

CANADA / JUDGMENT

Van Wollen v. Van Wollen

2024 BCSC 1677

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1677 Van Wollen v. Van Wollen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Van Wollen v. Van Wollen,

2024 BCSC 1677

Date: 20240910

Court File No. E222525

Registry: Vancouver

Between:

Elizabeth Valerie Van Wollen

Claimant

And

Sebastian Van Wollen, VW Consulting Ltd., Inc. No. BC0940721,

Blue Planet Plastics Recycling & Manufacturing

Ltd., Inc No. BC0704324, AG Envirotech Inc., Inc. No BC0399368

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph63(b) on September 13, 2024.

Before: Associate Judge Robertson

Reasons for Judgment

Counsel for the Claimant:

J. Wahid

Appearing in person, and as director of VW Consulting Ltd., Blue Planet Plastics Recycling and Manufacturing Ltd., and AG Envirotech Inc.

S. Van Wollen

Place and Dates of Hearing:

Vancouver, B.C.

August 7 and 8, 2024

Written Submissions:

August 20, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 10, 2024

Table of Contents

Background.. 3

Summary of the Parties' Financial Status. 8

Analysis. 10

Res Judicata. 11

Variation of an Interim "Without Prejudice" Order 11

Order Made. 18

- [1] The personal respondent, Mr. Van Wollen, brings this application on his own behalf and on behalf of the respondents to vary a term of a consent order made at the parties' January 18, 2023 judicial case conference (the "JCC Order") whereby it was agreed that each of the parties would be able to draw a monthly dividend of \$15,000 from either of their operating family companies, those being the respondents, Blue Planet Plastics Recycling & Manufacturing Ltd. ("Blue Planet") and AG Envirotech Inc. ("AG", collectively with Blue Planet, the "Operating Companies"), from which the sum of \$2,500 as received by each party was to be deposited into a joint account to cover joint family expenses, primarily the holding costs for their former family home located in West Vancouver (the "FFH"), which has now been sold, as well as the children's tutoring, counselling and healthcare expenses (the "Dividend Payment Term").

- [2] Specifically, Mr. Van Woollen seeks to reduce the dividend amount being paid to \$4,000 per month, given what he describes as the near insolvent circumstances in which the Operating Companies find themselves, or soon will if dividend payments totalling \$30,000 per month continue to be made. In addition, he argues, given that the FFH is now sold, the funds necessary for the holding costs relating to same are no longer required.
- [3] This particular term of the JCC Order was specifically made on an "interim and without prejudice" basis.

Background

- [4] By way of brief background, the parties began to cohabitate in February 2006, and were married on August 4, 2006. Their separation date is in dispute, although nothing turns on that for the purpose of this application, with it being in either October, 2021 or in the summer of 2022.
- [5] The parties have two children, aged 15 and 17.
- [6] Throughout the relationship the parties have held interests in the two Operating Companies, as well as a holding company. The two Operating Companies are in the food recycling business, with one of them specifically owning the licences, intellectual property and technology as used by the other in the operations themselves. The other company, the respondent VW Consulting Ltd. ("VW Consulting") owns various assets, primarily made up of real estate holdings which includes the commercial warehouse from which the Operating Companies operate, with those assets being valued at approximately \$12M.
- [7] In terms of corporate structure, VW Consulting is a 100% preferred shareholder of each of the Operating Companies, with a family trust, the Van Wollen Family Trust No. 1 (the "Family Trust"), being the 100% holder of the Operating Companies' common shares. The parties are joint beneficiaries and trustees of the Family Trust, and joint equal shareholders of VW Consulting.
- [8] Throughout their relationship, Mr. Van Wollen had the primary managerial role with respect to all of the companies, with the claimant both working outside the home as an on-call teacher, and providing administrative assistance, although the extent of her contribution is disputed by Mr. Van Wollen but need not be resolved for the purpose of this application.
- [9] Prior to separation the parties had consistently drawn just over \$15,000 per month from Blue Planet, although the accounting logistics for that is not entirely clear, but presumably involved a payment flowing through the Family Trust.
- [10] Since separation, the respondent has taken over all management of the family companies. The claimant states that she has offered to assist given her previous role, but that the respondent has refused to have her involved in the day to day operations.

