
CANADA / JUDGMENT

Bartch v. Bartch

2018 BCSC 1583

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Supreme Court of British Columbia

DECIDED

14 September 2018

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2018 BCSC 1583 Bartch v. Bartch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bartch v. Bartch,

2018 BCSC 1583

Date: 20180914

Docket: E108417

Registry: Kelowna

Between:

Terry Lynn Marie Bartch

also known as Terry Lynn Bartch

Claimant

And

Bradley Dean Bartch

also known as Brad Bartch

Respondent

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Claimant:

S.L. Specht

Counsel for the Respondent:

D.L. Polley

Place and Date of Hearing:

Kelowna, B.C.

June 13, 2018

Place and Date of Judgment:

Kelowna, B.C.

September 14, 2018

Introduction

- [1] The claimant, Ms. Terry Lynn Bartch, seeks to vary and set aside, effective April 1, 2018, part of an interim order which Justice Saunders pronounced at a Judicial Case Conference ("JCC") on March 20, 2015. She seeks to vary and set aside paragraph 1 of the order that requires her to pay \$10,000 a month to the respondent, Mr. Bradley Dean Bartch.
- [2] This application is made in a high conflict family law case. The primary issues in the underlying action are the enforceability of a separation agreement, the division of assets, and spousal support.

Facts

- [3] I do not intend to recite the background facts in detail as they can be found in previous decisions: see *Bartch v. Bartch*, 2017 BCSC 210; and *Bartch v. Bartch*, 2017 BCSC 1381 ["Bartch 2017"]. What follows is a brief summary of the facts.
- [4] I note that there have been numerous interim applications from both parties and although the matter has been scheduled for trial four times, it continues to be adjourned. The last adjournment was because Mr. Bartch suffered a stroke in December 2017 and was unable to attend the trial scheduled for February 2018.
- [5] The parties began to cohabitate on June 30, 1995. They married on September 14, 1996 in Saskatoon and moved to Kelowna in 1999. There are no children of the marriage.
- [6] Between 1999 and 2011, the couple earned modest incomes as fitness and rehabilitation consultants. They then attempted to earn money through various multilevel marketing (pyramid-structured) companies. Prior to 2010, their joint annual incomes never exceeded \$53,000.

- [7] In October 2009, they became involved in a multilevel marketing business known as NuCerity International ("NuCerity"). In September 2010, they incorporated Bartch Mentoring Corporation ("BMC"), and rolled their NuCerity partnership into BMC. After a couple of years the company's revenues significantly increased.
- [8] Ms. Bartch says they separated on December 30, 2012; Mr. Bartch says they separated on August 14, 2014.
- [9] The parties signed a separation agreement on September 1, 2014. The agreement stipulated, inter alia, that the claimant would retain all of the parties' business interests with BMC. The agreement also stipulated that the claimant would pay the respondent \$250,000 in instalments of \$10,000 per month for 25 months beginning September 1, 2014. The terms of the separation agreement are as follows:
- Date of separation December 30, 2012.
 - The mortgage and all lines of credit and Avion Visa paid off over and above the sale of the house by TL Bartch.
 - And that the account with RBC no longer joint, and will be my personal account (Brad Bartch).
 - Brad Bartch to sign off of Bartch Mentoring Corp.
 - \$250,000 to be paid out by TL Bartch to Brad Bartch (not including Bartch Mentoring Corp.).
 - Increments of payout or what TL sees fit (\$10,000/month ... for 25 months ...) starting as of September 1, 2014.
 - If TL sees fit payment can be made sooner.
 - All taxes personal and Bartch Mentoring up to and ending for the corporate year of 2013 paid by TL Bartch.
 - Both Hublot watches returned and the Bendz watch to Brad Bartch.
 - Brad Bartch will sign off any other assets and the above is final nothing else will come after that date.
- [10] The respondent seeks to have the separation agreement set aside. He claims that he was unaware at the time he signed the agreement that the claimant incorporated 0970023 B.C. Ltd. ("097") and rolled BMC into 097 in May 2013. He now claims a 50 percent interest in the 097 company. The claimant argues that the 097 company was created post-separation and that it is not family property.
- [11] On March 20, 2015, at a JCC before Justice Saunders, a consent order [the "JCC Order"] was made that provided in part that the claimant would pay \$10,000 per month to the respondent commencing March 31, 2015. The JCC Order was to be on an interim and without prejudice basis. The specific wording was: "On an interim basis, and without prejudice to the parties on the issue of entitlement or quantum, the claimant shall pay the respondent the sum of

\$10,000 per month commencing on March 31, 2015 and on the last day of every month thereafter." The JCC Order was confirmed by Justice Beames on September 18, 2015.

