

CANADA / JUDGMENT

A.E.E. v. M.T.E.

2022 BCSC 1534

COURT

Supreme Court of British Columbia

DECIDED

31 August 2022

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2022 BCSC 1534

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.E.E. v. M.T.E.,

2022 BCSC 1534

Date: 20220831

Docket: 211695

Registry: Victoria

Between:

A.E.E.

Petitioner

And

M.T.E.

Respondent

Before: The Honourable Madam Justice Murray

On appeal from: An order of an arbitrator, dated April 16, 2021

Reasons for Judgment

Counsel for Petitioner, appearing via videoconference:

A. Atwood-Brewka

Counsel for Respondent, appearing via videoconference:

N. Reid

Place and Date of Hearing:

Victoria, B.C.

January 31,

February 1-2, 2022

Place and Date of Judgment:

Victoria, B.C.

August 31, 2022

INTRODUCTION

- [1] The Petitioner A.E.E. appeals the arbitration award of arbitrator, Eugene Raponi QC, (the "arbitrator") made April 15, 2021 (the "award") pursuant to s. 19.19 of the Family Law Act, S.B.C. 2011, c. 25, [FLA], and seeks orders:
- 1) setting aside the award for spousal support as being "far below" the amount that would be calculated using the Spousal Support Advisory Guidelines ("SSAG") and amending the award to provide spousal support calculated in accordance with the parties' separation agreement, or alternatively an amount within the SSAG;
 - 2) setting aside the termination date for spousal support and amending the award to provide for ongoing and indefinite support;
 - 3) setting aside the arbitrator's failure to order payment of spousal support arrears and ordering arrears of support based on the separation agreement;
 - 4) setting aside the declaration that the method for calculating spousal support set out in the separation agreement is terminated without providing for an alternative method of calculating support other than "a pure discretionary approach" and providing a clear method for calculating support;
 - 5) setting aside the declaration that A.E.E. is not entitled to any portion of the sale proceeds of M.R. Ltd;
 - 6) setting aside the costs award and ordering costs to A.E.E. as being substantially successful.
- [2] Briefly put, the parties began living together in May, 1977 and were married on November 6, 1977. The parties have four children, who are now all adults. The parties support their youngest daughter, 28, who has disabilities. A.E.E. is now 65 years of age; M.T.E. is 68. The petitioner alleges that she suffers from disabilities which prevent her from gainful employment.

- [3] The parties, both archaeologists, met on a work site and worked together for many years thereafter. In around 1985 the parties started a consulting business, now called M.R. Ltd., of which M.T.E. was director. When the parties started having children A.E.E. helped as much as she could with the business but she was the children's primary caregiver while M.T.E. travelled to work sites, sometimes for extended period of time. The parties separated on November 26, 2010 when A.E.E. was 54, and M.T.E. was 57. They were divorced on July 6, 2016.
- [4] On September 8, 2015, after years of extensive negotiations which involved lawyers, accountants, a business evaluator and a mediator, the parties entered into a separation agreement. Notably, Mr. Raponi, QC, the arbitrator whose award is being appealed, was the mediator. The agreement, which the arbitrator described as "lengthy, complex and exhaustive", dealt with the division of property, and spousal support.
- [5] Regarding the division of property, pursuant to the separation agreement, M.T.E. bought A.E.E.'s half interest in M.R. Ltd. In addition, A.E.E. retained the family home, in which she still lives. In return, M.T.E. became the sole owner of M.R. Ltd., and would eventually be solely entitled to its proceeds upon sale.
- [6] Regarding spousal support, the separation agreement contained two formulas: one for the determination of each party's income for support purposes and the second for determining the level of support to be paid at those incomes. The agreement also provided for variation applications, annual reviews and a review when either party reached the age of 65. According to M.T.E., the formula in the agreement did not reflect his efforts in operating M.R. Ltd and the method of calculating support was flawed as it was based on 100% of pre-tax corporate income less amounts paid to his holding company, rather than his "true" income available for distribution. Nonetheless, he agreed to the clause. I do not find this to be relevant to the issues before me. Neither the arbitrator nor this court are reopening the previous final agreement only looking forward. In July 2018 M.T.E., about to turn 65 and wishing to plan for retirement, sought a review of A.E.E.'s entitlement to spousal support. He wanted to know what his support obligation would be prior to retiring so he could determine when he can stop working and make plans to sell M.R. Ltd. The parties, both represented by counsel, agreed to participate in the mediation/arbitration to resolve finally all issues and to avoid the expense of litigation. Pursuant to the mediation/arbitration agreement ("the mediation agreement"), Eugene Raponi QC was again appointed mediator/arbitrator with respect to spousal support and any other issues that remained to be determined by the parties.
- [7] The mediation/arbitration began in March 2019 and, after a series of delays, finished on December 22, 2020. In the spring of 2020, in the midst of the mediation/arbitration M.T.E. applied to reduce support on an interim basis.
- [8] The arbitrator's final decision was released to the parties on April 16, 2021. It is that decision which is being appealed.