- [11] Since the JCC Order was pronounced which, given the historical draws, appears to have been an attempt to maintain the parties' financial status quo, the \$15,000 draws were made as contemplated from January 2023 to January 2024, from Blue Planet.
- [12] On January 18, 2024, Mr. Van Wollen gave notice to the claimant that Blue Planet would no longer be paying the dividends. Instead, Mr. Van Wollen proposed that the parties would begin to liquidate VW Consulting's assets, and use those funds to cover their financial needs, with the dividends being paid out from the net sales proceeds. In addition, notice was given that Blue Planet would no longer be paying any rent to VW Consulting for use of the warehouse.
- [13] On February 1, 2024, as the claimant was unable to process the dividend cheque, she unilaterally withdrew \$15,000 from Blue Planet's bank account to replace the monthly draw.
- [14] Thereafter, the parties attempted to discuss how to address what Mr. Van Wollen saw as an issue with Blue Planet's working capital, including his suggestion that VW Consulting Assets be liquidated and, after the sale of the FFH, that the parties use those funds to cover their living expenses. The claimant proposed that Blue Planet draw on its available credit to enable such payments to be made.
- [15] On April 10, 2024, Mr. Van Wollen filed and brought an application to vary the JCC Order to prohibit withdrawal from the parties' joint account. In addition, although a business valuation of the Operating Companies had been prepared further to the JCC Order, a draft of which was provided on February 27, 2023, it only valued the companies to the fiscal year end December 2022. The respondent's application also sought an order to have that report updated to reflect what he felt had been material changes to the values of the Operating Companies. Mr. Van Wollen did not seek any relief regarding the Dividend Payment Term.
- [16] On April 23, 2024, the parties appeared before Associate Justice Vos who, in addition to granting some of the orders by consent, addressed the need for the updated valuation report and the request by Mr. Van Wollen for an order limiting the withdrawals from the joint bank account. Based on the transcript of those proceedings the claimant took issue with two things; whether or not that there was a binding settlement agreement in place in respect of certain property issues, and whether any updated valuation report should be done based on unaudited financial statements, taking the position that they should only be done after those statements were audited by KPMG. In the discussions between Mr. Van Wollen and the court on the issue as to the Dividend Payment Term including the \$2,500 that was still going into the joint account, Mr. Van Wollen noted as follows as to the claimant's use of the joint account funds:

THE COURT: Yeah, But isn't that already dealt with by the Order? The Order that says you each can draw \$15,000?

THE RESPONDENT VAN WOLLEN: Correct. But my concern is that Ms. Van Wollen - so we're trying to manage cash flow. The issue - the larger issue here, and there's corporate counsel that's taking this up at a separation application hearing - is that Blue Planet Recycling simply can't afford that dividend any further, right.

THE COURT: Can't afford what?

THE RESPONDENT VAN WOLLEN: \$15,000 a month. The company is - has much different financial situation that it did when this order was pronounced, right. So we're trying -

THE COURT: But then --- yeah

THE RESPONDENT VAN WOLLEN: So that's a separate issue. And the issue of how much money is coming out of the account is one issue. The issue at hand here is I simply don't trust Ms. Van Wollen with access to those bank accounts, given her record of dishonesty that - that she doesn't go and just use the bank accounts as she feels she's entitled to.

THE RESPONDENT VAN WOLLEN: And she could just withdraw whenever she feels like it. That's the concern. And so do I. So all I'm asking for is equal order that says you guys cannot withdraw money from these bank accounts without each other's permission. The \$15,000 a month, until that order is changed, is on autopilot.

THE COURT: Are you saying that neither of you can - can take those funds from the company in excess of \$15,000? Is that what you are saying?

THE RESPONDENT VAN WOLLEN: Sure. Yes.

