

[45] In the period between June, 2015 and November, 2015 when he filed his application to vary, Mr. Locke started a new job. This is a material change of circumstances that meets the first criteria set out in **Smith v. Helppi,** 2011 NSCA 65.

[46] The 2015 order would likely have been different had Mr. Locke made efforts to find work while laid off, even at a lower income. As such, I am satisfied that there should be forgiveness of some arrears.

[47] Mr. Locke's support obligation will be varied as follows: he will pay child support for one child from January, 2016 to date, based on an imputed income of

$36,000.00, which equates to $302.00 per month. The difference between that sum and what he was required to pay, and which accumulated as arrears under the 2015 order, shall be forgiven.

[48] Mr. Locke's monthly child support payment will continue so long as the younger child remains a dependent child of the marriage.

Issue #5 - Should Mr. Locke be required to continue to pay spousal support and, if so, in what amount?

[49] Mr. Locke asks the court to terminate his spousal support payments effective December 1, 2015. Ms. Bramwell agrees that spousal support should terminate, but says it should terminate no sooner than November 1, 2016.

[50] Ms. Bramwell (now Ms. Grant, having married her common law spouse in 2014) acknowledges that she has two incomes coming into her home. She still relies on CPP disability benefits, while her spouse now works as a computer technician earning $11.00 per hour. He previously worked at a discount store earning minimum wage, with no guaranteed number of hours. In 2015 he earned $17,865.00.

[51] Ms. Bramwell filed a statement of income, on which Canada Pension Plan (CPP) disability benefits are the sole source of income shown. She did not include the amount of CPP benefits her children receive as a result of her disability, nor the amount of the child tax benefit (CTB) coming into the home. The CTB is currently paid for two children, one of whom is her step son. She testified that her husband receives the GST credit. She does not.

[52] Ms. Bramwell and her husband share living expenses. She acknowledged that with her CPP income, the CTB and the children's CPP benefits, she has approximately $2,151.00 per month coming into the home, exclusive of her husband's income. She acknowledged that she has surplus income even before child or spousal support is paid. She did clarify, however, that the CTB only recently increased from $600.00 / month to $900.00 / month. She did not specify the date of the increase, but the new Canada Child Benefit (CCB) came into effect in late July, 2016, so the increase was likely effective in August, 2016.

[53] Mr. Locke argues that all of Ms. Bramwell's household income should be considered when considering whether spousal support should be paid after December, 2015. Although not cited by counsel, section 6 of the **Maintenance**

and Custody Act requires consideration of a spouse's income in these circumstances.

[54] Mr. Locke relies upon the Court of Appeal decision in **Vickers v. Vickers**, 2001 NSCA 96 which discussed the sources of income to be considered in the context of child support. Counsel argues that the **Vickers** case supports her position that all sources of income, including the CTB and children's CPP, should be included when considering spousal support as well.

[55] However, **Vickers** (supra) does not support that argument. It only addresses the children's CPP supplement in the context of child support, and more specifically, whether it constitutes payment by or on behalf of the payor spouse who is disabled. The court made no comment on whether the CTB and children's CPP supplement should be considered income for purposes of spousal support.

[56] Ms. Bramwell argues that the CTB (now CCB) and children's supplementary CPP benefits should be excluded from her total income for purposes of spousal support.

[57] She further points out that Mr. Locke seeks termination of spousal support effective December 15, 2015, but his household income increased after the June, 2015 order because he obtained employment. She says he had the ability to pay as a result.

[58] She is also suspicious of the fact that he did not include his wife's income in his hardship calculations. She notes that he filed an amended statement of undue hardship circumstances on May 20, 2016, and only two weeks later filed another amended statement, which did not include his wife's income. Irrespective of whether their separation is genuine or not, she argues that there were two incomes coming into his household until May, 2016. At the very least, she argues that spousal support should terminate no sooner than June 1, 2016.