- [12] On January 5, 2017, Justice G.P. Weatherill ordered an interim distribution of family assets to the respondent in the amount of \$150,000 (the "Interim Distribution Order"). The claimant sought leave to appeal in the Court of Appeal.
- [13] In July 2017, the claimant applied for a stay of the Interim Distribution Order pending the appeal. She also sought an order vacating the JCC Order requiring her to pay the respondent \$10,000 per month. Justice G.P. Weatherill dismissed that application on August 4, 2017 in *Bartch 2017* (the "August 4, 2017 Order"). He considered the application to vacate the JCC Order under the test for granting a stay, which includes three questions: 1) whether there is an arguable case; 2) whether irreparable harm would occur; and 3) whether the balance of convenience favours issuing a stay. The relevant portions of *Bartch 2017* respecting the JCC Order are as follows:
- [39] [The claimant's position is that] [w]hen the JCC Order was made, it was expected that the trial of this action would have occurred in 2016 and that is why the claimant agreed to pay the respondent \$10,000 per month until trial. In addition to the monthly \$10,000 she is paying the respondent, he has been paid \$51,000 for his share of family assets. In total he has been paid \$321,000 to date in addition to the interim distribution. She asserts that, accordingly, the JCC Order as supplemented by the Beames Order should be vacated to the extent they require her to continue to pay the respondent \$10,000 per month.
- [50] [The respondent] says there is nothing in either the JCC Order or the Beames Order to suggest that the \$10,000 per month the claimant is paying relates to spousal support. If those payments were to cease, the respondent says he would be forced to apply for interim spousal support and the parties would be no further ahead.
- [51] The respondent says that he is in difficult financial circumstances and needs the interim distribution and continued receipt of \$10,000 per month to properly advance his case.
- [65] If at trial the respondent proves to be entitled to spousal support, the amount of that support will likely exceed the \$10,000 per month he is currently receiving.
- [75] Respecting the claimant's application that the \$10,000 per month payments she is making to the respondent under the JCC Order and Beames Order, I [am] satisfied that they should continue until further order or agreement between the parties. The JCC Order and Beames Order were interim orders that were put in place as a stop gap measure pending trial. In my view, such interim orders should not be set aside pending trial unless exceptional circumstances exist. Any imbalance that these payments may be causing can be addressed when the issues between the parties are fully aired at trial.

- [14] The claimant's appeal of the Interim Distribution Order was ultimately dismissed by the Court of Appeal in *Bartch v. Bartch*, 2018 BCCA 271 ["Bartch 2018"]. Following this decision I invited further submissions from the parties regarding what impact, if any, the Court of Appeal decision had on the issues before me. I received a submission from the claimant on August 3, 2018 and from the respondent on August 15, 2018.