THE COURT: So the \$15,000 order would stand -

THE RESPONDENT VAN WOLLEN: Yes

THE COURT: but anything beyond that, you would have to consent of both parties?

THE RESPONDENT VAN WOLLEN: Correct.

[17] During the submissions of the claimant, the following dialogue with the court occurred:

CNSL. R. HUNTER: So there's been nothing pointed - there's been no corporate expense pointed to.

THE COURT: But on clarifying what the actual issue is, it appears that what Mr. Van Wollen is asking for is what the status quo would be, anyways. And that is that both parties would be - would continue to get the \$15,000 that are under the previous order, but if they wish to extract any additional funds in any month they must have the - must consult with and get the consent of the other party.

[18] And further:

THE COURT: I think the gist, for the reason for the order is to have a bit more certainty about the cash flow going out of the company because, as you pointed out, it looks like the company - company's cash flow has gone down recently.

CNSL. R. HUNTER: Yes.

THE COURT: So I think that's the basis for it. Am I - have I got that right?

THE RESPONDENT VAN WOLLEN: Yeah, absolutely.

- [19] Associate Judge Vos ordered that the parties were not to use the corporate accounts for any withdrawals in excess of the \$15,000 dividend payment unless agreed to in writing by the other party. However, the issue of the \$15,000 dividend itself was not directly addressed by him with, as noted, Mr. Van Wollen having advised the court at the outset that while the Operating Companies cash flow had changed such that the dividend was no longer affordable, that was "a separate issue".
- [20] Shortly before the parties appeared before Associate Judge Vos, the FFH sold on June 4, 2024, with approximately \$1.5M being paid into trust with the claimant's counsel to be held pending an agreement on distribution.
- [21] Mr. Van Wollen notes that \$510,000 in dividends has been paid out to the parties by Blue Planet since the JCC Order. In addition, \$500,000 was paid out from VW Consulting as an advance, with each party receiving \$250,000 by court order pronounced April 18, 2023, although Mr. Van Wollen sought to have that reduced to \$100,000 each when the parties appeared before the court on a separate application relating to the sale of the FFH, given his concerns then as to the financial status of the companies at that time, although he did so without a formal application such that no order was made. Ultimately, when the interim distribution was not made by VW Consulting as required by the court order, a further order was made on February 14, 2024 finding Mr. Van Wollen in contempt but that such contempt could be purged by him upon the making of the interim dividend to the claimant. That payment was then made by VW Consulting, and the contempt purged accordingly.
- [22] Trial is scheduled for 10 days commencing September 15, 2025, with the claimant seeking to schedule a mediation-arbitration in advance of the trial date; however there have already been two judicial case conferences and four failed mediations to date.
- [23] By all appearances, this is a highly acrimonious matter.

Summary of the Parties' Financial Status

- [24] According to the claimant's F8, last filed July 26, 2024, her line 1500 employment income is approximately \$24,000 per year, with her dividend or other income from the Operating Companies and/or Family Trust being a further amount \$222,000 per year. Mr. Van Wollen takes issue with the claimant's employment income, saying that she is underemployed. Annual expenses are approximately \$271,000 per year.