[59] Counsel have provided no case law to support the proposition that the CTB (now the CCB) should be included in a recipient spouse's income when calculating spousal support. The **Spousal Support Advisory Guidelines** take the CTB and certain tax credits into account when calculating the "with children" figure for spousal support, so I am inclined to include it for purposes of my calculations here. However, only that portion attributable to the parties' daughter will be included, not the portion payable for Ms. Bramwell's step-son. That equates to $5,400.00 in extra income.

[60] Counsel did not provide authority to persuade me either way on the issue of whether the children's supplementary CPP payments should be included in a custodial parent's income for purposes of spousal support. According to **Vickers** (supra), those are sums paid for, and intended for the benefit of, the children. However, the supplement is paid to a custodial parent of a child under 18 years of age to recognize the impact of raising children on a limited income. It is intended to supplement the household income according to however many children are living in the home.

[61] I find that for purposes of spousal support, a consideration of Ms. Bramwell's needs, means and circumstances must include consideration of any extra income coming into the home by way of the CPP supplement. That extra income allows her to meet her monthly expenses with a small surplus.

[62] After paying his monthly child support obligation, Mr. Locke will be left with roughly $24,000.00 (net of taxes). His net income is still higher than Ms. Bramwell's monthly income, including the CTB and CPP supplement for their daughter.

[63] Ms. Bramwell's husband recently changed jobs to gain more hours at a higher rate of pay. So the total household income will increase. At the same time, Ms. Bramwell says she recently paid off her mortgage, which reduced her monthly expenses. However, Ms. Bramwell continues to face the same disadvantages today that she faced on separation. She remains disabled, and she continues to provide primary care for the dependent child.

[64] Having reviewed the expenses of the parties, as well as their incomes and circumstances, I find that spousal support should terminate at the end of May, 2016.

Issue #6– Should there be forgiveness of any arrears accumulated since the last order?

[65] Mr. Locke requests forgiveness of arrears accumulated under the 2015 order, because he claims payment will cause him undue hardship. This may be a moot point, because of my decision on retroactive adjustment of payments above. Mr. Locke will not face significant arrears after the figures are adjusted. However, in the event I am wrong on that issue, I will address the hardship claim.

[66] In his statement of hardship circumstances, Mr. Locke says that he would suffer undue hardship if required to pay arrears because:

- He is responsible for an unusually high level of debts;
- He has a legal duty under a judgement, order or written separation agreement to support another person other than the children to whom this proceeding relates;
- He has a legal duty to support a dependent child in his household other than the child who is the subject of this proceeding; and
- His income was being fully garnisheed when he filed his statement of undue hardship circumstances on April 6, 2016.

[67] In the case of **Elliott v. Melnyk**, 2014 NSSC 446 Justice Forgeron set out the test to be met for undue hardship. She referred to her earlier decision in **Pretty v. Pretty**, 2011 NSSC 296 in which certain legal principles were set out in part, as follows:

> * A narrow definition of "undue hardship" must be adopted to ensure that the objectives of the *Guidelines* will not be defeated. Only exceptional circumstances will justify a reduction in child support: **Hanmore v. Hanmore**, supra, at para 10;
> * The burden of proof is on the person claiming the relief: **Hanmore v. Hanmore**, supra, at para 11;
> * Hardship" is defined as "difficult, painful suffering", and "undue" is defined as "excessive, disproportionate." To succeed, one must prove that the hardship is exceptional, excessive, or disproportionate in the circumstances. This produces a "very steep barrier" to a successful claim: **Hanmore v. Hanmore,** supra, at paras 11 and 17, and quoting from **Barrie v. Barrie** (1998), 230 A.R. 379 (Q.B.);
> * A departure from the *Guidelines* for undue hardship should be the "exception and not the norm": **Hanmore v. Hanmore**, supra, at para. 13, and quoting from **Hansvall v. Hansvall**, [1998] 4 W.W.R. 202 (Sask. Q.B.);
> * Parents are expected to exhaust all efforts to increase their incomes and decrease discretionary expenses before consideration can be given to reduce a child support obligation: **McPhee v. Thomas** 2010 NSSC 367.

