KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 183**

Date: **2025 10 29**
File No. KBG-SA-01508-2024
Judicial Centre: Saskatoon

BETWEEN:

KEYSTONE ENTERPRISES REAL ESTATE LTD.,
KEVIN GERRY, DOLORES GERRY, and
DON K. MCMILLAN, CPA, CA PROF. CORP.

APPLICANTS

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT

Counsel:

Caroline J. Smith and Joseph A. Gill	for the applicants
Melissa A. Nicolls	for the respondent

JUDGMENT
October 29, 2025

CROOKS J.

Introduction

[1] A corporation's earnings may be paid to its shareholders through dividends. Dividends are generally taxable to shareholders, however, the *Income Tax Act*, RSC 1985, c 1 (5th Supp), allows private corporations to elect to have some dividends treated tax-neutrally provided they meet certain criteria. A capital dividend is a tax-free dividend paid from a private corporation's capital dividend account [CDA], which is a notional account that tracks specific tax-free surpluses accumulated by the

corporation over time. The CDA is a running balance and capital dividends paid by the corporation will reduce that balance. The *Income Tax Act* contains detailed rules about calculating the balance of a CDA.

[2] If a corporation issues a dividend to its shareholders and elects to treat it as a capital dividend, it will only be tax-free up to the balance of the CDA. However, any amount exceeding the balance of the CDA is not tax-free and the corporation is liable, under Part III of the *Income Tax Act*, to 60 percent tax on the excess amount unless the shareholder and corporation jointly elect to treat the excess amount as a regular dividend taxable to the shareholder (see ss. 83(2) and 89(1) of the *Income Tax Act*).

[3] In this case, an accounting error resulted in the payment of capital dividends in excess of the balance of the CDA, resulting in significant tax consequences. The corporation seeks rectification of a director's resolution which authorized the capital dividend to reflect the correct balance of the CDA, thereby limiting the capital dividends to the amount available tax-free.

Background

[4] Keystone Enterprises Real Estate Ltd. [Keystone] was incorporated under the previous iteration of *The Business Corporations Act, 2021*, SS 2021, c 6. Keystone's current directors, officers and shareholders are Kevin Gerry [Mr. Gerry] and Dolores Gerry [Mrs. Gerry]. Don K. McMillan [Accountant] has been the accountant for Keystone since 2007.

[5] On May 29, 2023, the Accountant advised Mr. Gerry, on behalf of Keystone, that there was an available balance of $721,465 in Keystone's CDA. He advised that this balance could be paid to Keystone's shareholders as a non-taxable dividend.

[6] Mr. Gerry, who is also Mrs. Gerry's enduring power of attorney, agreed to be paid out the balance of Keystone's CDA, stating that he would do so as long as the Accountant could confirm that this payment was tax-free.

[7] The Accountant prepared the August 10, 2023 director's resolution [Director's Resolution], the relevant part of which stated:

> IT WAS RESOLVED THAT:
>
> Effective August 10th 2023 the Corporation pay Capital Dividends in the amount of $721,465 from the Capital Dividend Account of the corporation to the shareholders, Kevin Gerry and Dolores Gerry in proportion to their shareholder percentage ownership of the corporation.

[8] After the Director's Resolution was executed, Keystone filed Form T2054, "Election for a Capital Dividend Under Subsection 83(2)" of the *Income Tax Act*, electing to treat the dividend as a capital dividend. Form T2054 stated in part:

> If the amount of the dividend that is elected under subsection 83(2) exceeds the balance of the capital dividend account (CDA), the corporation may have to pay Part III tax on the excess portion of the dividend. …

[9] Capital dividends of $721,465 were paid to Keystone's shareholders.

[10] By letter dated June 7, 2024, the Canada Revenue Agency [CRA] advised that Keystone's CDA balance was $184,464, not $721,465. This resulted in an excess election of $537,001. The CRA advised that Keystone had the option of being taxed at 60 percent under Part III of the *Income Tax Act* or treating the amount as taxable dividends to the shareholders under s. 184(3) of the *Income Tax Act*, requesting a response advising of the preferred option within 30 days. On October 29, 2024, the CRA issued a notice of assessment to Keystone, taxing the amount at 60 percent.

[11] The Accountant acknowledges he made an error in calculating the CDA balance as he had not properly entered a capital dividend payment previously made to

a former shareholder, Mr. Gerry's father, Raymond Gerry, who passed away in 2014.

Position of the Parties

[12] The applicants' position is that the within circumstances support their request for rectification. Mr. Gerry was clear that his intention was to access only the amount that was tax-free. The issue was with the Accountant's calculation, not with Mr. Gerry's intention on behalf of Keystone and its shareholders. Mr. Gerry remains willing to repay the difference between the dividend he received and the tax-free dividend he intended to receive based on the accurate calculation of the CDA balance.

