

CANADA / JUDGMENT

Bradley v. Callahan

2025 BCCA 271

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 271 Bradley v. Callahan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bradley v. Callahan,

2025 BCCA 271

Date: 20250730

Docket: CA49714

Between:

Norval Bradley

Appellant

(Claimant)

And

Edward James Callahan, Midwest Ventures Ltd. and

C.M.S.T. Investments Ltd.

Respondents

(Respondents)

Before:

The Honourable Chief Justice Marchand

The Honourable Justice Fleming

The Honourable Justice Iyer

Supplementary Reasons to Bradley v. Callahan,
2025 BCCA 69, Vancouver Docket CA49714.

Counsel for the Appellant:

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Counsel for the Respondents:

L.A. Kahn, K.C.

J. Wahid

Place and Date of Hearing:

Vancouver, British Columbia

October 16 and 17, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 13, 2025

Written Submissions Received:

June 16, 2025, July 2, 2025 and July 9, 2025

Place and Date of Supplementary Judgment:

Vancouver, British Columbia

July 30, 2025

Supplementary Reasons of the Court

Summary:

The Court found the marriage agreement between the parties operated unfairly and remedied the unfairness by ordering property reapportionment. The respondent applies to reopen the appeal, claiming a potential miscarriage of justice arises from the property reapportionment order. He also asks the Court to clarify what the court below can do in determining the appropriate means for him to effect payment to the appellant. Held: Application dismissed. There was no unjustified failure to ascribe value to the respondent's contingent business interests at the time of marriage. The valuation was supported by the evidence, the authorities and the position taken by the respondent himself. The Court did not neglect to account for the tax consequences associated with awarding the appellant a 5 percent "return" in relation to reapportionment. This misconstrues the nature of re-apportionment. It is not a precise calculation but a holistic analysis of relevant factors, grounded in the evidence, to arrive at an all-inclusive amount to correct an unfairness. Finally, the court below requires no further guidance. The trial court will have to

determine how to structure payments so they are tax-advantageous to both parties and do not undermine the value and/or viability of the assets underlying the award.

Supplementary Reasons for Judgment of the Court:

Introduction

- [1] The appellant, Norval Bradley, and the respondent, Edward James Callahan, began living together in 1992, married on September 13, 1997, and separated on June 1, 2014. When they separated, their two children were 12 and 14 years old.
- [2] Two days prior to their marriage, the parties signed a marriage agreement setting out their rights and responsibilities in the event of a future termination of their marriage. Following their separation, the parties engaged in protracted litigation. The central issues were the validity of the separation agreement, division of assets, spousal support and child support.
- [3] Following a 40-day trial, the trial judge found the marriage agreement was valid and operated fairly. He made income findings, divided the parties' property according to the marriage agreement and ordered Mr. Callahan to pay Ms. Bradley \$8.6 million in lump sum spousal support. He declined to award Ms. Bradley retroactive child or spousal support. The judge's reasons for judgment are indexed as 2024 BCSC 163 [Trial RFJ].
- [4] On appeal, Ms. Bradley did not challenge the judge's finding that the marriage agreement was valid. Rather, she alleged the judge erred in principle by:
 - 1. finding the marriage agreement operated fairly and dismissing her claim for variation;
 - 2. failing to order retroactive child and spousal support according to the Federal Child Support Guidelines and the Spousal Support Advisory Guidelines respectively; and
 - 3. failing to divide the value of the parties' post-marriage RRSPs according to the marriage agreement.
- [5] On March 13, 2025, this Court allowed Ms. Bradley's appeal in part. The Court concluded the judge improperly applied the factors for determining whether a marriage agreement is fair, overlooked Ms. Bradley's indirect contributions to the growth of corporate assets held by Mr. Callahan (known as "the Argus Group"), and incorrectly concluded the enormous growth in those assets was reasonably contemplated by the parties at the time of the agreement. The Court held the agreement was not fair because it allowed Mr. Callahan to keep all the increased value in corporate assets despite Ms. Bradley's contributions to their growth over a 17-year marriage.
- [6] To remedy the unfairness, the Court ordered property reapportionment to satisfy the objectives of the applicable legislation, namely the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], and Divorce Act, R.S.C. 1985, c. 3. The Court held:

[132] As I have said, the circumstances before the court are unusual. Further, the parties have been litigating these issues for seven years, and fairness warrants finality.

