

CANADA / JUDGMENT

Bosa v. Canada

2025 BCSC 1284

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 1284 Bosa v. Canada

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bosa v. Canada,

2025 BCSC 1284

Date: 20250710

Docket: S237285

Registry: Vancouver

In the Matter of the Decimo Bosa Family Trust

Between:

Decimo Bosa, Valerie Bosa, Derek Bosa, Brian Bosa and Natasha Bosa

Petitioners

And:

His Majesty the King in Right of Canada

Respondent

Before: The Honourable Justice Shergill

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

August 1-2, 2024

January 22-23, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 10, 2025

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I. Overview

- [1] In this Petition, the beneficiaries of the Bosa Family Trust seek rectification of a trust deed and various declarations, such that all assets of the Trust would be indefeasibly vested to them retroactively from May 1, 2008.
- [2] Although this is not the stated purpose for the Petition, if these orders are granted, the Petitioners would effectively avoid tax consequences flowing from the failure of the Trustees to distribute the trust property prior to the deemed disposition date under the Income Tax Act, R.S.C., 1985, c. 1 (5th supp.) Those tax consequences exceed one million dollars, and are the subject of an appeal which is pending before the Tax Court of Canada. The Tax Court appeal is set for trial for six days in May 2026.
- [3] The central dispute before me is one of jurisdiction. Specifically, whether this Court should decline jurisdiction in light of the proceeding before the Tax Court. Determining this issue turns on the essential nature of the claim and the Petitioners' motivation in bringing this Petition.

- [4] If I agree to assume jurisdiction, the substantive issue I must address relates to interpretation and operation of the trust deed.[1]
- [5] It is common ground that this Court has the jurisdiction to make the declarations and rectifications sought by the Petitioners. The Petitioners submit that the issues raised here primarily concern the interpretation, rectification, and application of a trust. Further, these issues will not be resolved by the ongoing appeal before the Tax Court, as it is a statutory court with limited powers.
- [6] The Respondent Attorney General of Canada does not dispute that the Tax Court does not have the power to grant the equitable relief sought herein. However, the Respondent argues that the matter before this Court is fundamentally a tax issue, as the Petitioners are really asking this Court to exercise its equitable jurisdiction to relieve the Trust from the tax consequences of the Trustees' failure to dispose of the trust property before the deemed disposition date. Consequently, the Attorney General submits that this Court should decline to exercise its jurisdiction.
- [7] For the reasons that follow, I decline to exercise the Court's jurisdiction to hear this Petition.

II. Orders Sought

- [8] The Petition seeks the following relief:
1. A declaration that as of May 1, 2008, nunc pro tunc, all assets of The Decimo Bosa Family Trust were indefeasibly vested:
 - a) to those persons who would have been entitled to share in the estate of Decimo Bosa had he died intestate on May 1, 2008, domiciled in British Colombia [sic], leaving no settlor of the Decimo Bosa Family Trust surviving him by virtue of clause 2.04 of the terms of the trust deed by which The Decimo Bosa Family Trust was created;
 - b) in the alternative, in equal parts to all beneficiaries of The Decimo Bosa Family Trust; or
 - c) such other person(s) as this Court may determine;
 2. In the event paragraph 1(a) above is applicable, an order that the terms of the trust deed by which The Decimo Bosa Family Trust was created be amended, rectified and corrected, on the terms set out in Schedule "A" to this Petition, nunc pro tunc to May 1, 2008;
 3. A declaration that to the extent that The Decimo Bosa Family Trust is still in existence as of May 1, 2008 the Trustees had no power under the Trust Deed to make any distribution of Trust Property, net income, or capital thereof, and the Trustees (as these terms are later defined in the Petition) had no discretion with respect to the Trust Property or duties under the Trust Deed after May 1, 2008, other than to hold the Trust Property as bare trustees and agents for those persons referred to in paragraph 1(a) above, or in the alternative, 1(b) above or in the further alternative, 1(c) above.

4. In the alternative, an Order for directions as to how the Trustees held the Trust Property since May 1, 2008, and how the Trustees are to distribute the remaining Trust Property;
 5. An order that all other relevant documents of The Bosa Family Trust and any assets thereof be rectified and modified to conform with this Order, *mutatis mutandis*, as and from the dates mentioned herein;
- [9] The Respondent agrees that the relief sought at Terms 2, 5 and the second half of Term 4, can only be granted by this Court.
- [10] At Schedule A to the Petition, the Petitioners seek rectification of Clause 2.04 to the Trust Indenture which established the trust.

[11] Clause 2.04 of the Trust Indenture currently reads:

2.04 If the foregoing trusts fail because no person becomes entitled at the time of division to the trust fund, then the Trustees shall divide the assets of the trust fund amongst those persons who would have been entitled to share in the estate of the said Decimo Bosa had he died intestate at the date of division, domiciled in the Province of British Columbia, leaving no Settlor surviving him.

