

CANADA / JUDGMENT

Poon v. Yuen

2024 BCCA 296

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 296 Poon v. Yuen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Poon v. Yuen,

2024 BCCA 296

Date: 20240809

Docket: CA47822

Between:

Sau Kwan Poon also known as Sau-Kwan Poon

Appellant

(Claimant)

And

Ki Way Yuen also known as Ki-Way Yuen

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Butler

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

September 15, 2021, and oral ruling dated October 21, 2021

(Poon v. Yuen, 2021 BCSC 1809, Vancouver Docket E181194).

Oral Reasons for Judgment

Counsel for the Appellant:

W.M. Wong

S.C. Wai, Articled Student

Counsel for the Respondent

(appeared via videoconference August 9, 2024):

G.K. Yu

Place and Date of Hearing:

Vancouver, British Columbia

August 7, 2024

Place and Date of Judgment:

Vancouver, British Columbia

August 9, 2024

Summary:

The respondent applies pursuant to Rule 60 of the Court of Appeal Rules to strike portions of the appellant's amended factum. After a 16-day trial, the trial judge held that the family property should be split 60/40 in favour of the appellant wife. The parties could not agree on how to give effect to the 60/40 unequal division of family property, and the appellant appealed on the basis that the trial judge erred by using the wrong total value of the family property as the starting point of her calculations. An appeal was heard in November 2023. After hearing oral submissions from counsel, the division adjourned the appeal and directed the parties to file amended factums and to reset the appeal for hearing before a new division of the Court. The appellant's amended factum made reference to comments of the Court at the aborted hearing that she believes tend to support her position on appeal. The respondent argues that the inclusion of the Court's comments in the amended factum is improper and has the potential to prejudice his position on appeal. Held: Application granted. The impugned parts are struck from the appellant's amended factum, and the appellant shall file a further amended factum. The comments made by the members of the division at the aborted hearing are not relevant to the issues to be considered at the rescheduled appeal. A party to an appeal is not permitted to bolster its arguments by referring to supportive statements made by other lawyers or judges that do not form part of the record and are not otherwise properly included in their factum. Although the power to strike parts of a factum under Rule 60 should be exercised sparingly, such caution must be balanced against the necessity of maintaining the integrity of the appeal process.

- [1] BUTLER J.A.: The respondent applies pursuant to Rule 60 of the Court of Appeal Rules, B.C. Reg. 120/2022 [Rules] to strike part of the appellant's amended factum filed on February 1, 2024, and an order that the appellant file an amended appellant's factum without reference to the paragraphs struck. He also seeks to have this application heard before the hearing of the appeal. The appellant opposes these applications.

Factual Background

- [2] The parties, both in their 80s, were married in Hong Kong in 1971, and have no children with each other. They separated in 2017, when the appellant learned that the respondent had been financially supporting another woman and had fathered a child with her.
- [3] The appellant sought an unequal division of family property on the basis of the respondent's depletion of their joint wealth, his post-separation dissipation of their family property, her contributions during the marriage, and the respondent's lack of disclosure during the litigation. The appellant also claimed spousal support.

Proceedings in the Court Below

- [4] Following a 16-day trial, the judge issued reasons indexed at 2021 BCSC 1809. The judge granted the divorce and divided the family property 60/40 in favour of the appellant. Having regard to s. 95 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the judge held that it would be "significantly unfair" to divide the family property equally in the circumstances.
- [5] The judge determined that the sum of \$1,219,039 was the amount necessary to address the significant unfairness caused by the respondent's actions, taking into account: half the amount she paid for household expenses for the couple's properties in Hong Kong and Vancouver; half the funds the respondent gave to the mother of his child; and half of the funds the respondent withdrew from an overseas bank account post-separation: at para. 52.
- [6] The judge dismissed the appellant's claim for spousal support, noting that "the objectives of the FLA are best met through the unequal division of family property": at para. 33.
- [7] When the parties could not agree how to give effect to the 60/40 unequal division of family property they appeared before the judge for clarification. In an oral ruling made on October 21, 2021 (the "Oral Ruling"), the judge provided an explanation as to the calculation of the 60/40 unequal division. From the total asset pool of roughly \$6.9 million the judge deducted \$1,219,039--the amount she determined to represent "significant unfairness". The net amount of \$5.692 million was to be divided equally, giving each party assets of \$2,846,317. Based on this calculation, the appellant was to receive that amount plus \$1,219,039 (the "significant unfairness") bringing her total entitlement to approximately \$4,065,317: at para. 3. However, by ordering a 60/40 split, the respondent would be entitled to a slightly higher amount of \$4,147,003, effectively increasing the "significant unfairness" amount to \$1,300,686. Accordingly, the relevant term of the final order from the trial (after the Oral Ruling) provided:

1. The family property has a total value of \$6,911,673.03, and it shall be divided unequally with the Claimant receiving 60% of the family property and the Respondent receiving 40%;
- [8] The appellant brought an appeal from the final Order in her amended notice of appeal dated January 26, 2022. The appellant does not take issue with the 60/40 distribution of the family property or the "significant unfairness" amount. Rather, the appellant argued that the trial judge erred by using \$6.9 million as the starting point of her calculations. She contended that the other half of the "total dissipated amount"--from which the "unfairness amount" was calculated--should also have been included in the total value of the family property.

Proceedings in this Court

- [9] The appeal was heard on November 27, 2023. I will refer to that as the "Aborted Hearing". After hearing oral submissions from counsel, the division adjourned the appeal and directed the parties to file amended factums and to reset the appeal for hearing before a new division of the Court.
- [10] The appeal was adjourned because of concerns about the proper identification and quantification of the family assets available for division and of those that had been dissipated. The Court was of the view that the appellant's factum and oral submissions had not adequately identified and explained the issue before the Court. The exchange between counsel and the Court at the end of the hearing included the following:

THE COURT: we're going to adjourn the appeal because you should come back to - - a division with the proper foundation of figures.

You have not referred to them, Mr. Wong, in your oral submissions.

But you haven't pointed to the record, or the reasons for judgement that clarify these figures; that's the trouble.

So - - so my colleague has just clarified that you need to understand you'd be coming back before a new division with amended factums.

You need to have figures that show what the original pool of family assets was, and what the 2.4 figure is comprised of, because it's broken down into different amounts.

CNSL W. WONG: so we argue the appeal all over again, or ?

THE COURT: yes, you would.

Because you - - your submissions were very confusing and it took us a long time to get to partway there.

- [11] When counsel sought to clarify the procedure, the Court again stated that the parties would have to file amended factums and come back to argue the appeal before a different division of the Court. The Court also observed that the issue appeared to be "pretty straightforward" and expressed the hope that the parties might be able to resolve it without returning to

court. No order was entered following the hearing. Instead, the appeal was adjourned, the parties were directed to file amended factums and reappear before a new division in the event they could not resolve their dispute out of court.

- [12] In her amended factum filed February 1, 2024, the appellant made reference to the comments of the Court at the Aborted Hearing (the "Impugned Parts"). Without setting out the entirety of the Impugned Parts, it is apparent that the appellant has included statements made by individual justices (identified by name) in her amended factum that she believes tend to support her position that the trial judge erred in her calculation of the division of assets. Some examples from the amended factum will suffice:

Part 1 - Statement of Facts

13. During the Appeal, Madam Justice Dickson commented at around 3:15 pm that:

"had he [Respondent] not dissipated the \$2.4 million, the total asset pool would have been 7 million plus \$2.4 so that's \$9.4 million. If you divided that by two, 50% of that would be \$4.7 million and instead by doing a 60/40 split, she [the judge] gave less than that unintentionally".

18. Mdm. Justice Mackenzie also stated at around 4:30 pm that:

"she [the judge] never mentions the original asset pool, and that is her error".

19. The Division concluded that determining the composition of the \$2,438,078 was paramount before the Appeal can be decided.

Part 3 - Argument

37. However, during the Appeal, the Division suggested another method, which the Appellant submits is also appropriate and better reflects the presumption of equal division under S. 81 of the FLA.

38. The Appellant agrees with the Division's comments regarding the correct calculation method which should have been carried out as follows:

- a) Start with the Total Family Assets of \$9,361,187.70.
- b) Presumptively divide in equal shares pursuant to S. 81 of the FLA which equates to \$4,680,593.854 each party.

(the "Appeal Division Method")

39. By using the Appeal Division Method, the Appellant shall receive \$4,680,593.854, which is \$527,000 more than what [the judge] calculated with her method.

