

CANADA / JUDGMENT

Collins Family Trust v. Canada (Attorney General)

2020 BCCA 196

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 196 Collins Family Trust v. Canada (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Collins Family Trust v. Canada (Attorney General),

2020 BCCA 196

Date: 20200710

Docket: CA46250; CA46251

Docket: CA46250

Between:

Collins Family Trust

Respondent

(Petitioner)

And

The Attorney General of Canada

Appellant

(Respondent)

- and -

Docket: CA46251

Between:

Cochran Family Trust

Respondent

(Petitioner)

And

The Attorney General of Canada

Appellant

(Respondent)

Before:

The Honourable Madam Justice Fisher

The Honourable Madam Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

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

June 25, 2019 (Collins Family Trust v. Canada (Attorney General),

2019 BCSC 1030, Vancouver Dockets S180357 & S180359).

Counsel for the Appellant

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Counsel for the Respondents

(via videoconference):

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A. Khakhuda

Place and Date of Hearing:

Vancouver, British Columbia

May 15, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 10, 2020

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Madam Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Appeal from an order granting rescission of a declaration and payment of dividends to a discretionary trust on the basis of mistake, in a tax context. The chambers judge granted the order on the basis of this court's decision in *Re Pallen Trust*, 2015 BCCA 222 despite his opinion that the subsequent decisions in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 and *Jean Coutu Group (PCJ) Inc. v. Canada (Attorney General)*, 2016 SCC 55 had undermined its precedential value. The appellant contended that the chambers judge's interpretation of the effect of *Fairmont* and *Jean Coutu* was correct, or alternatively that the judge erred in failing to distinguish *Re Pallen Trust* and ascribing no weight to the availability of alternative remedies. Held: Appeal dismissed. Neither *Fairmont* nor *Jean Coutu* have undermined the principles expressed and applied in *Re Pallen Trust* in the context of the facts of that case, and the chambers judge did not err in his analysis of *Re Pallen Trust* or in his exercise of discretion in assessing the availability of alternative remedies.

Reasons for Judgment of the Honourable Madam Justice Fisher:

- [1] These appeals raise a question about the effect of the Supreme Court of Canada decisions in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 [*Fairmont*] and *Jean Coutu Group (PCJ) Inc. v. Canada (Attorney General)*, 2016 SCC 55 [*Jean Coutu*] on the availability of the equitable remedy of rescission on the basis of mistake in a tax context. In *Re Pallen Trust*, 2015 BCCA 222 [*Pallen Trust*], this court upheld an order granting rescission on this basis in respect of the declaration and payment of dividends by a corporation to a discretionary trust. The appellant, the Attorney General of Canada, contends that the principles set out in *Fairmont* and *Jean Coutu* undermine *Pallen Trust*.
- [2] *Pallen Trust* is important because the transactions in issue were the same as the transactions in issue in these appeals, all of them relying on the same provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [ITA] to avoid paying tax on the dividends. In the court below, the chambers judge considered himself bound by *Pallen Trust*. He granted rescission despite expressing the view that the principles in *Fairmont* and *Jean Coutu* had "significantly undermined" its precedential value.
- [3] The appellant also raises issues relating to the chambers judge's refusal to distinguish *Pallen Trust* and in assessing available alternative remedies.

- [4] It is my view that neither Fairmont nor Jean Coutu have undermined the principles expressed and applied in Pallen Trust regarding the availability of rescission on the particular facts of that case. It is also my view that the chambers judge did not err in his interpretation of Pallen Trust so far as it was applicable to the cases before him, or in his exercise of discretion in assessing the availability of alternative remedies. For the reasons that follow, I would dismiss the appeal.

Collins and Cochran Trust transactions

- [5] The facts of both appeals are not in dispute. In the court below and in this court, the parties focused on the facts in relation to the Collins Family Trust with the intention that they be treated the same as those in relation to the Cochran Family Trust.
- [6] Todd Collins is a principal of Rite-Way Metals Ltd. (RWML), a British Columbia company in the business of metal cladding, metal roofing, and envelope solutions. Mr. Collins retained an accounting firm, MNP LLP (MNP), to devise a plan for the protection of the assets of RWML.
- [7] Floyd Cochran is a principal of Harvard Industries Ltd. (Harvard), a British Columbia company in the business of roofing installation and maintenance. He also retained MNP, through his solicitors, to devise a plan for the protection of Harvard's assets.
- [8] The purpose of the plans was to protect corporate assets from creditors without incurring income tax liability. Asset protection and tax liability were of equal importance. Each plan involved the incorporation of a holding company that purchased shares in RWML or Harvard (the operating company), the creation of a family trust with the holding company as a beneficiary, a loan from the holding company to the trust that was used to purchase from the holding company shares in the operating company, and ultimately, the payment of dividends on the purchased shares from the operating company to the trusts. The funds from the dividends were then used to repay the initial loan from the holding company and, thereafter, either loaned by the trust to the holding company or invested or otherwise dealt with by the trust.
- [9] MNP devised the plans to take advantage of the attribution rules in s. 75(2) of the ITA and the inter-corporate dividend deduction in s. 112(1). Pursuant to those sections, the dividend income received by the trusts from the operating companies would be attributed to the holding companies (s. 75(2)) which, in turn, could claim a deduction in respect of those dividends (s. 112(1)). The intended net result was the movement of cash or retained earnings from the operating companies--RWML and Harvard--to the trusts, without any income tax being paid.
- [10] The understanding of MNP at the time was that the attribution rule in s. 75(2) of the ITA applied as long as the trust held the property, and the mode of transfer of the property to the trust--whether by sale or gift--was irrelevant for tax purposes. This view was shared by the Canada Revenue Agency (CRA) and by tax accountants and lawyers across Canada. MNP

conveyed to Messrs. Collins and Cochran that the proposals were based, in part, on the administrative practices of CRA at the time. However, it could not provide assurances that CRA's interpretation of the applicable tax provisions would be the same.

- [11] MNP also noted that there was some risk that the General Anti-Avoidance Rule (GAAR) in the ITA would apply:

Arguably, the transactions contained herein do not include an avoidance transaction since there are bona fide purposes for undertaking each transaction which is asset protection (other than to obtain the perceived tax benefit). As well, even if it is found that the primary purpose of one or more transactions was to obtain a tax benefit, the tax consequences associated with each of the transaction [sic] we have proposed are derived from specific sections in the ITA, which provide for those results. As such, you are entitled to take the position that the transactions, which we have proposed should not reasonably be considered to result directly or indirectly in a misuse or abuse of the ITA read as a whole. Notwithstanding the above, we wish to emphasize, however, that professional advice cannot remove all the risk inherent in this very subjective rule and we want to ensure you are aware of that risk before proceeding.

