S.C.C. File No.: 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)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF THE RESPONDENTS, COLLINS FAMILY TRUST AND COCHRAN FAMILY TRUST

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. In 2008, the national accounting firm of MNP LLP ("MNP") advised Todd Collins ("Collins")[1] to have his business corporation pay dividends to a trust (the "Collins Trust") and then have the Collins Trust lend the money back to the corporation. The BC Supreme Court ("BCSC") found that "the purpose of the plans was to protect assets from creditors without incurring income tax liability on the dividends paid under the plans" and that "the asset protection and tax liability aspects were of equal importance"[2]. On the basis of a "common general understanding as to the operation of s. 75(2) [of the *Income Tax Act*[3]] by income tax professionals and the CRA [Canada Revenue Agency]"[4], MNP gave Collins the opinion that s. 75(2) would apply so that the Collins Trust would not be taxable on those dividends.

2. In 2011, the Tax Court of Canada ("TCC"), in a different case (*Sommerer*[5]) held that this common, general understanding of s. 75(2) was incorrect, so that s. 75(2) would not apply to trusts such as the Collins Trust. The CRA then reassessed the Collins Trust for tax on the dividends. The Collins Trust applied to the BCSC to rescind the dividends, based on equitable rescission for mistake. The BCSC exercised its discretion and granted rescission. The BC Court of Appeal ("BCCA") held that there was no basis to interfere with that discretionary decision[6].

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1 This Response refers only to *Collins* but applies equally to *Cochrane*.
2 *Collins Family Trust v. Canada (Attorney General)*, 2019 BCSC 1030, paragraph 14, Applicant's Record, p. 9.
3 R.S.C. 1985, c. 1 (5th Supp.), as amended.
4 *Id.*, paragraph 48, Applicant's Record, p. 23.
5 *Sommerer v. The Queen*, 2011 TCC 212, aff'd 2012 FCA 207.
6 *Collins Family Trust v. Canada (Attorney General)*, 2020 BCCA 196, Applicant's Record, p. 51.

3. The CRA seeks leave to appeal the BCCA's decision. In doing so, it submits that that decision conflicts with this Court's decision in *Fairmont*[7]. Further, the CRA invites this Court to fashion a new rescission rule that would apply only in a tax context. There are six reasons, each discussed below under "Part III--Argument", why this Court should not grant leave.

4. First, rectification under *Juliar*[8] had deviated from its original roots and had to be restored in *Fairmont*. On the other hand, equitable rescission for mistake is a long-standing remedy. It can be traced back to at least 1681 and has not changed or deviated from its origins. Therefore, unlike *Fairmont*, there is no need for this Court to grant leave here.

5. Second, the CRA submits that the BCCA in *Collins* erred in holding that it was not bound by *Fairmont* to deny rescission. However, *Fairmont* dealt with rectification, not rescission. Moreover, it dealt with rectification in the context of a contract, not a unilateral, gratuitous, transfer such as a dividend. Rectification is about correcting documents, not consequences; equitable rescission is about setting aside transactions to avoid unfair consequences. *Fairmont* did not require the BCCA to deny rescission.

6. Third, in a 2013 unanimous decision of the UK Supreme Court ("UKSC"), *Pitt v. Holt*[9], that Court confirmed that equity permits rescission in a tax context just as it does in

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7 *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56.

8 *Canada (Attorney General) v. Juliar*, 2000 CarswellOnt 3518 (CA).

9 There were two claims originally: *Pitt v. Holt*, [2010] EWHC 45 (Ch) and *Futter v. Futter*, [2010] EWHC 449 (Ch). Both applicants appealed and the appeals were heard concurrently ([2011] EWCA Civ 197) as was the further appeal to the UKSC, *Pitt v. The Commissioners*

a non-tax context. Similarly, *Fairmont* confirmed that rectification applies in a tax context just as it does in a non-tax context. Although *Fairmont* dealt with a different remedy in a different context, the BCSC, as upheld by the BCCA, applied the same test for rescission in a tax context that it would have applied in a non-tax context. This was consistent with this Court's approach in *Fairmont*.

