SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) *v.* Collins Family Trust, 2022 SCC 26

APPEAL HEARD: January 11, 2022
JUDGMENT RENDERED: June 17, 2022
DOCKET: 39383

BETWEEN:

Attorney General of Canada
Appellant

and

Collins Family Trust
Respondent

AND BETWEEN:

Attorney General of Canada
Appellant

and

Cochran Family Trust
Respondent

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: (paras. 1 to 28)	Brown J. (Wagner C.J. and Moldaver, Karakatsanis, Rowe, Martin, Kasirer and Jamal JJ. concurring)
DISSENTING REASONS: (paras. 29 to 100)	Côté J.

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Attorney General of Canada *Appellant*

v.

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Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation — Income tax — Equity — Remedies — Rescission — Taxpayers mistaken about income tax consequences of transactions freely agreed upon — Taxpayers petitioning for rescission of transactions — Whether equitable remedy of rescission available.

Two companies implemented a plan to protect corporate assets from creditors without incurring income tax liability. The plan was based in part on interpretations published by the Canada Revenue Agency ("CRA") of the attribution rules in s. 75(2) and the inter-corporate dividend deduction in s. 112(1) of the *Income Tax Act*. It involved the creation of family trusts, to which dividends were paid. After the plans were implemented, the Tax Court of Canada, in another matter, interpreted s. 75(2) differently than was commonly accepted by tax professionals and CRA. CRA reassessed the trusts' returns and imposed unanticipated tax liability. The trusts petitioned for the equitable remedy of rescission of the transactions leading to and including the payment of dividends. The chambers judge considered himself bound to follow the Court of Appeal for British Columbia's decision in *Re Pallen Trust*, 2015 BCCA 222, 385 D.L.R. (4th) 499, which had applied the test for equitable rescission stated in *Pitt v. Holt*, [2013] UKSC 26, [2013] 2 A.C. 108, to similar transactions, and he allowed the petitions. The Court of Appeal dismissed the Attorney General's appeals.

Held (Côté J. dissenting): The appeal should be allowed, the judgments of the Court of Appeal and of the chambers judge set aside and the petitions dismissed.

Per Wagner C.J. and Moldaver, Karakatsanis, **Brown**, Rowe, Martin, Kasirer and Jamal JJ.: Taxpayers should be taxed based on what they actually agreed to do and did, and not on what they could have done or later wished they had done. A determination that equity can relieve a tax mistake is barred by a limiting principle of equity and by principles of tax law stated in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, and *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, [2016] 2 S.C.R. 670. Accordingly, the trusts are barred from obtaining rescission of the transactions.

A court of equity may grant relief where it would be unconscionable or unfair to allow the common law to operate in favour of the party seeking enforcement of the transaction. However, it is a limiting principle and a fundamental premise of equity that it developed to alleviate results under the common law that call for relief as a matter of conscience and greater fairness. Transactions that do not call for relief as a matter of conscience or fairness are properly outside equity's domain. There is nothing unconscionable or unfair in the ordinary operation of tax statutes to transactions freely agreed upon. If there is to be a remedy, it lies with Parliament, not a court of equity.

Furthermore, the principles of tax law and the prohibition against retroactive tax planning stated in *Fairmont Hotels* and *Jean Coutu* preclude any equitable remedy. Unless a statute says otherwise, taxpayers are to be taxed in accordance with the applicable tax statute's ordinary operation. Taxpayers may structure their affairs so as to reduce their tax liability but may also be taken as having

structured their affairs in such a way that increased their tax liability. Tax consequences do not flow from parties' motivations or objectives. Rather, they flow from their freely chosen legal relationships, as established by their transactions. A taxpayer should neither be denied nor judicially accorded a benefit based solely on what they would have done had they known better. The proper inquiry is into what the taxpayer agreed to do and not into whether there is a windfall for the public treasury or a taxpayer. A court may not modify an instrument merely because a party discovered that its operation generates an adverse and unplanned tax liability. These principles are of general application and are not confined to cases where rectification is sought. There is no room for distinguishing *Fairmont Hotels* or *Jean Coutu* based upon the particular remedy sought. A taxpayer is barred 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 principles stated in *Fairmont Hotels* and *Jean Coutu* are irreconcilable with the conclusion in *Pitt v. Holt* that equity can relieve a tax mistake. This conclusion contradicts these principles by maintaining that tax consequences are relevant to deciding whether a party to a voluntary disposition can satisfy the test for rescission. The lower courts therefore erred in relying upon *Pitt v. Holt*. Further, the constraint imposed by Parliament upon the Minister to assess a taxpayer in accordance with the facts and the law required CRA to reassess the trusts in light of the Tax Court's decision. The Minister was bound to apply Parliament's direction in the *Income Tax Act*, as interpreted by a court of law, unless and until that interpretation is judged to be

incorrect by a higher court. No unfairness lies in holding the trusts to the consequent tax liabilities of the ordinary operation of the *Income Tax Act* respecting transactions freely undertaken.

Per **Côté** J. (dissenting): The appeal should be dismissed. Rescission is, in strictly limited circumstances, an available remedy that can be used to unwind transactions that were undertaken on the basis of a mistaken assumption, even if permitting it would effectively relieve the taxpayer from payment of unexpected taxes. There is disagreement with the majority that *Fairmont Hotels* and *Jean Coutu* are dispositive of the case at bar. Although those cases affirmed certain principles of tax law, such as the principle that taxpayers should be taxed based on what they did, not what they wish they had done, and the principle that retroactive tax planning is impermissible, they are not determinative of the availability of rescission in the tax context. Neither *Fairmont Hotels* nor *Jean Coutu* generally precludes the availability of equitable remedies in a tax context. Both clarified the test for rectification. *Fairmont Hotels* and *Jean Coutu* stand for the following propositions: if a taxpayer does not meet the test for an equitable remedy, then a court has no discretion to grant that remedy, even if the taxpayer may have to pay taxes unexpectedly; if, however, a taxpayer meets the test for an equitable remedy, then the court may grant it, even if doing so would effectively relieve the taxpayer from payment of the unexpected taxes; and a common intention to limit or avoid tax liability is insufficiently precise to evince an existing prior agreement with definite and ascertainable terms.

Rescission and rectification are different remedies with different objectives and, depending on the nature of the case, one may justify a relief where the other cannot. Rectification requires a valid antecedent decision that was incorrectly transcribed on paper and it ensures that the written instrument accurately reflects the parties' agreement. Rescission requires a transaction that was entered into based on a mistaken assumption about the facts or the law. It enables a court to retroactively cancel the transaction, thereby restoring the parties to their original position.

Rescission on the ground of mistake is available in a tax context, but should be granted only in rare circumstances. The test developed in *Pitt v. Holt*, the leading case on equitable rescission of unilateral transactions for mistake, is compatible with Canadian law and should be endorsed. A court may rescind a voluntary disposition when there is a clear causative mistake of sufficient gravity that demands the intervention of equity. Only a mistake can warrant rescission, as opposed to mere ignorance or misprediction. The test for rescission is fact-specific and objectively assessed. Still, some types of mistake should not attract relief, for example when the taxpayer accepted the risk that a scheme might be ineffective, or when it would be against public policy to grant relief. Equity will not intervene to relieve a taxpayer from the consequences of a risk that was knowingly or recklessly accepted. Additionally, the fact that a transaction would have constituted abusive tax avoidance but for the mistake might preclude rescission because when a tax plan is aggressive, the taxpayer accepts the risk that it may not operate as intended. However, the purported morality of a plan remains irrelevant and what constitutes an aggressive tax plan akin to abusive tax

avoidance should be strictly interpreted. Taxpayers should not engage in bold tax planning on the assumption that it will be possible to rescind their transactions should that planning fail.

Rescission is a discretionary remedy. Appellate intervention is only warranted if a decision to grant rescission is manifestly unjust. There is no basis to intervene in the instant case. The taxpayers' erroneous belief about s. 75(2) was a mistake of law, not a misprediction in relation to a change in the law. Rescission relieves against mistakes concerning the situation that existed at the time of the transaction. Injustice stemmed from the CRA's change of position on the interpretation of s. 75(2) after the Tax Court rendered its decision, but while it was still arguing in the Federal Court of Appeal that the Tax Court had erred in law. CRA's discretionary decision to reassess the trusts in these circumstances takes this case into the zone of unfairness that allows equity to intervene, and neither policy reasons nor assumption of risk bars rescission in this case.

The taxpayers' plan did not constitute abusive tax avoidance. The primary goal of the plan was not to avoid payment of any tax. The purpose of the plan was to shield assets from creditors and to do so in a manner that did not attract tax liability, with both aspects having equal importance. The plan was also not aggressive at the time it was undertaken, because CRA was unlikely to have contested the taxpayers' position prior to the Tax Court's decision. Deference is also owed to the chambers judge's conclusion that the trusts never assumed the risk that CRA would reverse its

interpretation of the attribution rules. The only risk they assumed was that the general anti-avoidance rule might apply.