[emphasis on the words that are sought to be replaced]

[12] The proposed rectification to clause 2.04 is as follows:

1. Deleting the words "time of division" and replacing them with the words "Distribution Date".
2. Deleting the words "trust fund" and replacing them with the words "Trust Property".
3. Deleting the words "date of division" and replacing them with the words "Distribution Date".

[13] After rectification, the Petitioners wish clause 2.04 of the Trust Indenture to read as follows:

2.04 If the foregoing trusts fail because no person becomes entitled at the Distribution Date to the Trust Property, then the Trustees shall divide the assets of the Trust Property amongst those persons who would have been entitled to share in the estate of the said Decimo Bosa had he died intestate at the Distribution Date, domiciled in the Province of British Columbia, leaving no Settlor surviving him.

[emphasis on the words that have been replaced]

[14] I turn now to the background facts that are relevant to this Petition.

III. Background Facts

- [15] Decimo Bosa and his wife Valerie Bosa have three adult children who were all born in the 1970's: Derek, Brian and Natasha.[2] Mr. Bosa has been involved in the development and construction industry for his entire adult life.

- [16] In 1988, Mr. Bosa decided to set up a family trust. For the type of trust that Mr. Bosa wanted to establish, he could not be a beneficiary if he was also the settlor. As such, Mr. Bosa's father-in-law Francesco Andreola, acted as settlor and established the Bosa Family Trust.
- [17] The Trust was established on February 15, 1988, as a personal inter vivos discretionary trust resident in British Columbia. Mr. Andreola settled the Trust for \$100 for the benefit of the Petitioners, namely, Mr. and Ms. Bosa and their three children (collectively, the "Beneficiaries"). Mr. Bosa and Robert Stevenson were named as Trustees and signed the Trust Indenture in that capacity. Mr. Stevenson was the corporate lawyer for Mr. Bosa's companies, and was also the person who drafted the Trust Indenture.
- [18] During its lifetime, the Trust acquired shares in various companies established by Mr. Bosa. These constitute the only assets held by the Trust. Mr. Andreola did not have any relationship to these companies.
- [19] According to Mr. Bosa, Mr. Andreola was not required to have an active role in administering the Trust once the Trust was settled. Mr. Andreola passed away around 2023.
- [20] On October 18, 2007, Mr. Bosa and Mr. Stevenson were replaced as Trustees by Ma Nguyen and J. David Dunn, respectively. Mr. Nguyen was the corporate accountant for Mr. Bosa's companies, and Mr. Dunn was the corporate lawyer. Neither of the replacement trustees are related to the Beneficiaries.
- [21] The Trust Indenture includes the following clauses that are relevant to this Petition:
1. Clause 1.04 provides the following definition of "Trust Property":

Trust Property. Trust property shall mean all moneys, securities, property and assets under the control of the Trustees and all capital accretions to and all income from such property to be held upon the trusts and with and subject to the powers and provisions hereof and any property substituted therefor.
 2. Clause 1.05 states that, other than the Trust Property, "[n]o further property or assets may be settled upon the Trust by any person, corporation or trust".
 3. Clause 1.06 stipulates that the Trust is irrevocable by the settlor.
 4. Clause 2.01(b) defines the Distribution Date as follows:

"Distribution Date" shall mean the earlier of the date on which the Trustees have distributed all of the Trust Property to the Beneficiaries or May 1, 2008.
 5. Clause 2.02 empowers the Trustees to hold the Trust Property, and grants them discretionary powers regarding its distribution up to the Distribution Date.
 6. Clause 2.03 requires the trustees to distribute any remaining Trust Property to the beneficiaries on the Distribution Date, as follows:

On the Distribution Date, the Trustees shall divide the remaining Trust Property among the Beneficiaries or such one or more of them to the exclusion of the other or others and in such proportions as the Trustees in their uncontrolled discretion determine.

7. Clause 2.04 sets out what is to occur if the Trust fails:

If the foregoing trusts fail because no person becomes entitled at the time of division to the trust fund, then the Trustees shall divide the assets of the trust fund amongst those persons who would have been entitled to share in the estate of the said Decimo Bosa had he died intestate at the date of division, domiciled in the Province of British Columbia, leaving no Settlor surviving him.

[22] The interpretation and rectification of Clause 2.04 are central to the substantive relief sought in this Petition. The terms "time of division", "date of division" and "trust fund" used in clause 2.04 are not defined terms in the Trust Indenture.

[23] The Distribution Date falls approximately 10 months prior to February 15, 2009, which was the 21st anniversary date of the Trust ("Deemed Disposition Date").

[24] By May 1, 2008, the Trustees had not distributed all of the Trust Property. Apparently, in 2016 and in certain years thereafter, Mr. Bosa and his wife received dividends from one of the companies which had shares registered in the name of the Trust.

[25] Around March 2013, the Minister of National Revenue requested the Trustees file a T3 trust return for the 2009 taxation year for the Trust. Following the filing of the 2009 T3 trust return, the Minister conducted a review of the Trust.