- [12] During the 2008 and 2009 tax years, RWML paid dividends to the respondent Collins Family Trust in the amounts of \$400,000 and \$110,000, respectively. On the shares held by the respondent Cochran Family Trust, Harvard paid dividends totaling \$1,935,000 and \$150,000 during the same years. As devised in the plans, the dividends were declared as income by the holding companies pursuant to s. 75(2) of the ITA and subsequently deducted from their returns pursuant to s. 112(1). No tax was paid on any of the dividends.
- [13] A few years later, in *Sommerer v. The Queen*, 2011 TCC 212 [Sommerer], the Tax Court of Canada adopted a narrower interpretation of s. 75(2). It held that the "person" as defined in s. 75(2)(a)(i) of the ITA must be the settlor of the trust, and therefore the attribution rule did not apply where the property in question was sold to a trust, as opposed to gifted to, or settled on, the trust. It disagreed with CRA's view, expressed in Interpretation Bulletin IT-369, that a person other than a settlor may transfer property to a trust and become subject to the attribution rule in s. 75(2). Sommerer was affirmed by the Federal Court of Appeal in July 2012, indexed at 2012 FCA 207. The interpretation adopted in that case was contrary to the position consistently taken by CRA prior to Sommerer, a position CRA maintained in its submissions before both the Tax Court and the Court of Appeal in Sommerer.
- [14] In June 2012, the respondents received letters from Reynell Eugenio, an Aggressive Tax Planning Auditor with CRA, advising them of CRA's intention to reassess the 2008 tax returns of the trusts. Mr. Eugenio asserted that the dividends were to be included in the income of the trusts because, first, the application of s. 75(2) to the holding companies did not preclude an equivalent inclusion of the dividends into the trusts' incomes by virtue of s. 12(1)(j) of the ITA, and second, if CRA's position that s. 75(2) applied to persons other than the settlor was wrong and the Tax Court's decision in Sommerer was correct, s. 75(2) would not apply and

therefore the dividends paid by the operating companies were taxable in the hands of the trusts rather than attributed to the holding companies. Mr. Eugenio noted that Sommerer had reversed CRA's prior position on the application of s. 75(2) as set out in Interpretation Bulletin IT-369. He also noted an alternative position, that the GAAR should apply to include the dividends in the trusts' incomes for tax purposes, as the transactions enabled the trusts to withdraw surplus from the operating companies without paying tax and were contrary to the overall scheme of the ITA.

- [15] In December 2012, Mr. Eugenio notified the respondents that the reassessments would also include the 2009 tax year. In that letter, Mr. Eugenio stated that the dividends had to be included in the trusts' incomes as a result of the Federal Court of Appeal's decision in Sommerer. He added that CRA also believed that the GAAR should apply for the same reasons set out in his previous letter.
- [16] CRA finalized its audit of the trusts in January 2016 and issued Notices of Reassessment in March 2016. The respondents' objections to the reassessments were unsuccessful and they subsequently petitioned the Supreme Court of British Columbia seeking to rescind the transactions leading to and including the payment of the dividends to the trusts, on the basis of mistake.

Pallen Trust

- [17] It is not disputed that the transactions in issue in Pallen Trust were essentially identical to those in these appeals. The same tax advisors, MNP, devised the same plan, also in 2008, whereby a discretionary trust purchased shares in an operating company with funds loaned to it by a holding company, and dividends totaling \$1,750,000 were paid by the operating company to the discretionary trust. No income tax was paid, as the dividend income was attributed to the holding company under s. 75(2) of the ITA, and the holding company was able to receive a deduction under s. 112(1).
- [18] As in these appeals, in 2012, after the decision in Sommerer, CRA notified the Pallen Trust that it proposed to reassess its 2008 tax return. Following the reassessment, the dividends were included as taxable income of the Trust, resulting in \$552,678 in taxes owing, together with interest.
- [19] At first instance, the chambers judge, in reasons indexed as 2014 BCSC 305, granted rescission on the basis of mistake. Justice Masuhara relied in large part on the English authority *Pitt v. Holt*, [2013] UKSC 26, where the court held that rescission of a voluntary disposition may be available if a mistake of sufficient causative gravity occurred that would make it unconscionable, unjust or unfair to leave the mistake uncorrected.

- [20] Justice Masuhara considered that while the purpose of the plan was asset protection, the tax implications were basic to it. After noting the risks identified by MNP, he found that prior to the Sommerer decision, the general understanding of tax professionals and CRA was that s. 75(2) applied when property was sold to a trust:
- [52] However, the uncontroverted evidence is that prior to the Sommerer decision, the general understanding of tax professionals in Canada was contrary to the position that if the condition of s. 75(2) were met, then the fact that property was sold to the trust at fair market value rather than merely donated to the trust was irrelevant to its operation did not apply to the dividends paid to the Trust. This general understanding was also in line with that of CRA. The various interpretation bulletins issued by CRA, which I recognize are non-binding and certainly are not law, and the cross-examination of Mr. Eugenio on his affidavit demonstrates that this was so.
- [Emphasis added.]
- [21] Justice Masuhara also found that CRA would not likely have contested the tax position of the Trust prior to the Sommerer decision:
- [53] In terms of the "aggressive" tax planning, the petitioner countered this characterization by pointing out that the CRA has issued numerous Advance Rulings allowing tax-exempt First Nations Bands to transfer property to a trust and deliberately rely on s. 75(2) to divert income from the trust to the Band to eliminate completely the tax that the trust would otherwise pay. The Crown did not contest this argument. Further, the parties did not argue with any specificity the applicability of GAAR or the other provisions it cited. It is fair to say that the rule is broad and can encompass an extremely wide range of transactions. The decided cases dealing with complex and high structured plans, of which there are many, go both ways, and include surplus strip plans.
- [54] I also note that the CRA audit occurred subsequent to the release of the Sommerer decision. The screening tools used to identify the subject transactions may have been developed subsequently to the decision. My view of the evidence is the s. 75(2) was at the center of CRA's review of the subject transactions.
- [55] I infer from all of the above, that CRA would likely have not contested tax position of the petitioner prior to the Sommerer decision.
- [22] He concluded that rescission was an appropriate remedy in the circumstances:
- [57] In my view, the circumstances warrant the relief sought by the petitioners. The tax implications were basic to the transaction, there was clearly a causative mistake, the gravity of the mistake was significant and there is no prejudice to a third party affected by the Plan. The monies remain within the entities and remain subject to taxation. A key determinant in this case is the common general understanding as to the operation of s. 75(2) by income tax professionals and CRA as well as my finding that CRA would not have sought to reassess the Trust prior to Sommerer. This aspect of the case in my view is what takes the case into the

zone of unfairness. While there was an aspect of risk in the Plan, given the common understanding as to the operation of s. 75(2), I do not see the assumption of risk in this case as a sufficient factor to refuse the relief sought. Had the understanding been less certain, the assumption of risk taking would have negatively affected the question of fairness.

[Emphasis added.]