Because rescission is a remedy of last resort, it can only be granted if no alternative remedies are available. It is not sufficient for an alternative remedy to merely exist, the alternative remedy must be practical and adequate. No alternative remedies preclude rescission in this case. Applying to the Minister for a remission of tax is an extraordinary remedy granted in rare circumstances and it is highly unlikely that the Minister would recommend it in the instant case. A claim by the trusts against their tax advisers would also not be an adequate remedy because the tax advice was correct at the time it was given and so it is unlikely that a negligence claim would have any chance of success.

Cases Cited

By Brown J.

Applied: *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720; *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, [2016] 2 S.C.R. 670; *Canada Life Insurance Co. of Canada v. Canada (Attorney General)*, 2018 ONCA 562, 141 O.R. (3d) 321; **not followed:** *Re Pallen Trust*, 2015 BCCA 222, 385 D.L.R. (4th) 499; *Pitt v. Holt*, [2013] UKSC 26, [2013] 2 A.C. 108; **considered:** *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Sommerer v. The Queen*, 2011 TCC 212, 2011 D.T.C. 1162, aff'd 2012 FCA 207, [2014] 1 F.C.R.

379; *Harvest Operations Corp. v. Attorney General of Canada*, 2017 ABCA 393, 61 Alta. L.R. (6th) 1; *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739; **referred to:** *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1; *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49; *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795; *Neuman v. M.N.R.*, [1998] 1 S.C.R. 770; *Re Slocock's Will Trusts*, [1979] 1 All E.R. 358; *Harris v. Canada*, [2000] 4 F.C. 37; *Ludmer v. Canada*, [1995] 2 F.C. 3; *Longley v. Minister of National Revenue* (1992), 66 B.C.L.R. (2d) 238; *CIBC World Markets Inc. v. Minister of National Revenue*, 2012 FCA 3, 426 N.R. 182; *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600; *Canada v. 984274 Alberta Inc.*, 2020 FCA 125, [2020] 4 F.C.R. 384.

By Côté J. (dissenting)

Canada (Attorney General) v. Fairmont Hotels Inc., 2016 SCC 56, [2016] 2 S.C.R. 720; *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, [2016] 2 S.C.R. 670; *Pitt v. Holt*, [2013] UKSC 26, [2013] 2 A.C. 108; *Canada (Attorney General) v. Juliar* (2000), 50 O.R. (3d) 728; *Re Slocock's Will Trusts*, [1979] 1 All E.R. 358; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773; *Neville v. National Foundation for Christian Leadership*, 2013 BCSC 183, aff'd 2014 BCCA 38, 350 B.C.A.C. 7; *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49; *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65,

[2013] 3 S.C.R. 838; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Canada Life Insurance Co. of Canada v. Canada (Attorney General)*, 2018 ONCA 562, 141 O.R. (3d) 321; *5551928 Manitoba Ltd. v. Canada (Attorney General)*, 2019 BCCA 376, 439 D.L.R. (4th) 483, aff'g 2018 BCSC 1482, [2018] 6 C.T.C. 186; *Wilson v. Alharayeri*, 2017 SCC 39, [2017] 1 S.C.R. 1037; *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205; *Sommerer v. The Queen*, 2011 TCC 212, 2011 D.T.C. 1162; *Sommerer v. Canada*, 2012 FCA 207, [2014] 1 F.C.R. 379; *Re Pallen Trust*, 2015 BCCA 222, 385 D.L.R. (4th) 499; *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739; *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175; *Fiducie Financière Satoma v. The Queen*, 2018 FCA 74, 2018 D.T.C. 5052; *Fiducie Financière Satoma v. The Queen*, 2017 TCC 84, 2018 D.T.C. 1031; *Re Pallen Trust*, 2014 BCSC 305, [2014] 4 C.T.C. 129; *Fink v. Canada (Attorney General)*, 2019 FCA 276, 2019 D.T.C. 5127; *Escape Trailer Industries Inc. v. Canada (Attorney General)*, 2020 FCA 54, 86 Admin. L.R. (6th) 1; *Meleca v. Canada (Attorney General)*, 2020 FC 1159, 2021 D.T.C. 5012.

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APPEAL from judgment of the British Columbia Court of Appeal (Fisher, Griffin and DeWitt-Van Oosten JJ.A.), 2020 BCCA 196, [2021] 1 C.T.C. 153, 6 B.L.R. (6th) 170, 2020 D.T.C. 5062, 59 E.T.R. (4th) 1, 38 B.C.L.R. (6th) 1, 450 D.L.R. (4th) 447, [2021] 3 W.W.R. 377, [2020] B.C.J. No. 1110 (QL), 2020 CarswellBC 1700 (WL), affirming a decision of Giaschi J., 2019 BCSC 1030, [2020] 1 C.T.C. 26, 94 B.L.R. (5th) 303, 2019 D.T.C. 5085, 48 E.T.R. (4th) 101, [2019] B.C.J. No. 1185 (QL), 2019 CarswellBC 1826 (WL). Appeal allowed.

Michael Taylor and *Dayna Anderson*, for the appellant.

Joel A. Nitikman, *Q.C.*, and *Jessica Fabbro*, for the respondents.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ. was delivered by

BROWN J. —

I. Introduction and Background

[1] This Court has barred access to rectification where sought to achieve retroactive tax planning (*Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, at para. 3). Taxpayers should be taxed based on what they actually agreed to do and did, and not on what they could have done or later wished

they had done (*Fairmont Hotels*, at paras. 23-24, citing *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, at para. 45). At issue in this appeal is whether taxpayers are also barred from obtaining other equitable relief — here, rescission of a series of transactions — sought to avoid unanticipated adverse tax consequences arising from the ordinary operation thereon of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). As I explain below, they are.

[2] In 2008, Todd Collins, principal of Rite-Way Metals Ltd., and Floyd Cochran, principal of Harvard Industries Ltd., each retained the same tax advisor to propose a plan to protect corporate assets from creditors without incurring income tax liability. The resulting plans took advantage of the attribution rules in s. 75(2) and the inter-corporate dividend deduction in s. 112(1) of the *Act*. In each case, a holding company was incorporated to purchase shares in an operating company, a family trust was created with the holding company as a beneficiary, and funds were loaned to the trust to purchase shares in the operating company. The operating companies paid dividends to the trusts, which were attributed to the holding companies under s. 75(2). They, in turn, claimed a deduction in respect of those dividends under s. 112(1). The effect was to move $510,000 from Rite-Way to the Collins family trust, and $2,085,000 from Harvard to the Cochran family trust, without income tax being paid.

[3] The proposals were based in part on the interpretation of the provisions published by the Canada Revenue Agency ("CRA") at the time.

[4] In 2011, however, in *Sommerer v. The Queen*, 2011 TCC 212, 2011 D.T.C. 1162, aff'd 2012 FCA 207, [2014] 1 F.C.R. 379, the Tax Court of Canada held that the attribution rules in s. 75(2) are inapplicable where the property in question was sold to a trust, as opposed to gifted or settled. Subsequently, the CRA reassessed the respondents' returns, leading in turn to the issuance of notices of reassessment imposing tax liability upon the respondents in respect of the dividends. The respondents objected, were unsuccessful, then sued for rescission of the transactions leading to and including the payment of dividends.

[5] The chambers judge granted rescission, relying on *Re Pallen Trust*, 2015 BCCA 222, 385 D.L.R. (4th) 499, wherein the Court of Appeal for British Columbia, applying the English test for equitable rescission stated in *Pitt v. Holt*, [2013] UKSC 26, [2013] 2 A.C. 108, upheld an order rescinding the same types of transactions on the basis of a mistake about their tax consequences (2019 BCSC 1030, [2020] 1 C.T.C. 26). While expressing concern that *Re Pallen Trust* had been significantly undermined by the decisions of this Court in *Fairmont Hotels* and its companion case, *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, [2016] 2 S.C.R. 670, the chambers judge considered himself bound by it. The Court of Appeal affirmed, holding that the chambers judge did not err in applying *Re Pallen Trust* or in exercising his equitable discretion (2020 BCCA 196, [2021] 1 C.T.C. 153). *Fairmont Hotels* and *Jean Coutu*, it said, applied narrowly to preclude rectification; neither stands for the broad preclusion of *any* equitable remedy in these circumstances, or undermines the authority of *Pitt v. Holt*.

[6] The Attorney General of Canada raises two principal grounds of appeal: first, that the courts below erred in adopting the test for equitable rescission stated in *Pitt v. Holt*; and secondly (and alternatively), if *Pitt v. Holt* governs, then they erred in applying it.

[7] It suffices to dispose of this matter by allowing the appeal on the first ground. For the reasons that follow, a limiting principle of equity and, relatedly, principles of tax law stated in *Fairmont Hotels* and *Jean Coutu* are irreconcilable with the conclusion in *Pitt v. Holt*. Equity has no place here, there being nothing unconscionable or otherwise unfair about the operation of a tax statute on transactions freely undertaken. It follows that the prohibition against retroactive tax planning, as stated in *Fairmont Hotels* and *Jean Coutu*, should be understood broadly, precluding *any* equitable remedy by which it might be achieved, including rescission.