Positions of the Parties

- [13] The respondent seeks an order striking the Impugned Parts from the appellant's factum. He argues that the judicial comments and observations should not be included in the amended factum as they are not part of the appeal record and are irrelevant to the issue before the Court. He notes that the first division did not seize itself of the appeal and ordered that a new division should hear the appeal based on arguments set out in amended factums. The respondent argues that the hearing should be based on the trial record and "not a tandem appeal piggybacking on judicial comments made at the [Aborted Hearing]."
- [14] The respondent also submits that, in addition to their impropriety, the inclusion of the Impugned Parts in the amended factum has the potential to prejudice the respondent's position on appeal.
- [15] Accordingly, the respondent asks that the following parts be struck from the appellant's amended factum:
- a) Part 1: paragraphs 12-20; and
 - b) Part 3: paragraphs 13-14, 37-39, 41-42, 61 IV, 62, and 64-65.
- [16] The appellant makes two arguments in response. First, she submits that the respondent's preliminary objection should be heard and decided by the same division that hears the rescheduled appeal at the same time as the appeal, in accordance with the usual practice of this Court as stipulated under Rule 60(4): *Lac La Ronge Indian Band v. British Columbia*, 2024 BCCA 58 at para. 54. The appellant says that the respondent applicant bears the onus of justifying the departure from this general practice and that the respondent must satisfy the Court that striking the Impugned Parts in a preliminary hearing conforms with the twin procedural demands of fairness and efficiency in Rule 60: *Lac La Ronge Indian Band* at para. 55.
- [17] The appellant notes that the division spent a significant amount of time at the Aborted Hearing clarifying her submissions regarding the "total dissipated amount" and the pool of total assets. Accordingly, she says the interests of fairness and efficiency are better served by allowing the new division to have the benefit of the judicial comments and observations made during the Aborted Hearing.
- [18] Second, the appellant submits that there is nothing improper in including references to the comments and observations of the justices who sat on the first division. She notes that the Court has access to transcripts of the Aborted Hearing. She suggests that Rule 36 provides some support for her position as it allows the Court to "permit a party to use arguments, raise points of law or cite authorities that were not used, raised or cited in the party's factum filed [after an appeal is brought]." She also suggests that if she is prevented from referring to the Court's earlier comments, her ability to advance an argument based on those observations may be impaired.

Legal Framework

- [19] Rule 60(1)(a) allows a party to apply to strike part of the opposing party's factum. Pursuant to Rule 60(4), the application "must be heard at the same time of the hearing of the appeal" unless ordered otherwise by a justice or the registrar.
- [20] The rationale for Rule 60(4) was explained by Justice Dickson in *Lac La Ronge Indian Band*:
- [54] ... [A] preliminary objection in relation to an appeal should generally be heard and decided at the same time as the appeal, in accordance with this Court's usual practice. That general practice is reflected in Rule 60(4) and responds to the twin procedural demands of fairness and efficiency. As I see it, those demands are largely complementary, not competing, in nature. Efficiency is context-dependent, and, appropriately conceived and targeted, it does not detract from the fairness of appellate proceedings. On the contrary, it enhances the fairness of an appeal.
- [55] ... [The applicant] bears the onus of justifying a departure from this Court's general practice of hearing preliminary applications at the same time it hears the appeals brought for its determination
- [21] The chambers judge must exercise their jurisdiction to strike out Parts of a factum sparingly such that "the division which hears the appeal is not deprived of full argument on the issues properly raised": *Perron v. R.J.R. MacDonald Inc.* (1996), 81 B.C.A.C. 2, 1996 CanLII 2023 (B.C.C.A. Chambers) at para. 15; *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2019 BCCA 439 (Chambers) at para. 40; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2008 BCCA 250 at para. 10; *Gould v. Sandau*, 2004 BCCA 90 (Chambers).
- [22] The decisions in *Perron* and *Gould* were made prior to the inclusion of Rule 60(1)(a), the specific provision authorizing applications to strike parts of a factum. Nevertheless, they provide some guidance. A party may apply to have Parts of an opposing party's factum struck if the factum raises issues that are not properly available on appeal. In *Perron*, the respondents successfully applied to strike out the appellant's reply factum on the basis that the appellant sought to raise issues that could have been, but were not argued at trial. In granting the order, Justice Legg acknowledged that the jurisdiction to strike out a factum should be exercised with caution.
- [23] In *Gould*, Justice Saunders held that a single justice has the power to review a party's factum for basic compliance and "to make such remedial orders as may be appropriate to facilitate the appeal": at para. 11.

