File Number: 39383

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPLICANT
(Appellant)

AND

COLLINS FAMILY TRUST

RESPONDENT
(Respondent)

- AND -

BETWEEN

THE ATTORNEY GENERAL OF CANADA

APPLICANT
(Appellant)

AND

COCHRAN FAMILY TRUST

RESPONDENT
(Respondent)

MEMORANDUM OF ARGUMENT OF THE APPLICANT

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PART I – STATEMENT OF FACTS

A. Overview

1. The central issue in this case is whether taxpayers can rely on equity to undo transactions because they give rise to unintended or unwanted tax consequences. The answer to this question has critical implications for Canadian tax administration. The British Columbia Court of Appeal allowed equitable rescission to unwind a carefully crafted tax plan because the prevailing interpretation of the law changed after the transactions were entered into and the plan attracted unintended tax consequences. Using rescission in this manner creates uncertainty in the tax system. It runs contrary to this Court's pronouncements that taxpayers should be taxed based on what they actually did, not what they intended to do, and that courts may not modify an instrument merely because its operation generates an unplanned tax liability.[1]

2. The British Columbia Court of Appeal's decision presents a further issue of public importance that this Court has yet to consider: the proper framework for applying equitable rescission in tax-motivated cases. Rescission is a powerful remedy that unwinds transactions and restores parties to their pre-transaction position. While taxpayers and courts dealing with rectification have the benefit of this Court's guidance in *Fairmont* and *Jean Coutu*, the availability of rescission to relieve against tax consequences is unclear. Since *Fairmont* and *Jean Coutu*, some taxpayers facing unanticipated tax consequences have framed their applications in equitable rescission, or in the general inherent jurisdiction of the court, presumably hoping to achieve favourable results by using a different route.[2] In the absence of a clear framework specific to equitable rescission, the various provincial courts have taken inconsistent approaches in these cases.

[1] *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56 ("***Fairmont***") at paras 3, 23-24; *Jean Coutu Group (PJC) Inc v Canada (Attorney General)*, 2016 SCC 55 ("***Jean Coutu***") at paras 40-43.

[2] *Collins Family Trust v Canada (Attorney General)*, 2019 BCSC 1030 ("**BCSC Reasons**") at paras 97, 99 (Tab 2); *Canada Life Insurance Company of Canada v Canada (AG)*, 2018 ONCA 562 ("***CLICC***"), leave to appeal to SCC refused, 2019 CanLII 16454 (SCC); *Harvest Operations Corp v Canada (AG)*, 2017 ABCA 393 ("***Harvest***"); *BC Trust v Canada (Attorney General)*, 2017 BCSC 209 ("***BC Trust***").

3. Appellate courts in Ontario and Alberta (as well as the lower court in this case) have interpreted *Fairmont* and *Jean Coutu* as establishing general principles that apply beyond rectification. They have concluded that the rationale underlying *Fairmont* prevents the court from exercising any equitable jurisdiction to avoid unintended tax consequences.[3] The British Columbia Court of Appeal, on the other hand, declined to follow this Court's guidance.[4] Instead, the British Columbia Court of Appeal applied a legal test for rescission based on the United Kingdom doctrine of mistake, allowing taxpayers to retroactively unwind freely chosen transactions when the *Income Tax Act*[5] proved not to apply to their transactions as expected.[6] This test does not accord with this Court's jurisprudence about equitable relief from tax, and is contrary to fundamental principles of the Canadian tax system.

4. This case represents this Court's first opportunity to consider the divergent case law among the courts in British Columbia, Ontario and Alberta, and to expound upon the proper framework for rescission and its availability in tax cases. Absent such guidance, the inconsistency and uncertainty will continue for both taxpayers and the taxing authority, even in spite of this Court's decisions in *Fairmont* and *Jean Coutu*.