II. <u>Analysis</u>

A. *Rescission*

[8] Respectfully, the Court of Appeal erred by importing reasoning from *Pitt v. Holt*. Its determination that equity can relieve a tax mistake is incompatible with domestic law, being barred by a limiting principle of equity and by principles of tax law.

[9] I turn first to a limiting principle of equity — indeed, the most fundamental premise of that domain, found in its origins. Equity developed to alleviate results under "an unyielding common law" that called for the relief as a matter of "conscience" and "greater fairness" (J. Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at p. 2). Equitable principles "have above all a distinctive ethical quality, reflecting as they do the prevention of unconscionable conduct" (I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (9th ed. 2014), at p. 1).

[10] This broad scope for courts of equity to give relief also defines its own limits (hence a "limiting" principle): transactions that *do not* call for relief as a matter of conscience or fairness are properly outside equity's domain. This is reflected in some of equity's maxims, including that a person who comes to equity must come with "clean hands" and "he who seeks equity must do equity" (Spry, at pp. 5-6; Berryman, at pp. 16 and 18; *Snell's Equity* (34th ed. 2020), by J. McGhee and S. Elliott, at paras. 5-009 to 5-010).

[11] The jurisdiction of equity to protect against fraud, undue influence, and unconscionable transactions is well settled (McGhee and Elliott, at para. 8-001; see also G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 762; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 1402). Generally speaking, a court of equity may grant relief where it would be unconscionable or unfair to allow the common law to operate in favour of the party

seeking enforcement of the transaction. But there is nothing unconscionable or unfair in the ordinary operation of tax statutes to transactions freely agreed upon. As the Court of Appeal for Ontario recognized in *Canada Life Insurance Co. of Canada v. Canada (Attorney General)*, 2018 ONCA 562, 141 O.R. (3d) 321, at para. 93, "[t]here is nothing inequitable about [Canada Life] being taxed on 'what it did' rather than on what it intended to achieve." If there is to be a remedy, it lies with Parliament, not a court of equity. On this ground alone, *Pitt v. Holt* and *Re Pallen Trust* cannot, in my respectful view, be taken as stating the law of British Columbia.

[12] Turning to principles of tax law, the Canadian tax system is based on the *Duke of Westminster* principle that "taxpayers are entitled to arrange their affairs to minimize the amount of tax payable" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 11, citing *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.), quoted in *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49, at para. 29; see also *Shell Canada*, at para. 46). In *Shell Canada*, McLachlin J. (as she then was) explained that a court's role is "to apply an unambiguous provision of the Act to a taxpayer's transaction" and not to "recharacterize a taxpayer's *bona fide* legal relationships" (paras. 39-40). Courts "do not have the constitutional legitimacy and resources to be tax policy makers" (*Alta Energy Luxembourg*, at para. 96, citing *Canada Trustco*, at para. 41). Unless, therefore, a statute says otherwise, taxpayers are to be taxed, in accordance with the applicable tax statute's ordinary operation, based on what they actually agreed to do, and not on what they could have done (*Shell Canada*, at para. 45, citing *Duha Printers (Western)*

Ltd. v. Canada, [1998] 1 S.C.R. 795, at para. 88; *Neuman v. M.N.R.*, [1998] 1 S.C.R. 770, at para. 63).

[13] This principle operated in *Shell Canada* to *the taxpayer's favour*, by allowing it to deduct from its taxable income interest at the rate that it had actually paid for borrowing New Zealand dollars under debenture agreements, rather than at the lower rate it would have paid had it instead borrowed US dollars. Absent a "sham" arrangement, "the taxpayer's legal relationships must be respected in tax cases" (*Shell Canada*, at para. 39). But the principle operates the other way, too. And so, this Court applied the principle from *Shell Canada* in *Fairmont Hotels* and *Jean Coutu* in concluding that the instruments at issue in those cases could *not* be rectified (in *Fairmont Hotels*) or interpreted or retroactively amended (in *Jean Coutu*) in order to avoid an unanticipated, *adverse* tax consequence. Again, legal relationships were to be respected even if they appear ill-considered in hindsight. If, after all, taxpayers may structure their affairs so as to reduce their tax liability, they may also be taken as having structured their affairs in such a way that increased their tax liability.

[14] This Court made precisely that point in *Fairmont Hotels*. "Tax consequences", it held, "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" (para. 24). The inquiry, the Court added, is into *what the taxpayer agreed to do*, and *not* into whether the taxpayer or the CRA has obtained a "windfall".

[15] The point was made with even greater force in *Jean Coutu*. While that appeal was decided under art. 1425 of the *Civil Code of Québec*, the reasons for decision were broadly expressed, stating generally applicable tax law principles that militate against retroactive amendment of agreements when unforeseen tax consequences result:

> First, accepting PJC Canada's position would require this Court to ignore the legal relationships that it and PJC USA originally agreed to create, and actually created, in favour of the tax consequences they sought to achieve. It would thus undermine one of the fundamental principles of our tax system: that tax consequences flow from the legal relationships or transactions established by taxpayers. . . . For instance, in *Shell Canada*, this Court unanimously stated the following, at para. 45:
>
> > Unless the Act provides otherwise, a taxpayer is entitled to be taxed based on what it actually did, not based on what it could have done, and certainly not based on what a less sophisticated taxpayer might have done. [Emphasis in Wagner J.'s reasons.]
>
> Equally, if taxpayers agree to and execute an agreement that produce unintended tax consequences, they must still be taxed on the basis of that agreement and not on the basis of what they "could have done" to achieve their intended tax consequences, had they been better informed. Tax consequences do not flow from contracting parties' motivations or tax objectives.
>
> Second, I believe that allowing the amendment of the written documents in the instant appeal would amount to retroactive tax planning. [Emphasis added; paras. 41-42.]

[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).

[17] At issue here is whether these principles are of *general* application, or whether they are confined to denying pleas of *rectification*. While the Court of Appeal

confined them to cases where rectification was sought, appellate judgments in Ontario and Alberta have viewed them as more broadly applicable.

[18] In *Canada Life*, the respondent Canada Life and its affiliates undertook a series of transactions to realize a tax loss, so as to offset unrealized foreign exchange gains accrued in the same year. The CRA disallowed the claimed loss, and Canada Life sought rectification (or, in the alternative, an exercise of "inherent jurisdiction to relieve parties retroactively from the effects of their mistakes") to undo the transactions (para. 16). The application judge granted rectification. On appeal, the parties agreed that the order could not stand following the decision in *Fairmont Hotels*, which was released after the application judge's ruling. Canada Life cross-appealed to seek rescission, relying on *Pitt v. Holt* and *Re Pallen Trust* as "authority that the remedy of equitable rescission of voluntary dispositions is available, even when the objective is to avoid unintended adverse tax consequences" (para. 36).

[19] "What [Canada Life] is seeking", said the Court of Appeal in allowing the appeal and dismissing the cross-appeal, "is the same type of intervention, by a different name, that the Supreme Court considered in *Fairmont Hotels* and *Jean Coutu*" (para. 43), and rejected (para. 7). *Fairmont Hotels*, it said, "was concerned not only with the availability of rectification", but with "impermissible retroactive tax planning" (para. 67) in the form of a "'rewriting of history' . . . to correct an error leading to an unforeseen tax liability" (para. 75). Nothing, therefore, turns on whether the relief

sought involved the alteration of the agreements themselves, or to undo a "'mistake' . . . in the structure of the transaction" (*Canada Life*, at paras. 74-75).

[20] *Canada Life* relied upon two appellate judgments in support, the first being that of the Court of Appeal of Alberta in *Harvest Operations Corp. v. Attorney General of Canada*, 2017 ABCA 393, 61 Alta. L.R. (6th) 1 (paras. 80-82). There, the Court of Appeal, citing *Fairmont Hotels*, first affirmed the application judge's decision to deny rectification of documents recording share acquisition and reorganization transactions that had led to an unanticipated tax liability. The appellant had also pleaded in the alternative that "superior courts have equitable jurisdiction to relieve persons from the effect of their mistakes" (para. 73). This the Court of Appeal rejected as also having been caught by the precedent of *Fairmont Hotels* (paras. 74-75).

[21] *Canada Life* also relied on *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739, where the Ontario Court of Appeal had declined to relieve a taxpayer of a mistake that left her company liable for a land transfer tax, saying: ". . . courts do not look with favour upon attempts to rewrite history in order to obtain more favourable tax treatment" (p. 742). This conclusion flowed from the principle that tax liability is based on what was actually agreed upon and done, not on what, in retrospect, a taxpayer should have done or wished it had done.

[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.