ISSUES

[9] The issues to be decided are:

- 1) Did the arbitrator err when determining A.E.E.'s entitlement and quantum of spousal support on a prospective basis?;
- 2) Did the arbitrator err in failing to award spousal support arrears?;
- 3) Did the arbitrator err in making a declaration that A.E.E. was not entitled to anything from the sale of the business?; and
- 4) Did the arbitrator err in failing to order costs to A.E.E.?

[10] Before I consider the issues, I must address the framework and standard for the review and a preliminary matter concerning the sufficiency of the reasons.

LEGAL FRAMEWORK

[11] Pursuant to s. 19.19 of the FLA, an arbitration award is final and binding on the parties except as set out in the FLA.

[12] Section 19.19(1) allows for an appeal to this court on a question of law or mixed law and fact. On appeal this court may (a) confirm, amend or set aside the arbitration award; and/or (b) remit the arbitration award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal (FLA s. 19.19(3)).

STANDARD OF REVIEW

[13] Before the landmark decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov], the standard of review on an appeal of a family law arbitration on mixed questions of law and fact was reasonableness, as stated by Grauer, J., as he then was, in *Nolin v. Ramirez*, 2019 BCSC 934 at paras. 8-11, quoting *McMillan v. McMillan*, 2015 BCSC 2177 at para. 44, *aff'd* 2016 BCCA 441:

In considering any questions of mixed fact and law and whether the arbitrator applied a particular legal standard or test, it is to the facts as he found them. In doing so the court must consider whether the arbitrator's conclusions fall within an acceptable range with due deference to the arbitrator's reasoning.

[emphasis added]

[14] In *Vavilov* the court held that the presumptive standard of reasonableness can be rebutted in certain circumstances: first where the legislation indicates a different standard, and second where the rule of law requires that the standard of correctness be applied (at para. 17).

- [15] Vavilov's applicability to family law arbitration appeals was recently considered by our Court of Appeal in *Nolin v. Ramirez*, 2020 BCCA 274 [Nolin, 2020]. In that decision, Bennett, J.A. succinctly set out the issue as follows:
- [31] In *Vavilov*, the majority held (at para. 17) that the presumption of reasonableness can be rebutted in two types of situations: first, where the legislature has indicated that it intends a different standard or set of standards to apply; and second, where the rule of law requires that the standard of correctness be applied. In other words, the legislature's intent with respect to the role of the reviewing court must be reflected in the standard of review, except where giving effect to that intent is precluded by the rule of law: *Vavilov* at para. 23.
- [32] The majority goes on to describe the two ways in which a legislature can indicate its intent for a standard other than reasonableness to apply. It may explicitly prescribe the applicable standard through statute, or it may provide for a "statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards": *Vavilov* at para. 33. As regards to statutory appeal mechanisms, the majority observed:
- [36] Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court
- [37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37.
- [Emphasis added.]
- [33] The question borne by *Vavilov* is whether the dictates of the Court extend beyond judicial review of administrative decisions, and to arbitration appeals. Section 31 of the Arbitration Act, R.S.B.C. 1996, c. 55 provides:

Appeal to the court

31 (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if

- (a) all of the parties to the arbitration consent, or
- (b) the court grants leave to appeal.