[26] On July 17, 2013, the Minister initially assessed the Trust's 2009 taxation year as filed. However, the Minister reassessed the Bosa Trust's 2009 taxation year (the "Reassessment") on June 15, 2016. Further to the Reassessment, the Minister found that the Trust had unreported capital gains of \$2,947,990 (50% of which is included as taxable income). The amount owing was reassessed at \$1,030,601.34. This figure included a levy for late filing penalties and arrears interest.

[27] In arriving at the reassessed amount, the Minister found that:

- 1) the Trust was still in existence on February 15, 2009, which was the 21st anniversary of the Trust;
- 2) none of the Trust's interests had vested indefeasibly prior to February 15, 2009;
- 3) the Trustees continued to hold the Trust Property for the benefit of the Beneficiaries; and
- 4) a deemed disposition of the Trust Property occurred on February 15, 2009, pursuant to s. 104(4)(b) of the Income Tax Act.

[28] On July 31, 2017, the Trust served on the Minister, a Notice of Objection to the Reassessment which was dated July 28, 2017. On March 11, 2020, the Minister confirmed the Reassessment and did not make any adjustments.

- [29] On July 22, 2020, the Trust filed a Notice of Appeal in the Tax Court of Canada. The Attorney General filed a Reply to the Notice of Appeal, on December 7, 2020.
- [30] On May 31, 2022, the Trust asked that the Tax Court appeal be held in abeyance, so as to allow the filing of a petition in the BC Supreme Court "seeking an interpretation of and/or possible amendment to the trust deed in issue in the Appeal".[3] The request was granted and the matter was held in abeyance until March 10, 2023. A petition was not filed prior to the expiry of the abeyance period.
- [31] On March 10, 2023, Counsel for the Petitioner wrote to the Tax Court and sought an extension of the abeyance period to May 31, 2023, to allow further time to file the petition. The Tax Court denied the request by letter dated April 14, 2023.
- [32] On May 25, 2023, the Tax Court made an Order setting a timetable for the completion of examinations for discovery by November 24, 2023. The parties were also required to set the matter for hearing by April 2, 2024, if they were unable to resolve it prior to that date.
- [33] The Petition was filed on October 26, 2023; the Amended Petition was filed on November 8, 2023.
- [34] On November 9, 2023, the Trust filed an application before the Tax Court, again asking that the matter be held in abeyance pending the hearing of the Petition in this Court. Alternatively, the Trust asked that the deadlines for examinations for discovery and related matters be extended. The Tax Court denied the request for an abeyance, but extended the deadlines for examinations for discovery and scheduling of the hearing to April 30, 2024, and August 23, 2024, respectively.
- [35] Examinations for discovery were completed in the Tax Court proceeding prior to this Petition hearing. The sole party to be examined was Mr. Nguyen. Mr. Nguyen's examination for discovery was completed on April 10, 2024. On June 21, 2024, Mr. Nguyen provided responses to undertakings left at his discovery.
- [36] This matter came before me for hearing on August 1, 2024. The original two-day time estimate proved to be insufficient, and another two days were required. The hearing of this Petition concluded on January 23, 2025.
- [37] By letter dated May 14, 2025, the parties advised this Court that the Tax Court appeal had been set for a six-day trial, commencing in May 2026.

IV. Jurisdiction

- [38] The parties are in basic agreement as to the respective powers of the Tax Court and the Supreme Court of British Columbia. These were aptly described by Justice Fitzpatrick as resembling a Venn diagram, with a separate circle for each court, but some overlap between them: *Lau v. Canada (Attorney General)*, 2014 BCSC 2384, at para. 61.