- [25] Mr. Van Wollen's July 25, 2024 financial statement discloses employment income of \$76,500, as well as the same \$222,000 in other income from the Operating Companies and/or Family Trust.
- [26] With respect to AG's financials, the corporate tax returns show nominal income, or loss, from 2020 to 2023. Unaudited financial statements from 2018 to 2023 show that the value of the assets started at \$22,376 and has grown to \$94,059. Net income started at \$10,206 and has grown to \$75,677 (with two years, 2020 and 2021, of losses), and current retained earnings of \$80,326.
- [27] With respect to Blue Planet, the corporate tax returns as filed for the 2020 and 2021 tax year-ends, disclose taxable income of \$1,835,979 for the 2020 tax year, and \$1,999,775 for 2021. I was not taken to the 2022 tax return. The income in 2023 dropped dramatically from what it was in 2021, to \$225,940.
- [28] Unaudited financial statements from 2018 to 2023 show that the value of the assets grew from \$1,388,811 to \$2,827,921, with the net income decreasing from a high of \$1,546,415 in 2021, to \$189,554 in 2023, with the cash flow at year-end being \$25,889, but retained earnings in the amount of \$1,739,051.
- [29] The evidence of Mr. Van Wollen is that the loss of revenue to Blue Planet has occurred because:
- a) In the first quarter of 2022, Blue Planet had three large projects worth \$350,000 combined. Blue Planet did not have equivalent projects in the first quarter of 2023, which is a significant reason for the revenue decline.
 - b) Blue Planet's contract with two extra-provincial companies that provided \$150,000 in sales for 2022 ended.
 - c) In 2022, Blue Planet's revenues peaked due to the unique timing of entry into the food business and explosion of growth due to COVID. The COVID backlog in 2022 has now cleared, lowering demand. Revenues in 2023 have since returned to the baseline. This has resulted in Blue Planet's business with its top ten accounts from 2022 being down 50% in volume in 2023. Customer volumes are down by 25% on average.
 - d) There is also a new competitor to the food business that is impacting Blue Planet's income. Some customers are splitting their business between Blue Planet and its competitor to lessen their risk.
- [30] In addition, Mr. Van Wollen deposes that Blue Planet is facing increased costs, particularly given significant expenditures needed in 2023 as Blue Planet replaces capital assets, and faces increasing costs for the food operation line due to not only inflation but an evolving regulatory requirement. Specifically, with respect to the changing regulatory requirements, in order for Blue Planet to continue it will have to invest in new facilities for the food component of the business. Mr. Van Wollen cannot see how that will be able to be done

while the parties continue to draw \$15,000 per month from its cash flow, such that, leaving aside the cash flow insolvency being caused by the payments themselves, the effect of them continuing will severely hamper any ability to maintain or maximize profits on an ongoing basis.

- [31] Unaudited financial statements for VW Consulting show the value of its assets at \$11,433,787 at the 2023 year-end, a net loss on income, but retained earnings of \$6,464,522. As noted earlier, each of the parties recently received a \$250,000 dividend from VW Consulting.
- [32] The claimant does not necessarily dispute that Blue Planet's cash flow has decreased substantially, although may not agree as to the reason for that, or the necessity of further investment through the building of new facilities. Regardless, the claimant is of the view that, given the substantial assets of VW Consulting and retained earnings of VW Consulting and the Operating Companies funds could continue to be paid by having Blue Planet access its credit facilities, specifically by making draws against its secured line of credit.

Analysis

- [33] The claimant argues that there is no basis to make any order amending the JCC Order to reduce the Dividend Payment Term for two reasons, namely that:
- a) The determination as to whether there ought to be a reduction in the dividend payment is *res judicata*, given the April 23, 2024 appearance before Associate Judge Vos; and
 - b) Even if the matter is not *res judicata*, there has been no material change, or Mr. Van Wollen is unable to establish a material change, to justify any change to the order this close to trial. This issue requires a consideration of the effect of the Dividend Payment Term being made on a "without prejudice" basis.

Res Judicata

- [34] As to the first argument, I am not satisfied that whether or not the amount of the dividend payment should be varied was "distinctly put in issue" or "directly determined", that being the test set out in *MacKinnon v. National Money Mart Company*, 2009 BCCA 103, at para. 77, as relied upon by the claimant.
- [35] Although not relied upon by the claimant, in *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180, the Court of Appeal provided a useful summary of the principles applicable to both branches of *res judicata*, noting that issue estoppel may also apply if the issue for which a decision is being sought is "fundamental" to the decision previously made, at para. 41. The claimant's submissions on this point more closely resembled such an argument, despite not relying on this authority.