B. Statement of Facts

5. Mr. Collins and Mr. Cochran entered into transactions designed to remove surplus cash from their companies without incurring tax liability. In doing so, they were implementing a well-known tax plan (the "**Plan**") that their tax advisors had recommended and which has since been referred to in several reported cases.[7]

[3] *CLICC* at paras 82 and 93; *Harvest* at para 71-75.
[4] *Collins Family Trust v Canada (Attorney General)*, 2020 BCCA 196 ("**BCCA Reasons**") at paras 45, 48-56 (Tab 5).
[5] RSC 1985, c 1 (5th Supp), as amended ("***Income Tax Act***").
[6] *Re: Pallen Trust*, 2014 BCSC 305 ("***Pallen Trust BCSC***") at para 57, aff'd 2015 BCCA 222 ("***Pallen Trust***") at paras 29-36, 41-50, 55-57.
[7] BCSC Reasons at para 16 (Tab 2); *Fiducie Financière Satoma v Canada*, 2017 TCC 84, aff'd 2018 FCA 74 ("***Satoma***"), leave to appeal to SCC refused, 2019 CanLII 23869 (SCC); *Brent Kern Family Trust v R*, 2013 TCC 327, aff'd 2014 FCA 230; *Pallen Trust BCSC; Pallen Trust*.

6. Central to the Plan was the application of subsection 75(2) of the *Income Tax Act*, which is an anti-avoidance provision designed to prevent income splitting among multiple beneficiaries through the transfer of property to a trust. When it applies, subsection 75(2) reattributes income earned by the trust to another person.[8] The Plan relied on subsection 75(2) so that the dividend income earned by the family trusts of Mr. Cochran and Mr. Collins (the "**Trusts**") would be reattributed to corporations who would escape taxation by claiming a deduction under subsection 112(1) of the *Income Tax Act*. The income would then be available for distribution by the Trusts to beneficiaries on a tax-free basis.

7. At the time the Plan was implemented, the common understanding of subsection 75(2) was that it applied both to property gifted to a trust and transferred at fair market value. Based on this understanding, the Plan technically worked. However, the Canada Revenue Agency had consistently disapproved of this type of plan and considered it abusive tax avoidance.[9]

8. After the Plan was implemented, the Tax Court of Canada released *Sommerer v. Canada*,[10] which departed from the traditional interpretation of subsection 75(2) and held that the subsection does not apply when property is transferred to a trust at fair market value. This nullified the tax advantages of the Plan.

9. Following *Sommerer*, another trust, which had implemented a nearly identical plan, applied to the British Columbia Supreme Court for equitable rescission to undo transactions that had resulted in unplanned tax liability. In *Pallen Trust BCSC*, in the absence of a Canadian framework, the chambers judge adopted and applied the test for equitable rescission of a voluntary disposition from the UK case of *Pitt v. Holt*.[11] The *Pitt* test asks whether "a mistake of sufficient causative gravity was made that would make it unconscionable, unjust or unfair to leave the mistake uncorrected".[12] The chambers judge concluded that rescission was available because the relevant mistake was about the application of subsection 75(2), which was "basic to the transaction", and

[8] *Income Tax Act*, ss 75(2), 112; *Satoma* at para 52.
[9] BCSC Reasons at paras 16, 25-29, 47 (Tab 2).
[10] *Sommerer v Canada*, 2011 TCC 212, aff'd 2012 FCA 207 ("***Sommerer***").
[11] *Pitt v Holt,* [2013] UKSC 26 ("***Pitt***").
[12] *Pallen Trust BCSC* at para. 34.

it would be unjust not to grant relief.[13] The British Columbia Court of Appeal upheld that decision.[14]

10. Subsequent to the decision in *Pallen Trust*, this Court decided *Fairmont* and *Jean Coutu*, and the Tax Court and Federal Court of Appeal decided *Satoma*. At issue in *Satoma* was a near identical tax plan, which like the present case, relied on the combined use of subsection 75(2) and 112(1) to obtain dividends tax-free. The Tax Court and Federal Court of Appeal found that the plan, which used an anti-avoidance provision in order to achieve a tax avoidance result, constituted abusive tax avoidance under the General Anti-Avoidance Rule.[15]

11. The Canada Revenue Agency reassessed the Trusts in March 2016 to include dividends paid to the Trusts in income. The Trusts subsequently applied to rescind the Plan transactions based on mistake. The Attorney General of Canada ("**Canada**") opposed the application for rescission, relying on *Fairmont* and *Jean Coutu*, and on the decisions in *Satoma* before the Tax Court and Federal Court of Appeal, all of which were decided subsequent to *Pallen Trust*.