- [23] Justice Masuhara's order was affirmed by this court in reasons indexed as 2015 BCCA 222. For the court, Justice Newbury held that Justice Masuhara did not err in finding that CRA would not likely have contested the tax position of the Pallen Trust in the absence of the Sommerer decision, nor did he err in his application of the test for equitable rescission.
- [24] With respect to the factual issue, Justice Newbury considered the MNP re-organization proposal and the tax environment surrounding its inception, as well as CRA's various bulletins and publications over the years expressing its position on the application of s. 75(2), which supported the chambers judge's finding.
- [25] With respect to the test for equitable rescission, Justice Newbury carefully reviewed *Pitt v. Holt*, which addressed the circumstances in which mistake about the tax consequences of a transaction involving a voluntary settlement or transfer of property may ground rescission. In that case, the U.K. Supreme Court held (at para. 122) that rescission will be available in the context of an error made by the trustees of a trust where a "causative mistake of sufficient gravity" occurs and the mistake is either one "as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction". It confirmed (at para. 126) that the gravity of a mistake is to be assessed "by a close examination of the facts", including the circumstances of the mistake and its consequences for the person who made the disposition. It rejected an argument by the Commissioner of Revenue that a mistake which relates exclusively to tax cannot in any circumstances be relieved, concluding that tax consequences are relevant to assessing the gravity of a mistake (at para. 132). It acknowledged, however, that equitable relief would not be available in cases of "artificial tax avoidance" (at para. 135).
- [26] In the application of the test for equitable rescission, Justice Newbury accepted that mistakes about matters such as the tax consequences of a transaction would not necessarily justify the granting of the remedy. She considered *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739 (C.A.) [Bramco], where rectification had been sought and denied, and *Quebec (Agence du revenu) v. Services Environnementaux AES Inc.*, 2013 SCC 65 [AES], where orders similar to rectification had been granted under the Quebec Civil Code.
- [27] In *Bramco*, Galligan J.A. for the majority held (at 742) that allowing rectification would run contrary to a well-established rule in tax cases that the courts do not look with favour upon attempts to re-write history in order to obtain more favourable tax treatment. The cases seem to hold consistently that tax liability is based upon what happened, not upon what, in retrospect, the taxpayer wished had happened.

- [28] In AES, the orders were upheld but the Supreme Court warned (at para. 54) that "[t]axpayers should not view this recognition of the primacy of the parties' internal will--or common intention--as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to redo their contracts retroactively should that planning fail" and that an intention to reduce tax liability would not on its own "be sufficiently determinate or determinable".
- [29] Justice Newbury accepted that a precise and clearly defined object, rather than a simple intention to reduce tax liability, was required before rectification would be granted. She also accepted that cases such as Bramco reflected a public policy view that "taxpayers should not be encouraged to engage in aggressive tax planning and, when it proves to be unsuccessful, invoke the 'mistake' route to equitable rescission" (at para. 52). She held that the approach taken in *Pitt v. Holt* requiring a fact-intensive and objective analysis was consistent with the role of Equity in such cases and consistent with the notion that taxpayers must generally accept the consequences of their tax planning:
- [53] Carrying out a fact-focused analysis should ensure that the "social evil" of aggressive tax avoidance can, where it is just to do so, be appropriately disincentivized, and on the other hand that where the taxpayer's conduct has been reasonable (or as here, was induced by CRA's own published bulletins), he or she is not unfairly penalized by an unexpected change of position on the part of the fiscal authority.
- [30] Justice Newbury considered the facts of the case to be unusual, in that they did not involve "aggressive" tax-planning gone wrong but rather that the plan devised by MNP fit squarely within an attribution rule that CRA had consistently stated would apply to the dividends. She concluded that the chambers judge did not err in concluding that the circumstances warranted an order for rescission, as he had carried out a fact-intensive analysis and was cognizant of the fact the transactions were tax-driven:
- [56] What took this case "into the zone of unfairness" in the chambers judge's mind was the existence of the "common general understanding" regarding the operation of s. 75(2). Had the understanding been less certain, he said, the assumption of risk-taking on the part of the trustee would likely have led him to the opposite conclusion.
- [57] In my opinion, it has not been shown that the chambers judge erred in weighing all the factors that were relevant to this rather unusual case, including the extent of the risk taken, and the unlikelihood of a similar situation recurring in future. He concluded that it would be unjust to refuse the equitable remedy. I am unable to say this was erroneous or that he erred in the exercise of his discretion. Nor do I agree with CRA that the chambers judge's order effected a "windfall" for the Trust. Rather, it places the Trust and the related corporations back in their 'original' position. Tax will be payable on the dividend funds when they are distributed to the individual shareholders of the corporations or are otherwise taxable under the ITA. The "windfall" to the Trust beneficiaries is avoided.

The chambers judge's decision

- [31] The chambers judge considered the facts in Pallen Trust to be "virtually identical" to the facts in these proceedings. Importantly, he agreed with Justice Masuhara's findings that (1) the purpose of each plan was to protect assets from creditors without incurring tax liability, with both aspects being equally important; (2) prior to Sommerer, there was a general understanding in the tax community and by CRA that s. 75(2) of the ITA would apply to a sale of shares to a trust; and (3) in the absence of Sommerer, CRA would not likely have audited and reassessed the trusts.
- [32] On this last finding, the chambers judge noted that the audits were commenced in May 2012, a year after the Tax Court's decision in Sommerer, the reassessment letters in June and December 2012 suggested that Sommerer was the reason for the reassessments, and the effect of Sommerer on the interpretation of s. 75(2) had consistently been the primary grounds for the reassessments. Moreover, despite evidence that CRA had long considered these kinds of schemes to be tax avoidance, the GAAR had consistently been only an alternative basis for the reassessments, and CRA had taken no steps to audit or reassess the trusts until after Sommerer.
- [33] After reviewing the application of the test for equitable rescission by both levels of court in Pallen Trust, the chambers judge concluded that the case was "prima facie applicable" and binding on him given the "striking" factual similarities.
- [34] The judge rejected a submission by the Attorney General that Pallen Trust was distinguishable on the basis that it did not consider the GAAR, as it was his view that the Court of Appeal considered the tax avoidance and GAAR aspects of the case. He also rejected a submission that the decision in *Fiducie Financière Satoma v. The Queen*, 2017 TCC 84, aff'd 2018 FCA 74, leave to appeal ref'd [2018] S.C.C.A. No. 230 [Satoma], which found a similar plan to constitute abusive tax avoidance and subject to the GAAR, changed the result of Pallen Trust.
- [35] The chambers judge then considered whether Pallen Trust had been overruled or superseded by Fairmont and Jean Coutu. As I discuss below, Fairmont concerned the equitable remedy of rectification and its application in a tax context, and Jean Coutu concerned a similar remedy under the Quebec Civil Code. Fairmont clarified the test for rectification as limited to cases where a written instrument incorrectly records an agreement, and not available where a correctly recorded agreement has led to an undesirable or otherwise unexpected outcome, such as an unanticipated tax liability. Similar principles were applied in Jean Coutu.
- [36] After reviewing those decisions, as well as three subsequent cases at the appellate and trial levels, the chambers judge concluded that Fairmont and Jean Coutu established two related principles, both of which infringed in the petitions before him: (1) taxpayers should be taxed on what they actually did, not what they intended to do, and (2) it is not permissible to retroactively alter a transaction to achieve an intended tax objective (at para. 93). He

accepted the distinctions between rectification and rescission, but did not see why different equitable remedies should have dramatically different results:

- [97] The petitioners could have based these petitions on rectification by converting the sale aspects of the plans to gifts of the shares. Had they done so they would have had to directly overcome Fairmont and Jean Coutu. Additionally, they would have had to directly address GAAR and Satoma. By framing their petitions in rescission, they are, in essence, attempting to do indirectly what they are not permitted to do directly.
- [37] The chambers judge expressed the view that Fairmont and Jean Coutu "were intended to be of more general application and were certainly intended to apply to all taxation cases" (at para. 98) and that if this was correct, the petitions should be dismissed.
- [38] Notwithstanding these views, the judge did not consider it open to him to disregard Pallen Trust, as it had not been "expressly overruled". He considered that the proper approach under the doctrine of stare decisis was to apply the precedent and provide comment, citing *Canada v. Craig*, 2012 SCC 43. He concluded:
- [100] Therefore, despite my concerns that developments in the law have significantly undermined the precedential value of Pallen, I am bound to follow it. It is for the Court of Appeal to decide if Pallen is no longer good law.
- [39] Finally, the chambers judge found no basis to conclude that there was an alternative remedy available to the trusts and concluded that rescission could not be refused for that reason. The remedy he considered was a remission of tax by the Governor in Council under s. 23 of the Financial Administration Act, R.S.C. 1985, c. F-11. He held (at para. 105) that this was "merely a factor to take into account in the discretionary analysis of whether to grant rescission" and was unable to determine if this was a realistic alternative remedy given the lack of evidence before him.
- [40] In the end, the chambers judge granted rescission as requested in the petitions.

On appeal

- [41] The appellant submits that the chambers judge erred:
1. in law, by ordering rescission of the transactions based solely on Pallen Trust, in light of the subsequent Supreme Court of Canada decisions in *Fairmont* and *Jean Coutu*;
 2. alternatively, in law and fact by failing to distinguish Pallen Trust and failing to find that the transactions constituted aggressive tax avoidance; or
 3. alternatively, by ascribing no weight to the availability of alternative remedies when considering whether to exercise his equitable jurisdiction.

[42] The respondents submit that this appeal is governed by Pallen Trust and Fairmont and Jean Coutu have not undermined or overruled it. They also submit that they have no practical alternative remedy.

[43] I would define the issues in this appeal as follows:

1. Do Fairmont and Jean Coutu undermine Pallen Trust?
2. If not, is Pallen Trust distinguishable from the cases at bar given that a similar tax plan was subsequently found to be abusive tax avoidance, contrary to the GAAR?
3. If Pallen Trust is not distinguishable, was there an adequate alternative remedy available?

The standard of review

[44] These appeals involve a decision to grant the equitable remedy of rescission, a discretionary remedy. It is common ground that deference must be given to such decisions unless they are the result of an error in principle, a failure to consider and weigh all relevant circumstances, or are unjust: Pallen Trust at para. 57; see also Canada (Attorney General) v. Fontaine, 2017 SCC 47 at para. 36; and Radford v. MacMillan, 2018 BCCA 335 at para. 54.

Analysis

1. Do Fairmont and Jean Coutu undermine Pallen Trust?

[45] In my opinion, neither Fairmont nor Jean Coutu have undermined the principles expressed and applied in Pallen Trust. While both rectification (as sought in Fairmont) and rescission (as sought in Pallen Trust) are equitable remedies, each has its own legal test, and each applies in a non-tax as well as a tax context. If applicants meet the legal test for the remedy sought, they are entitled to that remedy. Fairmont did not establish otherwise.

[46] Fairmont concerned the conditions under which a taxpayer could ask a court to exercise its equitable jurisdiction to rectify a written legal instrument, where the effect of that instrument was to produce an unexpected tax consequence. Justice Brown, for the majority, clarified the test for rectification as limited to cases where a written instrument incorrectly recorded the parties' antecedent agreement, reversing a broader application of this remedy in Canada (Attorney General) v. Juliar, (2000) 50 O.R. (3d) 728 (C.A.).

[47] While emphasizing that the test is to be applied in the tax context just as it is in the non-tax context, Justice Brown made it clear that rectification is not available where an agreement that is correctly recorded in an instrument has led to an undesirable or otherwise unexpected outcome, such as an unanticipated tax liability. He also made it clear that parties seeking rectification on the basis of a common mistake must show a prior agreement with definite and ascertainable terms; a general intention to reduce tax liability is insufficient. Similar principles were outlined by Justice Wagner (now Chief Justice), for the majority, in Jean Coutu in the context of a similar remedy under the Quebec Civil Code.[1]

- [48] The appellant submits that Fairmont and Jean Coutu establish principles of general application regarding the availability of equitable remedies in a tax context, and more particularly that the court has signalled that retroactive tax planning through a court's equitable jurisdiction--whatever the remedy--is impermissible. The appellant relies primarily on paras. 23-24 of Fairmont, where Justice Brown, in discussing Juliar, noted that it did not accord with the court's direction in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 (at para. 45) that a taxpayer should expect to be taxed "based on what it actually did, not based on what it could have done", nor did it accord with the fact that tax consequences "flow from freely chosen legal arrangements, not from the intended or unintended effects of those arrangements, whether upon the taxpayer or upon the public treasury". Justice Brown concluded that Juliar, by erroneously departing from the principle that the inquiry is about what the taxpayer agreed to do, allowed for impermissible retroactive tax planning. The appellant also relies on paras. 41-43 of Jean Coutu, where Justice Wagner also referred to *Shell Canada* and discussed the same principles in the civil law context.
- [49] Consistent with this submission, the chambers judge concluded that Fairmont and Jean Coutu established two related principles: (1) taxpayers should be taxed on what they actually did, not what they intended to do, and (2) it is not permissible to retroactively alter a transaction to achieve an intended tax objective (at para. 93). In his view, the petitions before him infringed both principles because the trusts were asking the court "to unwind transactions they freely entered into" due to tax consequences that were "not what they intended or hoped" and were doing so only after CRA had audited and reassessed them (at para. 94). He considered equitable relief to be prohibited by the second principle and did not see why different equitable remedies should have dramatically different results. He also considered that Fairmont and Jean Coutu "were intended to be of more general application and were certainly intended to apply to all taxation cases" (at para. 98).
- [50] In my view, both the appellant and the chambers judge have interpreted Fairmont and Jean Coutu too broadly. The principles described by the chambers judge are not new. They are consistent with the direction in *Shell Canada*, as well as earlier authorities such as *Re Slocock's Will Trusts*, [1979] 1 All E.R. 358 (Ch. D.), cited with approval in Fairmont at paras. 21-22. These earlier authorities confirmed that the focus of the inquiry in a claim for rectification, applicable in both the tax and non-tax context, is whether the antecedent agreement or mechanism, in definite and ascertainable terms, was properly recorded:
- [21] *Re Slocock's Will Trusts* simply confirmed that, provided that the underlying mechanism by which the parties had agreed to seek a particular tax outcome was omitted or incorrectly recorded, and provided that all other conditions for granting rectification are satisfied, a court retains discretion to grant rectification. The focus of the inquiry remained properly fixed on whether that originally intended mechanism was properly recorded, and not on whether it achieved the desired tax outcome or resulted in a party incurring an undesired or unexpected tax outcome.