[23] The foregoing — and, in particular, the statement that legal instruments cannot be undone or otherwise modified to avoid a tax liability arising from the ordinary operation of a tax statute — answers my colleague Côté J.'s objection at paras. 35-39 of her reasons. She says that *Fairmont Hotels*' endorsement of the result in *Re Slocock's Will Trusts*, [1979] 1 All E.R. 358 (Ch. D.), "generally [confirms] the availability of equitable remedies in a tax context" (para. 39). As this Court explained in *Fairmont Hotels*, however, rectification in *Re Slocock's Will Trusts* was granted *not* to avoid a tax liability, but because "the deed as recorded . . . fail[ed] to record fully the terms of the parties' original agreement" (para. 21). As a result, the plaintiff in *Re*

Slocock's Will Trusts was taxed on the basis of what she had freely agreed to do — the selfsame basis on which I say the respondents ought also to be taxed.

B. *Pitt v. Holt*

[24] From the foregoing, it follows that the Court of Appeal erred in relying upon the conclusion in *Pitt v. Holt* that equity can relieve a tax mistake. That contradicts the principles outlined above, by maintaining that tax consequences are relevant to deciding whether a party to a voluntary disposition can satisfy the test for rescission — which in turn requires "a causative mistake of sufficient gravity . . . either 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" (para. 122; see also para. 132). This divergence is unsurprising, given that English law lacks the prohibition against retroactive tax planning stated in *Fairmont Hotels* and *Jean Coutu*, and operates under a different legislative framework.

[25] Nor does *Pitt v. Holt*'s conclusion on this point account for our law that, in this case, *required* the Minister of National Revenue to apply the *Act* to the transactions. By s. 220(1) of the *Act*, Parliament has imposed upon the Minister a *duty* ("[t]he Minister <u>shall</u>") to "administer and enforce" the *Act*. No discretion is afforded the Minister or the Minister's agents: "They are required to follow [the *Act*] absolutely, just as taxpayers are also required to obey it as it stands" (*Harris v. Canada (C.A.)*, [2000] 4 F.C. 37 (C.A.), at para. 36, citing *Ludmer v. Canada*, [1995] 2 F.C. 3 (C.A.); see also *Longley v. Minister of National Revenue* (1992), 66 B.C.L.R. (2d) 238 (C.A.), at para. 19). Quite apart from undermining Parliament's direction, inconsistent

exercises of discretion by the Minister or the Minister's agents create inequity among taxpayers (S. Templeton, "A Defence of the Principled Approach to Tax Settlements" (2015), 38 *Dal. L.J.* 29, at p. 32). In a self-assessing tax system such as that provided for in the *Act*, taxpayers should have confidence that the Minister is administering and enforcing the same tax laws in the same way for everyone (pp. 33-34 and 68).

[26] Practically, this constrains the Minister to assess a taxpayer in accordance with the facts of the matter — here, the transactions — and the law (*CIBC World Markets Inc. v. Minister of National Revenue*, 2012 FCA 3, 426 N.R. 182, at paras. 16 and 20-21, per Stratas J.A.; *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 (C.A.), at p. 602; *Canada v. 984274 Alberta Inc.*, 2020 FCA 125, [2020] 4 F.C.R. 384, at para. 52). This goes to the respondents' submission and my colleague's conclusion that what brought this case into a "zone of unfairness" was the CRA changing its interpretation of the provisions and reassessing the respondents retroactively in light of the Tax Court's decision in *Sommerer* (transcript, at p. 59; see also *Re Pallen Trust*, paras. 9 and 56; C.A. reasons, at para. 30; Côté J.'s reasons, at para. 80). My colleague impugns this as a "discretionary" measure on the CRA's part, and finds "unfairness" in its decision to reassess the respondents in light of the Tax Court's decision while simultaneously arguing at the Federal Court of Appeal that it was incorrectly decided. But, and respectfully said, this ignores that the Minister was *bound* to apply Parliament's direction in the *Act*, as interpreted by a court of law, unless and until that interpretation is judged to be incorrect by a higher court. Unless a statute gives the Minister the power to deviate from that direction, the Minister may not deviate; nor

may a court undermine that direction by resort to equity, since there is nothing unconscionable or unfair about the Minister administering the *Act* as Parliament directs. Equity is the conscience of the common law, not of Parliament.

[27] In short, the "unfairness" the respondents complain of was the direct result of the ordinary operation of the *Act* respecting transactions freely undertaken. And, as already discussed, no unfairness lies in holding the respondents to the consequent tax liabilities.

III. Conclusion

[28] I would allow the appeal, with costs to the Attorney General in this Court and in the courts below. The judgments of the Court of Appeal and of the chambers judge should be set aside and the respondents' petitions should be dismissed.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[29] I have had the benefit of reading the reasons of my colleague Justice Brown. I agree with him that both *Canada (Attorney General) v. Fairmont*

Hotels Inc., 2016 SCC 56, [2016] 2 S.C.R. 720, and *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, [2016] 2 S.C.R. 670, affirm certain governing principles of tax law, such as the principle that taxpayers should be taxed based on what they did, not what they wish they had done, and the principle that retroactive tax planning is impermissible.

[30] However, I am unable to agree with my colleague that *Fairmont* and *Jean Coutu* are dispositive of the case at bar. Those cases are not determinative of the availability of rescission in the tax context. As I will explain below, rescission is, in strictly limited circumstances, an available remedy in Canadian law that can be used to unwind transactions that were undertaken on the basis of a mistaken assumption, even if permitting it would effectively relieve the taxpayer from payment of unexpected taxes.

II. Analysis

[31] I will begin by discussing the governing principles that arise from *Fairmont* and *Jean Coutu* and will explain why, in my opinion, they do not preclude rescission in the tax context. These principles and the availability of the remedy of rescission can coexist. I will then consider the test for rescission and explain how the test developed in *Pitt v. Holt*, [2013] UKSC 26, [2013] 2 A.C. 108, ought to be applied in Canadian law. Finally, before applying the legal framework to the facts of this case, I will briefly comment on three topics that require clarification.

A. *In Canadian Tax Law, Fairmont and Jean Coutu Do Not Preclude Rescission for the Purpose of Unwinding Transactions That Have Been Entered Into Freely and Voluntarily*

[32] In 2016, this Court rendered decisions in two companion tax law cases, *Fairmont* and *Jean Coutu*. My colleague writing for the majority in the case at bar agrees with the appellant that those cases preclude the availability of equitable remedies in the tax context and are as a result dispositive of this appeal. In my respectful view, neither *Fairmont* nor *Jean Coutu* precludes as a matter of principle the availability of an equitable remedy, be it rescission or rectification, in the tax context. Rather, those cases lay down principles of general application that are compatible with the availability of the remedy of rescission in the tax context.

[33] In *Fairmont*, this Court overruled the Ontario Court of Appeal's decision in *Canada (Attorney General) v. Juliar* (2000), 50 O.R. (3d) 728, on the basis that it had erroneously "allowed for impermissible retroactive tax planning" (para. 24). In *Juliar*, the Court of Appeal had allowed parties to rectify an agreement freely entered into because it had produced unintended tax consequences (*Fairmont*, at para. 19); that result represented a departure from this Court's jurisprudence and from the fundamental principles governing rectification.

[34] As was explained in *Fairmont* and *Jean Coutu*, a court cannot rectify an instrument merely because, in hindsight, the instrument is seen to have generated an adverse and unplanned tax liability. Rather, rectification is available only where: (i) there was a prior agreement whose terms are definite and ascertainable; (ii) the

agreement was in effect at the time the instrument was executed; (iii) the instrument fails to accurately record the agreement; and (iv) the instrument, if rectified, would properly give effect to the parties' prior agreement (*Fairmont*, at para. 38).

[35] The majority in *Fairmont* did not say, however, that equitable remedies — and rectification more specifically — can never be granted in a tax context. Instead, they simply clarified the test for rectification, emphasizing that it "is to be applied in a tax context just as it is in a non-tax context" (*Fairmont*, at para. 25). The decision did not preclude the application of equitable remedies in a tax context. As A. Swan, J. Adamski and A. Y. Na observe, "[t]he result of *Fairmont Hotels* is that the remedy of rectification has been returned or limited to its usual and proper scope" (*Canadian Contract Law* (4th ed. 2018), at §8.404).

[36] As for *Jean Coutu*, it too concerned the issue of rectification of documents that had resulted in unintended tax consequences, but under the *Civil Code of Québec*. In that case, Jean Coutu Group (PJC) Inc., relying on art. 1425 *C.C.Q.*, sought to modify documents recording a series of corporate transactions, the purpose of which was one of tax neutrality. However, the scheme, as implemented, did not permit Jean Coutu to avoid tax liability. The majority refused to grant the rectification sought, explaining that to allow a general intention of tax neutrality to serve as a basis for retroactively modifying contracts would effectively amount to "a kind of catch-all insurance for . . . inadvertence or mistakes . . . in planning transactions" (para. 42).