- [39] The first circle of the Venn diagram relates to the Tax Court, which derives its jurisdiction from statute. The Tax Court of Canada Act, R.S.C. 1985, c. T-2, s. 12 grants the Tax Court exclusive jurisdiction to determine the validity of tax assessments made by the CRA through a comprehensive appeal process: Lau, at para. 62.
- [40] The second circle relates to the powers of the provincial superior court. As a court of equity, the BC Supreme Court has exclusive jurisdiction to rectify documents and make declarations that bind the parties to a transaction: Lau, at paras. 68 and 70, citing GLP NT Corp. v. Canada (Attorney General), 65 O.R. (3d) 840, at 844, 2003 CanLII 41554 (S.C.), and Lloyd v. Canada (sub nom Lloyd v. The Queen), [2002] 2 C.T.C. 2601, at para. 19, 2002 CanLII 879 (T.C.C.).
- [41] However, there exist areas where these two circles overlap, such that the Tax Court and the BC Supreme Court have concurrent jurisdiction. In such cases, each court is empowered to make necessary and incidental findings of fact and law which would otherwise fall within the purview of the other court. Justice Fitzpatrick explained this in Lau, as follows:
- [63] Where the two circles overlap, both courts will have jurisdiction. Firstly, the TCC has jurisdiction to make necessary and incidental findings of provincial law in the process of adjudicating tax matters if a court of competent jurisdiction has not already decided the issue: GLP NT Corp. v. Canada (Attorney General), 2003 CanLII 41554 (ON SC), [2003] 65 O.R. (3d) 840 (S.C.J.) at 844. See also Sheila Holmes Spousal Trust (Trustee of) v. Canada (Attorney General), 2013 ABQB 489 at paras. 21-22, 72 (relating to the validity and residency of a trust). This jurisdiction extends to determining the validity and legal effect of transactions where relevant to a tax dispute: Lloyd v. Canada (sub nom Lloyd v. The Queen), 2002 CanLII 879 (TCC), [2002] 2 C.T.C. 2601 (T.C.C.) at paras. 18-20.
- [64] Secondly, within the overlapping section of the circles, is the jurisdiction of the provincial courts. Again, it is well established that such courts have jurisdiction to determine matters ancillary to tax assessments: Sheila Holmes at paras. 23-37. In that case, such orders would be binding on the TCC: GLP NT Corp. at 844. However, in that event, the provincial courts may decline jurisdiction in favour of the TCC where appropriate.
- [42] In Canada v. Addison & Leyen Ltd., 2007 SCC 33 ("Addison"), the Court cautioned against assuming jurisdiction over matters that are within the purview of the Tax Court. The Court noted that Parliament has created a "complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada": Addison, at para. 11. Other courts should seek to preserve the integrity and efficacy of this system, and not decide matters that attempt to circumvent the jurisdiction of the Tax Court and the system of tax appeals established by Parliament: Addison, at para. 11.

- [43] I find that the true purpose of this Petition is to interfere with the appeal process that is currently before the Tax Court. Although the Reassessment is not directly before this Court, a declaration that the Trust Property vested indefeasibly in the Beneficiaries on the Distribution Date would directly impact the primary basis upon which the Trust was reassessed.
- [44] The Petitioners are asking the Tax Court to set aside the Reassessment, whereas they would like the BC Supreme Court to rectify the Trust Indenture and to make certain declarations as to the persons in whom the assets of the Trust were vested as at May 1, 2008. Due to the manner in which the relief sought is framed, neither the Tax Court nor the BC Supreme Court can provide the precise relief sought by the Petitioners before the other Court. However, to grant their respective orders, both the Tax Court and this Court must make findings of fact on exactly the same dispute. That dispute relates to whether the Trust continued to hold assets on February 15, 2009 (i.e. the deemed disposition date), or if all interests of the Trust had been vested indefeasibly in the Beneficiaries on May 1, 2008 (i.e. the Distribution Date), by operation of clause 2.04 of the Trust Indenture.
- [45] The virtually identical nature of the arguments made before each Court is evident when the terms of the Orders sought and arguments advanced in this Petition are compared to the issues and reasons set out in the Notice of Appeal filed in relation to the Reassessment;[4] the submissions made in the July 28, 2017, Notice of Objection to the Notice of Reassessment;[5] and the Notice of Confirmation dated March 11, 2020.[6]
- [46] The Notice of Confirmation provides the decision of the reassessment officer that is under appeal to the Tax Court (the "Decision"). The four-page Decision considered the same arguments advanced by the Petitioners at the hearing of this Petition. Those arguments relate to the manner in which clause 2.04 of the Trust Indenture should be interpreted, and whether the Trust failed such that by operation of clause 2.04, the Trust's assets were indefeasibly vested in the beneficiaries on May 1, 2008. Through this Petition, the Petitioners seek to attack those findings of fact and have this Court come to a different conclusion, rendering many of the issues before the Tax Court to be moot.
- [47] It is an established principle that where a provincial superior court has concurrent jurisdiction with the Tax Court, it should exercise this jurisdiction only over issues that are "ancillary" rather than "fundamental" to the Tax Court proceedings: *Sheila Homes Spousal Trust v. Canada (Attorney General)*, 2013 ABQB 489, at para. 61 ("Sheila Trust"). In *Sheila Trust*, the Court declined jurisdiction, holding that the validity of the trust in that case was fundamental to the tax assessment: at paras. 63, 74. I come to a similar conclusion here.
- [48] The existence of the Trust as at February 15, 2009, is fundamental to the determination of the validity of the tax assessment.