7. Fourth, contrary to the CRA's submission, *Collins* does not conflict with *Canada Life*[10], *Harvest Operations*[11] or *BC Trust*[12], each of which dealt with different facts and/or different remedies.

8. Fifth, the CRA argues that the Collins Trust could have applied to the Governor in Council to remit the tax, under s. 23(2) of the *Financial Administration Act* ("FAA")[13]. The BCSC held that the CRA had not presented any evidence as to how remission would apply in this case. The BCCA affirmed this holding. The BCCA further observed that the Governor in Council will remit tax only when the CRA recommends it and that it was "highly unlikely" that the CRA would recommend remission in this case.

9. Sixth, the facts of this case are unique. Prior to MNP giving its opinion, there had been a longstanding, common, understanding within the tax community and the CRA on

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for Her Majesty's Revenue and Customs, [2013] UKSC 26. The Chancery and Court of Appeal decisions are not included in the Book of Authorities.

10 *Canada Life Insurance Company of Canada v. Canada (Attorney General)*, 2018 ONCA 562.

11 *Harvest Operations Corp. v. Canada (Attorney General)*, 2017 ABCA 393.

12 *BC Trust v. Canada (Attorney General)*, 2017 BCSC 209.

13 R.S.C., 1985, c. F-11.

the correct interpretation of s. 75(2). Then the TCC held that that understanding was incorrect and applied a new interpretation. Rather than applying the new interpretation on a go-forward basis, the CRA applied it retroactively to the Collins Trust. The BCSC in *Collins*, as affirmed by the BCCA, held that it was this unique set of facts that formed the basis for equitable rescission. Such a set of facts is unlikely to occur very often.

10. The CRA's application for leave to appeal should be dismissed.

STATEMENT OF FACTS and DECISIONS OF THE LOWER COURTS

11. Collins owned an operating business corporation ("Rite-Way"). Rite-Way was successful and had cash on hand. In 2008, to protect that cash from possible claims of future creditors, Collins implemented certain steps suggested by MNP. First, he established a new corporation, Engage Holdings Ltd. ("EHL") and the Collins Trust. EHL paid $100 to subscribe for shares of Rite-Way and then sold them for $100 to the Collins Trust. Rite-Way then paid its cash to the Collins Trust as dividends. The Collins Trust then lent the cash back to Rite-Way on a secured basis[14].

12. The BCSC found that the purpose of these steps was to protect Rite-Way's cash from creditors without incurring income tax liability on the dividends and that these two aspects were of equal importance. On the basis of a common, general, undestanding among tax professionals and the CRA on the correct interpretation of s. 75(2), MNP wrote an unqualified opinion that that provision would apply so that the Collins Trust

14 BCSC Reasons, paragraph 15, Applicant's Record, p. 10.

would not be taxable on the dividends[15]. Collins would not have proceeded without that assurance[16].

13. In 2011, the TCC in *Sommerer* held that the common, general interpretation of s. 75(2) was incorrect, so that s. 75(2) would not apply to trusts such as the Collins Trust. In 2012, the Federal Court of Appeal affirmed the TCC's interpretation. The CRA then reassessed the Collins Trust for tax on the Rite-Way dividends, on the basis that s. 75(2) did not apply to those dividends[17]. In light of *Sommerer*, the Collins Trust had no basis on which to appeal the reassessment to the TCC. Nor could the Collins Trust apply to the BCSC to rectify the documents implementing the various steps, because those documents recorded the intended transactions accurately[18]. The Collins Trust applied to the BCSC to rescind the dividends. The BCSC exercised its discretion and granted rescission; the BCCA found that there was no basis to interfere with the BCSC's exercise of its discretion.

PART II – STATEMENT OF QUESTIONS IN ISSUE

14. Does this case raise an issue of public importance?

15 BCSC Reasons, paragraph 16, Applicant's Record, p. 11.
16 *Id.* at paragraph 10, Applicant's Record p. 9.
17 BCSC Reasons, paragraphs 20-22, Applicant's Record, pp. 13-14.
18 The BCSC in *Collins* suggested that the Collins Trust had done an "end-run" around *Fairmont* by applying for rescission rather than rectification. The BCCA in *Collins* corrected that suggestion by noting that the Collins Trust had no basis on which to apply for rectification.