- [36] While the decision of Associate Judge Vos specifically referenced that the \$15,000 dividend would remain in place, the decision before him was whether or not the corporate accounts, to which both parties had access, should be protected. Thus, the issue as to the amount, or financial viability of, the payment itself was not directly in issue or determined.
- [37] In addition, given the comments at the beginning of the submissions, specifically Mr. Van Wollen's statement to the court that this issue was a "separate issue" which corporate counsel would be dealing with, it cannot be said that it was fundamental to the decision before Associate Judge Vos, even if it provided some context or comfort that the order he was being asked to make was not one that would inadvertently affect the status quo resulting from the Dividend Payment Term an issue that would, as noted, be dealt with separately.
- [38] I do not find that the issue is res judicata on the basis of issue estoppel.

Variation of an Interim "Without Prejudice" Order

- [39] As to the second argument that Mr. Van Wollen had not established a material change to support variation of the Dividend Payment Term, during submissions I asked counsel to address the comments from this court in cases such as *Sandhu v. Bhullar*, 2016 BCSC 59 ("Sandhu") as to the nature of without prejudice orders. Specifically, I raised the comment in *Sandhu* where the court noted as follows at para. 42:
- [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.

[emphasis added]

- [40] Counsel for the claimant took the position that a material change did, nonetheless, need to be shown relying on ss. 215 to 217 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"). However, as counsel was not necessarily prepared to address that issue as it had not been raised in the application filed by Mr. Van Wollen, who was self represented on this application, I gave counsel an opportunity to provide written submissions on this point.
- [41] Written submissions were received on August 20, 2024. Despite that Mr. Van Wollen was also given an opportunity to then provide reply submissions thereafter, he has not done so.

[42] In her written submissions, the claimant argues that s. 217 of the FLA makes it mandatory that there be a material change in order to vary any order made, given its clear wording:

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.

[43] In support of this position, the claimant relies upon various authorities where a consent order was sought to be varied, such as *Chin v. Hegarty*, 2016 BCSC 1767 at para. 5 and *DeWolfe v. Flanagan*, 2021 BCSC 872 at paras. 20 and 21, which support the proposition that, in order to vary an interim order, there must be a material change or evidence that the parties would be seriously prejudiced if they were compelled to wait until trial to do so. The order in *Chin* was not made on a "without prejudice" basis. While the order in *DeWolfe* stated that it was on a "without prejudice basis" it then also included the words that either party was at liberty to apply to vary its terms "on a material change of circumstances", with neither party taking the position that a material change did not need to be shown.

[44] The claimant did reference *D.A.C. v. K.J.*, 2021 BCSC 224 ("D.A.C.") at para. 31 where the court considered *Sandhu* and noted that where the order is made "without prejudice" the court will be "more flexible with the requirement to show a material change in circumstance" (at para. 31).

[45] Counsel for the claimant argues that the effect of this is that a material change still needs to be established, as required under s. 217 of the FLA, but that the threshold may be lowered. I note, however, that in *D.A.C.* the court did then go on to consider the matter on the same basis as if it was an initial order, however given that the application related to parenting time such that the best interests of the children remained the guiding factor, it was necessary to determine that question effectively as if it was an initial order in any event.

[46] In *D.A.C.*, the court also considered *Burchhardt v. Geismayr*, 2019 BCSC 1850, where the court noted as follows at para. 33:

[33] On my understanding of this law, the requirement from *Earle* of a material change that is significant and long lasting is moderated in the context of a consent order which is made expressly without prejudice. There must still be a real basis in the evidence justifying a change, and the resulting interim order must be consistent with the principles that would apply as if the application were an initial application, but the court will be more flexible with regard to the requirement of a change in circumstances.