- [49] I am supported in this conclusion by the position taken by the Petitioners. The Petitioners acknowledge that if I grant the orders they are seeking, this would effectively end the appeal before the Tax Court. This is based on the principle that declaratory relief granted by the superior court is binding on the Minister and the Tax Court: *Sheila Trust*, at para. 20, citing *Dale v. Minister of National Revenue* (1997), 51 D.T.C. 5252, 1997 CanLII 4969 (F.C.A.).
- [50] In my view, by bringing the Petition in this Court, the Petitioners are hoping to get a favourable outcome which will bind the Tax Court in the upcoming appeal of the Reassessment decision. The interpretation of the Trust Indenture which they urge me to adopt is based on the same arguments that the Reassessment officer considered and rejected. Those arguments are the subject of the appeal to the Tax Court which is scheduled for hearing next summer. I find that assuming jurisdiction in such circumstances would undermine the independence and specialization of the Tax Court.
- [51] The fact that the Petitioners are not asking me to determine the validity of the Reassessment is an artificial distinction. To decide if the Reassessment is valid, the Tax Court will need to interpret the Trust Indenture, particularly Clause 2.04, and come to conclusions about the existence of the Trust as at February 15, 2009. That requires consideration of the arguments that are advanced to support the interpretation advocated by the Petitioners. As I have said, those arguments are the same in both Courts and are already the subject of the Tax Court appeal. The Tax Court has the power to determine both the proper interpretation of the terms of the Trust Indenture and whether the Trust Property vested indefeasibly in the Beneficiaries on the Distribution Date. It should be permitted to do so.
- [52] I turn now to the argument that rectification can and should be granted in this case.
- [53] Rectification is available to ensure that an instrument correctly records the agreement of the parties; rectification is not available to address a situation where the accurately recorded agreement has led to an undesirable tax outcome: *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 ("Fairmont"). The Court in *Fairmont* explained this as follows:
- [12] If by mistake a legal instrument does not accord with the true agreement it was intended to record -- because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement -- a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (*Swan and Adamski*, at §8.229).
- [13] Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (*Snell's Equity* (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (*Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 56, citing

Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 31), be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": Performance Industries, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at §8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, *The Law of Contract* (14th ed. 2015), at para. 8-059; Mackenzie v. Coulson (1869), L.R. 8 Eq. 368, at p. 375 ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement, but the agreement itself. More to the point of this appeal, and as this Court said in Performance Industries (at para. 31), "[t]he court's task in a rectification case is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".

- [54] I find that rectification is not necessary in this case. While the wording of Clause 2.04 of the Trust Indenture may be somewhat confusing, it is possible to come to an interpretation of Clause 2.04 by using the ordinary rules of interpretation and construction of trust instruments.
- [55] The parties agree with the principles of interpretation that should be applied in this case. These principles require the Court to ascertain and give effect to the settlor's expressed intention by considering the trust instrument as a whole, and giving every word its natural and ordinary meaning: *The Bank of Nova Scotia Trust Company (Trustee) v. Quinn*, 2019 BCSC 439, at para. 23, citing *Re Tyhurst Estate*, [1932] S.C.R. 713, at p. 716, 1932 CanLII 12 (S.C.C.).
- [56] I also find that the rectification sought in this case has limited utility.
- [57] Even if Terms 2 and 5 of the Petition are granted, the Petitioners seek additional equitable relief in the form of various declarations. Specifically, the Petitioners want a declaration that the assets of the Trust indefeasibly vested in the Beneficiaries prior to the Deemed Disposition Date (Term 1(a) of the Petition). This declaration is ostensibly necessary because the Trustees failed to dispose of the assets in a timely manner. The Petitioners also want a declaration that, to the extent that the Trust existed as of May 1, 2008, the Trustees had no power under the Trust Indenture to distribute any Property (Term 3 of the Petition). Based on the evidence before me, this appears to be sought to address the consequences of the distributions made in 2016 and afterwards.
- [58] It is well established that equitable relief is not available to avoid unanticipated adverse tax consequences which arise from the ordinary operation of the Income Tax Act: *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26 ("Collins Trust"), at para. 1.

- [59] In *Collins Trust*, the Court noted that equitable relief (not just rectification) is precluded when it is sought to avoid an unintended tax liability. The Court summarized the principles which apply when seeking equitable relief, as follows:
- [16] From *Fairmont Hotels* and *Jean Coutu*, taken together, I draw the following interrelated principles relevant to deciding this appeal:
- (a) Tax consequences do not flow from contracting parties' motivations or objectives. Rather, they flow from the freely chosen legal relationships, as established by their transactions (*Jean Coutu*, at para. 41; *Fairmont Hotels*, at para. 24).
 - (b) While a taxpayer should not be denied a sought-after fiscal objective which they should achieve on the ordinary operation of a tax statute, this proposition also cuts the other way: taxpayers should not be judicially accorded a benefit denied by that same ordinary statutory operation, based solely on what they would have done had they known better (*Fairmont Hotels*, at para. 23, citing *Shell Canada*, at para. 45; *Jean Coutu*, at para. 41).
 - (c) The proper inquiry is no more into the "windfall" for the public treasury when a taxpayer loses a benefit than it is into the "windfall" for a taxpayer when it secures a benefit. The inquiry, rather, is into what the taxpayer agreed to do (*Fairmont Hotels*, at para. 24).
 - (d) A court may not modify an instrument merely because a party discovered that its operation generates an adverse and unplanned tax liability (*Fairmont Hotels*, at para. 3; *Jean Coutu*, at para. 41).
- [22] I agree with the conclusion in *Canada Life* that *Fairmont Hotels* and *Jean Coutu* bar a taxpayer from resorting to equity in order to undo or alter or in any way modify a concluded transaction or its documentation to avoid a tax liability arising from the ordinary operation of a tax statute. The statements of principle in those judgments that tax consequences flow from legal relationships, that taxpayers' liabilities should be governed by the ordinary operation of tax statutes and on what the taxpayer agreed to do, and that legal instruments cannot be modified merely because they generated an adverse tax liability are categorical, and not restricted to cases where rectification is sought. To be clear: they are of general application, precluding equitable relief altogether when sought to avoid an unintended tax liability that has arisen by the ordinary application of tax statutes to freely agreed upon transactions. There is no room for distinguishing *Fairmont Hotels* or *Jean Coutu* based upon the particular remedy sought. While a court may exercise its equitable jurisdiction to grant relief against mistakes in appropriate cases, it simply cannot do so to achieve the objective of avoiding an unintended tax liability.
- [60] I consider the declarations that are being sought (particularly the retroactive vesting order), to be an attempt to avoid an unintended tax liability. Equitable relief is not available in such a circumstance. As noted by the Court in *Attorney General of Canada v. Juliar*, 50 O.R. (3d) 728, at para. 15, 2000 CanLII 16883 (C.A.): "Tax liability is based upon what happened, not upon what, in retrospect, the taxpayer wishes had happened".