[37] With great respect, I am of the view that my colleague unduly expands the scope of those cases. Both of them stand for the well-settled principle that taxpayers must be taxed based on what they agreed to do, not what they ought to have done. I agree with the Court of Appeal that the principles flowing from these decisions are not new, but

> 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 (Eng. Ch. D.) . . . . 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.
>
> (2020 BCCA 196, [2021] 1 C.T.C. 153, at para. 50)

[38] Lest there be any doubt, the majority in *Fairmont* actually affirmed that equitable remedies — even rectification — can be available in a tax context if the requisite equitable test is satisfied. They cited with approval, and relied upon, *Re Slocock's Will Trusts*, commenting that the availability of rectification in that case had "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" (para. 21). Thus, a court may order rectification where the conditions for granting this remedy are met, even where rectification results in savings for the taxpayer. And that is in fact what had occurred in *Re Slocock's Will Trusts*, which the majority in *Fairmont* approvingly described as "an unremarkable

application of rectification to cure an omission in the instrument recording an antecedent agreement” (*Fairmont*, at para. 21).

[39] Thus, neither *Fairmont* nor *Jean Coutu* generally precludes the availability of equitable remedies in a tax context. Both of those decisions clarified the test for rectification. In *Fairmont*, the majority emphasized that “rectification is limited solely to cases where a written instrument has incorrectly recorded the parties’ antecedent agreement” (para. 13) and that, on the facts of that case, the party seeking rectification “could not show having reached a prior agreement with definite and ascertainable terms” (para. 39). Similarly, in *Jean Coutu*, which was rendered in the civil law context, the majority held that, under art. 1425 *C.C.Q.*, a general intention of tax neutrality that is not related to obligations whose objects are determinate or determinable cannot on its own give rise to a common intention that would form part of the original contract and permit the requested modifications.

[40] Moreover, while both *Fairmont* and *Jean Coutu* clarified the circumstances in which the remedy of rectification is available, neither addressed specifically the availability of rescission. This is the consensus in the academic literature as well. For example, T. Fitzsimmons and E. S. Roth explain that

> [t]he majority of the Supreme Court of Canada in *Fairmont* made no reference to rescission and did not determine (or even comment on) the circumstances in which the remedy of rescission can or should be granted. Although rectification and rescission share a doctrinal overlap and common evidentiary foundation, they are separate and distinct equitable remedies, and on the basis of the court’s reasons for judgment, it appears

> that the availability of the equitable remedy of rescission should therefore have been unaffected by the decision in *Fairmont*.
>
> ("Rectification, Rescission, and Other Equitable Remedies After Fairmont Hotels Inc.", in Canadian Tax Foundation, *Report of Proceedings of the Sixty-Ninth Tax Conference* (2018), 30:1, at p. 30:34; see also T. J. Agioritis, "Is Rectification Still a Remedy? A Practical Overview", in Canadian Tax Foundation, *2017 Prairie Provinces Tax Conference & Live Webcast* (2017); R. Pandher and B. Graversen, "Does Fairmont Hotels Eliminate *All* Equitable Remedies in the Tax Context?" (2018), 66 *Can. Tax J.* 931, at p. 940.)

[41] Rescission and rectification ought not to be confused. As Pandher and Graversen write, "[t]he same brush cannot be used to paint all equitable remedies in the tax context" (p. 940). Rescission and rectification are two different remedies with different objectives. They "are not simply two roads leading to the same place" (R.F., at para. 40). Hence, depending on the nature of the case, one may justify a relief where the other cannot.

[42] Rectification requires a valid antecedent decision to carry out a particular transaction that was incorrectly transcribed on paper. The premise underlying this remedy is that it would be unfair to hold a person to be bound by a transaction they never agreed to (Swan, Adamski and Na, at §8.406). As for rescission, it relieves against a mistake. It presupposes that the transaction was transcribed correctly but was entered into under a mistaken assumption about the facts or the law. If granted, rescission "puts the parties <u>in status quo ante</u> and restores things, as between them, to the position in which they stood before the contract was entered into" (*Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 39 (emphasis

added), quoting *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 (H.L.), at p. 781; see also *Snell's Equity* (34th ed. 2020), by J. McGhee and S. Elliott, at para. 15-001). In other words, the purpose of rectification is to ensure that a written instrument accurately reflects the parties' antecedent agreement, whereas rescission enables a court to retroactively cancel a transaction that was entered into by mistake, thereby restoring the parties to their original position.

[43] In sum, *Fairmont* and *Jean Coutu* stand for the following propositions:

(a) If a taxpayer does not meet the test for an equitable remedy, then a court has no discretion to grant that remedy, even if the taxpayer may have to pay taxes unexpectedly through no fault of its own (*Fairmont*, at paras. 13 and 39; *Jean Coutu*, at para. 23).

(b) If the taxpayer meets the test for an equitable remedy, then the court may grant it, even if doing so would effectively relieve the taxpayer from payment of the unexpected taxes (*Fairmont*, at paras. 21-22; *Jean Coutu*, at para. 24).

(c) A common intention to limit or avoid tax liability is insufficiently precise to evince an existing prior agreement with definite and ascertainable terms (*Fairmont*, at paras. 39-40; *Jean Coutu*, at paras. 23 and 50).

Contrary to my colleague's conclusion, *Fairmont* and *Jean Coutu* cannot be read as precluding all equitable remedies from potentially applying in a tax law context.

B. *Rescission for Mistake in the Case of a Voluntary Disposition of Property*

[44] The leading case on equitable rescission of unilateral transactions for mistake is *Pitt v. Holt*, a 2013 decision of the Supreme Court of the United Kingdom. My colleague asserts that the test for equitable rescission stated in *Pitt v. Holt* cannot be adopted in Canada, because its effect is that tax consequences are relevant to deciding whether a party to a voluntary disposition of property can satisfy the test for rescission (para. 24). I respectfully disagree.

[45] According to the propositions outlined above, if a taxpayer does not meet the test for an equitable remedy, then a court has no discretion to grant that remedy, even if the taxpayer may have to pay taxes unexpectedly, through no fault of its own. However, if the taxpayer meets the test for an equitable remedy, then the court may grant it, even if doing so would effectively relieve the taxpayer from payment of the unexpected taxes (R.F., at para. 8). Therefore, the test developed by Lord Walker in *Pitt v. Holt* is compatible with Canadian law and should be endorsed by this Court.

(1) <u>Test for Rescission for Mistake in the Case of a Voluntary Disposition of Property</u>

[46] A court may rescind a voluntary disposition when there is "a clear causative mistake of sufficient gravity that demand[s] the intervention of equity" (A. H. Oosterhoff, "Causative Mistake of Sufficient Gravity, or Retroactive Tax Planning? A Comment on *Re Pallen Trust*" (2016), 35 *E.T.P.J.* 135, at p. 144). And "the test will normally be satisfied only when there is a mistake either 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" (*Pitt v. Holt*, at para. 122).

[47] The test for rescission does not involve a strict set of rules. Rather, it is a fact-specific, objectively assessed "in-the-round" approach, as was explained in *Pitt v. Holt*:

> The evaluation of what is or would be unconscionable must be objective. . . .
>
> The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion. . . .
>
> . . .
>
> The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus . . . on the facts of the particular case. . . .
>
> . . .
>
> . . . The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the

> seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case. [paras. 125-126 and 128]

[48] Nevertheless, Lord Walker stated in *Pitt v. Holt*, and I agree, that “there are some types of mistake about tax which should not attract relief” (para. 132). Rescission on the ground of mistake should not be granted when the taxpayer has accepted the risk that the scheme might be ineffective, or when it would be against public policy to grant relief.

[49] I pause here to note that only a mistake can warrant rescission, as opposed to mere ignorance or “misprediction” (*Pitt v. Holt*, at para. 104). As Lord Walker explained, “[a] misprediction relates to some possible future event, whereas a legally significant mistake normally relates to some past or present matter of fact or law” (para. 109). In other words, a misprediction is a belief that later turns out to be wrong, whereas a mistake is a belief that is wrong at the time of the transaction (W. Seah, “Mispredictions, Mistakes and the Law of Unjust Enrichment” (2007), 15 *R.L.R.* 93, at p. 100). Similarly, a taxpayer’s ignorance or inadvertence cannot be characterized as a mistake, as that would be incompatible with the self-reporting and self-assessing nature of our tax system.

[50] Ultimately, equity will not intervene to relieve a taxpayer from the consequences of a risk that was knowingly or recklessly accepted. A taxpayer who is fully aware of potential tax issues associated with a transaction, or who proceeds with

a tax plan in a reckless or ignorant manner, generally assumes the risk of being wrong and having to pay taxes.

[51] For example, in *Neville v. National Foundation for Christian Leadership*, 2013 BCSC 183, aff'd 2014 BCCA 38, 350 B.C.A.C. 7, Mr. Neville made a donation to a foundation on the understanding that the foundation "could" use all or part of the money to pay a scholarship to his daughter. Before he made the donation, the foundation had warned him that the Canada Revenue Agency ("CRA") might not accept the tax receipt as evidencing a valid gift and that the plan was "risky". That case is a clear example of an accepted risk. Mr. Neville was aware of and assumed the risk that the CRA would disallow the tax credit he was claiming; there was no mistake, and rescission was unavailable to him.

