Court of Appeal for Saskatchewan
Docket: CACV3383 **Date: 2023-06-29**

Diana Anderson	Appellant (Applicant)
and	
James Anderson	Respondent (Respondent)

Before: Amy Groothuis, Registrar (on June 13, 2023)

Fiat

I. Introduction

[1] On September 1, 2021, the Court of Appeal allowed the appeal of a family law decision that examined the weight given to an interspousal agreement following a three-year marriage. In allowing the appeal, the Court of Appeal set aside the trial judge's decision and ordered a division of the parties' family property such that the respondent, James Anderson [James] was to pay $4,914.95 to the appellant, Diana Anderson [Diana]. Diana was awarded her costs on appeal "in the usual way".

[2] Following the release of the Court of Appeal's decision, Diana had a formal judgment taken out, which reflected the following orders [appeal judgment]:

> (i) That the appeal be allowed and the judgment appealed from be varied as follows: Aside from the order of divorce, the Trial Decision is set aside. There shall be an order directing the division of family property in accordance with the December of 2015 values [...] and for Mr. Anderson to pay the sum of $4,914.95 to Ms. Anderson to equalize the distribution of their family property.
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> (ii) That the respondent forthwith pay the appellant's taxed costs on appeal as determined under column 2 of The Court of Appeal Tariff of Costs.

[3] James then applied for and was granted leave to appeal the appeal judgment to the Supreme Court of Canada. The Supreme Court's reasons for decision and judgment were released on May 12, 2023. The Supreme Court's judgment reads, in its entirety:

> The appeal from the judgment of the Court of Appeal for Saskatchewan, Number CACV3383, 2021 SKCA 117, dated September 1, 2021, heard on December 5, 2022,

> is allowed. The decision of the Court of Appeal with respect to division of property is set aside and the respondent [Diana] is ordered to pay $43,382.63 to the appellant [James]. The parties will each bear their own costs in this Court.

[4] Following the Supreme Court's decision, Diana took out a notice of appointment for taxation of costs with respect to the Court of Appeal's judgment, supported by a proposed bill of costs.

II. Proposed Bill of Costs

[5] Diana claims the following fees under Column 2 of the Court of Appeal Tariff of Costs [Tariff]:

2.	Notice of Appeal	$ 400.00
4.	Simple Motion (show cause)	$ 375.00
6.	Agreement as to contents of appeal book	$ 200.00
7.	Preparation of Appeal Book	$ 500.00
8.	Preparation of Factum	$ 2,000.00
9.	All Other Preparation of Hearing	$ 750.00
10.	Appearance to Present Argument	$ 400.00
11.	Preparing Formal Judgment	$ 200.00
12.	Correspondence	$ 200.00
13.	Preparation of Bill of Costs	$ 150.00

[6] The proposed fees total $5,175.00. Additionally, Diana claims disbursements under Tariff item 16, for transcripts ($1,152.90) and photocopying ($1,223.25). Together, fees and disbursements total $7,551.15. To this, Diana adds GST of $377.56 and PST of $453.07, for a global total of $8,381.78.

III. Issues

[7] Two issue arose in this taxation hearing:

(a) Whether Diana is entitled to the costs awarded to her by the appeal judgment, or whether the Supreme Court's judgment set aside the entirety of the Court of Appeal's decision;

(b) If Diana is entitled to her costs at the Court of Appeal, is Tariff item 4 (simple motion – show cause) properly claimed.

A. Entitlement to Costs – Appeal Judgment

[8] The appeal judgment clearly awards costs of the appeal to Diana, calculated pursuant to Column 2. The Supreme Court judgment clearly sets aside the Court of Appeal's decision with "respect to division of property". What is not immediately clear is whether the Supreme Court also set aside the costs award reflected in the appeal judgment. The parties take opposing views on whether Diana remains entitled to her costs at the Court of Appeal.

[9] While James acknowledges that the Supreme Court of Canada's decision indicates that the appeal judgment was set aside "with respect to the division of family property", he submits that the only issue before either court related to family property. From this follows his position that since the appeal was allowed, and the appeal judgment was set aside, Diana is not entitled to costs at the Court of Appeal level. He encourages me to read the Supreme Court's decision, which allowed the appeal, as being all encompassing and including the appeal costs.