PART III – STATEMENT OF ARGUMENT

15. In exercising its discretion to grant rescission the BCSC, as affirmed by the BCCA, applied the doctrine of equitable rescission for mistake, which goes back to at least 1681[19] and which the UKSC in *Pitt v. Holt* confirmed is applicable in a tax context as much as in a non-tax context. There is no Commonwealth decision that has declined to follow this aspect of *Pitt v. Holt*. In fact, that aspect has been applied in numerous other Commonwealth courts[20], as well as in *Pallen*[21] and *Collins*. The CRA now invites this Court to develop an entirely new equitable doctrine, that would be unique in the

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19 See John Newland, Treatise on Contracts within the Jurisdiction of Courts of Equity (Philadelphia: William P. Farrand and Co., 1808) Chapter XXVIII, 432-433, footnote (d), citing *Gee v. Spencer* (1681), 1 Vern. 32, 23 ER 286 (*Gee* is not included in the Book of Authorities). See especially *Henry v. Armstrong* (1881), 18 Ch. D. 668 (Ch) at 669, followed in *Ogilvie v. Littleboy* (1897), 13 TLR 399 (CA), aff'd *Ogilvie v. Allen*, (1899), 15 TLR 294 (HL), which in turn was followed in *Pitt v. Holt* (*Henry* and the *Ogilvie* decisions are not included in the Book of Authorities).

20 Singapore (*Bok v. Bol*, [2017] SGHC 316 at paragraph 85); Isle of Man (*The Estate Of Gubay v. Gubay*, May 23, 2018 (Ch) at paragraph 40)); Guernsey (*Hereward House Remuneration Trust v. Estera Corporate Trustees (Guernsey) Ltd.*, [2019] GRC 075); Hong Kong (*Wong Chi Ching v. Bocom International Holdings Co Ltd.*, [2018] HKCFI 227 at paragraph 14); Australia (*Ballenden v. Bryant (No 2),* [2013] NSWSC 454 at paragraph 19). In the United States see *Stone v. Stone*, 29 N.W.2d 271 (Mich. SC 1947) where the Court ordered rescission of a trust for a tax mistake on facts almost identical to those in *Collins*. See especially *Representation re Strathmullan Trust*, [2014] JRC 056 where the Court said:

> 23. . . We note also that in *Pitt v Holt* ... HMRC contended that a mistake which related exclusively to tax could not in any circumstances be relieved. . . This submission was rejected by the Supreme Court as being much too wide and unsupported by principle or authority. . . .

21 *Re Pallen Trust*, 2014 BCSC 305, aff'd 2015 BCCA 222 ("*Pallen*").

Commonwealth, to be applied solely in a tax context. This Court should not accept that invitation.

(a) Equitable rescission for mistake is a long-standing remedy that has not deviated from its roots

16. In *Juliar* the Ontario Court of Appeal ("OCA") applied rectification to correct a *transaction*, rather than the *expression* or the *recording* of that transaction in a document. In *Fairmont* this Court held that that was an error; rectification is confined to correcting documents; it does not correct transactions or their consequences.

17. In *Pitt v. Holt*, Mr. Pitt had received damages as compensation for a catastrophic injury. His wife obtained tax advice to invest the money in a trust, but the advice was wrong. When Mr. Pitt died, Mrs. Pitt was faced with a large tax assessment. She applied to the Chancery Division of the High Court of England to rescind the trust settlement on the basis of mistake. The High Court denied that application and its decision was upheld on appeal. On further appeal the UKSC granted the application. The UKSC held, applying *Ogilvie*, that a court has the equitable jurisdiction to rescind a voluntary transaction for mistake if the mistake caused the transaction to occur and was "sufficiently serious" to warrant rescission[22]. Critically, the UKSC affirmed that this test applies equally to tax and non-tax mistakes[23].

