CACV2318

MELANIE KEMERY

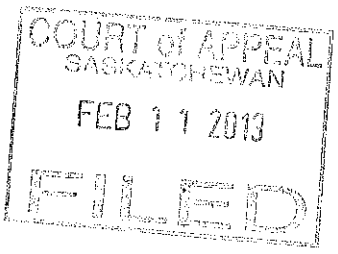
APPELLANT

- and -

CHAD KEMERY

RESPONDENT

James J. Vogel for the Appellant
Gerald B. Heinrichs for the Respondent



Taxation before Melanie A. Baldwin
Registrar, Court of Appeal
February 8, 2013

Background

Ms. Kemery appealed an interim order of Scherman J. relating to parenting of the parties' child by filing a Notice of Appeal on September 5, 2012. Mr. Kemery applied to lift the automatic stay triggered by the appeal and, on September 14, 2012, Herauf J.A. declined to lift the stay, ordered that the appeal be heard during the week of November 13, 2012, imposed timelines for the filing of materials prior to the appeal hearing and awarded fixed costs of $350 to Ms. Kemery.

The appeal was heard on November 15, 2012. On December 27, 2012 the Court released written reasons allowing the appeal, striking the order of Scherman J. and awarding Ms. Kemery "costs of the appeal in the usual manner."

Counsel for Ms. Kemery served and filed a Notice of Appointment for Taxation returnable on February 8, 2013. Counsel for Mr. Kemery raised the issue of whether the taxation should proceed, referring to Rules 553 and 554 of *The Queen's Bench Rules*. I asked both counsel to file written submissions on this issue and on the appropriate column and tariff items. They did so on Thursday, February 7, 2013.

Mr. Vogel and Mr. Heinrichs appeared before me on February 8, 2013 to make verbal submissions on the issues described above and this fiat represents my decision in relation thereto.

Authority for Taxation

The Court's decision on the appeal awarded Ms. Kemery "costs of the appeal in the usual manner."

Rule 54 of *The Court of Appeal Rules* provides for taxation of costs and indicates that Part Forty-Six of *The Queen's Bench Rules* applies, with any necessary modification, to a taxation of costs under Rule 54.

Proposed Bill of Costs

The proposed Bill of Costs lists the following fees under Column 2 of the Court of Appeal Tariff of Costs:

2	Notice of Appeal	$ 400
5(a)	Complex Motion (opposed): Motion – Lift Stay (per Herauf J.A.)	$ 350
7	Preparation of Appeal Book	$ 500
8	Preparation of Factum	$2000
9	Preparation for Hearing	$ 750
10	Appearance	$ 400
11	Preparation of Order	$ 200
12	Correspondence	$ 200
13	Preparation of Bill of Costs	$ 150
14	Taxation of Bill of Costs	$ 75

The fees claimed total $5025 (the proposed Bill of Costs indicates that the total fees claimed amount to $4625 – this is an error in calculation). The proposed Bill of Costs also claims PST and GST on the fee items claimed of 10 per cent. Based on the actual amount of fees claimed, the PST and GST would amount to $502.50.

The proposed Bill of Costs also claims disbursements amounting to $350 composed of $125 for the Court's fee for filing the Notice of Appeal, $25 for the Court's fee for filing the application to lift the stay, $100 for the Court's fee for filing the Appeal Book, $20 for the Court's fee for issuing the Judgment and $80 for the Court's fees for filing the Notice of Appointment for Taxation and issuing the Certificate of Taxation.

At the taxation, Mr. Vogel acknowledged that the $25 fee relating to the application to lift the stay and $40 of the $80 fees relating to the taxation should be taxed off as they were not fees actually paid by or on behalf of Ms. Kemery. The disbursements claimed therefore total $285.

Positions of the Parties

Once the changes described above are made to the proposed Bill of Costs, there does not appear to be any dispute between the parties in relation to the tariff fee items or the disbursements claimed.

Mr. Heinrichs questioned the inclusion of the GST/PST on the fees claimed on the proposed Bill of Costs.

On the issue of whether the proposed Bill of Costs should be assessed at this time, Mr. Vogel argued that it should. His argument can be summarized as follows:

- the application before Scherman J. was arguably not an interim application so his order was arguably not an interim order. In any event, the appeal proper was not an interlocutory motion or application. Therefore, Rule 553 of *The Queen's Bench Rules* does not apply.
- Rule 554 of *The Queen's Bench Rules* applies to appeals to the Court of Queen's Bench only. In any event, the appeal fully disposed of the matter in issue in the Court of Appeal. Therefore, Rule 554 of *The Queen's Bench Rules* does not apply.
- the costs order made by the Court can never be varied or changed and there is no way of knowing when or even if the action in the Court of Queen's Bench will be finally determined so there is no practical reason for waiting to assess the costs until after the action in the Court of Queen's Bench has been finally determined.