1. The Decision of the Chambers Judge

12. The chambers judge determined that *Pallen Trust* had been seriously undermined by developments in the law, particularly by *Fairmont* and *Jean Coutu*, as well as by other lower court decisions.[16] He found that the petitions infringed the general principles set out in *Fairmont* and *Jean Coutu*; namely, that is it not inequitable, unconscionable or unjust to tax people based on what they actually did rather than what they intended to achieve, and that a court may not modify an instrument merely because its operation generates an adverse or unplanned tax liability.[17] The chambers judge also questioned why rectification and rescission, which are both equitable remedies, should have dramatically different results.[18] He concluded that, while the taxpayers had

[13] *Pallen Trust BCSC* at para 57.
[14] *Pallen Trust* at paras 29-40.
[15] *Satoma* at para 52; *Lipson v Canada*, 2009 SCC 1 at para 42.
[16] See *CLICC, Harvest, BC Trust*.
[17] *Pallen Trust BCSC* at para 93; *Pallen Trust* at para 49.
[18] BCSC Reasons at para 97 (Tab 2).

framed their petitions in rescission, they were attempting to do exactly what this Court has said is not permissible.[19]

13. Despite these views, the chambers judge concluded that he was still bound to follow *Pallen Trust* since it had not been expressly overruled.[20] In granting rescission, the chambers judge also dismissed Canada's submissions that the aggressive tax avoidance nature of the Plan, which had then been confirmed by the Federal Court of Appeal in *Satoma*, justified a departure from *Pallen Trust*, and that available alternative remedies precluded equitable relief.[21]

2. The Decision of the British Columbia Court of Appeal

14. The British Columbia Court of Appeal dismissed Canada's appeal, concluding that *Pallen Trust* remains a binding precedent and is not undermined by *Fairmont* or *Jean Coutu*.[22]

15. In contrast to the decisions of the Alberta and Ontario Courts of Appeal in *Harvest* and *CLICC*, the British Columbia Court of Appeal interpreted this Court's decisions in *Fairmont* and *Jean Coutu* as not laying down general principles governing equitable relief in taxation cases.[23] The Court distinguished *CLICC* and *Harvest* on the basis that neither case analyzed *Fairmont* in the context of a proper claim for rescission.[24] The Court concluded that different equitable remedies can have different results, and that rescission remains available if all the conditions for it are met, even if a tax advantage is achieved.[25]

16. In dismissing the appeal, the British Columbia Court of Appeal relied on the *Pitt* test. The Court described the *Pitt* test as requiring 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."[26] While the British Columbia Court of Appeal placed

[19] BCSC Reasons at paras 97, 99 (Tab 2).
[20] BCSC Reasons at para 10 (Tab 2).
[21] BCSC Reasons at paras 65-72, 101-105 (Tab 2).
[22] BCCA Reasons at para 45 (Tab 5).
[23] BCCA Reasons at paras 48-54 (Tab 5).
[24] BCCA Reasons at para 62 (Tab 5).
[25] BCCA Reasons at para 55 (Tab 5).
[26] BCCA Reasons at para 25 (Tab 5).

importance on the fact that *Fairmont* did not specifically address the test set out in *Pitt* and applied in *Pallen Trust*,[27] it did not consider whether the *Pitt* test reflected or accorded with principles established by this Court, including 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".[28]

17. The British Columbia Court of Appeal also declined to distinguish this case from *Pallen Trust* in light of *Satoma* and it upheld the decision of the chambers judge on the question of alternative remedies.

PART II – QUESTION IN ISSUE

18. The issue is whether the proposed appeal raises one or more matters of public importance such that this Court should grant leave to appeal.

19. The proposed appeal raises issues of public importance, namely the proper framework for rescission in Canada in tax cases and whether taxpayers can avail themselves of equitable rescission solely to escape unanticipated tax consequences.