Positions of the Parties

- [15] Ms. Bartch argues that there have been material changes in her circumstances in the past several months such that I should vary the JCC Order from March 2015. First, the trial scheduled for February 4, 2018 was again adjourned, on application of the respondent. The claimant argues that due to numerous delays, the parties are "way past the consent order in question being a temporary fix to a difficult problem."
- [16] Second, the respondent has engaged in conduct intentionally designed to do damage to the claimant's financial interests personally and corporately. By serving a three year old restraining order, dated September 18, 2015, on the claimant's bank in February 2018, Mr. Bartch caused the claimant's 097 bank accounts to be frozen for almost two months without any justification. The restraining order was set aside by Justice Baker on May 9, 2018: *Bartch v. Bartch*, 2018 BCSC 827. In making that order Justice Baker stated:
- [38] No concrete reason was advanced by counsel for the respondent on this application as to the steps taken [with] respect to Scotiabank. Counsel for the respondent took the position before me that it was not the intention of the respondent to have the Scotiabank freeze the accounts and that it was a problem of Scotiabank's own making. I cannot agree that this was entirely a response that lies at the feet of Scotiabank. Clearly the respondent was the author of this miscommunication with the bank that resulted in the steps taken by Scotiabank.
- [17] Third, due to a merger between NuCerity International and another multi-level marketing company known as Ariix, the claimant's income has been reduced to approximately one-fourth of what her previous salary was with NuCerity. She deposes that her future salary prospects within Ariix will not be as lucrative as they were when she worked for NuCerity. This new corporate structure has had a drastic effect on her income and the respondent certainly has no claim to income from the Ariix business.
- [18] The claimant provides further reasons why this Court should vary the JCC Order. The claimant argues that there is no legal foundation to pay the respondent from post-separation assets. Based on the date she says they separated, December 30, 2012, she deposes that the money her business generates today has been earned post-separation.
- [19] The claimant argues that while the respondent's interests have been financially secured through Justice Baker's order dated May 9, 2018 (stipulating that \$300,000 be held in a bank account pending trial), she has not been financially secured at all. There is no accounting of where the respondent is spending his money. His car has been repossessed for lack of payment. He has not sought employment for the past five years. The object of the rules

regarding proportionality have not been met. Her access to justice has been delayed and denied.

- [20] The claimant points out that the respondent argues the \$10,000 payments at issue are spousal support payments. She disagrees and notes that earlier he took the position that they were not for spousal support. In any event, Mr. Bartch is not paying income tax on these payments, which indicates he is treating them as an interim advance of property for tax purposes. Mr. Bartch does not deny that he has not been paying taxes on the \$10,000 payments.
- [21] The claimant argues that the payments she makes to the respondent are not spousal support payments, but are in the nature of an interim advance of property which the court has no jurisdiction to order pursuant to s. 88 of the FLA. Where there is a separation agreement in place, the court does not have the ability to order an interim distribution of family property, despite having done so multiple times in this Action to date. This was a key issue in the Court of Appeal action regarding the Interim Distribution Order which has now been decided. The Court of Appeal rejected Ms. Bartch's position regarding s. 88 because the separation agreement is being contested: *Bartch* 2018.
- [22] The claimant argues that the respondent has been fully paid under the separation agreement, which she deposes is final and valid. In fact, the respondent has been paid more than double the amount to which the parties agreed. Since the JCC Order, Ms. Bartch has paid Mr. Bartch over \$600,000. She has overpaid because at the time of the JCC Order the parties were scheduled for trial in January 2016. This trial has been adjourned four times since that time.
- [23] The claimant raises the concern that if she is successful at trial and the separation agreement is upheld, the respondent will not be in a position to repay her the amounts she overpaid. He has provided little explanation for why he requires \$10,000 a month and the claimant alleges that he spends all of his money. As a result, he does not have savings or source of income with which he could repay the claimant. If she is successful at trial, she will not be able to recover the debt.
- [24] Mr. Bartch resists this application. He argues that virtually the same application was made before Justice G.P. Weatherill on March 31, 2017. That application, to vary the JCC Order requiring the claimant to pay the respondent \$10,000 per month, was dismissed in the August 4, 2017 Order. Justice Weatherill determined that the JCC Order should remain in place pending the trial. Justice Weatherill's decision was upheld on appeal by the Court of Appeal.