(3.1) A party to an arbitration in respect of a family law dispute may appeal to the court on any question of law, or on any question of mixed law and fact, arising out of the award.

[36] All that said, there is an issue percolating in courts across the country as to whether Vavilov applies to commercial arbitration, or arbitration generally. To date, and to my knowledge, no appellate court has considered the issue.

[37] In this case, if the statutory appeal mechanism contemplated in Vavilov captures s. 31(3.1) of the Arbitration Act, the standard of review is palpable and overriding error for questions of mixed fact and law where the legal principle is not readily extricable: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26-37. If Vavilov does not apply, the standard of review is reasonableness: see *McMillan v. McMillan*, 2015 BCSC 2177, aff'd 2016 BCCA 441, where Punnett J. relies on *Sattva*.

[Emphasis added.]

[16] In the end the Court of Appeal found that it did not need to decide the question as the result would be the same regardless of the test. Although the Court of Appeal considered this question in the context of the Arbitration Act, S.B.C. 2020, c. 2 [Arbitration Act], which previously applied to family arbitration, and the present case considers the amended FLA, the wording of s. 19.19 FLA is nearly identical to s. 31(3.1) of the previous Arbitration Act.

[17] While the Court of Appeal did not directly address the question of the standard of review for questions of law, or "extricable questions of law," by the same line of reasoning and jurisprudence, if Vavilov applies, the standard of review for questions of law is the appellate standard of correctness, and if it does not apply, it remains "almost always" reasonableness: *Boxer Capital Corporation v. JEL Investments Ltd.*, 2015 BCCA 24 [Boxer] at para. 10, quoting *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 75.

[18] A.E.E. argues that the standard of review should be that applied to appeals. M.T.E. takes the position, as in *Nolin*, 2020, that the result would be the same regardless of the test.

[19] I agree with M.T.E. that whether a standard of reasonableness, palpable and overriding error, or correctness is applied, the result will be the same. It is therefore not necessary to decide the question.

- [20] In considering this appeal, I note that arbitration is intended to be "an alternate dispute mechanism" rather than "one more layer of litigation": Boxer at para. 6 quoting BCIT (Student Association) v. BCIT, 2000 BCCA 496 at para. 14.
- [21] In terms of process, in conducting this appeal, this court is bound by the findings of fact of the arbitrator, who in addition to affidavit evidence heard viva voce evidence from both of the parties and also from a chartered accountant regarding M.R. Ltd.

SUFFICIENCY OF REASONS

- [22] A.E.E. raises an issue regarding the sufficiency of the arbitrator's reasons for decision. She takes the position that his reasons were insufficient particularly on the issue of her interest in M.R. Ltd. She is referring to the arbitrator's declaration that A.E.E. does not have a right to any of the proceeds of sale of the company. A.E.E. says her interest in M.R. Ltd was not an issue before the arbitrator. Having been bought out of the company via the separation agreement, A.E.E. is not seeking further interest in the company. According to A.E.E., the arbitrator did not clarify why he made this declaration or how it was related to the issue of spousal support. I will return to this.
- [23] In an effort to keep costs down, the mediation/arbitration agreement provided that the arbitrator was to deliver only summary reasons for his decision, unless full reasons were requested at the close of arguments prior to the pronouncement of the award. Neither party requested full reasons. M.T.E. argues that as such A.E.E. cannot now complain that there are not full reasons. In any event he submits that the reasons are 17 pages long (plus attachments) and contain ample justification for the award.
- [24] Given my findings below it is not necessary to address the sufficiency of the arbitrator's reasons except as they relate to his failure to award arrears and his award on costs.