[133] Although there is no mathematical formula for calculating fairness, considering all of the above, I would reapportion \$29 million to Ms. Bradley from the value of the Argus Group. This award approximates 25 percent of the increase in the value of Argus Group from the date of the marriage to the triggering event, plus a 5 percent return on that increase to the date of trial, less the lump sum award of spousal support made by the trial judge.[1] I consider the deduction of the spousal support award necessary to avoid double recovery: Dhaliwal at para. 28.

[134] Despite the imprecise valuation of the assets as a whole, I am confident this reapportionment, along with the spousal support order made by the trial judge, would satisfy the objectives of both the FRA and Divorce Act. It would balance the parties' clear intentions in the marriage agreement against the need for fairness in light of the unanticipated circumstances of the parties when the marriage ended.

[135] Given the scale of the assets in question, it is appropriate to give the parties an opportunity to arrange their affairs and for Mr. Callahan to effect payment to Ms. Bradley in a tax-efficient fashion. I would give them 90 days to reach such an agreement, with leave to return to the court below if they fail to do so.

[Footnote [1] omitted.]

[7] For reasons that are not germane to Mr. Callahan's application to reopen the appeal, the Court dismissed the other grounds of appeal raised by Ms. Bradley.

[8] The Court's judgment is indexed as Bradley v. Callahan, 2025 BCCA 69 [Appeal RFJ]. The parties have yet to enter the Court's order.

[9] On June 16, 2025, Mr. Callahan applied to reopen the appeal to remedy a potential miscarriage of justice. He raises three issues. He says:

1. The Court overestimated the increase in value of the Argus Group by failing to ascribe any value to his contingent interests in certain corporate assets at the time of the marriage;
2. The Court did not make any allowance for tax on the 5 percent "return" awarded to Ms. Bradley; and
3. The Court did not clearly delineate the scope of what the court below can do to establish the most appropriate means for Mr. Callahan to effect payment to Ms. Bradley.

[10] For the reasons below, Mr. Callahan's application is dismissed.

Discussion

Threshold to Reopen an Appeal

- [11] The threshold to reopen an appeal is not controversial. In *R. v. Chudley*, 2015 BCCA 391, this Court described it as follows:
- [9] The leading case in this jurisdiction on re-opening an appeal is *R. v. Hummel*, 2003 YKCA 4. Hummel found that there was inherent jurisdiction in this Court to re-open an appeal if the order had not been entered. However, doing so is an "extraordinary power" that should be "exercised rarely": at para. 3. Three justices of this Court, sitting as a division of the Yukon Court of Appeal, listed five factors that are relevant to an application to re-open an appeal (at para. 24):
1. Finality is a primary but not always determinative factor.
 2. The interests of justice include finality and the risk of a miscarriage of justice.
 3. The applicant must make out a clear and compelling case to justify a re-opening.
 4. If the case has been heard on the merits the applicant must show that the court overlooked or misapprehended the evidence or an argument.
 5. The error must go to a significant aspect of the case.
- [10] In short, Hummel has been said to require "the demonstration of a potential miscarriage of justice" in order to justify re-opening an appeal: *R. v. Jahanrakhshan*, 2013 BCCA 398 at para. 5. This must be a "clear and compelling case": *Hadcock v. Georgia Pacific Securities Corp.*, 2007 BCCA 127 at para. 1.

Issue 1: Failure to ascribe value to certain corporate assets at the time of marriage

- [12] Mr. Callahan says the Court provided Ms. Bradley with a 25% interest in the increase in value of his business assets without accounting for the value of significant contingent interests in the assets disclosed in the marriage agreement.
- [13] Mr. Callahan points to a joint expert valuation report by Michael Bowie ("Bowie report") dated May 2, 2019, to support his claim the assets at issue were worth \$26 million in 1997. He then points to the results of a 2008 arbitration that awarded him 38% of these (and apparently other) assets. He therefore says his contingent business interests were worth \$10 million in 1997 (\$26 million x 38%). Had the Court accounted for his contingent interests, Mr. Callahan says the award to Ms. Bradley would have been approximately \$25.5 million rather than \$29 million.
- [14] Respectfully, the flaw in this aspect of Mr. Callahan's application is not difficult to discern.
- [15] At trial, Ms. Bradley sought to set aside the marriage agreement on several grounds, including the sufficiency of Mr. Callahan's disclosure of the value of his business interests.