- [25] Mr. Bartch deposes that he has had a stroke and his speech and comprehension have been impaired. Although there has been some improvement, currently he cannot work. He argues that he has never been able to make more than \$30,000 per annum, even when he was healthy. He claims he owes over \$200,000 for "unbilled [legal] work in progress" and that his rent is \$2000 per month.
- [26] Mr. Bartch deposes that the parties became involved in NuCerity International in 2009. They were some of the first distributors in Canada. Although initially they did not earn much, they earned significant revenues from the company from 2012 forward. It was like the parties had won the lottery.
- [27] The respondent disagrees that the money Ms. Bartch's business generates today has been earned post-separation. He deposes that before they separated in August 2014, Ms. Bartch diverted funds from the family business. She hid money from him, he has been left with no income and no assets, and their separation agreement is not valid as a result.
- [28] Mr. Bartch argues that he is not making himself "judgment-proof"; he simply wants his share of the family property. These issues will have to be determined at trial but he wants to protect his interest in the assets.
- [29] Mr. Bartch agrees that the merger between NuCerity and Ariix is a change since the previous application was dismissed by the August 4, 2017 Order, but he challenges the evidence regarding the change. He argues that the lower income is a result of the transition time it takes to allow Ariix to become established. He argues that the compensation plan offered by Ariix is the highest in the industry.
- [30] Overall, the respondent argues that interim orders are to achieve "rough justice" because evidence in chambers does not permit an in-depth analysis of the factual issues. The respective needs and means of the parties are the most prominent factors on which to assess an interim application. If there is the ability to pay, the interim support should permit him to continue at the same standard of living he enjoyed before the separation. Mr. Bartch needs the financial resources due to his stroke. Finally, he argues that the means of the parties includes capital assets and all pecuniary resources. Given Ms. Bartch's income and resources, he has been underpaid since March 2015, when the JCC Order was made.
- [31] The claimant responds that she needs the money to support the costs of her new business. In contrast, the respondent has an extravagant lifestyle. She points to numerous liquor purchases, hydro bills suggesting that he operates a marijuana growing operation, and many restaurant bills. His bank statements do not show someone who is struggling financially. He fails to pay his bills and is setting himself up for bankruptcy.

Legal Framework

- [32] Interim orders are designed to provide short-term solutions and to maintain the status quo: *Johnson v. Jessel*, 2012 BCCA 393 at para. 48, citing *Leung v. Leung* (1998), 44 R.F.L. (4th) 121 (B.C.C.A.) at para. 10; *Eaton v. Eaton* (1987), 11 R.F.L. (3d) 92 (B.C.C.A.); and *Prost v. Prost* (1990), 30 R.F.L. (3d) 80 (B.C.C.A.) (in chambers). Only where there is a change in circumstances should an interim order be varied.
- [33] The test for when a court may change, suspend or terminate an interim order made under the Family Law Act, S.B.C. 2011, c. 25 [FLA] is set out in s. 216. Subsections (3) and (4) are particularly relevant:

Court may make interim orders

216(1) Subject to this Act, if an application is made for an order under this Act, a court may make an interim order for the relief applied for.

- (2) In making an interim order respecting a family law dispute, the court, to the extent practicable, must make the interim order in accordance with any requirements or conditions of this Act that would apply if the order were not an interim order.
- (3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:
 - (a) a change in circumstances has occurred since the interim order was made;
 - (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
- (4) In making an order under subsection (3), the court must take into account all of the following:
 - (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
 - (b) the length of time that has passed since the interim order was made;
 - (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
 - (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
 - (ii) would not necessarily reflect the final arrangement between the parties;
 - (d) whether a trial has been scheduled;
 - (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

- [34] Section 217 additionally provides:

Interim orders before changing, suspending or terminating orders

217 If an application is made to change, suspend or terminate an order, an interim order for the relief applied for may be made only if the court is satisfied that

- (a) a change in circumstances has occurred since the order that is the subject of the application was made, and
- (b) the hardship to a party of denying interim relief before the application is heard outweighs the hardship to any party of granting interim relief.

[35] In the August 4, 2017 Order, Justice G.P. Weatherill declined to vary the JCC Order. He applied the test for a stay rather than the test to vary interim orders. However, he noted that "exceptional circumstances" were required to vary interim orders. Justice Weatherill found that the claimant's 097 company had significant cash reserves and paid the claimant's personal expenses. He noted that there is extreme financial imbalance between the parties and, at that time, Ms. Bartch's income was in excess of \$800,000 per year.

[36] Here there is no stay application and thus the application to vacate or vary the JCC Order should be dealt with according to the principles applicable to variations of interim orders in family cases.