- [61] I turn to the argument that to achieve a just outcome, the Trust Indenture must be rectified prior to the Tax Court appeal being heard. This argument was accepted by the Court in *Lau*. Justice Fitzpatrick granted rectification, holding that the articles of the corporation needed to be rectified before the Tax Court could interpret them. The Court's reasoning was as follows:
- [71] The matter comes down to characterization. CRA contends that the relief sought here relates to the interpretation and not the rectification of the Articles. Needless to say, CRA is quite content to leave the Articles as currently drafted, so that the TCC can decide the effectiveness of the Stock Dividend Shares issue on that basis. It also says that the sole purpose of the petitioners is to obtain an order binding the TCC in respect of Geoffrey's tax assessment issues.
- [72] I agree with CRA that the legal effectiveness of the Stock Dividend Transaction is properly before the TCC and that the issue of interpretation of the Articles will also be before it. However, it is equally true that the TCC cannot interpret the Articles unless they are true and correct in the sense that no rectification issues arise in relation to them. Simply put, if the Articles contain an error or mistake that can and should be rectified, and if the wording and effect of the Articles affects other issues before the TCC, then it is difficult to see how justice can be done by the TCC unless the matter of rectification is addressed first.
- [62] The circumstances before me are distinguishable from *Lau*. Here, rectification is not necessary in order to get the desired outcome. If the Tax Court agrees with the Petitioners' interpretation of the Trust Indenture, the Petitioners can succeed in setting aside the Reassessment decision even if clause 2.04 of the Trust Indenture is not rectified.
- [63] Indeed, the Petitioners seem to recognize this when admitting that "the Tax Court may consider the common law in arriving at the factual determination of whether the Bosa Trust continued to hold the assets on February 15, 2009 (the 21st anniversary of the trust)".[7]
- [64] The Petitioners' desire to have this Court assume jurisdiction is grounded in the assertion that the declaratory relief and rectification are necessary to achieve goals unrelated to the Tax Court matter. They argue that:
- [the Tax Court] has no jurisdiction to make the declaratory orders sought as to who, either at the Distribution Date or subsequently, are the beneficiaries entitled to the Trust Property and in what proportions. Nor does it have any power to make any consequent amendments to the Trust Deed to allow the Trustees to make distributions to beneficiaries (if the position of the Tax Court is that the trust continued to hold assets after the Distribution Date). As such, the issues raised are best addressed by this court, ensuring a comprehensive and effective resolution that accounts for all pertinent aspects of the trust in question.[8]
- [65] I do not agree that the orders sought are necessary for the purposes articulated.