Mr. Heinrichs argued that the proposed Bill of Costs should not be assessed at this time. His argument can be summarized as follows:

- both the order made by Scherman J. and the decision of the Court of Appeal were interlocutory. This is supported by the decision of the Court of Appeal which remits the case to the Court of Queen's Bench for a settlement conference and full hearing. The appeal did not finally dispose of the custody dispute between Mr. Kemery and Ms. Kemery. Therefore, Rules 553 and 554 both apply to this situation and the costs should be neither assessed nor payable until the custody dispute is finally disposed of.
- the Court could have ordered that costs be paid forthwith. It did not do so.
- there are sound policy reasons behind Rules 553 and 554. Litigants should focus on reaching a final determination in their litigation not on "distractions" such as interim assessments of costs, Court resources should be used as efficiently as possible, costs in litigation are cumulative and costs should be set-off whenever possible. All of these reasons support the conclusion that costs should not be assessed at this time.

Decision

PST/GST

On the issue of the inclusion of PST/GST, I refer to Rule 563(4) of *The Queen's Bench Rules* and conclude that it is appropriate for me to allow PST/GST on the fees portion of the proposed Bill of Costs should I decide to assess costs at this time.

Assessment of Costs at this Time

As noted above, Rule 54 of *The Court of Appeal Rules* provides that Part Forty-Six of *The Queen's Bench Rules* applies to a taxation of costs in the Court of Appeal "with any necessary modification." I therefore must consider the specific rules found in Part Forty-Six of *The Queen's Bench Rules* that may be relevant to the issue of whether I should assess costs at this time.

Rules 553(1)(c) and 554(2) of *The Queen's Bench Rules* read as follows:

> **553(1)** The costs of an interlocutory motion or application:
>
> (c) are not payable until final determination of the action or proceeding.

> **554(2)** The costs of an appeal that does not finally dispose of the matter shall not be assessed or payable until the final determination of the action or proceeding in the court appealed from.

I agree with Mr. Vogel that, while there certainly are interlocutory motions heard and determined in the Court of Appeal (such as the application to lift the stay brought by Mr. Kemery in this proceeding), the hearing of an appeal proper cannot fall within this description. The costs associated with the hearing of an appeal proper cannot be characterized as costs "of an interlocutory motion or application." This is the case even where the appeal relates to an interlocutory decision from the Court of Queen's Bench.

If the drafters of *The Queen's Bench Rules* had intended Rule 553 to apply to an appeal of an interlocutory decision, they would have said so as they did in the former Rule 566(o):

> **566(o)** Where in any interlocutory proceedings, **or on appeal in interlocutory proceedings** costs are awarded to any party . . . such costs shall not be taxed and need not be paid until the final determination of the action or proceeding.
>
> **emphasis added**

When *The Queen's Bench Rules* relating to costs were amended in 2003, the language of this provision was changed to the existing wording found in Rule 553. Based on the existing wording of Rule 553, Rule 553 is not applicable to the issue of whether I should assess the costs of this appeal at this time.

An analysis of Rule 554 and its potential application to the issue before me is more complicated. Unlike Rule 553, Rule 554 specifically speaks of the costs of an appeal. Given Rule 54(2) of *The Court of Appeal Rules*, I am not convinced that Rule 554 can be limited to cases of appeal to the Court of Queen's Bench as argued by Mr. Vogel on behalf of Ms. Kemery. Rather, Rule 554(2) will apply to an appeal to the Court of Appeal "with any necessary modification."

In *The Queen's Bench Rules of Saskatchewan: Annotated*, 3rd ed., the commentary following Rule 554 notes that it was derived from former Rule 549(9):

> **549(9)** On any appeal the scale of costs of the appeal, and if so stated in the judgment, also of the proceedings in the court below, shall be as directed by the judgment in appeal, or in default of direction shall be the same as that fixed under the order or judgment appealed from, and **unless ordered to be paid forthwith shall not be taxed until the final determination of the action or proceeding in the court appealed from**.
>
> **emphasis added**

Thus, under *The Queen's Bench Rules* pre-2003, the costs of any appeal were not to be taxed until the final determination of the action or proceeding in the court appealed from. The only noted exception to this rule was a situation where the court ordered the costs to be paid forthwith.

Since 2003, Rule 554(2) has contained a different exception to the rule that the costs of an appeal are not to be taxed until the final determination of the action or proceeding in the court

appealed from. Today, the costs of an appeal that "finally disposes of the matter" may be assessed before the final determination of the action or proceeding in the court appealed from.

As I understand Ms. Kemery's position (as advanced by Mr. Vogel), Ms. Kemery says that the appeal did finally dispose of the matter. Her position is that the "matter" mentioned in Rule 554(2) should be understood to be the matter before the appellate court. The matter before the Court on Ms. Kemery's appeal was whether the interim order made by Scherman J. should be set aside. The Court finally disposed of the matter by determining that the interim order should be set aside, allowing the appeal, striking the interim order and ordering that a pre-trial settlement conference be held as soon as possible.

Mr. Heinrichs, on behalf of Mr. Kemery, says that the appeal did not finally dispose of the matter. Mr. Kemery's position is that the "matter" mentioned in Rule 554(2) should be understood to be the custody and access action between the parties. That matter was not finally disposed of by the appeal and will not be finally disposed of until all proceedings in the Court of Queen's Bench (and potentially in the appellate courts) relating to the custody and access of the parties' child are complete.