PART III – ARGUMENT

A. This Court's guidance on the availability of the equitable remedy of rescission in tax-motivated cases is needed

1. Rescission is a powerful remedy and its availability in tax-motivated cases has yet to be considered by this Court

20. The availability of rescission in tax cases is an issue of public importance. Rescission is an equitable remedy that permits a transaction to be set aside and the parties to be restored to their pre-transaction positions. In some ways, rescission is a more powerful remedy than rectification in the tax context. Whereas rectification binds taxpayers to an alternate transaction based on their prior intention, rescission gives taxpayers a complete reset and the opportunity to design a new

[27] *Pallen Trust* at para 55.
[28] *Fairmont* at para 24; *CLICC* at paras 66-67.

transaction. As rectification cannot be used as a means of retroactive tax planning, neither should the more powerful remedy of rescission.

21. The UK courts have considered equitable rescission in the tax context on several occasions. While equitable rescission was not historically available for mistakes of law, in *Gibbon v. Mitchell,*[29] the UK Chancery Division held that rescission was available for a mistake of law so long as the mistake related to the effect or legal nature of a transaction, and not merely to its consequences or to the advantages to be gained by entering into it. In *Pitt*, the UK Supreme Court rejected this distinction between effects and consequences in favour of a broader test of unconscionableness. The court held that a voluntary disposition may be rescinded for any type of mistake so long as the mistake is basic to the transaction and the consequences of the mistake are sufficiently grave such that it would be unjust to leave the mistake uncorrected.

22. There is very little Canadian jurisprudence on equitable rescission in a tax context. Of the cases that do consider rescission in the tax context, some courts earlier adopted the *Gibbon* distinction,[30] while more recently the courts in British Columbia have adopted the *Pitt* test.[31] This proposed appeal represents the first opportunity for this Court to consider the divergent case law from across the country and to pronounce on the proper framework for rescission.

2. <u>The decision of the British Columbia Court of Appeal ignores this Court's principles and leads to doctrinal inconsistency between equitable remedies</u>

23. If this British Columbia Court of Appeal decision stands, then in some provinces the law of equity will permit retroactive tax planning by allowing taxpayers to unwind tax plans if they are based on incorrect interpretations of the law, while in other provinces it will not. This decision is incompatible with principles consistently outlined in this Court's prior decisions, which rejected effecting retroactive tax planning through equity, and which emphasized that taxpayers are taxed

[29] *Gibbon v Mitchell*, [1990] 1 WLR 1304 (Ch D) ("***Gibbon***").
[30] See *Stone's Jewellery v Arora*, 2009 ABQB 656; *771225 Ontario Inc v Bramco Holdings Co Ltd*, 1995 CanLII 745 (ON CA) (*"**Bramco**"*). Note: both of these cases pre-dated *Pitt*. See also *Jaft Corp v Jones*, 2014 MBQB 59 ("***Jaft***") at para 44.
[31] See *Pallen Trust BCSC* at paras 34-43; *Pallen Trust* at paras 29-40; BCCA Reasons at para 55 (Tab 5).

based on transactions actually undertaken, not based on their intentions and expectations.[32] These are fundamental principles of the *Income Tax Act* and the Canadian tax system. Applying equitable remedies without due regard for these principles creates uncertainty and inconsistency in the application of the *Income Tax Act.*

24. The decision of the British Columbia Court of Appeal also leads to doctrinal inconsistencies between rectification and rescission in the tax context. While rectification is not available to retroactively alter a transaction to achieve an intended tax objective, taxpayers in British Columbia can instead turn to rescission to fix their tax planning errors. Based on this Court's decisions in *Fairmont* and *Jean Coutu,* retroactive tax planning should be impermissible by any means.