- [66] First, I am not convinced that there is any need for a declaration "as to who, either at the Distribution Date or subsequently, are the beneficiaries entitled to the Trust Property and in what proportions". In my view, Clause 2.04 of the Trust Indenture already addresses this question.
- [67] I am supported in this conclusion by the fact that the Petition does not seek as primary relief, a declaration as to who the beneficiaries are that are entitled to share in the Trust Property or in what proportions (see para. 8 above). Rather, Term 1(a) of the Petition, in combination with Term 2, seeks a declaration that contains the same wording as Clause 2.04 of the Trust Indenture, with the exception that the Petitioners ask that the Date of Distribution (i.e. May 1, 2008) be read into the clause in place of the words "time of division" and "date of division", and the words "trust fund" be replaced with the words "Trust Property".
- [68] Further, the unified stance taken in this Petition by all the Beneficiaries reinforces that there can be no confusion in their minds about who the beneficiaries should be by operation of Clause 2.04 of the Trust Indenture. The Petition is brought by all of the beneficiaries of the Trust, who are also all of the persons who could make a claim if Mr. Bosa had died intestate as per Clause 2.04.
- [69] While Term 1(b) asks for a declaration that the property is vested "in equal parts to all the beneficiaries" of the Trust, this is an alternative form of relief, and only applies if Term 1(a) is not granted. The same consideration applies to the request at Term 1(c) that the Court divide the Trust Property to "such other person(s) as this Court may determine". Given that all of the Beneficiaries have agreed to the relief sought at Term 1(a) of the Petition, and based on the material relied on at this hearing, there would be no need to resort to the alternative relief sought in Term 1(b) or Term 1(c).
- [70] Second, even if the Tax Court finds that the Trust continued to hold assets after the Distribution Date, "consequent amendments" to the Trust Indenture are not necessary to "allow the Trustees to make distributions to the beneficiaries". This is because the Beneficiaries all agree as to how the Trust Property should be divided.
- [71] Third, the requirements for issuing a declaration are not met.
- [72] The basic criteria for issuing a declaration was set out in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12:
- [11] This Court most recently restated the applicable test for when a declaration should be granted in *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44. The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. [emphasis added].

- [73] In this case, the Petitioners have not taken any steps, apart from legal proceedings, to remedy the problem that they wish to rectify through the court process. This supports a finding that their interest is to avoid tax liability, rather than for some other business purposes.
- [74] This is similar to the circumstances in *Fitzgerald v. Gilridge Golf Club Inc.*, 2023 NBKB 162, where the Court denied a declaration that the applicant had ceased to be a director of the companies at the time of their dissolution, and also denied rectification of corporate records removing him as director. The Court declined to exercise its jurisdiction to grant the relief sought, noting that the applicant had taken no steps to resign prior to commencing court proceedings, which "underscores" that the central purpose of the court application was to avoid tax liability: *Fitzgerald*, at para. 18.
- [75] The rule in *Saunders v. Vautier*, (1841), 41 ER 482, 10 LJ Ch 354 (Eng. Ch.), also supports a finding that this Court should decline to exercise jurisdiction. The rule was summarized in *Arthur Underhill & David J. Hayton, Underhill and Hayton Law Relating to Trusts and Trustees*, 14th ed., (Butterworths: 1987), at p. 628, as cited in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, at para. 21: Where there are several beneficiaries, "and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees."
- [76] The Petitioners, who are all beneficiaries of the Trust, are all over the age of majority, none of them are under any legal disability, and they are all of one mind. They thus have the option to collapse the Trust or direct the distribution of the Trust Property under the rule in *Saunders v. Vautier*, without needing to resort to the declarations they seek from this Court. To that end, I reject any suggestion that there is uncertainty as to the beneficiaries under the Trust, for the reasons set out earlier.
- [77] Mr. Bosa's evidence about the purpose of the Trust Indenture also does not assist. According to Mr. Bosa, there were three reasons why the family trust was created: (1) tax deferral; (2) estate planning to distribute assets equally between the children; and (3) to meet the financial needs of Mr. Bosa and his wife during their lifetime.[9] Insofar as the Orders sought before this court are intended to serve those three purposes, I note as follows.
- [78] The tax deferral purpose puts this matter squarely within the jurisdiction of the Tax Court. The estate planning purpose can still be achieved by applying the rule in *Saunders v. Vautier* and collapsing the trust. There is nothing stopping the Petitioners from doing that now. Their decision not to take that step is another clear indication that they are motivated by tax reasons to bring this Petition. Finally, it is also open to the Petitioners to work together to come up with a solution that would meet Mr. and Ms. Bosa's financial needs during their lifetime.