[68] In an amended statement of undue hardship circumstances filed on May 20, 2016, Mr. Locke clarified that his monthly student line of credit payment is

$271.00, and he attached confirmation from the credit union showing a balance owing on the student line of credit of $3,759.27 as of April 4, 2016. The student line of credit debt was incurred in order to earn a living. The monies were used for Mr. Locke to complete training as a welder. The balance is not excessive, nor are his monthly payments onerous.

[69] Mr. Locke is in arrears on his income tax, but there is no evidence of what payment arrangements are in place. He also owes a small amount for legal fees, which were not incurred in order to earn a living. In addition, he has debt arising from the 2015 order for arrears. They are being repaid at the rate of $150.00/month, which is not onerous.

[70] Mr. Locke's expenses include monies to pay some discretionary items. That money could be used to pay debts instead. He also opted to incur rent charges when he moved out of his parents' home recently. That is extra money that could have been used to pay bills.

[71] Mr. Locke also claims relief due to his duty to support Ms. Bramwell. However, she agrees that spousal support for her should terminate no sooner than November 1, 2016. Mr. Locke seeks an earlier termination date, so either way he will have no longer be obliged to pay spousal support for Ms. Bramwell after November 1, 2016. This ground of relief is rejected.

[72] Mr. Locke next claims to have a legal duty to support a dependent child in his household, namely his wife's children. There was no evidence at trial that Mr. Locke has a legal obligation to support these children, or whether their biological father pays support for them. I reject this ground of relief.

[73] Mr. Locke's final claim for relief due to undue hardship arises from the garnishment of his wages. At the time he filed his application, the Director of Maintenance Enforcement was garnishing 100% of his income. The parties reached agreement in April, 2016 that all action to enforce arrears would be suspended, and that only ongoing support obligations would be garnished from his wages. A consent order was issued, so this is no longer a basis for hardship relief.

[74] In addition to the factors outlined above, I note that Mr. Locke is no longer required to pay support for his older daughter. Support for his younger daughter will decrease, based on a lower imputed income, effective January, 2016. Some arrears accumulated under the 2015 order will be forgiven as a result. This will all add up to a lower monthly child support payment.

[75] As Justice Forgeron noted in **Pretty** (*supra*), the onus of proof is on the person claiming hardship relief. Mr. Locke must demonstrate that the hardship arising from the circumstances outlined in his evidence are "exceptional, excessive, or disproportionate" in the circumstances. He has not done so.

[76] Circumstances of undue hardship have not been proven, so I need not compare household standards of living.

Issue #7 - Should Mr. Locke be required to provide coverage under his health plan for the child of the marriage?

[77] Mr. Locke testified that his daughter is currently covered under his wife's medical plan. He agreed to make efforts to have her covered under his own plan. Ms. Bramwell wants this requirement contained in an order, because she says that when he obtained his welding job in western Canada, he obtained health coverage for himself only. He did not obtain coverage for the children. She has no confidence that he will obtain coverage under his own plan now, unless ordered to do so.

[78] It is reasonable to require Mr. Locke to obtain health coverage for his daughter under his plan, given his evidence that he and his wife are separated. I will direct that he continue to provide health (medical and dental) coverage, either under his wife's plan or his own plan, for so long as the child remains a dependent child of the marriage.

[79] Mr. Locke will make arrangements with the administrator of the plan to receive direct submission of claims by Ms. Bramwell, and direct reimbursement of payments to her. Failing that, he will submit claims presented by her for the child within seven days of receipt, and reimburse Ms. Bramwell within seven days of receipt of payment. Ms. Bramwell will be responsible for any uninsured expenses, copayments and deductibles.

ANCILLARY ISSUES:

[80] In the 2015 order, no schedule was set for payment of the section 7 arrears. Ms. Bramwell requests one. A payment schedule will also benefit Mr. Locke. I direct that Mr. Locke repay the amount of section 7 arrears owing in monthly increments of $50.00, until such time as the total amount owing has been paid.

CONCLUSION:

[81] Mr. Locke's support obligations will be varied as outlined. His counsel is asked to prepare the order. If either party wishes to be heard on costs, time may be arranged through the scheduling office.

MacLeod-Archer, J.