25. There is no principled reason why rescission should be available for the sole purpose of avoiding unwanted tax consequences, when rectification is not. Rescission and rectification are both equitable remedies. This Court has confirmed that it is not unconscionable or unjust for a taxpayer to be taxed based on what was done, and that being mistaken about a tax outcome is not an injustice that warrants equity.[33] In this case, the taxpayers voluntarily and intentionally undertook each transaction in the Plan, and were not mistaken about the legal effects of their transactions. However, the transactions failed to yield the surplus tax stripping benefits that the taxpayers wanted because the law applied differently than expected. Equitable remedies cannot be used to cure tax consequences just because a taxpayer argues that the taxing statutes are unfair, or because a tax liability was not intended or expected.

26. There is also no principled reason why a subsequent change in the interpretation of the law should prompt equitable relief. In our self-assessing tax system, taxpayers bear the risk of a change in legal interpretation, particularly when undertaking aggressive tax avoidance transactions. Equitable relief from such changes relieves taxpayers of that risk and transfers it to the public treasury. This Court expressly disagreed with that outcome in *Jean Coutu.*[34] Further, this reasoning extends beyond tax. Legal certainty and the stability of transactions would be

[32] See *Bronfman Trust v The Queen,* [1987] 1 SCR 32 at para 58; *Shell Canada Ltd v Canada,* [1999] 3 SCR 622 ("***Shell***") at para 45; *Fairmont* at para 23; *Jean Coutu* at paras 40-43.
[33] *Fairmont* at para 24.
[34] *Jean Coutu* at paras 41-43.

undermined if parties were entitled to go back and rescind legal documents and transactions each time a legal interpretation changed.

27. The decision may drive a trend toward taxpayers grounding their case in rescission instead of rectification, and lead to an increase in tax-driven rescission cases, as was arguably seen in the UK in the aftermath of *Pitt*,[35] and as was seen for rectification in Canada following *Juliar v. Canada*.[36] By opening up rescission as a post-*Fairmont* alternative to fix tax planning errors, the decision allows taxpayers to achieve similar results by a different route. Several commentators have already suggested that rescission is the "next frontier"[37] and may supplant rectification in tax cases.[38]

[35] In the aftermath of *Pitt*, UK commentators have noted an increase of cases pleading equitable mistake, and that, seemingly without exception, the claimants have been able to persuade the courts that their mistakes about tax consequences were sufficiently serious to ground rescission: see Paul S. Davies and Simon Douglas, "Tax Mistakes Post-Pitt v Holt" (2018) 32 TLI 3; Tom Graham "Pitted Against Each Other? Mistaken Transactions in Unjust Enrichment and Equity" (2019) Plymouth Law & Criminal Justice Rev 11 at 58-72. A search of Canadian legal research databases shows seven equitable rescission cases in the UK post-*Pitt*, and rescission was granted in all seven cases: *Rogge & Anor v Rogge & Ors*, [2019] EWHC 1949 (Ch); *Van der Merwe v Goldman and another*, [2016] EWHC 790 (Ch); *Freedman v Freedman and others*, [2015] EWHC 1457 (Ch); *Lobler v Revenue and Customs Commissioners*, [2015] UKUT 152 (TCC); *Kennedy and others v Kennedy and others*, [2014] EWHC 4129 (Ch); *Payne & Anor v Tyler & Anor*, [2019] EWHC 2347 (Ch); *Wright v National Westminster Bank Plc*, [2014] EWHC 3158 (Ch).

[36] *Juliar v Canada*, 2000 CanLII 16883 (ON CA), aff'g 1999 CanLII 15097 (ON SC), leave to appeal to SCC refused (2001), [2000] SCCA No 621 (WL).

[37] John J. Tobin "The Law of Unintended Tax Consequences" (19 July 2017) Torys LLP online: <https://www.torys.com/insights/publications/2017/07/the-law-of-unintended-tax-consequences#>

[38] Marshall Haughey and Wade Ritchie, "Correcting Tax Mistakes: Will Rescission Supplant Rectification?" (August 2019) 9:3 *Canadian Tax Focus*, online: <https://www.ctf.ca/ctfweb/EN/Newsletters/Canadian_Tax_Focus/2019/3/190306.aspx>; Marshall Haughey and Wade Ritchie, "Rescission Reborn-the BC Court of Appeal's Decision in Collins Family Trust" (July 2020) Bennett Jones on Tax Disputes; Rami Pandher, "Rectification is Back-Is Rescission Next?" (January 2020) 20:1 Tax for the Owner-Manager.