- [47] Any application to vary a "without prejudice" order requires a balancing of the objective of without prejudice orders, namely the importance of encouraging parties to make "band aid" solutions with such orders not being used as either a sword or a shield in later litigation on that issue, as against the parties' respective prejudice in either varying the order or maintaining it.
- [48] In my view, it is in the context of the balancing of prejudice that the court may ask what has changed since the order was agreed to, but a material change may not be necessary to be shown. To find otherwise disregards to the object of the "without prejudice" term being used in the first place.
- [49] Simply, if parties are required to show a material change before they can vary bargains reached solely to bridge the gap, or act as a band aid, until there can be a hearing on a full evidentiary record, it will inevitably chill such orders from being made and further burden the already overburdened chambers process, contrary to the objective of the Supreme Court Family Rules as set out in R. 1-3(1)(b), namely to help parties resolve legal issues in a manner that is just, speedy and inexpensive. It also enables parties to use such orders as a sword or shield in later litigation.
- [50] In my view, in the circumstances of this case the factors for the court's consideration in exercising its discretion to vary or set aside this "without prejudice", include the following:
- a) even if there is no evidence to show a material change, there must be some evidence as to why the order is being sought to be varied or set aside, which may include what has changed since the order was made;
 - b) the court should approach the application on a de novo basis, based on the evidentiary record before it, without the order being used as either a sword or a shield in respect of the variation being sought. However, the order may be relevant to the question of the status quo;
 - c) the litigation history since the order under review was pronounced is relevant, particularly as to subsequent applications brought and orders made where the existence of the order under review has been relied upon by the court or the parties, even if not to the extent that the issue is res judicata, or where there has been a delay in bringing the application that has not been adequately explained;
 - d) whether the opposing party has changed their position based upon a reasonable reliance of the order's terms;
 - e) there must be a balancing of the prejudice of the party seeking the variation if the variation is not granted, against the prejudice of the opposing party if it is, and whether or not there are other remedies available to address those prejudices; and
 - f) the final decision should be one that is in the overall interests of justice to make.

- [51] As to those factors, the jurisdiction for the court to make the order under review on a de novo basis is not clear, as it would, by its nature, be a direction to the corporate respondents and Family Trust to make the necessary transfers and payments. Given the corporate structure, the court would have to direct the Operating Companies to make payments to the Family Trust, and then direct the trustees of the Family Trust, to make the payments to the claimant and Mr. Van Wollen as beneficiaries thereunder.
- [52] No submissions were made by either party as to jurisdiction in this respect. While the Operating Companies are parties to these proceedings, the Family Trust is not. The court was not taken to any particular terms in the trust documents themselves to show that, assuming the parties, or either one of them, are trustees, that they can be directed to make a distribution from the trust under its terms. While I presume it is subject to the trustee's directions, and that Mr. Van Wollen is either a trustee or can guide the trustee, given how they have been dealing with matters to date, it is not clear on the evidence.
- [53] What is evident is that the Dividend Payment Term was to maintain the parties' financial status quo, the effect of which was that the parties were not required to then make what would have otherwise been the more standard support orders, which would have required sufficient evidence as to the parties' incomes, which may have needed to be imputed.
- [54] Thus, while there is insufficient evidence before me to support making the order on a de novo basis, it is of some bearing that the JCC order has maintained the pre-separation financial status quo of the parties for some time.
- [55] Turning then to the relevant litigation history and conduct of the parties in respect of that status quo, I summarize as follows:
- a) The Dividend Payment Term has been in place since January 2023 and, as noted, approximates their pre-separation dividend payments;
 - b) Since then, not including this application, there have been approximately nine or ten notices of applications filed by the parties, including ones that dealt with financial matters, such as the making of a financial advance from VW Consulting, the payment of holding costs for the FFH, the use and sale of the FFH, and the use of the sales proceeds therefrom;
 - c) This application was filed on May 30, 2024, with the issue coming to light sometime in April 2024. The delay in bringing it forward for hearing after that date is the result of the usual issues, such as other applications taking priority and obtaining court time.
 - d) While the parties agreed to have both VW Consulting and the Operating Companies valued, with an update to that valuation now ordered, that evidence is not yet before the court. The parties disagree as to whether or not audited financial statements are required for the final report. As a result, the financial information remains incomplete.