Analysis

- [24] I do not accept the appellant's submission that the Impugned Parts are properly included in the amended factum on this appeal. Her position reflects a misunderstanding of what occurred at the Aborted Hearing, as well as a misunderstanding of the appeal process itself. Having concluded that the Impugned Parts are not properly included in the appellant's

amended factum and should not be placed before the division hearing the rescheduled appeal, I would allow the respondent's application under Rule 60(1)(a) to be heard and decided by a single justice in chambers in advance of the appeal.

- [25] The appellant's submission fails to take account of what actually transpired at the Aborted Hearing. The Court made no order other than to adjourn the hearing of the appeal. In doing so, it directed the filing of amended factums and indicated that the appeal would be heard afresh by a new division of the Court. The Court did not issue reasons and did not make findings that could bind a future division hearing the rescheduled appeal.
- [26] Contrary to the appellant's submissions in the amended factum, the Court did not: arrive at "conclusions"; identify errors made by the judge; or find that the judge had "unintentionally" awarded less than she intended to award (at paras. 13, 18-19 of Part 1). The Court certainly did not "suggest" the "Appeal Division Method" should be used at the rescheduled hearing of the appeal for calculating the appropriate division of assets.
- [27] The comments of the Court were just that: comments for the benefit of counsel and the parties based on the material before it. By adjourning the appeal, directing the exchange of amended factums and that the rescheduled appeal be heard by a new division, the Court clearly indicated that the parties would have to start over. Indeed, when appellant's counsel asked if the Court's direction meant that the parties had to argue the appeal all over again, the response was a clear "yes".
- [28] In light of what occurred at the Aborted Hearing, the comments made by the members of the division were not "fair game" to be used by either party to their advantage at a subsequent hearing. Quite simply, statements made by the Court at the Aborted Hearing have no relevance for the rescheduled appeal.
- [29] This conclusion is, of course, consistent with the appeal process. An appeal from a family trial order is based on the record before the trial court, including the exhibits, testimony and submissions of counsel at trial. The appeal flows from the order made by the trial court which is informed by the rulings and reasons of the judge considered in context. The material that can be referred to on appeal does not include reference to the opinions of others about the trial decision. Of course, that is exactly what the appellant's amended factum attempts to include by way of the comments of the Court at the Aborted Hearing. It matters not that the comments were made by justices of this Court. The appeal was adjourned to be heard by a new division based on amended factums. The comments made by the Court should not have been included in the amended factum.
- [30] Allowing the appeal to be complicated by references to comments made during the Aborted Hearing would undermine the fairness and integrity of the appeal process. While the risk of prejudicing the new division, who must adjudicate the matter based on the amended factums is small, the risk to the integrity of the process is real. A party to an appeal is not permitted to bolster its arguments on appeal by referring to supportive statements made by other lawyers or judges that do not form part of the record and are not otherwise properly

included in its factum.

- [31] Accordingly, while I am mindful that the judge's power to strike all or parts of a factum under Rule 60 should be exercised sparingly, this caution must be balanced against the necessity of maintaining the integrity of the appeal process.
- [32] I am also of the view that granting the application to strike the Impugned Parts from the appellant's amended factum in this application before the hearing of the appeal will facilitate a fair and efficient appeal process.

Disposition

- [33] The application to strike the Impugned Parts of the factum is granted. The appellant shall file an amended factum without reference to comments of the Court made at the Aborted Hearing. To be clear, the order does not limit the appellant's ability to raise any arguments it wishes to raise regarding the proper approach to calculating or affecting the property division ordered by the judge, including any arguments that may have been suggested by comments made at the Aborted Hearing. However, it is improper to characterize the method that the appellant is suggesting as the "Appeal Division Method" or to say that the first division supports or suggests a particular line of analysis. The factum is to be based on the record from the trial and should refer only to materials that properly form part of that record, not statements made at the Aborted Hearing.
- [34] The Impugned Parts are struck from the appellant's amended factum.
- [Discussion with counsel for the respondent re: timing and costs]
- [35] BUTLER J.A.: The appellant shall file her further amended factum on or before August 30, 2024. The respondent shall file his further amended factum on or before September 13, 2024.
- [36] The respondent shall have his costs of this application in any event of the appeal.
- "The Honourable Mr. Justice Butler"

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