22 *Hartogs v. Sequent (Schweiz) AG*, [2019] EWHC 1915 (Ch) at paragraph 17, applying *Pitt v. Holt*.
23 *Ibid*.

18. In *Pallen*, the BCSC exercised its discretion and applied *Pitt v. Holt* to rescind a dividend. The BCCA upheld that decision. The facts in *Pallen* were, except for names and amounts, identical to the facts in *Collins*. The BCSC in *Collins* held that it was bound by *Pallen*. The BCCA in *Collins* held that *Fairmont* had not overruled *Pallen*. There are no Canadian decisions finding that *Pitt v. Holt* should not be applied here.

19. Thus, unlike rectification after *Juliar* and before *Fairmont,* the law of rescission as it stands today has not been broadened beyond its original scope. If anything, the UKSC in *Pitt v. Holt* went the other way, holding that the doctrine of rescission for mistake had been unduly narrowed by previous decisions that had excluded tax mistakes and needed to be expanded back to include them[24].

(b) *Fairmont* dealt with rectification, not rescission, in the context of a contract, not a dividend

20. *Fairmont* dealt with rectification, not rescission. This Court held that rectification permits parties to correct the wording of a document to ensure it reflects accurately the actual terms of the transaction, even if the error arose in a tax context and even if correcting the error has a tax benefit. It held that rectification does not permit the parties to change the underlying transaction so as to achieve their intended tax consequence.

21. The UKSC came to the same conclusion in *Pitt v. Holt*, stating: "Rectification is a closely guarded remedy, strictly limited to some clearly-established disparity between the

24 *Pitt v. Holt*, *supra*, at paragraph 132.

words of a legal document, and the intentions of the parties to it. It is not concerned with consequences" [emphasis added][25].

22. On the other hand *Collins* deals with equitable rescisison for mistake, which holds that, if the consequences of a mistaken transaction are sufficiently serious, then a court may, in its discretion, set the transaction aside and return the parties to their original positions. Rectification and equtable rescission are distinct remedies that have different purposes, results and tests and operate in different contexts. As one author states: "Whilst the test for rescission sets a high threshold, in that it requires a "sufficiently serious" mistake, it also has a much wider scope than rectification, as it is not limited to any particular type of mistake"[26].

23. In *Collins* the BCCA accepted this distinction:

> 56. . .I see no principled reason why different equitable remedies may not have different results, especially since rectification and rescission serve different purposes and have different effects. Rectification is limited to a clearly–established disparity between the words of a legal document and the intentions of the parties, and is not concerned with consequences. Rescission considers consequences to be relevant to the gravity of a mistake. [emphasis added]

24. Moreover, *Fairmont* involved a contract. *Pallen* and *Collins* each concerned a voluntary, unilateral, gratuitous, transfer: the declaration of a dividend. This Court has

25 *Id.* at paragraph 131.

26 Simon Douglas, "Misuse of Rectification in the Law of Trusts" (2018), 134 LQR 138 at 150.

likened dividends to a "gift"[27]. In *Pitt v. Holt*, the UKSC dismissed as "heterodox" the Crown's suggestion that rescission of contracts and rescission of voluntary transactions should be governed by the same principles[28].

25. Accordingly, *Collins* is two steps removed from *Fairmont*: *Fairmont* involved rectification rather than rescission and a contract rather than a dividend. *Fairmont* did not overrule *Pallen* and does not apply to *Collins*. A 2018 article sets out the principle for which *Fairmont* stands and its irrelevance to equitable rescission[29]:

> While some may interpret *Canada Life* and *Harvest Operations* as applying *Fairmont Hotels* beyond rectification to all equitable relief, rescission and rectification are distinct remedies that require separate analysis. The same brush cannot be used to paint all equitable remedies in the tax context. . .It follows that other distinct remedies, such as rescission, remain available following *Fairmont Hotels*. [emphasis added]

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27 *McClurg v. Minister of National Revenue*, [1990] 3 S.C.R. 1020 at paragraph 29.