- [16] The marriage agreement listed Mr. Callahan's various business interests, including his then contingent interests. Regarding the value of these interests, the marriage agreement provided: "While no formal or informal valuation has ever been conducted in respect of these companies, it is assumed that the value as of the date of this Agreement is in excess of \$2 million": Trial RFJ at paras. 181-182.
- [17] The Bowie report valued Mr. Callahan's business interests in the Argus Group as of September 11, 1997, at \$2,967,417 to \$3,305,278. Mr. Bowie's valuation expressly excluded the value of Mr. Callahan's contingent business interests: Trial RFJ at paras. 10-11.
- [18] The trial judge adopted approximate values from the Bowie report, including approximately \$3 million as the value of Mr. Callahan's business interests as of September 11, 1997: Trial RFJ at para. 226.
- [19] In satisfying himself Mr. Callahan had made "proper disclosure", the trial judge noted that "contingent or discretionary interests are generally considered to have little or no value": Trial RFJ at para. 203, citing *H.S.S. v. S.H.D.*, 2018 BCCA 199 at para. 99 and *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 48. On any fair reading of the Trial RFJ, it is apparent the judge concluded Mr. Callahan's contingent business interests in fact had little to no value at the time of the parties' marriage.
- [20] At trial and on appeal, it was in Mr. Callahan's interest to minimize the value of the business interests he held at the time of the parties' marriage, including his contingent business interests; the lower the value, the more likely his disclosure would be found sufficient. Had Mr. Callahan's contingent business interests been valued by the judge at \$10 million as of September 1, 1997 (as Mr. Callahan now suggests should be done), the judge may well have found Mr. Callahan's pre-marriage agreement disclosure to have been insufficient.
- [21] As it was, Mr. Callahan did not dispute Mr. Bowie's September 1, 1997, valuation of his business interests on appeal: Appeal RFJ at para. 34.
- [22] As can be seen, there was no unjustified failure to ascribe value to Mr. Callahan's contingent business interests at the time of marriage. The judge's valuation was supported by the evidence, the authorities and the position taken by Mr. Callahan himself. Holding Mr. Callahan to the position he took on valuation at trial and on appeal will not risk a miscarriage of justice and provides no basis to reopen the appeal.

Issue 2: Allowance for tax on the 5 percent "return" awarded to Ms. Bradley

- [23] As noted above, this Court's \$29 million award to Ms. Bradley "approximates 25 percent of the increase in the value of Argus Group from the date of the marriage to the triggering event, plus a 5 percent return on that increase to the date of trial, less the lump sum award of spousal support made by the trial judge": Appeal RFJ at para. 133. In making its award, Mr. Callahan says the Court neglected to account for the tax consequences associated with the 5 percent "return".

- [24] Mr. Callahan says Ms. Bradley would have had to pay tax on any "return" she earned, but the Court's award effectively requires him to pay that tax on her behalf. Using a marginal tax rate of 50%, Mr. Callahan seeks a downward adjustment of the Court's award of \$4,385,000.
- [25] There are three factors that weigh heavily against this aspect of Mr. Callahan's application.
- [26] First, given the seven-year history of this litigation, the Court determined it was appropriate to fashion a remedy rather than return the matter to the trial court. As stated at para. 132 of the Appeal RFJ, "fairness warrants finality". On this application, finality weighs heavily against reopening the appeal.
- [27] Second, Mr. Callahan misconstrues the nature of the re-apportionment exercise undertaken by the Court. He characterizes it as a precise calculation, rather than what it was, a holistic analysis of relevant factors, grounded in the evidence, to arrive at an all-inclusive amount to correct an unfairness.
- [28] The basis of the Court's assessment in the "unusual circumstances" of this case was fully set out at paras. 117-135 of the Appeal RFJ. As noted at para. 133, the Court had to: (1) contend with imprecise valuations; (2) endeavour to satisfy the objectives of both the FRA and Divorce Act; and (3) "balance the parties' clear intentions in the marriage agreement against the need for fairness in light of the unanticipated circumstances of the parties when the marriage ended."
- [29] In the exercise of its "wide discretion", Ms. Bradley correctly notes the Court could have made other choices. For example, had the Court awarded Ms. Bradley 25% of the growth in the Argus Group to the date of trial, the award could have been much larger. Using Mr. Callahan's estimates of the value of the Argus Group at trial, the award would have been between \$28.4 million and \$31.4 million.[1] Using Ms. Bradley's estimates, the award would have been between \$47.4 million and \$50.4 million.[2]
- [30] Finally, Mr. Callahan did not make an alternative submission about what the Court should do if it found the marriage agreement operated unfairly. That was his choice, and a factor that weighs against reopening.
- [31] Mr. Callahan's tax arguments do not make out a clear and compelling case to reopen.