[22] Subsequent English authorities confirm that *Re Slocock's Will Trusts* created no distinct threshold for granting rectification in the tax context. In *Racal Group Services Ltd. v. Ashmore* (1995), 68 T.C. 86 (C.A.), the English Court of Appeal made clear that a mere intention to obtain a fiscal objective is insufficient to ground a claim in rectification: ". . . the court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective. The specific intention of the grantor as to how the objective was to be achieved must be shown if the court is to order rectification" (p. 106). Similarly, the court in *Ashcroft v. Barnsdale*, [2010] EWHC 1948, [2010] S.T.C. 2544 (Ch. D.), held that it could not rectify an instrument "merely because it fails to achieve the fiscal objectives of the parties to it": para. 17

[Emphasis in original.]

[51] The same principles were cited with approval by this court in *5551928 Manitoba Ltd. v. Canada (Attorney General)*, 2019 BCCA 376 at para. 18, where Justice Newbury interpreted the following observations at para. 38 of *Fairmont* as "a description of the circumstances in which rectification has traditionally been available":

Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties' prior agreement.

[52] Moreover, in *Pallen Trust*, Justice Newbury considered authorities such as *Bramco* and *AES*, accepted that they reflected a public policy view that "taxpayers should not be encouraged to engage in aggressive tax planning and, when it proves to be unsuccessful, invoke the 'mistake' route to equitable rescission", and concluded that the requirement of a fact-intensive and objective analysis of the mistake at issue to be consistent with the notion that taxpayers must generally accept the consequences of their tax planning (at paras. 52-53). All of this is consistent with *Fairmont*.

[53] In my view, neither *Fairmont* nor *Jean Coutu* stand for the broad proposition that the granting of any equitable remedy in a tax context will result in "impermissible retroactive tax planning". Rather, they confirm that retroactive tax planning cannot be achieved by rectification (or amendment) of an instrument that correctly records an antecedent agreement, simply because the effect of that instrument produces an unexpected tax consequence. As Justice Brown stated in *Fairmont* at para. 24, *Juliar* allowed for "impermissible retroactive tax planning" because it erroneously departed from the principle that the inquiry is into what the taxpayer agreed to do. Similarly, Justice Wagner noted in *Jean Coutu* (at para. 42) that allowing the amendment of written documents where there is no discrepancy with the true agreement of the parties would amount to "retroactive tax planning".

- [54] The corollary of this is that the remedy of rectification will be available if all of the conditions for granting rectification are met, even if a tax advantage is achieved, as was the situation in *Re Slocock's Will Trusts* and 5551928 Manitoba Ltd.
- [55] The same can be said for the remedy of rescission: it will be available if all the conditions for granting rescission are met, even if a tax advantage is achieved. And importantly, Fairmont says nothing about the test for rescission as set out in *Pitt v. Holt* and applied in *Pallen Trust*. As described above, that test--applicable in the context of a voluntary settlement or transfer of property--requires a "causative mistake of sufficient gravity", which is a mistake as to (1) the legal character or nature of a transaction, or (2) some matter of fact or law which is basic to the transaction.
- [56] Contrary to the chambers judge's view, I see no principled reason why different equitable remedies may not have different results, especially since rectification and rescission serve different purposes and have different effects. Rectification is limited to a clearly-established disparity between the words of a legal document and the intentions of the parties, and is not concerned with consequences. Rescission considers consequences to be relevant to the gravity of a mistake: *Pitt v. Holt* at paras. 131-132. Rectification places the parties in the position they originally intended (which, in the tax context, achieves their tax plan), but rescission places the parties back in their original position (which does not): *Pallen Trust* at para. 57.
- [57] The appellant cites three decisions subsequent to Fairmont and Jean Coutu and submits that they correctly applied the Fairmont principles to all forms of equitable relief: *Canada Life Insurance Company of Canada v. Canada (Attorney General)*, 2018 ONCA 562, leave to appeal ref'd [2018] S.C.C.A. No. 371; *Harvest Operations Corp. v. Canada (Attorney General)*, 2017 ABCA 393; and *BC Trust v. Canada (Attorney General)*, 2017 BCSC 209. In my opinion, the appellant has again ascribed a much broader interpretation of Fairmont to these cases than is justified.
- [58] In these cases, the primary relief sought was rectification, with alternative positions attempting to ground relief under a general equitable jurisdiction. Importantly, in all of these cases, the courts considered the alternative relief sought in the particular circumstances to be essentially the same type of relief as that provided by rectification, i.e., the alteration of a transaction to achieve an intended tax result. Only in *Canada Life* was there any discussion of rescission, as that was a second alternative remedy sought.
- [59] In *Canada Life*, the applicant insurance company had, prior to Fairmont, obtained rectification in the Superior Court of a complex series of transactions that had been entered into with the intention of realizing a capital loss. On appeal by the Attorney General, it was acknowledged by all parties that Fairmont had undermined the basis for the rectification order. *Canada Life* cross-appealed, seeking to substitute for the order made in the court below a new order that would permit it to achieve the intended tax purpose of the transactions. In doing so, it relied first on the court's inherent jurisdiction in equity, and

secondly on equitable rescission, as alternative bases for the relief sought, both based on a mistake having been made in structuring the transactions. The Court of Appeal held that neither remedy was available to Canada Life because it was seeking the same type of intervention as rectification, by a different name. On the facts of that case, it was clear that this was so, as Canada Life was not seeking to simply unwind the entire set of transactions but rather to alter them with a complex series of substitute orders (set out at para. 27). With respect to equitable rescission, the court declined to consider whether Pallen Trust was still good law (Canada Life having attempted to bring itself within the parameters of a voluntary disposition) due to other impediments, most notably that rescission is an "all or nothing" remedy but Canada Life was seeking to have only part of the transactions rescinded:

[90] The purpose of rescission is to eliminate a benefit one party has received due to a mistake made by one or both parties to a contract. This is accomplished by cancelling and unwinding the contract and by issuing whatever ancillary orders are necessary to restore the parties to their original rights. Here, however, [Canada Life] seeks to have only part of the Transaction rescinded, in order to generate a particular tax outcome. It does not ask the court to rescind the entire Transaction, and to restore it and its affiliates to their original rights, because to do so would not achieve its objective of triggering a loss to set off against its foreign exchange gains.