- [79] The lengthy delay between May 2008 and the filing of this Petition, also causes me to conclude that the Petitioners are motivated for tax reasons, rather than a genuine interest in resolving any underlying deficiency in the Trust Indenture. As noted by the Respondent, there were many opportunities over the ensuing years when the Petitioners could have taken steps to rectify the situation.
- [80] I also am not swayed that the Declarations are required to address concerns related to maintaining a transparency register under the Business Corporations Act, S.B.C. 2002, c. 57 and filings with the Land Owner Transparency Registry under the Land Owner Transparency Act, S.B.C. 2019, c. 23. I note that this assertion is made by Mr. Bosa in his Reply Affidavit,[10] rather than as a part of the main thrust of his Petition.
- [81] For context, as of October 1, 2020, private companies are required under Part 4.1 of the Business Corporations Act, to maintain a transparency register: Business Corporations Amendment Act, 2019, S.B.C. 2019, c. 15. Further, since November 30, 2022, the Land Owner Transparency Act and Regulations have required that certain corporations and trustees file transparency reports with the Land Owner Transparency Registry when they apply to register an interest in land in their name: Land Owner Transparency Act, s. 12.
- [82] It is unclear what specific issues arise from these legal obligations that make the declaration necessary. Mr. Bosa's affidavit is vague at best, and does not explain what the actual concern is that he is trying to remedy with a declaration. He simply asserts that:
- we continue to encounter issues and have ongoing questions regarding the accurate completion of filings with the Transparency Register and transparency declarations with the Land Owner Transparency Register with respect to companies the shares of which are registered in the name of the trust and that own real property.
- [83] There is no evidence about what precipitated the need for a declaration now, rather than when the legal obligations arose. Nor is there sufficient evidence on how the declaration will facilitate the ability of the corporate entities or individuals to comply with their statutory obligations to make the necessary filings or disclosures.
- [84] I am unable to conclude that issues related to maintaining a transparency register or making filings with the Land Owner Transparency Registry are motivating this Petition. If these concerns were genuine, one would expect them to have been raised much earlier, or for there to be some specific evidence about how the absence of a declaration is affecting the Petitioners in relation to their statutory obligations.
- [85] The argument that the declarations are required for the arbitration proceedings involving Mr. Nguyen is also not supported. According to Mr. Bosa, the "issue of who is responsible for any tax liability owing by the Bosa Trust is the subject of ongoing arbitration proceedings between the Bosa Trust and Mr. Nguyen".[11]

- [86] However, this Court does not have the jurisdiction to determine tax liability - that is exclusively within the purview of the Tax Court. Therefore, even if I was to make the declarations sought, this would not resolve the matter. The Tax Court would still have to make a final determination regarding the validity of the Reassessment in order for the parties to resolve the issues that are the subject of arbitration.
- [87] Interests of judicial economy and efficiency should not be the reason for the court to exercise jurisdiction in circumstances where it is otherwise not warranted. While I accept that considerable resources have been expended on this four-day hearing, the Petitioners were aware that there was a risk that this Court may not assume jurisdiction. While they have a right to decide how to litigate their case, they must also bear responsibility if they are not successful. Further, the time expended in this hearing has not been totally wasted. The parties have been able to crystallize the issues in dispute through this proceeding, and will be able to re-use most of their written materials, particularly given that the substantive arguments that are raised before the Tax Court are virtually identical to those made before me.
- [88] I note also that the Tax Court proceeding was instigated many years prior to this Petition, and it has progressed to an advanced stage. This further supports the desirability of allowing that appeal process to proceed unfettered. Importantly, the answers provided by Mr. Nguyen during his examination for discovery, which are relied on by both parties, were obtained through discoveries conducted under the Tax Court process.
- [89] Finally, I wish to address the issue of delays that will be occasioned by the parties having to await a determination of the appeal by the Tax Court, if I decline jurisdiction to hear this Petition. It is true that the appeal hearing is still a year away. However, much of the delay in securing an earlier appeal hearing date is due to the Petitioners' actions. Had they proceeded expeditiously, they would likely have had resolution of their Tax Court matter by now.
- [90] The first delay was for about 10 months, and occurred between May 2022 and March 2023. This is when the Trust asked for and was granted a request to put the Tax Court appeal in abeyance until March 2023, in order to commence this Petition. Nevertheless, the Petition was not commenced until October 2023, about 17 months from the date of the original request. Further delays were caused between April 2024 and August 2024, when the Petitioners sought and were granted an additional five months to complete examinations for discovery and to set the Tax Court appeal hearing.
- [91] Thus, in total, the Petitioners actions directly resulted in the Tax Court appeal proceeding being delayed by well over a year. Consequently, while it is unfortunate that they must wait until May 2026 for their Tax Court appeal to be heard, had the Petitioners wished to do so, they could have had their Tax Court appeal concluded by now.
- [92] In conclusion, the circumstances in this case do not warrant this Court exercising its jurisdiction to hear the Petition.

V. Order Made

[93] The Petition is dismissed.

"Shergill J."

[1]The document at issue is titled "trust indenture". The words "trust deed" and "trust indenture" are used interchangeably in these Reasons.

[2] As most of the children share the same last name as their parents, I will refer to them by their first names to avoid any confusion. No disrespect is intended.

[3] Affidavit #1 of C. Quon made March 5, 2024 ("Quan Affidavit #1"), at para. 5, Exhibit C.

[4] Quan Affidavit #1, at para. 3, Exhibit A at paras. 4.1 and 6.1.

[5] Affidavit #1 of M. Markota, made April 3, 2024 ("Markota Affidavit #1"), at para. 15, Exhibit E.

[6] Markota Affidavit #1, at para. 16, Exhibit F.

[7] Petitioner's Brief of Argument, IV. Legal Basis, at para. 6.

[8] Petitioner's Brief of Argument, IV. Legal Basis, at para. 6.

[9] Affidavit #1 of D. Bosa, made October 25, 2023, at para. 17.

[10] Affidavit #2 of D. Bosa, made July 15, 2024 ("Bosa Affidavit #2"), at para. 13.

[11] Bosa Affidavit #2, at para. 11.

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