Issue 3: Establishing the most appropriate means for Mr. Callahan to effect payment to Ms. Bradley

- [32] In allowing the appeal and ordering Mr. Callahan to pay Ms. Bradley \$29 million, this Court considered it "appropriate to give the parties an opportunity to arrange their affairs and for Mr. Callahan to effect payment to Ms. Bradley in a tax-efficient fashion": Appeal RFJ at para. 135. The Court therefore ordered:

- [169] The parties have 90 days to reach an agreement as to the most appropriate means for Mr. Callahan to effect payment to Ms. Bradley. If they are unable to do so, the parties have leave to return to the court below.
- [33] Noting the parties have not reached an agreement with respect to payment of the judgment, Mr. Callahan asks the Court to reopen the appeal to clarify para. 169 of the Appeal RFJ. Specifically, he asks the Court to confirm "a Supreme Court judge may consider all relevant evidence, including distributive and latent taxes, to decide the terms of payment that must be made by [him]."
- [34] Mr. Callahan says he "should not be faced with the Supreme Court Judge declining to do so because this Court did not specify which parameters (including tax issues) could be considered." He adds he "should not be required to dispose of assets in a manner that leads to excessive tax consequences that could be avoided, or payment terms which affect the financial viability of the Argus Group."
- [35] Mr. Callahan relies on *Sea v. He*, 2024 BCCA 161, where this Court recognized that: (1) compensation payments "have to come from somewhere"; and (2) trial judges have to "undertake a case- and fact-specific inquiry into, among other things, the likelihood that the value of assets subject to division will be reduced by latent tax consequences or other costs as a consequence of the division": at paras. 88, 90.
- [36] Here, Mr. Bowie estimated the fair market value of the Argus Group at various points in time using an "adjusted equity approach" that provided for the latent selling costs and corporate income taxes that would arise on a notional sale of the real estate and related assets held by the Argus Group. These "latent realization costs" were estimated based on "an overall deferral of approximately four to ten years" in the sale of the real estate and related assets. In other words, Mr. Bowie addressed the issue of concern in *Sea* by accounting for the latent realization costs associated with an orderly sale of real estate and other assets.
- [37] In these circumstances, is there a need to reopen the appeal to address Mr. Callahan's desire to more clearly define the scope of the powers of a Supreme Court judge to determine the most appropriate means to effect payment to Ms. Bradley? In our view, the answer is "no".
- [38] This Court has determined the amount of the compensation payment to be made by Mr. Callahan to Ms. Bradley, namely \$29 million. The Appeal RFJ made clear the Court was alive to the need for the parties to arrange their affairs to enable Mr. Callahan to pay Ms. Bradley in a tax-efficient fashion. In the event of disagreement between the parties, the only issue referred by this Court to the trial court was the "means" of payment.
- [39] In our view, no further guidance is necessary. In the circumstances that have arisen, the trial court will have to determine such things as timing issues and how to structure payments to Ms. Bradley in a manner that is tax-advantageous to both parties. The trial court will necessarily have to hear the parties' submissions about Mr. Callahan's ability to pay in a fashion that would not undermine the value and/or viability of the very asset (the

Argus Group) that justified the \$29 million award. It will be up to the trial court to determine the most appropriate way forward.

Disposition

[40] For all of these reasons, Mr. Callahan's application to reopen the appeal is dismissed. Ms. Bradley is entitled to costs of this application.

"The Honourable Chief Justice Marchand"

"The Honourable Justice Fleming"

"The Honourable Justice Iyer"

[1] $[(\$151 \text{ million} - \$3 \text{ million}) \times 0.25] - \$8.6 \text{ million} = \$28.4 \text{ million}$ to $[(\$163 \text{ million} - \$3 \text{ million}) \times 0.25] - \$8.6 \text{ million} = \$31.4 \text{ million}$. See Appeal RFJ at para. 35.

[2] $[(\$227 \text{ million} - \$3 \text{ million}) \times 0.25] - \$8.6 \text{ million} = \$47.4 \text{ million}$ to $[(\$239 \text{ million} - \$3 \text{ million}) \times 0.25] - \$8.6 \text{ million} = \$50.4 \text{ million}$. See Appeal RFJ at para. 35.

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