28 *Pitt v. Holt*, *supra*, at paragraphs 114-115. See *Co-operative Bank plc v. Hayes Freehold Ltd (in liquidation)*, [2017] EWHC 1820 (Ch):

> 130. The rule in *Pitt v Holt* applies to transactions where the defendant has not given consideration for what it has received from the claimant. The law does not bestow the same sanctity on voluntary transactions as it does on contracts and therefore it is possible to rescind a gift on the basis of unilateral mistake in circumstances where it would not be possible to rescind a contract; per Lord Walker in *Pitt v Holt* at [114]. [emphasis added]

29 Jeremie Beitel, Carrie Aiken, Rami Pandher & Britta Graversen, "Current Cases" (2018), 66 Can. Tax J. 919 at 940. See to the same effect Robert A. Neilson and Ashvin R. Singh, "When is the Equitable Remedy of Rescission Available? Implications of the British Columbia Court of Appeal's Decision in *Collins Family Trust*", Tax Litigation (Federated Press), Vol. XXIII, No. 3, 2020, 2.

(c) Rescission applies in a tax context just as it does in a non-tax context

26. The CRA points to certain statements in *Fairmont* that, when read by themselves, appear to create a very broad rule that a court cannot grant equitable relief in a tax context. However, one cannot read those isolated statements without considering *Fairmont*'s context, the facts and the principles at issue. In *Fairmont* this Court was faced with a line of cases, stemming from *Juliar*, that had expanded rectification beyond its original purpose and scope. This Court was at pains to explain why *Juliar* was too broad and why rectification should be brought back to its original scope.

27. In *Collins* the BCCA held that, despite those broad statements in *Fairmont*, the *ratio* of *Fairmont* is this: if the facts meet the test for rectification, then it should be granted, even if that saves the petitioner tax. If the facts do not meet that test, then rectification should not be granted, even if that means the petitioner will pay an unexpected tax[30].

28. The BCCA's understanding of *Fairmont* is correct. In *Fairmont* this Court held that the test for rectification "is to be applied in a tax context just as it is in a non-tax context" [31].

29. In *Collins* the BCSC followed *Pallen* and exercised its discretion to apply equitable rescission for mistake to the Rite-Way dividends, but expressed some hesitation in doing so, on the basis that *Fairmont* may have overruled *Pallen*. The BCCA, with no

30 *Collins* (BCCA) at paragraphs 45, 47, 50, Applicant's Record, pp. 65-67.
31 At paragraph 25.

hestitation, agreed with the BCSC's exercise of its discretion. The BCCA held that the BCSC's decision to grant rescission was appropriate on the facts and consistent with *Pitt v. Holt, Pallen* and *Fairmont*[32], because rescission for mistake applies in both a tax and non-tax context.

(d) *Collins* does not conflict with *Canada Life, Harvest Operations* or *BC Trust*

30. The CRA submits that *Canada Life,* as well as *Harvest Operations* and *BC Trust*, conflict with *Pallen* and *Collins*. This is not correct.

31. In *Canada Life* and *Collins* the OCA and the BCCA held that their respective decisions did not conflict with each other. The OCA held that *Pallen* and *Pitt v. Holt* were distinguishable because *Canada Life* involved a contract rather than a gratuitous transfer:

> 88 In my view, it is unnecessary to determine whether *Re Pallen Trust* is good law following the Supreme Court's decision in *Fairmont Hotels*, or whether *Pitt v. Holt* should be followed in Ontario. . .This was not a gratuitous transfer; rather, CLICC GP's transfer of its assets occurred as part of a transaction between related entities. The transfer was effected under a contract. . . [emphasis added]

32. In *Collins* the BCCA rejected the CRA's submission that it should follow *Canada Life,* noting that that was a contract case whereas *Collins* was a case of a voluntary disposition of money[33].

32 *Collins* (BCCA) at paragraphs 52-55, Applicant's Record, pp. 68-69.
33 At paragraph 59.