ISSUE 1: DID THE ARBITRATOR ERR WHEN DETERMINING A.E.E'S ENTITLEMENT AND QUANTUM OF SPOUSAL SUPPORT ON A PROSPECTIVE BASIS?

- [25] A.E.E. alleges that the arbitrator erred by:
- 1) terminating support before M.T.E. has retired;
 - 2) terminating support despite finding that she was entitled to long-term support;
 - 3) failing to consider the proper factors when deciding to terminate support;
 - 4) disregarding the income formula set out in the separation agreement when determining the quantum of support;
 - 5) failing to give any weight to A.E.E.'s failure to earn the income imputed to her when determining the quantum of support; and

- 6) disregarding the SSAG and taking a discretionary approach to setting the quantum of support.
- [26] For the reasons below, I find that the arbitrator erred in terminating support before M.T.E. has, in fact, retired.
- [27] A.E.E. argues that the arbitrator's decision to reduce the quantum of support, and eventually terminate support in August 2025, is inconsistent with his finding that she was entitled to "long-term support" that goes beyond M.T.E.'s 65th birthday on all three bases of support: compensatory, needs-based and contractual. The arbitrator's finding that M.T.E. was entitled to support is not being appealed by either M.T.E. or A.E.E.
- [28] A.E.E. further argues that the arbitrator's decision was based on M.T.E. retiring, which he has not, in fact, done. She takes the position that the arbitrator's findings were premature and speculative, and that as long as M.T.E. is working, he should be paying support.
- [29] M.T.E. responds that the arbitrator was correct in prioritizing finality and certainty. In support he relies on *Shen v. Tong*, 2013 BCCA 519 [Shen] at para. 85 for the proposition that courts should resist making orders subject to review and resolve controversies before them, in this case, as in *Shen*, by fixing a date for termination of spousal support. I do not find that *Shen* stands for the proposition advanced by M.T.E., nor do I find it helpful. It is factually distinguishable from the case at bar.
- [30] M.T.E. argues that he must know his support obligations in advance of retirement; only then will he know if and when he can retire.
- [31] In reaching his decision to terminate support, the arbitrator found M.T.E. reaching the "traditional retirement age of 65" to be "the most significant factor" in determining A.E.E.'s entitlement to spousal support stating:
64. [M.T.E.] submits that he is past retirement age, is looking for finality and desires certainty.
65. [A.E.E.], for her part, acknowledges this when she stated (her affidavit sworn January 19, 2020, at paragraph 87): "if [M.T.E.] earns to 70, he should pay at least support to 70 so I can retire at 70 as well".
66. I take that to be an admission on the part of [A.E.E.] that certainty and establishing a termination date for support at age 70 (whether her turning 70 or [M.T.E.] turning age 70 is not clear) are legitimate interests for both of the parties.
67. I am guided by the cases cited by [M.T.E.] in his argument, including *Beninger v Beninger*, 2007 BCCA 619, *Chutter v Chutter*, 2008 BCCA 507, *Cramer v Cramer*, 2000 BCCA 272 and *Shen v Tong*, 2013 BCCA 519.

[32] I do not find any of the cases relied on by the arbitrator helpful. Beninger, Cramer and Shen (as noted above) are factually distinguishable. Chutter is closest factually but involved a payor husband who had already, in fact, retired. In no case cited by the arbitrator did the court terminate support based on a payor's wish or stated intention to retire in the future.

[33] The separation agreement sets M.T.E.'s 65th birthday as one of several milestones for revisiting A.E.E.'s entitlement to support. Other triggering events include A.E.E.'s 65th birthday; if after his 65th birthday M.T.E. completes a sale of more than 20% of M.R. Ltd, and/or if either party ceases employment after age 65. It also earmarked the fact that M.T.E. intended to start working less at 65 and that A.E.E. should work at becoming financially independent:

- 1) M.T.E. intends to work full-time until age 65 then begin working part-time;
- 2) M.T.E.'s employment after reaching 65 would be voluntary and his income will decrease if he works less or reduces his ownership in M.R. Ltd;
- 3) A.E.E. is under a "continuing duty" to "promote and maintain her self-sufficiency and economic independence".