[37] Interim orders are temporary. Interim orders for the payment of support should only be varied if there is a compelling change of circumstances such that one or both parties would be seriously prejudiced by waiting until trial: *Hama v. Werbes* (1999), 66 B.C.L.R. (3d) 120 [Hama], at para. 12 and *King v. Pike*, 2016 BCSC 1632 at para. 14. As Justice Martinson stated in *Hama*:

[8] The litigation process in this province is generally designed to resolve, at a trial, disputes between parties who are not otherwise able to resolve them. Family law disputes too often get bogged down on interim applications. Time and money that could be better used for other purposes, are spent dealing with them. Interim applications can also "add fuel to the fire" in acrimonious disputes .

[38] The exception to the above test is when consent orders are made "without prejudice" at a JCC. This court treats these differently than orders arising from applications that are without consent and are with prejudice. As Justice Pearlman explained in *Sandhu v. Bhullar*, 2016 BCSC 59 [Sandhu]:

[42] In *D.P.G. v. V.M.G.*, 2015 BCSC 1038, the parties attended a JCC where they consented to an order which expressly provided that on an interim without prejudice basis they would equally share parenting time. Mr. Justice Rogers heard an application by the claimant father for an interim order varying the consent order pronounced at the JCC by granting him exclusive parenting responsibilities. The Court considered whether it should treat the claimant's application as a motion to vary an existing order, or deal with it as an initial application. At paragraph 37, Rogers J. held the "without prejudice" term of the consent

order meant the order was not to be used as either a sword or a shield in later litigation on the same issues. A without prejudice JCC order was "no more than a Band-Aid provision" which did not impede the parties' freedom to argue for a different result without being hampered by "earlier agreements made extemporaneously for purposes of expediency". Accordingly, the court approached the application as if it were an initial application.

[39] This same point was made in *I.J.G.P.G. v. K.M.*, 2016 BCSC 1072 [I.J.G.P.G.] at para. 156.

Analysis

[40] In this application, the claimant argues that there has been a material change in circumstances justifying a variation to the JCC Order made in 2015 that she pay \$10,000 per month to the respondent until trial. She also says she will experience prejudice if the JCC Order is not vacated or varied.

[41] Justice G.P. Weatherill's August 4, 2017 Order declining to set aside the JCC Order implicitly found that there had not been a material change in circumstances justifying a variation of the JCC Order at that time, since a finding to the contrary would have led to the opposite result. Accordingly, that date should be the benchmark from which to determine if there has been a material change in circumstances.

[42] Since the JCC Order was an interim "without prejudice" consent order, it was not intended to "impede the parties' freedom to argue for a different result without being hampered by 'earlier agreements made extemporaneously for purposes of expediency'": Sandhu at para. 42 and *I.J.G.P.G.* at para. 156. Based on this jurisprudence, Ms. Bartch does not in fact need to establish that there has been a material or compelling change in circumstances.

[43] The parties are engaged in prolonged litigation. Justice G.P. Weatherill was concerned with Mr. Bartch's inability to fund a defence when the parties ultimately get to trial, limiting Mr. Bartch's access to justice. Justice Weatherill also noted that the potential harm to Ms. Bartch if the \$10,000 per month payments continue is not irreparable harm (the test for a stay) because it is solely financial in nature.

[44] As noted earlier, this Court made an interim advance order of \$150,000 to assist Mr. Bartch in funding his litigation. This order was recently upheld by the Court of Appeal in *Bartch* 2018. The Court of Appeal noted that Mr. Bartch received \$65,000 more than he ought to have received in the advance based on the evidence before the chambers judge. Ms. Bartch has paid the \$150,000 to Mr. Bartch.

[45] Also relevant is the decision of Justice Baker, who ordered that \$300,000 be held to secure Mr. Bartch's potential interest in the claimant's 097 company.