What is the "matter" that must be finally disposed of according to Rule 554(2)? Is it something different from the "action" or "proceeding" also referred to therein? It is an oft-cited presumption of statutory interpretation that, in an enactment, different words should be given different meanings. Following this presumption, "matter" must refer to something other than the "action" or "proceeding" in the court appealed from. Otherwise, why would the same words not have been used in both places?

If the presumption that different words should be given different meanings is applied, Mr. Kemery's position cannot be correct. The matter which may or may not have been disposed of by the appeal cannot be one and the same as the custody and access proceeding between the parties. It must therefore be the matter that was before the Court on the appeal – whether the order of Scherman J. should be set aside. That matter was finally disposed of by the Court in its decision of December 27, 2012.

This brings me, however, to another presumption of statutory interpretation – the presumption against tautology. It is presumed that every word in an enactment has a specific meaning or function. An interpretation that renders words pointless should be avoided.

If I interpret "matter" to mean the matter before the appellate court, does this render the remainder of Rule 554(2) essentially meaningless? If it does, I should avoid that interpretation.

It is difficult to conceive of many situations where an appeal would not finally dispose of the matter before the appellate court, however, that is not to say that this situation would never arise.

For example, in a case where a party was found not liable and so no damages were awarded at trial in the Court of Queen's Bench, the other party could appeal the trial court's findings on liability and damages to the Court of Appeal. If the appellant successfully argued before the Court of Appeal that the respondent was liable, the Court of Appeal could determine liability and assess and award damages itself pursuant to s. 12 of *The Court of Appeal Act, 2000*. It could also, however, determine liability only and remit the matter of damages to be determined by the Court of Queen's Bench. This would be a situation where it would be appropriate to delay the assessment of costs of the appeal until the matter of damages had been disposed of in the court appealed from (which would also amount to a final determination of the action or

proceeding in the court appealed from) if only to determine which column of the tariff to use on the assessment.

The interpretation of "matter" to mean the matter before the appellate court therefore does not render the remainder of Rule 554(2) pointless or meaningless, although it does perhaps operate to invoke the exception to the rule more often than the rule itself. What it does do is to reconcile the two competing presumptions of statutory interpretation in a way that does the least violence to each.

I conclude that the Court did finally dispose of the matter before it on Ms. Kemery's appeal within the meaning of Rule 554(2). As such, I may assess the costs of the appeal at this time.

If I am in error about how to interpret Rule 554(2) and if it operates to prevent me from assessing the costs of the appeal at this time, it is my opinion, given the particular circumstances of this appeal, that a modification is necessary as contemplated by Rule 54(2) of *The Court of Appeal Rules*. The necessary modification would permit me to exercise my discretion to assess the costs of this particular appeal at this time on the basis that it is appropriate to do so.

Ms. Kemery was successful on her appeal and was awarded costs accordingly. An award of costs is intended as an indemnity to a successful litigant. There is no way of knowing how long it might take for the final determination of the custody and access proceeding between the parties – it could conceivably carry on for a number of years. In addition, nothing that happens in the remainder of the custody and access proceeding can change what costs Ms. Kemery is entitled to as a result of the Court's award of costs on this appeal. Surely Ms. Kemery should be entitled to receive the assessed indemnity for the costs she incurred on the appeal now rather than having to wait months if not years to recoup at least some of the costs she incurred to bring the appeal.

Mr. Kemery, through Mr. Heinrich, argues that, if the assessment of all costs is left until the end of a proceeding, the litigants are encouraged to put their energy into coming to a final determination of the dispute between them and are not distracted by such things as interim taxation of costs. The same argument (about what constitutes such a distraction) could no doubt be made about litigants bringing unwarranted interim applications. Clearly, it is in the best interests of parties to litigation and of the courts to have disputes between parties resolved expeditiously. I am not convinced, however, that delaying the assessment of costs under the circumstances before me does anything to advance that laudable goal.

As for the concept that costs of an action or proceeding are cumulative and should be set off whenever possible, this might make practical sense in the context of a civil action that could take a year from start to finish. It does not work so well in the context of a family law proceeding, particularly one involving issues of custody of and access to a young child, with no clear end in sight. Perhaps this is why there is a specific Rule (Rule 608(7)) in Part Forty-Eight of *The Queen's Bench Rules* which recognizes the unique nature of a family law proceeding by giving a judge dealing with a particular "step" in a family law proceeding the ability to consider the issue of costs after that step in a summary manner.

For all of the foregoing reasons, I conclude that I both may and should assess the costs of the appeal at this time.

Assessment

The proposed Bill of Costs will be taxed as follows:

Taxed on:	$ 40	PST/GST on fees
Taxed off:	$ 25	Filing fee for application to lift the stay
	$ 40	Excess disbursements claimed for taxation

The proposed Bill of Costs is therefore taxed and allowed at $5812.50 ($5025 in fees, $285 for disbursements, $502.50 PST/GST on fees). Mr. Vogel should prepare and file a Certificate of Taxation of Costs to this effect (in Form C) for issuance.

DATED at Regina, Saskatchewan, this 11th day of February, 2013

REGISTRAR – COURT OF APPEAL