- e) The parties' financial circumstances, primarily living expenses, have changed as a result of the sale of the FFH, such that they have each had to set up new homes suitable for their individual parenting time to be exercised, as they are no longer able to parent in the FFH under the nesting arrangement that was previously in place.
- [56] As to those latter points, the claimant argues that she acted in reliance upon the Dividend Payment Term being in place in setting up her new accommodations and entering into a lease based on her income staying at that level until trial. Further, although current counsel is relatively new so was not able to say why no Guideline Income Report has been sought, it is not unreasonable to assume that prior counsel was relying on the Dividend Payment Term continuing until trial, such that such a report would not be needed until closer to trial to ensure that it was as current as possible for trial purposes and final support orders. As such, the claimant was not in a position to adequately bring a cross application for support, particularly spousal support, to ensure that she is able to cover her living expenses.
- [57] Thus, the claimant argues that she would be severely prejudiced if the Dividend Payment Term was varied.
- [58] Mr. Van Wollen argues his prejudice, and the prejudice of the respondents generally, arises from the impending financial risk caused to the business' operations if these payments are maintained. While the claimant argues that there is an ability to continue making the payment if Blue Plastics accessed its line of credit, which is currently at a zero balance, the respondent argues that will be prejudicial to the overall financial health of the Operating Companies, including impairing its ability to make capital expenditures to ensure future viability. The financial statements, although unaudited, support a potential cash flow issue. The evidence, although hearsay, as to the regulatory issues supports the need for some further capital expenditures in the near term. This evidence adequately answers the court's question as to what has changed since the JCC Order was made.
- [59] Turning then to the overall interests of justice, the financial evidence is sufficiently complex that, although it seems evident and acknowledged that Blue Planet's cash flow has decreased sufficiently that a total of \$30,000 being paid out per month is not sustainable in the longer term without some financial adjustments, it is not possible to fully determine the financial consequences of the various alternatives being proposed, namely causing Blue Planet to draw on its line of credit, or authorizing VW Consulting to liquidate assets. Specifically, it is not clear if Blue Planet could maintain such debt given the loss in cash flow and avoid a default under the Operating Companies' or VW Consulting's' primary lenders given the cross collateralization of those credit facilities, or what the tax consequences would be (and addressed) in respect of asset liquidation.

- [60] However, I am satisfied that there is sufficient evidence to establish that, if maintained until trial, there is a risk that the continued payments will render the Operating Companies insolvent from a cash flow perspective. It is not necessary for Mr. Van Wollen to wait until that is a certainty, and therefore put the respondents' in breach of their credit facilities with their primary lender, to address the issue.
- [61] In contrast, any prejudice to the claimant as a result of a variation to the Dividend Payment Term can be addressed through other terms, including as to an effective date of any such variation, given that the financial evidence also shows some ability for the payments to continue to be made in this manner for the short term.

Order Made

- [62] Having regard to the above it is in the overall interests of justice to vary the Dividend Payment Term as sought by the applicant. However, there ought to be sufficient time given before any such variation comes into effect to enable the claimant to bring a cross application for support (or, since it was mentioned as a goal, for the parties to mediate and consider the alternatives based on accounting advice) and, if necessary, obtain further financial information to be able to determine Mr. Van Wollen's guideline income for that purpose.
- [63] I make the following orders:
- a) Effective immediately, para. 3 of the JCC Order is varied to eliminate the required \$2,500 contribution from each party to their joint account; and
 - b) Effective February 1, 2025, para. 3 of the order pronounced January 18, 2023 is varied to reduce the amount of the monthly dividend to the parties from \$15,000 to \$4,000 per month.
- [64] I will briefly note that with respect to (a) above that it was not clear during submissions as to how much of the \$2,500 contribution was covering the children's special expenses, as opposed to the holding costs of the FFH. However, upon review of the court file I see that a consent order was entered on September 4, 2024, after the hearing of this application, to address the parties' respective obligations towards those expenses, such that such contributions should no longer be necessary.
- [65] Given Mr. Van Wollen's success on this application, he shall have his costs of this application, in the cause.

"Associate Judge Robertson"

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