[10] Unsurprisingly, Diana takes the opposite approach. She asserts that the primary issue before the Supreme Court of Canada was whether or not a separation agreement, executed without the assistance of legal counsel, and without independent legal advice, was enforceable; on that point she says that James' appeal was *not* successful and this is why paragraph 85 of the Supreme Court's decision refers to success being divided. Diana argues that the language used in the Supreme Court's decision intentionally restricted its order on costs to those in relation to the Supreme Court appeal only, with the costs awarded by the Court of Appeal left undisturbed.

[11] I find it useful to orient myself by reviewing the history of the matter and the specific findings made at each level of court.

[12] The trial judge held there was no enforceable agreement, which is the position James had advanced. Diana appealed the trial decision, and the Court of Appeal agreed with her, holding that there was an enforceable agreement; James was ordered to pay Diana the sum of $4,914.95 to equalize the distribution of their family property. James appealed to the Supreme Court, seeking to overturn the appeal judgment. The Supreme Court agreed with the Court of Appeal that the parties entered into an enforceable agreement but found that the Court of Appeal erred in applying the law to the facts of the case. Diana likened this to correcting what was essentially an arithmetic error.

[13] Diana argues that the Supreme Court could not dismiss the appeal outright owing to the necessity of correcting the ultimate distribution of property between the parties. Fundamentally, however, the Supreme Court held that separated parties may make an agreement on the division of their family property without independent legal advice and that agreement will be enforced in the future, but in this instance, there needed to be a correction to the amount owing under that enforceable agreement. The following portions of the Supreme Court's decision are instructive:

> [10] I agree with the Court of Appeal's conclusion that the agreement was binding and there were no substantiated concerns with its fairness. A lack of independent legal advice

> and formal disclosure can undermine informed choice, but was not troubling here because the husband could not point to any resulting prejudice: there was no suggestion that the absence of these safeguards undermined either the integrity of the bargaining process or the fairness of the agreement. As a result, the agreement was entitled to serious consideration. But the trial judge erred in finding the agreement was not binding on the parties and in failing to consider its substance in his property distribution. And while the Court of Appeal concluded the agreement should be given great weight, it equalized the family property in a way that defeated the intent of the parties and resulted in unfairness.
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> [11] Given the circumstances, including the brief marriage and the assets each party brought into the marriage, the simple agreement to keep individual assets and divide the family home equally was fair and equitable, given the criteria and objectives of the *FPA*. I would allow the appeal, set aside the decision of the Court of Appeal with respect to the division of family property, and divide the family home and household goods as of the date of trial. I would order that the wife pay the husband $43,382.63.

[14] From the above, James argues that as the appeal was allowed, he was successful, and costs generally flow to the successful party. He urges me to find that the costs awarded to Diana in the appeal judgment were directly related to her success at the Court of Appeal, and this can be contrasted with the ultimate outcome of Diana paying approximately $43,000 to James, rather than James paying any amount to Diana.

[15] I agree that it is unusual for one party to be liable to pay damages to the other party, and yet be entitled to receive litigation costs. However, I am not convinced that Diana's obligation to pay an equalization payment to James, in the circumstances, means that she is not entitled to receive the costs awarded to her in the appeal judgment. The wording of the judgments – both the Court of Appeals and the Supreme Court of Canada's – matter greatly.

[16] Both parties candidly acknowledged that they were unable to identify any relevant caselaw addressing a similar situation that may assist in ascertaining the end result of the Supreme Court's judgment and its treatment of the appellate level costs. I remind myself that while the reasons for decision may prove helpful in ascertaining which party was successful on appeal, I am bound by the formal judgment when assessing costs. At the Court of Appeal, the appeal judgment was taken out by the parties and issued by the Registry; at the Supreme Court, it is the Supreme Court Registry that prepares and issues the formal judgment. I find it useful to repeat the entirety of that judgment:

> The appeal from the judgment of the Court of Appeal for Saskatchewan, Number CACV3383, 2021 SKCA 117, dated September 1, 2021, heard on December 5, 2022, is allowed. The decision of the Court of Appeal with respect to division of property is set aside and the respondent [Diana] is ordered to pay $43,382.63 to the appellant [James]. The parties will each bear their own costs in this Court.

[17] The *Supreme Court Act*, R.S.C., 1985, c. S-26 [Act] provides some assistance. This Act outlines the Supreme Court's authority in granting a judgment, and in awarding costs:

> 45 The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded.

...

> 47 The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed.
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> ...
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> 51 The judgment of the Court in appeal shall be certified by the Registrar to the proper officer of the court of original jurisdiction, who shall make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereon as if the judgment had been given or pronounced in the last mentioned court.

