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No such thing as fairness when it comes to tax: Supreme Court of Canada

By James Bowden | 28 June 2022

On 17 June 2022, the Supreme Court of Canada issued its much-anticipated decision in *Canada (Attorney General) v. Collins Family Trust*[1]. The facts can be summarized briefly as follows:

- In 2008, a taxpayer (Todd Collins) created a trust and holding company structure.
- Collins was advised by an accounting firm as to the tax consequences of the structure, which were thought to be predictable and reliable based on:
    - absolute consensus in the professional community regarding the interpretation of the particular section of the *Income Tax Act* on which the plan relied (section 75(2)); and
    - the Canada Revenue Agency's (**CRA**) agreement with that position as stated in a then-current Interpretation Bulletin, and as demonstrated by its conduct (no attempts at prior reassessments of such structures).
- In 2011, the Tax Court of Canada decided another, entirely unrelated case,[2] which interpreted section 75(2) in a manner different from the prevailing consensus, the effect of which was to totally eliminate the tax efficiencies of the Collins structure. A large and unexpected tax bill would become due on the Collins structure (and other identical structures) on the basis of the *Sommerer* judgment.
- After *Sommerer*, the CRA embarked on multiple retrospective reassessments of structures that followed the Collins model, including for years prior to the 2011 *Sommerer* decision when everyone, including the CRA, thought the Collins structure was uncontroversial.
- One such Collins-style structure called *Pallen Trust* had already applied to the court in BC[3] to seek the equitable remedy of recission to allow them to effectively undo the structure on the basis that the *Sommerer* case had made the structure unfairly

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[1] *Canada (Attorney General) v. Collins Family Trust* (2022 SCC 26)
[2] *Sommerer v. The Queen*, 2011 TCC 212, 2011 D.T.C. 1162, aff'd 2012 FCA 207, [2014] 1 F.C.R. 379
[3] *Re Pallen Trust*, 2015 BCCA 222, 385 D.L.R. (4th) 499

onerous from a tax perspective. *Pallen Trust* argued that it was equitable to grant recission because it would have been unfair to impose such negative tax consequences retroactively since the plan was implemented on what were understood to be predictable and reliable grounds at the time. That is, the structure was implemented on the basis of a "mistake" (an equitable mistake, not just bad planning). The court agreed and granted the equitable relief requested.

- The Collins Family Trust sought the identical equitable relief as was granted in Pallen on identical facts. The BC Superior Court agreed with the Collins Family Trust, as did the BC Court of Appeal. The Attorney General appealed to the Supreme Court.

In an 8-1 majority decision, the Supreme Court found against Collins stating that it found "nothing unconscionable or unfair" about the facts at hand, and that this was simply "the ordinary operation of a tax statute". Given the factual context of the case, it is difficult to comprehend the conclusion that there is nothing unfair about the application of what are effectively punitive tax consequences on a surprise, retroactive basis. The majority also went out of its way, somewhat bizarrely, to state that equitable remedies could never apply to relieve a tax mistake.

In the minority was Justice Côté whose dissenting reasons accounted for 71 out of the total 100 paragraphs in the judgment. On our reading, the dissenting position and reasoning of Justice Côté was much more rational, more persuasive and fairer than that of the majority. Côté uses strong language in places taking the majority to task for what she saw as incorrect and inappropriate reasoning and conclusions by the majority, and stating that tax mistakes were eligible for equitable relief if they met the usual tests (which were indeed met in this case, in Côté's view). However, as convincing as Côté's reasons are, she is only one out of nine and her position does not reflect the law in Canada as of today, unfortunately.

It is unfortunate not only for Collins (and the others who used identical structures), but for all Canadian taxpayers. Legally minimizing one's tax burden is a fundamental right of Canadians, but the law is such that planning almost always contains some level of uncertainty. That reality is already an unfortunate starting point, and rather than achieving greater certainty over time, we seem to be doing the opposite. The Collins Family Trust judgment stands as a warning that taxpayers cannot even rely on planning that is thought to be normal, conventional, and entirely acceptable, including as affirmed in published positions of the CRA. ■

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