[Emphasis added.]

[34] After considering all of the factors, the arbitrator provided the following reasons for terminating support on August 1, 2025, when M.T.E. will be 72 and A.E.E. will be 68 (69 in November of that year), as follows:

79. In my disposition of [M.T.E.]'s spousal support obligation and [A.E.E.'s] spousal support entitlement, I accept the following factors as relevant:

- a. [A.E.E.'s] entitlement to long-term spousal support,
- b. the fact that [M.T.E.] purchased [A.E.E.'s] interest in the business based on earnings over \$150,000, tempered by the parties' agreement that [M.T.E.] should be supported and rewarded for his efforts so as to increase the profitability of the linear for both parties' benefit,
- c. the legitimate business needs of M.R. Ltd and its effect on the income available to [M.T.E.] to support purposes,
- d. the SSAG ceiling,
- e. the parties' need for certainty,
- f. the difficult circumstances facing M.R. Ltd.

80. I refer to the Divorce Mate calculation set out as Schedule B. In that calculation, I have set [M.T.E.'s] income at the four-year average, rounded, and [A.E.E.'s] income at the imputed income as agreed by the parties.

81. I accept that, taking all of the factors set out above into account, spousal support should be set at no more than the low end of the SSAG calculation. That being so, the spousal support paid from September 1, 2018 to date is higher than the level that I consider appropriate by about \$1,000 per month.
82. However, that overpayment is compensated by the fact that [M.T.E.] should have paid the amount based on the annual adjustment formula for July and August 2018 (a total shortfall of about \$13,500) and that [M.T.E.] should be responsible for the arbitration costs related to the day spent hearing from Josh Matte and for the adjournment that was required on November 10, 2020, as set out below. For those reasons, I conclude that the amount paid by [M.T.E.] to date, should not be adjusted retroactively.
83. Based on the current trend, I anticipate that [M.T.E.'s] future available income will be no more than \$150,000 to \$200,000 - and likely much less if he begins to work part time as he has suggested he wishes to or if he is able to sell M.R. Ltd either wholly or partially.
84. I direct that the amount currently being paid by [M.T.E.] be adjusted effective May 1, 2021.
85. Spousal support will be payable by [M.T.E.] to [A.E.E.] as follows:
 - a. From May 1, 2021 to June 1, 2022: \$7,500 per month,
 - b. From July 1, 2022 to June 1, 2023: \$5,500 per month,
 - c. From July 1, 2023 to June 1, 2024: \$3,750 per month,
 - d. From July 1, 2024 to August 1, 2025: \$2,500 per month.
86. Spousal Support will terminate absolutely on August 1, 2025 on the payment of the spousal support as set out above. At that point, [M.T.E.] will be turning 72 years of age and [A.E.E.] will be turning 69 years of age in November of that year.
87. My goal in establishing spousal support on a declining basis, with specified amounts that are not adjustable, is to create the certainty that both parties require so that they can plan for their retirement years.
88. It takes into account M.R. Ltd's deteriorating prospects, and accordingly, [M.T.E.'s] available income prospects.
89. If [A.E.E.] knows and can rely on levels of support that are certain, she can plan accordingly. She will be able to plan when and if she needs to remediate and sell the former family residence. Her business ventures have not been very successful to date. However, [A.E.E.] has shown that she is both intelligent and resourceful and so her income prospects may improve. Moreover, she will shortly be entitled to CPP and OAS benefits to supplement her income.