[52] Additionally, a transaction that would have constituted abusive tax avoidance *but for* a mistake might be a consideration in the "in-the-round" analysis and preclude rescission. That would be an important element in the overall analysis, as it would highlight the risk the taxpayer has accepted and help to determine whether equity should intervene. When a tax plan is "aggressive", the taxpayer is accepting the risk that the plan will not operate as intended. This weighs against the availability of rescission.

[53] However, the purported morality of a plan remains irrelevant. As this Court recently reiterated in *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49, it is important to distinguish what is immoral from what is abusive: "Taxpayers are allowed

to minimize their tax liability to the full extent of the law and to engage in ‘creative’ tax avoidance planning, insofar as it is not abusive within the meaning of the [general anti-avoidance rule (“GAAR”)]” (para. 48). Therefore, rather than focusing on the purported morality of taxpayers arranging their affairs within the acceptable confines of the law, the focus should be on the risk the taxpayers accepted.

[54] It can be difficult to establish what constitutes an “aggressive” tax plan akin to abusive tax avoidance. Consequently, this concept should be strictly interpreted:

> While a court may be reluctant to grant rescission to provide a taxpayer with relief from its own “aggressive” tax planning, that limitation should be narrowly interpreted. Courts may be expected to recognize the longstanding principle that taxpayers can structure their affairs to mitigate their tax burden, but structuring that goes beyond the pale may be subject to GAAR. . . . There will often be some level of uncertainty around tax-structuring outcomes, and it would not be reasonable for a judge to conjure a notional spectrum of inappropriate but legal behaviours against which to gauge whether to grant equitable relief, unless the transaction was attacked with GAAR as the primary assessing position.
>
> (J. Sorensen and A. Yuk, “Equitable Rescission for Tax Mistakes: It’s Not Over (Until it’s Over)” (2020), 68 *Can. Tax J.* 1149, at p. 1156)

[55] In sum, for rescission to be granted, the mistake needs to be sufficiently serious. Rescission will be available whenever failure to grant it would result in unfairness or in an injustice (P. S. Davies and S. Douglas, “Tax Mistakes Post-Pitt v Holt” (2018), 32 *T.L.I.* 3).

[56] In accordance with this Court’s approach in *Fairmont* and *Jean Coutu*, rescission on the ground of mistake is an available remedy in a tax context just as it is

in a non-tax context. That being said, rescission based on a mistake that relates solely to the tax consequences of a transaction should be granted only in rare circumstances. This is so because, as LeBel J. stated in *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838, "[t]axpayers should not view this recognition . . . as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to [rescind] their [transactions] retroactively should that planning fail" (para. 54; *Fairmont*, at para. 82; *Jean Coutu*, at para. 21).

[57] Similarly, in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, at para. 45, this Court stressed that a taxpayer should expect to be taxed "based on what it actually did, not based on what it could have done". As the majority of the Court explained in *Fairmont*, just as taxpayers should not be denied a benefit because others have not availed themselves of the same benefit, "taxpayers should not be judicially accorded a benefit based solely on what they would have done had they known better" (para. 23). While this principle does not preclude the availability of recession in a tax context, *Shell* likewise underscores the fact that rescission is a remedy that may be granted only in rare circumstances where required by equity.

(2) Alternative Remedies

[58] Finally, rescission is a remedy of "last resort": even if a party meets the test for rescission, it can be granted only if no alternative remedies are available.

[59] There are two competing approaches to the assessment of the availability of alternative remedies. In *Canada Life Insurance Co. of Canada v. Canada (Attorney General)*, 2018 ONCA 562, 141 O.R. (3d) 321, the Ontario Court of Appeal held that the mere existence of a legal remedy warrants denying equitable relief. The court framed the question not as whether an alternative remedy would be successful, but solely whether there exists a remedy at law. The opposite view was expressed by the British Columbia Court of Appeal in *5551928 Manitoba Ltd. v. Canada (Attorney General)*, 2019 BCCA 376, 439 D.L.R. (4th) 483: it held that, when a court must determine whether an equitable remedy should be granted, it is not sufficient for an alternative remedy to merely exist. The court must, in exercising its discretion, ask whether the alternative remedy is practical or adequate.

[60] The second approach should be endorsed. The mere theoretical possibility of an alternative remedy where there is no evidence on how the remedy might apply in practice is insufficient to displace the court's equitable jurisdiction to grant rescission. The alternative remedy must be sufficient to replace the relief being sought. In *5551928 Manitoba Ltd.*, a case concerning rectification, Newbury J.A. rightfully quoted a comment from *Snell's Equity* that "rectification will not be decreed if the desired result can conveniently be achieved by other means" (paras. 40-41 (emphasis in original), quoting *Snell's Equity* (31st ed. 2005), at para. 43-04). She went on to "doubt that Equity would force upon a party . . . an 'alternative' that is neither practical nor certain" (para. 41).

C. *Further Remarks*

[61] Before applying the test for rescission to the facts of this case, I wish to discuss three matters that arise in this appeal.

(1) Standard of Review

[62] Rescission is an equitable remedy that can be granted on a discretionary basis. It is trite law that deference is generally owed to discretionary decisions. Absent palpable and overriding error, deference is owed to findings of fact. Absent an error of law, erroneous principles or irrelevant considerations, deference is owed to a trial judge's exercise of discretion (*Wilson v. Alharayeri*, 2017 SCC 39, [2017] 1 S.C.R. 1037, at para. 59). Thus, if the trial judge "has given sufficient weight to all relevant considerations and the exercise of discretion is not based on an erroneous principle, appellate reviewers must generally defer" (*Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205, at para. 36). If there is no such error, appellate intervention is only warranted if the decision is manifestly unjust.

(2) *Sommerer v. The Queen*

[63] In 2012, the Federal Court of Appeal affirmed the Tax Court of Canada's decision in *Sommerer v. The Queen*, 2011 TCC 212, 2011 D.T.C. 1162, in which that court had narrowly interpreted s. 75(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") (*Sommerer v. Canada*, 2012 FCA 207, [2014] 1 F.C.R. 379).

[64] Section 75(2) of the *ITA* reads as follows:

> **75 (2)** If a trust, that is resident in Canada and that was created in any manner whatever since 1934, holds property on condition
>
> **(a)** that it or property substituted therefor may
>
> **(i)** revert to the person from whom the property or property for which it was substituted was directly or indirectly received (in this subsection referred to as "the person"), or
>
> **(ii)** pass to persons to be determined by the person at a time subsequent to the creation of the trust, or
>
> **(b)** that, during the existence of the person, the property shall not be disposed of except with the person's consent or in accordance with the person's direction,
>
> any income or loss from the property or from property substituted for the property, and any taxable capital gain or allowable capital loss from the disposition of the property or of property substituted for the property, shall, during the existence of the person while the person is resident in Canada, be deemed to be income or a loss, as the case may be, or a taxable capital gain or allowable capital loss, as the case may be, of the person.

[65] Before *Sommerer*, there was a general understanding in the tax community, which the CRA shared, that s. 75(2) would apply to a sale of shares as well as to a gift of shares. In the proceedings in *Sommerer*, the CRA, relying on its Interpretation Bulletin IT-369R(SR), "Attribution of Trust Income to Settlor" (June 24, 1994), argued that s. 75(2) applied both to shares sold and to shares gifted: a person other than the settlor could transfer property to a trust and become subject to the attribution rules. The CRA advanced this position in its submissions to both the Tax Court and the Federal Court of Appeal. In the Tax Court, Miller J. held that the CRA's interpretation was

wrong. He concluded that the "person" referred to in s. 75(2) had to be the settlor of the trust. Therefore, a person other than a settlor could not transfer property to a trust and become subject to the attribution rules of s. 75(2). The CRA appealed the Tax Court's decision and maintained its position in the Federal Court of Appeal, arguing that the trial judge had erred in his interpretation of s. 75(2), because a textual, contextual, and purposive interpretation of the provision supported the position that it applied both to shares sold and to shares gifted.

[66] However, the Federal Court of Appeal upheld Miller J.'s decision, holding that the "person" as defined in s. 75(2)(a)(i) of the *ITA* must be the settlor of the trust, and that the attribution rules therefore did not apply where the property in question was sold to a trust, as opposed to gifted to, or settled on, the trust. The court disagreed with the CRA's long-standing view that a person other than the settlor may transfer property to a trust and become subject to the attribution rules of s. 75(2).