- [46] If the claimant wins at trial, it is unlikely that Mr. Bartch will be in a position to pay her back. He has received approximately \$600,000 in payments since the JCC Order and he has no explanation of where the money has gone. He has not sought meaningful employment in five years and he is not paying his bills or addressing his debts. If the claimant is successful at trial, it may well be an empty judgment.
- [47] Ms. Bartch has made out a compelling case on the facts, especially with respect to the unfairness of her being held to terms of a without prejudice consent order that was agreed to based on an anticipated trial date of January 2016. Ms. Bartch has also established a significant decrease in her income as well as Mr. Bartch's inability to repay her in the event that his action is unsuccessful.
- [48] From a policy perspective, holding parties to their without prejudice consent agreements for years on end will discourage consensual resolution between parties. This Court should be encouraging settlements, not putting roadblocks in the way of litigants. This is not to say that consent orders should be easily set aside. However, different considerations are necessary when the parties have made agreements based on assumptions that, due to no fault of their own, are factually inaccurate or for which the underlying facts have changed.
- [49] For these reasons, I am prepared to vary the JCC Order.
- [50] If I am wrong on the law regarding varying without prejudice consent orders, I am persuaded that there have been material changes in circumstances, the general test for varying interim orders.
- [51] There are two changes in circumstances that have occurred since Justice G.P. Weatherill's decision:
1. The trial has been adjourned yet again. At the time of the August 4, 2017 Order, it was scheduled to commence in February 2018. The trial is now set to commence on June 17, 2019.
 2. The claimant's income has decreased significantly.
- [52] First, the further adjournment of the trial to June 2019 is a significant change in circumstances because it will cause a long delay in reaching a final resolution of the issues between the parties. Had the trial proceeded in February 2018, a final decision would likely have been issued by this time or would be imminent. Instead, over a year has passed since the August 4, 2017 Order was made and the trial has not yet commenced. By the time of trial, over four years will have passed since the JCC Order.
- [53] The principle that interim orders should not be amended absent compelling circumstances is diminished due to the length of time it is taking for these issues to go to trial. Here Ms. Bartch will be seriously prejudiced if she must wait until trial to adjust these payments. Mr. Bartch has no savings and considerable debt despite receiving approximately \$600,000 from Ms. Bartch. There is no indication that he will be in a position to repay her if he is

unsuccessful at trial. With the \$10,000 a month payments continuing, he also has little incentive to proceed to trial.

- [54] Second, Ms. Bartch has established that her income has declined, affecting her ability to pay. Pursuant to the JCC Order, she will continue to pay Mr. Bartch \$10,000 per month until a decision is reached after the trial in June 2019.
- [55] As found by Justice G.P. Weatherill, Ms. Bartch was formerly making an income of approximately \$800,000 per year. Her pay would vary, but it was typically about \$20,000 CAD per week. The claimant provided a printout of her pay history with NuCerity, her previous employer, for August and September of 2017. This evidence demonstrated that she was making between \$17,874.21 CAD and \$28,941.86 CAD per week during this period. An additional printout of her commission history for the week of March 12, 2018 lists her income as \$22,538.33 CAD.
- [56] Following NuCerity's merger with Ariix, the claimant's income dropped dramatically. On March 30, 2018, the claimant received her first weekly payment from her new employer, Ariix. That payment was for \$3,690.65 USD. The claimant provided additional printouts entitled "Commission Statement" representing four consecutive weeks of pay from the end of March to April 2018 for the following amounts: \$3,558.48; \$4,734.90; \$5,157.93; and \$4,964.63. Based on these pay stubs, the claimant was making about \$4,600 per week in US dollars in the five weeks following her move to Ariix.
- [57] On June 14, 2018, the claimant's bookkeeper deposed that the claimant earned an average of \$4,401.27 per week in USD since she had started working with Ariix 11 weeks prior. The bookkeeper provided a printout entitled "Commission Statement & Rebate From Week 13 of 2018 to Week 23 of 2018" with each individual payment listed. This evidence indicates that the claimant is now making approximately \$17,600 USD per month as opposed to her previous \$20,000 CAD per week. Ms. Bartch also claims that she puts a portion of her income back into her business to cover her base expenses.
- [58] The bookkeeper also referred to an adjustment for \$30,573.12 USD from May 2018 in the claimant's NuCerity Commission Statement. She submitted in her affidavit that the adjustment does not form part of the claimant's income because it is a flow through of tax remitted to the government.
- [59] Mr. Bartch argued that the bookkeeper's submission regarding the nature of the adjustment goes beyond what the claimant was entitled to provide post-application. He says that the affidavit consists of both opinion and advocacy. I agree and I am not referring to the flow through of tax in my analysis. Even assuming the \$30,573.12 USD is income, Ms. Bartch has established a significant reduction in income despite only a few months of statements.