90. [M.T.E.] needs certainty so that he can make decisions regarding the potential sale or winding up of his business. The declining support schedule gives substance to the parties' agreement that his work after age 65 should be voluntary. I anticipate that his income will decline over the next five years and then any choice he makes to continue to work should be his make without concern to his implication to spousal support.
91. My approach also dispenses with ongoing dispute resolution costs that have negatively impacted both parties' finances.

[Emphasis added.]

- [35] While A.E.E. acknowledges that M.T.E. will at some point retire and her support will be terminated, she argues that while he is working, he should pay support. In an interim ruling dated July 7, 2020, the arbitrator noted that M.T.E. conceded that he is obliged to pay A.E.E. spousal support until he retires.
- [36] That is what this appeal is about: as long as M.T.E. is working, he must pay A.E.E. support. His support obligation cannot end until he actually retires. While I agree with the arbitrator (in para. 87 of his reasons) that certainty can be an important consideration "so the parties can plan for their retirement years", the arbitrator's final order was premised on speculative events that have not yet occurred. That, in my view, cannot be the basis for a final order.
- [37] After considering the record and the law, regardless of which standard is applied, I conclude that the arbitrator erred in law by ordering the termination of spousal support before M.T.E. retired.
- [38] The arbitrator additionally cited the "difficult circumstances facing M.R. Ltd." as a reason he "anticipated" M.T.E.'s income would decrease in the future, and awarded support based on these projections. Like his finding that M.T.E. intended to retire, the impact of these business difficulties on M.T.E.'s income is speculative. It concerns events which may happen in the future, and cannot be a finding of fact. The arbitrator erred in law by basing the quantum of a final award on future events which had not yet occurred. If M.T.E. does not in fact, retire, or his income increases, rather than decreases, the result will be significantly unfair to A.E.E.
- [39] Accordingly, I order that the Award be amended as follows:

The termination date for spousal support of August 1, 2025 is set aside and replaced with an order that spousal support, as calculated based on the formula in the Separation Agreement, will continue until further court order or agreement of the parties.

- [40] Having come to this conclusion, it is unnecessary to consider A.E.E.'s remaining arguments concerning spousal support.

ISSUE 2: DID THE ARBITRATOR ERR IN FAILING TO AWARD SPOUSAL SUPPORT ARREARS?

- [41] The arbitrator failed to address A.E.E.'s claim for spousal support arrears for the period June 2018 to June 2021. The reasons for failing to award arrears are unclear.
- [42] Given my finding that the arbitrator erred in terminating support, I necessarily find, regardless of which standard is applied, that he erred in failing to award support arrears. M.T.E. is obliged to pay to A.E.E. spousal support as calculated under the formula set out in the separation agreement from July 2018 forward.
- [43] I therefore order that the Award be amended to add a term that A.E.E. is entitled to arrears of support based on the formula in the Separation Agreement. I leave it to counsel to calculate the amount owing.

ISSUE 3: DID THE ARBITRATOR ERR IN MAKING A DECLARATION THAT A.E.E. WAS NOT ENTITLED TO ANYTHING FROM THE SALE OF THE BUSINESS?

- [44] In his award the arbitrator declared that A.E.E. was not entitled to any sale proceeds of M.R. Ltd. A.E.E. argues that this declaration was outside the scope of the arbitrator's jurisdiction as she was not seeking sale proceeds. As stated above, as an example of the sufficiency of reasons, A.E.E. claims that the arbitrator did not explain why he made this declaration or how it was related to the issue of spousal support.
- [45] This is a non-issue. The parties agreed that the arbitrator was to address "all and any other issues that remained to be determined" between them in the written arbitration agreement. The eventual sale of the business was one of the issues in the arbitration. It was open, and prudent in the interest of finality, for the arbitrator to clarify that all proceeds of the sale were M.T.E.'s.
- [46] Regardless of which standard is applied, I am unable to conclude that the arbitrator erred in making the declaration.

ISSUE 4: DID THE ARBITRATOR ERR IN FAILING TO AWARD COSTS TO A.E.E.?