B. The law of rescission is applied inconsistently in tax cases across the country

1. The appellate courts are inconsistently interpreting and applying the principles set out in *Fairmont* and *Jean Coutu*

28. The post-*Fairmont* case law shows that guidance from this Court is needed on rescission. Provincial appellate courts have taken divergent views on the proper interpretation and application of *Fairmont* and *Jean Coutu* beyond rectification. The British Columbia Court of Appeal has taken a liberal approach to equitable relief in taxation cases, while the Alberta and Ontario courts have taken a stricter approach. A consistent national approach on this issue is necessary for the effective administration of the *Income Tax Act*. Absent a decision from this Court, there will continue to be a lack of clarity and consistency about the availability of rescission in tax-driven cases.

29. Taxation depends upon consistency and finality.[39] Under the *Income Tax Act,* tax consequences flow from the legal relationships formed and transactions entered into by taxpayers.[40] The particular legal relationships formed and transactions entered into are determined by the terms of an "agreement". The tax consequences of a transaction, or series of transactions, are not terms of an agreement. Rather, they are the legislated consequence of the application of the provisions of the *Income Tax Act* to the parties' private legal relationships. Where parties draft an agreement based on a particular understanding of tax legislation, and the law is subsequently clarified by the court, that subsequent clarification does not change the parties' original intention as to the terms of their agreement. Certainty in commercial transactions and certainty in taxation require that the parties be taxed in accordance with their chosen transactions.

30. *Fairmont* and *Jean Coutu* dealt with the intersection of equity and taxation. This Court held that rectification does not apply to correct unintended tax consequences, and is limited to cases where an agreement is not properly recorded. This Court confirmed that a taxpayer should expect to be taxed based on what was actually done, not what could have been done, and that rectification cannot be granted solely to avoid an unanticipated tax liability.[41] While those decisions settled the

[39] *Bramco* at para 13.
[40] *Jean Coutu* at para 41; *Shell* at para 39.
[41] *Fairmont* at paras 3,19, 23-24; *Jean Coutu* at paras 41-43.

law for rectification, confusion remains as to the availability of other equitable remedies in tax-driven cases.

31. The Alberta and Ontario Courts of Appeal, as well as the British Columbia Supreme Court, have all interpreted this Court's pronouncements in *Fairmont* and *Jean Coutu* as establishing general principles applicable to all forms of equitable relief sought in tax-driven cases:

a. Pre-dating *Fairmont*, in *CLICC*, the lower court granted the application for rectification. On appeal, post-*Fairmont*, the parties agreed that rectification was not available because the test was not met. The applicant instead sought relief based on the Court's inherent equitable jurisdiction and on equitable rescission. The applicant relied on *Pallen Trust* as authority for the proposition that voluntary transactions may be rescinded, even when the objective is to avoid unintended tax consequences.[42] The Ontario Court of Appeal held that it is impermissible to use equity to rewrite history in respect of a tax-driven transaction in order to reverse the factual basis of the tax assessment and defeat the tax liability.[43]

b. In *Harvest*, the applicant applied for rectification and alternatively relied on the Court's general equitable jurisdiction to relieve against mistakes. After concluding that rectification was not available, the Alberta Court of Appeal held that it could not exercise a general equitable jurisdiction to provide relief without ignoring the precedential value of *Fairmont*.[44]

c. In *BC Trust*, the applicant trustee requested relief from a failure to allocate income either through rectification or the court's inherent jurisdiction. The British Columbia Supreme Court dismissed the application after observing that the trustee had decided not to allocate the trust's income and now wished to take a different course of action as a result of hindsight. The Court found that the trust was attempting to invoke the court's equitable jurisdiction to "give them a mulligan".[45]

[42] *CLICC* at para 83.
[43] *CLICC* at paras 68-74.
[44] *Harvest* at paras 70-71, 75.
[45] *BC Trust* at para 31.

d. The chambers judge in this case concluded that the petitions before him infringed the general principles that this Court had set down in *Fairmont* and *Jean Coutu* and that, by framing their petitions in rescission, the taxpayers were, in essence, attempting to do indirectly what they are not permitted to do directly.