- [60] Mr. Bartch tendered evidence to establish that Ariix, the new company, will pay the claimant enough for her to continue the \$10,000 payments. He also tendered evidence that the decrease in Ms. Bartch's income is temporary. The claimant correctly points out that this evidence is hearsay. Although admissible in an interlocutory application, I cannot ascribe much weight to this evidence.
- [61] It is difficult to determine on the evidence whether the lower income is permanent. This will be addressed at trial. On the evidence before me, Ms. Bartch's income is significantly lower than it was one year ago when a similar application was made. Ms. Bartch is prejudiced with respect to the \$10,000 per month payments because she has recently experienced a decline in her income.
- [62] This Court must consider any hardship that would be caused to the respondent if the JCC Order is set aside. The respondent says that he has no other source of income and will not be able to continue to afford these proceedings without receiving the \$10,000 monthly payments. This argument is undermined by the \$150,000 awarded to him to fund the litigation by the Interim Distribution Order. Given the decision of the Court of Appeal in *Bartch* 2018 upholding the \$150,000 payment, \$10,000 per month should not be required to fund Mr. Bartch's litigation.
- [63] Mr. Bartch argues out that in addition to over \$200,000 in unbilled legal work he paid the entire account of the expert expenses whereas the Court of Appeal only accounted for him paying 50 percent. This is set out in the reasons of the court in *Bartch* 2018:
- [74] With Ms. Bartch's submissions addressed, only one issue remains: the amount of \$150,000 ordered to be paid under s. 89. The order was made in the face of an estimate that fees and disbursements for completing the trial would be \$60,000. The judge found that sum was conservative, but he did not himself give another estimate. To those fees one may add Mr. Bartch's one-half share of the expert's fees incurred by court order, approximately \$25,000, for a total sum of \$85,000, an amount considerably less than the sum distributed by the order. It may be that the judge intended the balance (\$65,000) to be directed to legal fees owing by Mr. Bartch, but he did not say so, and there is no evidence such payment was necessary to allow Mr. Bartch to present his case. Further, the judge did not consider the extent to which the \$10,000 per month received by Mr. Bartch could be used to support the litigation.
- [64] The Court of Appeal points out that Mr. Bartch received more money through the interim distribution than he required to fund his litigation. Even accounting for the extra money he paid for the expert, he still received a significant amount of money to assist in effectively participating in the litigation.

- [65] To the extent that Mr. Bartch is in arrears regarding his legal bills, I agree with Ms. Bartch that he is the author of his own misfortune. Although he recently suffered a stroke, prior to this he had not made meaningful attempts to work since the parties separated. He has not accounted for where all the money he has received has gone, and he is not living a lifestyle of someone trying to save money for his litigation.
- [66] I am of the view that \$10,000 per month is a significant income. I am persuaded that Mr. Bartch's living expenses do not require \$120,000 per year.
- [67] Weighing the hardship to each party, I conclude that the JCC Order should be varied so as to allow the respondent to continue to receive a level of income while also ensuring that the claimant is not making payments beyond her means. This is particularly important given the concerns that Ms. Bartch will be unable to recover the money in the event she is successful at trial.
- [68] In these circumstances I am reducing the monthly payments to \$5,000. I am not going back to April 1, 2018 as requested by the claimant. This is to partially offset the Mr. Bartch's 100 percent payment of the expert expenses referred to by the Court of Appeal. Consequently, the reduction in payments is retroactive to September 1, 2018.
- [69] Both parties have enjoyed a measure of success. In these circumstances, there will be no order as to costs.

"The Honourable Madam Justice D. MacDonald"

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Prepared on 28 October 2026 · Esheria