- [47] A.E.E. argues that the arbitrator erred in failing to award her costs that he found were owed to her.
- [48] In his reasons denying M.T.E.'s request to reduce support on an interim basis the arbitrator noted that A.E.E. was entitled to costs of the interim application. In his final award, the arbitrator also noted that M.T.E. wasted time in the final arbitration by calling the evidence of Josh Matte, which he later decided not to rely on; as well as causing delay by providing insufficient notice about his accountant's opinion.
- [49] In his final reasons, the arbitrator did not award A.E.E. any of these costs directly. Instead he ordered that the parties should share the cost of the mediation/arbitration and bear their own costs throughout.
- [50] In reaching the decision that each of the arbitrator provided the following reasons:

93. Success has been mixed.
94. [M.T.E.] was entitled to request the review of spousal support. He has succeeded in obtaining an award that dispenses with the annual adjustment and income formula set out in the Separation Agreement.
95. However, the spousal support amounts and duration that he proposed were much lower than I have ultimately awarded.
96. Moreover, at least one of the arbitration days was taken up by considering the evidence of Josh Matte, which evidence [M.T.E.] ultimately discarded. That being so, the cost thrown away in relation to that exercise should be borne by [M.T.E.].
97. Additionally, the arbitration sessions scheduled for November 10 and 11, 2021 had to be adjourned because insufficient notice was given by [M.T.E.] of Angus Izard's opinion as to his available income.
98. As noted above, [M.T.E.'s] "overpayment" of spousal support from July 1, 2018 to date achieves the balance of compensating [A.E.E.] for the time and expense thrown away in the arbitration process relating to the expert evidence as well as for [M.T.E.'s] underpayment of support in the annually adjusted amounts for July and August 2018.
99. Otherwise, each of the parties should bear one half of the costs of the Mediation/Arbitration process and their own costs throughout.
- [51] I see a number of problems with the Arbitrator's decision. First, he mixed costs with what he saw to be an overpayment of support. The two should be separate. The purpose of costs is to compensate a party to a litigation when appropriate. In this case, as noted above by the arbitrator, A.E.E. was entitled to be compensated for three days of the arbitration. If there was an "overpayment" that should have been a separate order. How that "balanced" out would then be left for counsel to determine. Second, even if lumping the two together was not fatal, the arbitrator's reasons are insufficient as they do not explain what "overpayment" he refers to or how he concluded that M.T.E.'s "overpayment" "balanced" the costs out.
- [52] By any standard of review, I find that the arbitrator erred by failing to order costs to A.E.E. after finding she was entitled to them. Accordingly I order that the arbitrator's award regarding costs be amended to award costs to A.E.E. for three days of arbitration.

CONCLUSION

- [53] Although A.E.E. has been successful on this appeal, as a result of it there may be an abrupt end to her spousal support upon M.T.E.'s retirement. While pursuant to clause 5.16 of the Separation Agreement M.T.E. will have to request a full review of entitlement and quantum once he has retired, given the evidence in this appeal and findings made, A.E.E. must prepare herself for the possibility that spousal support will end in the near future. The Arbitrator attempted to decrease the support over several years to ease A.E.E. into that

reality. As a result of the findings of this appeal, A.E.E. could face an immediate end to her spousal support payments if M.T.E. ceases to work and receive an income. She may ultimately receive less than she was awarded by the Arbitrator.

[54] The awards made by the arbitrator are amended as follows:

- 1) The termination date for spousal support of August 1, 2025 is set aside and amended with an order that spousal support, as calculated based on the formulas set out in the Separation Agreement for determining M.T.E.'s income and support payable, will continue until further court order or agreement of the parties;
- 2) A.E.E. is entitled to arrears of support from June 2018 to June 2021 based on the formula in the Separation Agreement, to be calculated by counsel;
- 3) A.E.E. is entitled to costs of the interim application as well as three days of the arbitration.

[55] Costs of this appeal to A.E.E.

"The Honourable Madam Justice Murray"

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