[18] While James is correct that the costs of legal proceedings routinely follow the outcome of a case, section 47 grants the Supreme Court the discretion to award costs of an appeal regardless of the outcome, and similarly to order the payment of costs for the proceedings below. See, for example, *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at paragraph 65.

[19] I find considerable guidance in the textbook, *Supreme Court of Canada Practice*[1], which provides an annotated guide to the Act, stating with respect to costs:

> If the words "costs here and in the courts below" or "costs throughout" are not present, the cost awards made by the lower courts technically remain undisturbed. Occasionally, such an award is an oversight—counsel may have neglected to ask for costs in the Court "and in the courts below", or "throughout". On application to amend the judgment or for re-hearing, the Court may then be asked to cure the oversight to harmonize the cost awards in the lower courts with that made by the Court. In *Amaratunga v. Northwest Atlantic Fisheries Organization* (July 7, 2014), Doc. 34501 (S.C.C.), the appellant filed an application "for a clarification of a judgment" asking the Court whether the appeal judgment which read "appeal is therefore allowed in part, with costs to the appellant" included costs in the courts below. LeBel J. dismissed the application with costs stating "The award of the Court is clear that the appellant was granted his costs in this Court only."

[20] There is no information before me that an application to amend the Supreme Court judgment was made. Seen in this context, the Supreme Court's judgment is clear: the appeal judgment was set aside only with respect to the division of property (not with respect to the enforceability of the agreement) and Diana was to pay James $43,382.63. The silence with respect to the appeal judgment that awarded Diana costs on column 2 means that portion of the appeal judgment was not set aside, and the Supreme Court's express order that the parties each bear their own costs on the appeal to the Supreme Court aligns with the limited manner in which the appeal was allowed. Taken together, I conclude that the costs award made by the Court of Appeal was not disturbed and as such Diana is entitled to her costs on appeal, calculated under Column 2.

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[1] D. Lynne Watt, Graham Ragan, Guy Régimbald, Jeffrey Beedell, Matthew Estabrooks, *Supreme Court of Canada Practice* (Toronto: Ontario: Thomson Reuters, 2021) at page 135.

B. Proposed Bill of Costs

[21] Counsel for James confirmed that if Diana was found to be entitled to her costs on the appeal, that no objections were taken to the proposed bill of costs. However, I identified one claimed item, being Tariff item #4 – simple motion (show cause) and requested the parties' positions with respect to its inclusion.

[22] Briefly, following a show cause notice and hearing, Diana was granted leave to perfect her appeal, though the Court endorsement does not award her costs of the appearance. In fact, the endorsement is entirely silent on costs. As such, counsel for Diana quite reasonably agreed that in that circumstance she was not entitled to that particular Tariff item, and this amount is therefore taxed off the proposed bill of costs.

[23] Counsel also spoke to the taxing on of an amount for Tariff item 14, attendance at the taxation of costs. In the circumstances, given that there was no significant issue taken with the proposed bill of costs and the primary question was a unique and unusual issue involving entitlement to costs, I decline to award any amount for attendance at the taxation hearing and the parties shall bear their own costs with respect to the appearance.

IV. Decision

[24] As a result, I tax the appellant's costs on Column 2 of the Tariff, as follows:

2.	Notice of Appeal	$ 400.00
6.	Agreement as to contents of appeal book	$ 200.00
7.	Preparation of Appeal Book	$ 500.00
8.	Preparation of Factum	$ 2,000.00
9.	All Other Preparation of Hearing	$ 750.00
10.	Appearance to Present Argument	$ 400.00
11.	Preparing Formal Judgment	$ 200.00
12.	Correspondence	$ 200.00
13.	Preparation of Bill of Costs	$ 150.00
		$ 4,800.00

[25] Diana is also entitled to her disbursements, for transcripts ($1,152.90) and photocopying ($1,223.25), which total $2,376.15. Finally, she is entitled to her taxes, calculated as follows:

(a)	GST on fees:	$240.00
(b)	PST on fees:	$ 288.00
(c)	GST on disbursements:	$ 118.81
(d)	PST on disbursements:	$ 142.57

[26] The proposed bill of costs is therefore taxed and allowed at $7,965.53.

[27] For enforcement purposes, Diana Anderson may wish to prepare and file a certificate of taxation of costs in Form 11d in the amount of $7,965.53 for issuance. I thank counsel for their helpful submissions.

Amy Groothuis

Counsel: Chris Butz for Diana Anderson
Lindsay Gates for James Anderson