33. After reviewing *Canada Life*, *Harvest Operations* and *BC Trust* the BCCA in *Collins* said:

> 62 In my opinion, these cases simply demonstrate that an equitable remedy such as rescission will not be available where the parties are not seeking to be restored to their original position but rather to alter their transaction in order to achieve their intended tax objective. They do not analyse *Fairmont* in the context of a proper claim for rescission as in these appeals. [emphasis added]

34. The CRA's submission that there are conflicting decisions requiring this Court's intervention is incorrect.

(e) The CRA did not submit evidence to show that remission under the FAA was a practical remedy

35. In *Canada Life* the OCA held that rescission should not be granted because the petitioner could apply under the FAA for remission of the tax payable. The CRA argues that the BCSC and BCCA in *Collins* should have followed that finding from *Canada Life*.

36. In *Collins* the BCSC did not reject that finding from *Canada Life* as a matter of principle; it held that the CRA had not presented any evidence as to how remission would apply on the facts of the case:

> 105. The availability of an alternative remedy under s. 23 of the *FAA* is merely a factor to take into account in the discretionary analysis of whether to grant rescission. . .I have 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. I am completely unable to determine if it is a realistic alternative remedy. Accordingly, its availability does not change the result. [emphasis added]

37. The BCCA affirmed this aspect of the BCSC's decision:

> 86. . .I see no basis for this court to interfere with the chambers judge's conclusion in this case that the availability of an alternative remedy under s. 23 of the *Financial Administration Act* did not change the result. In essence, he placed the onus on the appellant to establish that an application to government for remission was a practical alternative, *an onus that was not met*. . . [emphasis added; italics in original]

38. Accordingly, the CRA is not correct in suggesting that there is a conflict in the law on this point; it is simply a question of evidence. In each case the CRA has the onus of proving that remission is more than a theoretical alternative and that, on the facts of the specific case, it may be a real, practical alternative. In *Canada Life* the CRA met that onus; in *Collins* it did not.

39. With respect, the CRA is not being candid. The CRA is suggesting that there is some possibility that the Governor in Council might remit tax to the Collins Trust, when under s. 23(2) of the FAA, such remission depends on the CRA's recommendation. The BCCA, in a comment that is confirmed by the very fact that the CRA has sought leave to appeal, said:

> 87 I agree with the respondents that in light of CRA's position on the trusts, it is highly unlikely that the Minister would recommend a remission of tax. [emphasis added]

40. The CRA's submissions go even further and suggest that the mere *possibility* of remission makes it a sufficient alternative remedy, regardless of whether it is a practical remedy. If this Court were to accept that suggestion, then rectification and rescission

could *never* be granted in a tax context, under *any* circumstance. *Fairmont* did not say that.

(f) The facts in *Collins* are unique

41. At paragraph 40 of its Memorandum the CRA invites this Court to create a test for rescission for tax mistake that meets three principles. The CRA's first principle would deny rescission, indeed any equitable relief, for *any* mistake as to tax consequences. This would be the opposite of the *ratio* of *Pitt v. Holt* and contrary to what this Court said in *Fairmont*.

42. The second principle, clean hands, is not at issue in this case. Prior to MNP giving its opinion to Collins that s. 75(2) would apply, there had been a longstanding, common understanding among tax professionals and the CRA that s. 75(2) would apply to the Collins Trust. Then the TCC in *Sommerer* developed a new interpretation of s. 75(2), such that it did not apply to the Collins Trust. Rather than applying that new interpretation on a go-forward basis, the CRA applied it retroactively to reassess the Collins Trust for tax on the Rite-Way dividends. The BCSC in *Pallen*, as affirmed by the BCCA in both *Pallen* and *Collins*, held that it was this unique set of facts that formed the basis for equitable rescission. In *Collins* the BCCA stated:

> 70. . .Significant in my view were these key findings by Justice Masuhara in *Pallen Trust* that were upheld on appeal:
>
> > [57] … A key determinant in this case is the common general understanding as to the operation of s. 75(2) by income tax professionals and CRA as well as my finding that CRA would not have sought to reassess the Trust prior to *Sommerer*. This aspect of the case in my view is what takes the case into the zone of unfairness…