32. The British Columbia Court of Appeal, on the other hand, held that rectification and rescission are based upon different principles. The Court distinguished *Fairmont* and *Jean Coutu* as strictly rectification cases that have no application to rescission. The Court reasoned that rescission and rectification serve different purposes and have different effects, including that rectification places the parties in the position they originally intended, while rescission undoes a transaction and places the parties back in their original position.[46] The British Columbia Court of Appeal held that rescission is available if all of the "conditions" for granting rescission are met (i.e. if the *Pitt* test is met), even if the sole purpose for seeking rescission is to avoid unintended or unwanted tax consequences.[47] The British Columbia Court of Appeal failed to consider whether these conditions are compatible with Canadian law relating to equitable relief in tax cases.

33. The British Columbia Court of Appeal's attempt to distinguish this case from *CLICC* and *Harvest*, because rescission was not the primary relief sought in those cases, is a distinction without merit. On appeal, both *CLICC* and *Harvest* sought equitable remedies other than rectification and the courts considered whether these equitable remedies were available in the circumstances. In each case, the courts declined to provide any form of equitable relief. In particular, the Ontario Court of Appeal clearly set out its view in *CLICC* that this Court has signalled that retroactive tax planning through the Superior Court's equitable jurisdiction is impermissible, and that *Fairmont* and *Jean Coutu* prevents taxpayers from using equity to avoid unintended tax consequences.[48]

[46] BCCA Reasons at para 56 (Tab 5).
[47] BCCA Reasons at paras 54-55 (Tab 5).
[48] *CLICC* at paras 42-43, 46.

2. Appellate courts have different views on the effect of adequate alternative remedies

34. The various appellate courts have also taken divergent positions on whether the existence of adequate alternative remedies precludes the granting of equitable relief.

35. In *CLICC*, the Ontario Court of Appeal relied on the principle that a court should not exercise its equitable jurisdiction when adequate alternative remedies are available.[49] The Ontario appellate court further concluded that the question is not whether the taxpayers will necessarily be successful in pursuing such alternative relief, but whether there is a remedy at law.[50] The decision in *CLICC* is consistent with the previous decision in *Bramco*, which held that the existence of an alternative remedy was a bar to the exercise of equitable jurisdiction, even when the taxpayer had been unsuccessful in its attempt to obtain such relief.[51]

36. The British Columbia Court of Appeal decision cannot be reconciled with the Ontario Court of Appeal's jurisprudence. The Court found that seeking a remission order or suing one's advisors were not adequate alternative remedies and concluded that equity would not force an alternative that was not practical or certain, and which may exceed the cost of "the penalty Canada seeks to impose".[52] However, those same alternative remedies were available in *CLICC* and in that case the Ontario Court of Appeal declined to grant relief in light of the available alternative remedies, among other reasons.[53] The Ontario Court of Appeal did not equate the availability of the remedy with the likelihood of obtaining relief. The Ontario Court of Appeal decision is consistent with this Court's statements in *Jean Coutu* that a claim against advisors is the appropriate avenue to recoup losses when taxpayers agree to certain transactions and later claim that their advisors mistakenly failed to properly advise them that the transactions would produce unintended tax consequences.[54]

[49] *CLICC* at paras 91-92; See also *Bramco* at para 4-8, *Graymar Equipment (2008) Inc v Canada (Attorney General)*, 2014 ABQB 154 at para 30; *JAFT* at paras 44-48.
[50] *CLICC* at para 92.
[51] *Bramco* at paras 4-8.
[52] *BCCA Reasons* at para 85 [Tab 5].
[53] *CLICC* at para 92.
[54] *Jean Coutu* at para 43.