[Emphasis added.]

[60] In Harvest Operations, the appellant entered into various share acquisition and reorganization transactions with the intention of doing so on a tax-neutral basis. Steps taken in the plan, however, triggered significant adverse tax consequences for some of the entities involved in the transactions. Rectification was not available because the instruments in issue reflected the true agreement of the parties. The appellant sought an alternative remedy on the basis of an asserted equitable jurisdiction of superior courts "to relieve persons from the effect of their mistakes". Without commenting on the merits of that assertion, the court held that to do so would undermine the rectification doctrine and ignore "the precedential value of Fairmont". Importantly, the court considered the appellant to be asking it, in the guise of exercising equitable jurisdiction, to give the rectification doctrine "the strength or force that the Supreme Court of Canada recently [in Fairmont] and consistently [prior to Fairmont] has declined to do" (at para. 75).

[61] In BC Trust, trustees applied to retroactively allocate income for the 2012 tax year to the sole beneficiary of the trust after a reassessment dispute with CRA had been resolved. The issue before the court was whether the trustees' decision not to allocate the income in 2012 was a mistake that ought to be remedied either by application of the doctrine of rectification or by the inherent jurisdiction of the court. Rectification was not available because there was no document that incorrectly recorded the trustees' intentions. Because the trustees wished to take a different course of action with the benefit of hindsight, the chambers judge considered the request to invoke the inherent jurisdiction of the court to be asking for a "mulligan".

- [62] In my opinion, these cases simply demonstrate that an equitable remedy such as rescission will not be available where the parties are not seeking to be restored to their original position but rather to alter their transaction in order to achieve their intended tax objective. They do not analyse Fairmont in the context of a proper claim for rescission as in these appeals.
- [63] Finally, I see no basis for the chambers judge's statement that the respondents, by framing their petitions in rescission, were "in essence, attempting to do indirectly what they are not permitted to do directly" (at para. 97). In these appeals, rectification was not sought, for good reason: the instruments correctly recorded the transactions as share transfers, not gifts. Rescission was sought, not to seek relief similar to rectification, but to set aside the entire transaction. This relief was granted in Pallen Trust on the basis of a fact-focused analysis of the gravity of the mistake and the conclusion that in the specific and rather unusual circumstances, it would have been unjust to refuse it, the factual basis accepted by the chambers judge in these petitions. The effect of the order granting rescission in all three cases is that tax will be payable on the dividend funds when they are distributed to the individual shareholders of the corporations or are otherwise taxable under the ITA: see Pallen Trust at para. 57.
- [64] Therefore, it is my view that Fairmont and Jean Coutu have not undermined Pallen Trust.
2. Is Pallen Trust distinguishable from the cases at bar given that a similar tax plan was subsequently found to be abusive tax avoidance, contrary to the GAAR?
- [65] After Pallen Trust was decided, the Tax Court of Canada, in Satoma, found a similar tax plan that relied on ss. 75(2) and 112(1) of the ITA to constitute abusive tax avoidance and subject to the GAAR. The appellant submits that Pallen Trust did not consider the same plan to be aggressive or abusive tax avoidance, and Satoma now establishes otherwise. This distinguishes Pallen Trust, it is contended, because aggressive or abusive tax avoidance is a factor relevant to assessing whether to grant equitable relief, and deference should be given to the Tax Court and the Federal Court of Appeal on these questions. In essence, the appellant says that the finding in Satoma is conclusive on the facts of these appeals.
- [66] The chambers judge did not consider the decision in Satoma sufficient to distinguish Pallen Trust. He found two important distinctions in Satoma. First, the taxpayer in Satoma had to be assessed based solely on the GAAR, as the scheme involved funds which had been gifted and Sommerer did not affect the application of s. 75(2) of the ITA. In contrast, the cases at bar were caught by Sommerer and the taxpayers were reassessed on the basis that s. 75(2) did not apply. In this circumstance, the GAAR was only an alternative assessing position. The judge considered this to be important, if not critical:
- [68] GAAR only applies to an "avoidance transaction" which is defined in s. 245 (3) as follows:
- (3) An avoidance transaction means any transaction

- (a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit; or
- (b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.

[Emphasis added.]

- [69] GAAR applied in *Satoma* because the tax payer received a benefit that, but for GAAR, CRA was not able to challenge under any other provisions of the ITA. In the matters before me (and in *Pallen*), the tax benefits can be, and are, successfully challenged by CRA under s. 75(2). Hence, the "but for" test in s. 245(3)(a) is not met in the matters before me and the transactions cannot be declared "avoidance transactions" within the meaning of s. 245(3) of the ITA.
- [67] Second, the judge found a distinction in the purpose of the transactions. In *Satoma*, the primary purpose of the plan was found to be tax avoidance, a point that was not disputed by the taxpayer, but in the cases at bar, the purpose of the plans was twofold: to shield assets from creditors and to do so in a manner that did not attract tax liability, both of which were found to be of equal importance.
- [68] I see no error in the judge's analysis of the effect of *Satoma*. Respectfully, I do not accept the appellant's submission that the fact that the GAAR was an alternative basis of assessment "says nothing" as to whether the plans constitute abusive tax avoidance. The GAAR can only be applied if a transaction otherwise complies with the provisions relied upon in the ITA. That was the case in *Satoma*, but not in the case here, where the transactions did not comply. Therefore, the GAAR was not relevant.
- [69] Moreover, it is important to recognize the difference between "tax avoidance" and "abuse" and the nature of the GAAR scheme. As discussed in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 at paras. 65-70, "tax avoidance" is not synonymous with "abuse" given that taxpayers are entitled to structure their affairs and enter transactions to minimize their tax liability, and the GAAR is a specific mechanism of "last resort" that relies on an assessment of the object, spirit or purpose of the provisions relied upon by the taxpayer:
- [70] The object, spirit or purpose can be identified by applying the same interpretive approach employed by this Court in all questions of statutory interpretation -- a "unified textual, contextual and purposive approach" (*Trustco*, at para. 47; *Lipson v. Canada*, 2009 SCC 1, [2009] 1 S.C.R. 3, at para. 26). While the approach is the same as in all statutory interpretation, the analysis seeks to determine a different aspect of the statute than in other cases. In a traditional statutory interpretation approach the court applies the textual, contextual and purposive analysis to determine what the words of the statute mean. In a

GAAR analysis the textual, contextual and purposive analysis is employed to determine the object, spirit or purpose of a provision. Here the meaning of the words of the statute may be clear enough. The search is for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves. However, determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do.

[Emphasis added.]