(3) *Re Pallen Trust*

[67] In 2015, the British Columbia Court of Appeal rendered its decision in *Re Pallen Trust*, 2015 BCCA 222, 385 D.L.R. (4th) 499. The facts in *Pallen* and in the case at bar are nearly identical. Indeed, as the British Columbia Supreme Court noted in its reasons in the instant case, "except for the names, the sections of the [reorganization] plan quoted in the chambers and Court of Appeal judgments in *Pallen* are identical to the . . proposals for Collins and Cochran Family Trusts" (2019 BCSC 1030, [2020] 1 C.T.C. 26, at para. 38).

[68] In *Pallen*, the Court of Appeal considered precedents — such as *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739, to which my colleague refers — that reflect 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" (*Pallen*, at para. 52). Rescission was nonetheless granted on the basis of the specific facts of the case.

[69] In light of the reasons set out above, one fact stands: *Fairmont* and *Jean Coutu* did not cause the result in *Pallen* to be wrong. Not only do I agree with the Court of Appeal's conclusion in the case at bar that *Pallen* remained good law in British Columbia following *Fairmont* and *Jean Coutu*, but I also conclude that *Pallen* was rightfully decided. Rescission "will be available if all the conditions for granting [it] are met, even if a tax advantage is achieved" (C.A. reasons, at para. 55). I will discuss *Pallen* in more detail in the application of the law to the facts, to which I now turn.

III. Application

[70] As I will explain, the chambers judge in this case did not err in granting rescission, and the Court of Appeal was right to uphold his decision. Indeed, I am of the view that there is no basis for an appellate court to intervene with the chambers judge's exercise of discretion.

A. *The Respondents Made a Mistake, Not a Misprediction*

[71] I explained above that rescission cures only a mistake of law, not mere ignorance or a misprediction. Thus, the first issue to be decided is whether the respondents made a mistake rather than a misprediction. If the interpretation of s. 75(2) in *Sommerer* were deemed to have changed the law, then the respondents' belief would have amounted to a misprediction, as they would not have anticipated that the law might be changed by a future judicial decision. I conclude that the respondents' erroneous belief about s. 75(2) of the *ITA* was a mistake of law, not a misprediction in relation to a change in the law.

[72] Given that s. 75(2) had never been analyzed by a court when the Tax Court of Canada released its decision in *Sommerer*, that decision did not change the law. It stated what the law had always been even though the law had been erroneously interpreted by the CRA and by tax professionals. Indeed, the CRA's interpretation bulletins are not authoritative sources of law (*Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, at pp. 195-97). The argument that *Sommerer* changed the law cannot therefore stand. The respondents' belief that s. 75(2) applied was consistent with the CRA's interpretation at the time of the transactions in 2008 and 2009. That belief turned out to be wrong, as is clear from the decision in *Sommerer*.

[73] As I explained in discussing *Pitt v. Holt*, rescission relieves only against mistakes concerning the situation that existed at the time of the transaction. Such a mistake is what happened in the present case. Rescission is therefore available to remedy the respondents' mistake about the law. It must now be determined whether,

based on the "in-the-round" approach, rescission should have been granted by the chambers judge.

B. *The Respondents Meet the Pitt v. Holt Test for Rescission*

[74] Rescission requires an inquiry that is focused on the specific facts of the case in question. Every minor fact can make a difference, and the decision is highly discretionary. The chambers judge, relying on the reasons of Newbury J.A. in *Pallen*, applied the proper test and weighed all of the relevant factors.

[75] The chambers judge noted that, in *Pallen*, the facts the Court of Appeal had had before it when it upheld the order for rescission were substantially analogous to the facts of this case. In *Pallen*, the Court of Appeal had held that "the existence of [a] 'common general understanding' regarding the operation of s. 75(2)" took the case "into the zone of unfairness" (para. 56). In the present case, the chambers judge held that *Pallen* was analogous and binding, making the following findings of fact at para. 56:

a) The purposes of the plans were substantially the same;

b) The material steps in the various plans were virtually identical;

c) The plans were devised by the same accounting firm within approximately ten months of each other;

d) There was a risk of GAAR applying to all of the plans and the accounting firm MNP advised of this risk;

e) All matters concern the 2008 tax year (although the matters [here] also concern the 2009 tax year);

f) The tax environment was the same (i.e. there was a general understanding, including by CRA, that s. 75(2) of the *ITA* applied to a sale of shares to a trust at fair market value);

g) The effectiveness of the plans depended on the application of s. 75(2) of the *ITA* to deem the dividend income as being received by the holding company;

h) The *Sommerer* decision thwarted all of the plans;

i) All of the trusts were re-assessed after the *Sommerer* decision and by the same auditor; and

j) The reason for the reassessments was the *Sommerer* decision.

[76] In both *Pallen* and the case at bar, the lower courts reasoned that the injustice stemmed from the CRA's change of position on the interpretation of s. 75(2) after *Sommerer* was released. I agree with their reasoning. As in *Pallen*, what takes this case into the zone of unfairness is the CRA's retroactive application of s. 75(2). At the time of the transaction, the taxpayer's understanding was that the attribution rules of s. 75(2) applied as long as the trust held the property. This view was shared by the CRA and by tax professionals.

[77] It was only after the Tax Court had rendered its decision in *Sommerer* in April 2011, but before the Federal Court of Appeal had upheld the decision, that the CRA first notified the respondents that their 2008 to 2010 tax returns were under review. And it was while arguing in the Federal Court of Appeal in *Sommerer* that the trial judge had erred in law that the CRA first proposed to reassess the trusts at issue

here and to include the dividends as income. The CRA's position was: first, the application of s. 75(2) did not preclude an equivalent inclusion of the dividends in the trusts' income by operation of s. 12(1)(j); second, if the CRA's position on s. 75(2) was wrong and the decision in *Sommerer* was upheld, then s. 75(2) would not apply; and third, in the alternative, the GAAR should apply (C.A. reasons, at para. 14; see also A.R., vol. I, at pp. 176-77).

[78] In December 2012, after the Federal Court of Appeal had upheld the Tax Court's decision in *Sommerer*, the CRA notified the respondents that, in light of that ruling, the dividends had to be included in their income. The CRA finalized its audit in January 2016 and issued notices of reassessment in March 2016.

[79] With respect, my colleague misapprehends what takes this case into the zone of unfairness. He explains that the Minister was *bound* to apply Parliament's direction in the *ITA* as interpreted by a court of law (para. 26). As a result, it forecloses, he says, the respondents' submissions on unfairness. While I agree that s. 220(1) of the *ITA* imposes upon the Minister a *duty* to "administer and enforce" the *ITA*, I cannot agree that that s. 220(1) of the *ITA* is dispositive of the issue of unfairness.

[80] In my view, what takes this case into the zone of unfairness is not the application of the law, but rather the CRA's *discretionary* decision to reassess the taxpayers based on a retroactive approach to s. 75(2). Unfairness results when the CRA reverses a long-standing interpretation and then seeks to reassess a taxpayer retroactively. To be clear, I wish to emphasize that, while arguing in the Federal Court

of Appeal that the trial judge in *Sommerer* had erred in law in his interpretation of s. 75(2), the CRA was seeking to reassess the taxpayers in this case by applying the same legal interpretation it was simultaneously arguing to be incorrect. This unfairness allows equity to intervene.

(1) Neither Policy Reasons Nor Assumption of Risk Bars Rescission in This Case

(a) *The Respondents' Plan Was Not an Abusive Tax Avoidance Scheme*

[81] The appellant submits that the chambers judge erred in exercising his discretion by failing to consider that the transactions at issue would have constituted abusive tax avoidance but for the mistake. The appellant relies on *Fiducie Financière Satoma v. The Queen*, 2018 FCA 74, 2018 D.T.C. 5052, in which the Federal Court of Appeal deemed a similar scheme to constitute abusive tax avoidance. In *Satoma*, the Federal Court of Appeal concluded that a scheme involving the combined use of ss. 75(2) and 112(1) of the *ITA* (as in the case at bar) constituted abusive tax avoidance under the GAAR. Under the scheme in question, money was gifted to a trust and used by the trust to purchase shares, and the related dividends were attributed to the donor corporation pursuant to s. 75(2). The donor corporation used the attributed funds to donate surplus capital to the dividend paying corporation, reported the dividend income, and claimed an intercorporate dividend deduction in the same amount under s. 112(1), so that no taxes were paid on the issued dividends. The scheme complied with the *ITA* because the shares were substituted property for the gifted property, but

the Minister considered the result abusive. The plan had the dual purpose of (1) transferring funds held by the corporation to the trust to finance the operations of related companies and (2) shielding the funds in question from potential lawsuits directed against those related companies.

[82] My understanding is that the appellant is suggesting that the result reached in *Satoma* should also have been reached in this case. In other words, the scheme in the present case should have been found to constitute abusive tax avoidance, which would be a significant factor of the "in-the-round" test.

[83] Although there are some similarities between this case and *Satoma*, the courts below were right to distinguish that case. The chambers judge stated that there are two important distinctions between *Satoma* and the present case: (1) in *Satoma*, the taxpayer's reassessments were based solely upon the GAAR; and (2) the purposes of the transactions are different. I find no error in this regard in the chambers judge's reasons.