37. This Court's guidance is necessary to establish a consistent approach in Canada. There is no principled reason why taxpayers in British Columbia should be allowed to avail themselves of equitable remedies to unwind their tax-driven plans, when taxpayers in Ontario are not. Consistency is important in the tax context given that the same federal legislation applies throughout the country.[55]

C. It is a matter of public importance that the framework for rescission aligns with Canadian principles of equity and taxation

38. The threshold for rescission adopted by the British Columbia Court of Appeal has serious implications for the application and administration of the *Income Tax Act*. It could result in numerous additional requests for rescission, with attendant uncertainty and additional costs flowing from a multiple-phased administration: an initial assessment of tax based on what actually happened, a complete reversal of that assessment after rescission is used to retroactively unwind the transactions, and then a new assessment once a taxpayer undertakes new transactions designed with the benefit of hindsight.

39. Without this Court's clarification, the low standard for rescission set by *Pitt* and adopted by the British Columbia Court of Appeal may permeate case law nationally. In this case, the Court granted relief to taxpayers who wanted to unwind their transactions solely to avoid tax consequences, and only after they learned that their tax plan had failed. Equitable remedies, whether in the form of rectification or rescission, should not be used for this purpose since there is nothing inequitable about a taxpayer being taxed based on what that person actually did.

40. The British Columbia Court of Appeal's decision provides this Court with an opportunity to clarify this area of the law, and to consider the proper test for rescission and its availability in tax-driven cases. The *Pitt* test was developed without consideration of the evolution of tax law jurisprudence in Canada. It also fails to clearly delineate the kinds of mistakes giving rise to rescission and provides an unsatisfactory rationale for focussing instead on the seriousness of the consequences of the mistake.[56] The test for rescission in tax-motivated cases should:

[55] *Jean Coutu* at para 5.
[56] *Pitt* at paras 122, 123, 128.

a. distinguish between a mistake as to the effect or legal nature of a transaction or as to an existing fact which is basic to the transaction, and a mistake as to its consequences (including tax) or advantages to be gained by entering into it. Rescission may be available for the former, but not the latter. This allows rescission to be used to remedy unfairness where, for instance, the transaction recorded is not what the parties agreed to do, or the transaction the parties completed is not what they believed they were doing, but it is not available to re-write history when the transaction fails to produce the intended benefits;

b. propose a proper framework for refusing equitable relief on grounds of public policy, such as when the transactions involve aggressive tax avoidance. An applicant who does not come to equity with "clean hands" should not be entitled to relief. Equity should never be used as an insurance policy, particulary when aggressive tax avoidance transactions are later discovered by tax authorities and found to be fiscally ineffective or an abuse of the provisions of the *Income Tax Act* under the General Anti-Avoidance Rule; and

c. consider whether an adequate alternative remedy exists at law. The question on this point must be whether the legislator has occupied the field by creating a remedy broad enough in scope to relieve from the mistake, not whether the applicant would be successful in pursuing the remedy. If the legal remedy could relieve from the mistake and make the petitioner whole, then it is adequate and equity should not intervene. Equity is a remedy of last resort.

41. This proposed framework is in harmony with the principles of equity and taxation pronounced on by this Court in cases such as *Fairmont* and *Jean Coutu*, and with the approach followed by Canadian courts that considered rescission in the tax context prior to *Pitt*. Under the proposed framework, and consistent with the principles underlying rectification, equity would allow mistakes about the effect or legal nature of a transaction or an existing fact which is basic to the transaction to be corrected, while ensuring that tax liability continues to flow from legal relationships freely entered into by the taxpayer. Such a framework would promote both certainty in commercial transactions as well as certainty in taxation.

42. This Court's guidance on the availability of equitable rescission to escape adverse tax or other regulatory consequences of transactions will ensure consistency in the application of the law in the common law provinces, and enhance the effective administration of the Canadian tax system. Leave to appeal should be granted.

PART IV – COSTS

43. There is no reason why costs should not follow the cause in this matter.

PART V – ORDER SOUGHT

44. The applicant requests that this application for leave to appeal from the judgment of the British Columbia Court of Appeal should be granted with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, the Province of British Columbia, this 10th day of November, 2020.

Christa Akey and Geraldine Chen

Counsel for the Applicant

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