- [70] Thus, a determination of whether the GAAR applies is quite different from an assessment of "aggressive" tax avoidance, which is a broader term. Clearly, factual issues about "aggressive" tax avoidance are relevant to whether equitable rescission ought to be granted: see *Pitt v. Holt* at para. 135; and *Pallen Trust* at para. 53. This is what the court in *Pallen Trust* addressed, and it did so in the context of the particular facts of the case. That a similar plan was found to be abusive tax avoidance under the GAAR in a different case involving a different set of facts does not change the fact-focused analysis that was carried out in *Pallen Trust*. Significant in my view were these key findings by Justice Masuhara in *Pallen Trust* that were upheld on appeal:
- [57] A key determinant in this case is the common general understanding as to the operation of s. 75(2) by income tax professionals and CRA as well as my finding that CRA would not have sought to reassess the Trust prior to *Sommerer*. This aspect of the case in my view is what takes the case into the zone of unfairness
- [71] The chambers judge explicitly endorsed Justice Masuhara's finding that the reason for the audits and reassessments in these cases was the change in the interpretation of s. 75(2) resulting from *Sommerer*. In doing so, he considered evidence of CRA concerns and opinions about these kinds of plans being tax avoidance transactions going back to 2009 or earlier, but found the evidence that it took no steps to audit or reassess the trusts until after *Sommerer* to be significant (at para. 47).
- [72] Related to this is the chambers judge's conclusion that both levels of court in *Pallen Trust* considered the tax avoidance and GAAR aspects of the case, a conclusion with which I agree. Justice Masuhara noted that the GAAR rule is "broad and can encompass an extremely wide range of transactions" and the decided cases dealing with complex plans go both ways (at para. 53). Justice Newbury addressed these aspects in more detail:
- [37] CRA's primary argument in the case at bar is that the chambers judge "failed to correctly apply the test for equitable rescission of a voluntary disposition made as part of an artificial tax avoidance plan." I note at the outset that CRA's use of the phrase "tax avoidance" is rather loaded and seemed to be equated in its mind with "abuse", another loaded term. As is well known, although it is open to a taxpayer to structure his or her affairs in such a way as to minimize tax, the ITA contains a General Anti-Avoidance Rule ("GAAR") that provides a fairly "blunt instrument" for the "abuse" of the ITA. (See J. Li and T. Hwong, "GAAR in Action: An Empirical Exploration of Tax Court of Canada Cases (1997-2009) and Judicial Decision-

Making," (2013) 61:2 Canadian Tax Journal 321 at 330.) Section 245(3) defines an "avoidance transaction" generally as one that would result directly or indirectly in a "tax benefit" unless the transaction may "reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit". S. 245(2) provides that where an avoidance transaction takes place, the tax consequences shall be determined "as is reasonable in the circumstances in order to deny a tax benefit that, but for the section, would result from the transaction."

- [38] The possible application of GAAR was certainly one of the risks Mr. Pallen ran in undertaking the re-organization. It will be recalled that in their memorandum dated December 14, 2007 to Mr. Hagan, MNP flagged the possible applicability of GAAR. After noting that the meaning of "those very subjective words" in s. 245 was unclear and that case law would probably "take years to evolve," they suggested that if GAAR were invoked by CRA, there would be the argument that the tax consequences of the proposed transactions were "derived from specific sections of the ITA which provide for these results." (See above at para. 14.)
- [39] GAAR was referred to by Mr. Eugenio in his audit report on the Pallen reorganization, as a third alternative basis on which CRA could deny the tax benefit. However, the first alternative basis was the non-availability of s. 75(2) based on Sommerer. And, as Mr. Nitikman emphasized, Mr. Eugenio admitted in his cross-examination that until Sommerer, CRA's consistent position was that s. 75(2) would apply in the circumstances of the Pallen reorganization. One may surmise that this fact was what MNP were relying on in their letter, quoted above, to Mr. Hagan in December 2007.
- [40] In any event, we are (mercifully) not concerned with the applicability of GAAR. The issue for this court is whether the chambers judge erred in concluding that equitable rescission was available in respect of the dividends received by the Pallen Trust on the basis of mistake
- [Emphasis added.]
- [73] The chambers judge did not interpret the underlined comment in para. 40 to mean that Justice Newbury failed to consider the GAAR or tax avoidance, but simply that s. 245 of the ITA was not the issue before the court, and I agree.
- [74] The appellant also submits that the chambers judge wrongly characterized the primary goal of the plan in Satoma as being to avoid tax. He says that the chambers judge's analysis was wrong because he failed to examine the purpose of each transaction within the broader series of transactions comprising the tax plan, which is a requirement under s. 245(3) of the ITA, citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 and *MacKay v. Canada*, 2008 FCA 105.
- [75] In my view, this submission ignores the fact that the requirement to examine the purpose of each transaction within a plan under s. 245(3) comprises one step in a three-step analysis under the GAAR. As outlined in *Canada Trustco*, the application of the GAAR requires that

three questions be decided: (1) was there a tax benefit arising from a transaction or series of transactions (s. 245(1) and (2)); (2) was the transaction giving rise to the tax benefit an avoidance transaction (s. 245(3)); and (3) was the avoidance transaction giving rise to the tax benefit abusive (s. 245(4)). Moreover, as the court explained at paras. 34-37, even if a transaction is found to be an avoidance transaction under s. 245(3), the GAAR will not apply to deny the tax benefit if it did not result from abusive tax avoidance under s. 245(4), a requirement that has given rise to the most difficulty in the interpretation and application of the GAAR.

[76] All of this is to say that the chambers judge was not required to conduct a GAAR analysis in assessing the purpose of the transactions here. While there was an asset protection aspect to the complex series of transactions in Satoma, I see no error in the judge's conclusion that the primary purpose of those transactions was found by the Tax Court judge to be tax avoidance. That finding (at para. 75 of Satoma) was made in the context of an assessment of whether the taxpayer received a tax benefit under s. 245(1) and (2), coupled with the taxpayer's concession given that finding, that "a series of transactions was conducted for the purpose of obtaining a tax benefit" and therefore constituted an avoidance transaction within the meaning of s. 245(3).

[77] Clearly, the application of the GAAR is complex, and as the Supreme Court of Canada acknowledged in *Canada Trustco* (at para. 16), the GAAR draws a line between legitimate tax minimization and abusive tax avoidance that is "far from bright".

[78] In light of the specific findings of fact in these cases, I would not accede to this ground of appeal.

3. Was there an adequate alternative remedy available?

[79] The appellant's final submission is that the chambers judge erred by ascribing no weight to the alternative remedies that are available to the respondents. He says that the respondents have adequate alternative remedies to address the adverse tax consequences resulting from the mistake they rely on by applying to the Minister for a remission of tax under s. 23 of the *Financial Administration Act* or bringing legal action against MNP, their professional advisor.

[80] The chambers judge relied in part on the decision of first instance in *5551928 Manitoba Ltd. (Re)*, indexed as 2018 BCSC 1482, where Branch J. did not find that these alternative remedies outweighed the equities:

[47] Specifically:

a) The ability to apply for remission through an Order in Council is restrictive, uncertain, complex and slow. Furthermore, Canada was unwilling to advise whether the Minister of National Revenue would even support such an application in this case.