[84] In *Satoma*, the Associate Chief Justice of the Tax Court had found that the primary purpose of the transaction was to avoid payment of any tax (chambers judge's reasons, at paras. 66 and 70). As well, the taxpayer had conceded that "a series of transactions was conducted for the purpose of obtaining a tax benefit" and that this therefore constituted "an avoidance transaction within the meaning of subsection 245(3) of the ITA" (*Fiducie Financière Satoma v. The Queen*, 2017 TCC 84, 2018 D.T.C. 1031, at para. 76). The respondents in the case at bar make no such

concession. On the contrary, the chambers judge in this case concluded that the "evidence before [him] does not establish that the primary goal of the petitioners was to avoid payment of any tax. Rather, the evidence before [him] establishes that the purpose was to shield assets from creditors and to do so in a manner that did not attract tax liability, <u>with both aspects having equal importance</u>" (para. 71 (emphasis added)). This finding is unassailable, as it is based on the parties' agreed statement of facts (A.R., vol. I, at p. 98).

[85] The appellant submits that the purpose of asset protection could have been attained solely by means of a holding company and that there was no need to create the trusts to protect assets, adding that, "[i]f the chambers judge had examined each transaction in the [p]lan in isolation, he would have found that the following transactions had only a tax avoidance purpose and no asset protection purpose" (A.F., at para. 121 (emphasis deleted)). However, "[t]he purpose of a transaction is relevant mainly to characterize it as either an avoidance transaction or a *bona fide* transaction and, specifically, to assess the abusive nature of the transaction" (*Alta Energy Luxembourg*, at para. 47). The chambers judge concluded that there was a *bona fide* purpose for undertaking each of the transactions, namely asset protection. This was part of the analysis of the facts and is owed great deference by an appellate court.

[86] As in *Pallen*, the facts of this case are unusual and, in my view, did not involve aggressive tax planning. Weighed against all other considerations, the reorganization plan was not "aggressive" at the time it was undertaken, because the

CRA was unlikely to have contested the respondents' position prior to the decision in *Sommerer*.

(b) *Assumption of Risks*

[87] While it may be risky to base an entire tax scheme on a provision that has yet to be interpreted by the courts, the chambers judge held that the respondents had never assumed the risk of a "reversal" by the CRA of its interpretation of s. 75(2) (paras. 47-48). Deference is owed to the chambers judge's conclusion on this point.

[88] I agree with the appellant that taxpayers and their advisors bargain to allocate risks of mistake and errors. But I do not agree that a taxpayer who hires an advisor is clearly aware of the tax risk involved in a transaction and should accordingly bear all the consequences — however remote or unforeseeable — that ensue. That would put a careless taxpayer who did not retain professional advice in a better position than one who did. In *Pitt v. Holt*, Lord Walker expressed the contrary view that if a taxpayer undertakes a plan without tax advice then a court might find that the taxpayer assumed the risk of the plan being mistaken and, therefore, cannot argue mistake.

[89] The appellant also argues that the respondents assumed the risks by not asking for an advance tax ruling. In my view, the advance ruling is a red herring. The most likely reason that MNP LLP ("MNP"), the respondents' advisor, did not apply for such a ruling is that the CRA's position on s. 75(2) was more than clear. The CRA's interpretation of s. 75(2) had been consistent and was undisputed. It is unnecessary to

obtain an advance ruling when the purpose of the scheme depends "on a particular, and widely accepted, interpretation" (chambers judge's reasons, at paras. 2, 46 and 55; *Pallen*, at para. 55). But even if the respondents had asked for an advance ruling, the CRA's advance rulings do not constitute law and are not binding on the courts.

[90] In my opinion, the only risk the respondents assumed was that the GAAR could potentially apply. The risks communicated by MNP in the plan proposals read as follows:

> This proposal is based upon our understanding and interpretation of the existing provisions of the ITA, the ITR [the Income Tax Regulations] and the current administrative practices of the CRA.
>
> . . .
>
> The opinions expressed herein represent our views as Chartered Accountants experienced in income tax matters. None of the opinions are or should be construed to be legal opinions.
>
> It should be noted that no application has been made for an advance tax ruling with respect to this proposal nor is it intended that any application be made. Accordingly, no assurance can be given that the tax (or valuation) considerations discussed herein will not differ from the interpretation of the CRA.
>
> . . .
>
> In preparing this proposal, we have, of course, proposed transactions which are designed to meet with your client's planning objectives while, at the same time, minimizing the income and other tax implications associated with those objectives.
>
> Effective for transactions entered into after September 12, 1988, a broad GAAR can be used to eliminate any form of tax advantage resulting from one transaction or a series of transactions . . .
>
> . . .

> 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 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. [Text in brackets in original.]

(chambers judge's reasons, at paras. 17-18)

[91] MNP specified that the proposal was "based upon the current tax environment" (A.R., vol. I, at p. 124). Although it did say that there was some risk the GAAR might apply, it did not alert the respondents to any risk with respect to s. 75(2). This was because of the CRA's long-standing and well-publicized interpretation of s. 75(2). The respondents were not told and did not assume any risk that that interpretation could be overturned and a new one applied *retroactively*.

[92] The chambers judge ultimately agreed with the chambers judge in *Re Pallen Trust*, 2014 BCSC 305, [2014] 4 C.T.C. 129, at para. 57, and relied on his conclusion:

> 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. <u>While there was an aspect of risk in the Plan, given</u>

> 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; para. 48.]

[93] I agree with the chambers judge. In my opinion, the respondents did not assume the risk that the CRA would retroactively apply a decision that deemed its interpretation bulletins wrong. In fact, as I explained above, the certainty of the understanding on s. 75(2) is precisely what brings this case into the zone of unfairness.

(2) Alternative Remedies

[94] Lastly, there are no alternative remedies that would preclude rescission in this case. The appellant submits that there are two alternative remedies that could be used to address the adverse tax consequences resulting from the mistake: (1) applying to the Minister for a remission of tax under s. 23 of the *Financial Administration Act*, R.S.C. 1985, c. F-11, and (2) taking legal action against the respondents' professional advisor, MNP. However, the proposed alternative remedies are neither practical nor appropriate; both are highly unlikely to succeed. The appellant in fact concedes that this is so, noting that these alternative remedies are "unlikely to assist a taxpayer who makes a tax planning mistake like the mistake in this case" (A.F., at para. 134). Yet the appellant argues that this is irrelevant to the outcome of this appeal. I disagree.

[95] First, a remission order pursuant to s. 23 of the *Financial Administration Act* is an extraordinary remedy to be granted by the Governor in Council in rare

circumstances on the recommendation of the appropriate Minister (*Fink v. Canada (Attorney General)*, 2019 FCA 276, 2019 D.T.C. 5127, at para. 1). As well, "[t]he ability to apply for remission through an Order in Council is restrictive, uncertain, complex and slow" (*5551928 Manitoba Ltd. (Re)*, 2018 BCSC 1482, [2018] 6 C.T.C. 186, at para. 47, aff'd 2019 BCCA 376, 439 D.L.R. (4th) 483, at para. 41).

[96] A taxpayer can mitigate their risk by asking for an advance tax ruling. In its Remission Guide, the CRA explains that incorrect advice on its part may support a positive recommendation for remission (*CRA Remission Guide — A Guide for the Remission of Income Tax, GST/HST, Excise Tax, Excise Duties or FST under the Financial Administration Act*, October 2014 (online); see *Escape Trailer Industries Inc. v. Canada (Attorney General)*, 2020 FCA 54, 86 Admin. L.R. (6th) 1, at paras. 3-4; *Meleca v. Canada (Attorney General)*, 2020 FC 1159, 2021 D.T.C. 5012, at para. 26). Given that the respondents did not ask for an advance ruling and in light of the CRA's position on the trusts, it is highly unlikely that the Minister would recommend a remission of tax. The chambers judge placed the onus on the appellant to establish that an application to the government for remission was a practical alternative, and this onus was not met (C.A. reasons, at para. 86).

[97] I find no error in the chambers judge's reasoning that there was "no evidence whatsoever regarding the procedure or conditions applicable to such a remedy or of the position the CRA is likely to take if such remedy was pursued", and that he was therefore "completely unable to determine if it is a realistic alternative remedy"

(para. 105). Accordingly, the possibility of applying for a remission order under s. 23 does not preclude rescission.

[98] Second, a claim against MNP would not be an adequate remedy. In *Jean Coutu*, the majority of this Court explained that

> 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. [para. 43]

[99] MNP duly advised the respondents about their plan. As Fisher J.A. concluded, MNP's advice was correct at the time it was given. It is thus unlikely that a negligence claim against MNP would have 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" (C.A. reasons, at para. 90).

IV. Disposition

[100] For the foregoing reasons, I would dismiss the appeal.

Appeal allowed with costs throughout.

Solicitor for the appellant: Attorney General of Canada, Vancouver.

Solicitors for the respondents: Dentons Canada, Vancouver.