> 71 The chambers judge [in *Collins*] explicitly endorsed Justice Masuhara's finding that the reason for the audits and reassessments in these cases was the change in the interpretation of s. 75(2) resulting from *Sommerer*. In doing so, he considered evidence of CRA concerns and opinions about these kinds of plans being tax avoidance transactions going back to 2009 or earlier, but found the evidence that it took no steps to audit or reassess the trusts until after *Sommerer* to be significant (at para. 47). [emphasis added]

43. Normally, this Court would not grant leave in a case with facts that are unlikely to be repeated[34].

43. The third principle, dealing with alternative remedies, is addressed in paragraphs 35 to 40 above.

Conclusion

44. Leave to appeal should be dismissed.

PART IV – SUBMISSIONS ON COSTS

45. The Respondents request costs.

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[34] The CRA's Memorandum cites *Fiducie Financière Satoma v. Canada*, 2018 FCA 74. On facts that are ostensibly similar to *Collins* the FCA held that, under the general anti-avoidance rule ("GAAR"), the Satoma trust was taxable on dividends it received. The CRA does not cite *Satoma* in support of any particular argument. In *Collins* both the BCSC and the BCCA found that *Satoma* was not relevant for three reasons: the CRA had not reassessed the Collins Trust under GAAR; the facts in *Satoma* were materially different than those in *Collins*; and the concepts of "abuse" under GAAR and "aggressive tax planning" in equity were distinct. Moreover, in light of *Satoma*, it is highly unlikely that any future taxpayer will create a trust to receive dividends, thus reinforcing how unique the facts are in *Collins*.

PART V – ORDER SOUGHT

46. The Respondents request that the application for leave to appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December, 2020

For: **DENTONS CANADA LLP**
Joel Nitikman

PART VI – TABLE OF AUTHORITIES AND STATUTORY PROVISIONS (hyperlinked)

Cases Authorities	**Referred to in Memorandum of Argument at Para(s):**
Ballenden v. Bryant (No 2), [2013] NSWSC 454 at paragraph 19	15
BC Trust v. Canada (Attorney General), 2017 BCSC 209	7, 30, 33
Bok v. Bol, [2017] SGHC 316 at paragraph 85	15
Canada (Attorney General) v. Fairmont Hotels Inc., 2016 SCC 56	3, 4, 5, 6, 16, 18, 19, 20, 24, 25, 26, 27, 28, 29, 40, 41
Canada (Attorney General) v. Juliar, 2000 CarswellOnt 3518 (CA)	4, 16, 19, 26
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PART VII – TABLE OF AUTHORITIES AND STATUTORY PROVISIONS (not hyperlinked)

Tab	Cases Authorities	Referred to in Memorandum of Argument at Para(s):
2	*Hereward House Remuneration Trust v. Estera Corporate Trustees (Guernsey) Ltd.*, [2019] GRC 075	15
3	*The Estate Of Gubay v. Gubay*, May 23, 2018 (Ch) at paragraph 40	15
4	*Wong Chi Ching v. Bocom International Holdings Co Ltd.*, [2018] HKCFI 227 at paragraph 14	15
	Secondary Sources	
5	Jeremie Beitel, Carrie Aiken, Rami Pandher & Britta Graversen, "Current Cases" (2018), 66 Can. Tax J. 919 at 940	25

6	John Newland, Treatise on Contracts within the Jurisdiction of Courts of Equity (Philadelphia: William P. Farrand and Co., 1808) Chapter XXVIII, 432-433, footnote (d), citing *Gee v. Spencer* (1681), 1 Vern. 32, 23 ER 286	15
7	Robert A. Neilson and Ashvin R. Singh, "When is the Equitable Remedy of Rescission Available?" Implications of the British Columbia Court of Appeal's Decision in Collins Family Trust", Tax Litigation (Federated Press), Vol. XXIII, No. 3, 2020, 2	25
8	Simon Douglas, "Misuse of Rectification in the Law of Trusts" (2018), 134 LQR 138 at 150	22