- b) The ability to pursue a professional negligence suit against the accountants is again expensive, slow and uncertain. The net outcome will depend on both the availability of assets and insurance, and the legal expense necessary to pursue the claim.
- [81] The judge held that the availability of an alternative remedy was "merely a factor to take into account in the discretionary analysis of whether to grant rescission" (at para. 105). As he had "no evidence whatsoever regarding the procedure or conditions applicable to [an application for remission of tax] or the position CRA is likely to take if such a remedy is pursued" he was unable to determine if s. 23 of the Financial Administration Act was a realistic alternative remedy, and its availability did not change the result.
- [82] The appellant submits that the chambers judge misdirected himself by dismissing outright the availability of the remedy under s. 23 of the Financial Administration Act. He relies on comments made in *Canada Life* at para. 92, that the question was not whether the taxpayer would necessarily be successful in pursuing such alternative relief, but "whether there was a remedy at law". The appellant also submits that the judge erred in giving no weight to a potential claim against MNP given his earlier comment (at para. 95) that the appropriate remedy was for the respondents to claim against MNP.
- [83] The respondents submit that an alternative remedy must be one that is equally effective, adequate or practical, citing several authorities in the judicial review context as well as this court's decision in *5551928 Manitoba Ltd.*
- [84] The appellant relied on the same passage from *Canada Life* before this court in *5551928 Manitoba Ltd.* However, Justice Newbury noted (at para. 40) that most texts on equitable remedies "state the principle in somewhat less formal terms":

The editors of *Snell's Equity* (31st ed., 2005), for example, state at para. 43-04 that "rectification will not be decreed if the desired result can conveniently be achieved by other means", while I.C.F. Spry in *Equitable Remedies* (8th ed., 2010) states that rectification may be refused "if on any other basis an alternative remedy is more appropriate" (my emphasis), citing *Taylor v. Johnson* (1983) 151 C.C.R. 422 (H.C.A.).

- [85] She concluded that the chambers judge, in finding that the possible alternative "remedies" involved such risk and expense that they did not outweigh the equities that favoured rectification, did not proceed on a wrong principle, consider anything he should not have considered, or give undue weight to something to which he should not have given weight, and saw no basis to interfere with his exercise of discretion. Justice Newbury added that in the circumstances, she doubted that "Equity would force upon a party such as the respondent an 'alternative' that is neither practical nor certain and the cost of which might well exceed the penalty Canada seeks to impose" (at para. 41).
- [86] I would echo Justice Newbury's comments. Similarly, I see no basis for this court to interfere with the chambers judge's conclusion in this case that the availability of an alternative remedy under s. 23 of the Financial Administration Act did not change the result. In

essence, he placed the onus on the appellant to establish that an application to government for remission was a practical alternative, an onus that was not met. Moreover, as the respondents submit, this remedy is neither practical, adequate nor appropriate given its nature, described in *Fink v. Canada (Attorney General)*, 2019 FCA 276:

- [1] Subsection 23(2) of the Financial Administration Act, R.S.C. 1985, c. F-11, allows the federal government to provide full or partial relief from any tax or penalty, including interest paid or payable thereon, where the Governor in Council "considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty." A remission order is an extraordinary remedy granted by the Governor in Council on the recommendation of the appropriate Minister. Remission orders are highly discretionary and are entitled to significant deference on judicial review.

[Emphasis added.]

- [87] I agree with the respondents that in light of CRA's position on the trusts, it is highly unlikely that the Minister would recommend a remission of tax.
- [88] In addition, although the judge did not mention a potential claim against MNP in assessing this issue, I do not read his earlier comment to mean that such a claim would have been a practical or appropriate alternative remedy in the circumstances. This comment was made in the context of his discussion of *Fairmont* and *Jean Coutu*, where he concluded that equitable relief would be prohibited by the principle that "it is not permissible to retroactively alter a transaction to achieve an intended tax objective". He then added:
- [95] insofar as it may be said that the plans before me failed due to a mistake by MNP, the appropriate remedy is for the petitioners to claim against MNP rather than attempt to rescue the plans through the courts. This flows from the statement in *Jean Coutu* that the appropriate remedy when a mistake is made by a tax advisor is claim against the tax advisor, not retroactive amendments of the agreements through the courts.

[Emphasis added.]

- [89] It is important to note that the statement in *Jean Coutu* was somewhat more nuanced:
- [43] when taxpayers agree to certain transactions and later claim that their advisors made mistakes by failing to properly advise them that the transactions they agreed to would produce unintended tax consequences, the appropriate avenue to recoup their ensuing losses is not through the retroactive amendment of their agreement. Rather, if the mistakes are of such a nature as to warrant it, taxpayers can bring a claim against their advisors, who generally have professional liability insurance, and try to prove that claim in the courts.

[Emphasis added.]

- [90] In the circumstances of these appeals, where MNP's advice at the time it was given was correct, it is likely that a negligence claim against them would have little, if any, chance of success. While an adequate remedy does not mean that it would necessarily be successful, I would not see a claim against MNP on the particular facts here to be either practical or appropriate.
- [91] Accordingly, I would not interfere with the chambers judge's exercise of discretion on the question of alternative remedies.

Conclusion and disposition

- [92] It is evident in the chambers judge's reasons that he would have dismissed the petitions had he not considered himself bound by Pallen Trust, given his interpretation of Fairmont and Jean Coutu. While it is true that stare decisis requires lower courts to follow the precedent of higher courts, in this case the chambers judge was bound to follow the Supreme Court of Canada if he was of the opinion that Fairmont and Jean Coutu had effectively overruled Pallen Trust.
- [93] Canada v. Craig, cited by the chambers judge, is not pertinent to the approach to be taken in the circumstances of the judge here. In Craig, the Federal Court of Appeal followed Gunn v. Canada, 2006 FCA 281 in allowing the appeal. Gunn had purported to overrule Moldowan v. The Queen, [1978] 1 S.C.R. 480, an aspect of which had received considerable criticism over the years. The problem created by this was that the court in Craig was in a difficult position of facing two inconsistent precedents and having to decide which one to follow. In that context, the Supreme Court of Canada noted that the court in Gunn ought to have written reasons as to why Moldowan was problematic rather than purporting to overrule it.
- [94] In any event, as I have explained, it is my opinion that Pallen Trust remains a binding precedent for these appeals, on both the facts and the law, and therefore, I would dismiss the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

- [1] I do not intend to discuss Jean Coutu in any detail, other than to note Justice Brown's acknowledgement in Fairmont (at para. 33) that on the question before the court, "both equity and the civil law are ad idem, despite each legal system arriving at that same conclusion via different paths -- the former being concerned with correcting the document, and the latter focusing on its interpretation".

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