[13] The applicants suggest that it was the intention and agreement to declare only the dividends that would be received on a tax-free basis and, if the Director's Resolution had included the correct amount, then there would be no tax payable. Although it was Mr. Gerry's and Keystone's intention to receive these dividends tax-free, they relied upon the advice of the Accountant in making that request and having those dividends paid to them.

[14] The applicants argue that it is only the amount that needs to be changed. In doing so, the applicants take the position that the Director's Resolution will then reflect the agreement – that only those capital dividends that were available tax-free were to be paid from Keystone.

[15] The Attorney General of Canada [Attorney General] suggests that, based on the advice of the Accountant, the agreement was that there was $721,465 available in the CDA, accessible on a tax-free basis. That is what is reflected in the Director's Resolution.

[16] The respondent's position is that rectification should not be available as it effectively asks the Court to rewrite the history of the declaration and resulting payment of the dividend following the realization of an unintended tax liability.

Issue

[17] The issue in this case is whether the Court is able to rectify the Director's Resolution executed by Keystone so as to change the amount of the capital dividends declared.

[18] The facts are not in dispute. Mr. Gerry was advised by the Accountant that there was $721,465 available in the CDA, which would be payable to Keystone's shareholders on a tax neutral basis. The Accountant has acknowledged that his calculation was inaccurate due to an improper entry of capital dividends paid in prior years to a former shareholder.

Law and Analysis

[19] The leading case on rectification is *Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720 [*Fairmont*], along with its companion case, *Jean Coutu Group (PJC) Inc. v Canada (Attorney General)*, 2016 SCC 55, [2016] 2 SCR 670 [*Jean Coutu*], which was decided under the *Civil Code of Québec*, CQLR c CCQ-1991.

[20] In *Fairmont*, the Supreme Court confirmed the test for rectification, confirming that the party seeking rectification must show:

a. there was a prior agreement whose terms are definite and ascertainable;

b. the agreement was still in effect at the time the instrument for which the parties seek rectification was executed;

c. the instrument fails to accurately record the prior agreement; and

d. the instrument, if rectified, would carry out the parties' prior

agreement.

[21] When deciding whether to exercise the equitable remedy of rectification, a court may also consider whether an adequate alternative remedy is available.

[22] The parties differ in their view of what the "prior agreement" was. The applicants suggest the agreement was to "clean out" Keystone's CDA, not to specifically pay dividends of $721,465. The applicants invite the Court to follow the approach taken by the British Columbia Court of Appeal in *5551928 Manitoba Ltd. v Canada (Attorney General)*, 2019 BCCA 376, 439 DLR (4th) 483 [*928 Manitoba*], where a private corporation "unwittingly" triggered a significant income tax liability when it relied on a tax advisor's erroneous calculation of the CDA. The facts are highly similar to the within circumstances, including the admission of the erroneous calculation. The Court determined that rectification to permit a "retroactive correction" of the resolution to reflect the parties' true intentions was appropriate.

[23] Conversely, the respondent points to the specific wording of the Director's Resolution as the agreement, notably that Keystone pay capital dividends in the amount of $721,465 from the CDA to the shareholders. The Attorney General points to cases such as *RJ McLeod Investments Inc. v McLeod*, 2021 ABQB 439, 26 Alta LR (7th) 197, *Feeney v Canada (Attorney General)*, 2024 ONSC 6712, 174 OR (3d) 387, and *Pyxis Real Estate Equities Inc. v Canada (Attorney General)*, 2025 ONCA 65, 175 OR (3d) 721 [*Pyxis Real Estate*]. The Attorney General also suggests that *928 Manitoba* did not properly apply *Fairmont* in light of the Supreme Court's subsequent decision in *Canada (Attorney General) v Collins Family Trust*, 2022 SCC 26, [2022] 1 SCR 747 [*Collins Family Trust*].

[24] While counsel cite a number of cases from other jurisdictions, which reflect mixed result or differing factual bases, my focus throughout my analysis is on the application of the binding authorities of the Supreme Court of Canada.

[25] In *Fairmont*, the Supreme Court provided clear guidance on the limitations of rectification. It is limited to cases where the agreement between the parties was not correctly recorded:

> [3] Without disputing that tax neutrality was the parties' intention, for the reasons that follow it is my respectful view that both courts below erred in holding that this intention could support a grant of rectification. Rectification is limited to cases where the agreement between the parties was not correctly recorded in the instrument that became the final expression of their agreement: A. Swan and J. Adamski, *Canadian Contract Law* (3rd ed. 2012), at s.8.229; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 817. It does not undo unanticipated effects of that agreement. While, therefore, a court may rectify an instrument which inaccurately records a party's agreement respecting what was to be done, it may not change the agreement in order to salvage what a party hoped to achieve. Moreover, these rules confining the availability of rectification are generally applicable, including where (as here) the unanticipated effect takes the form of a tax liability. To be clear, a court may not modify an instrument merely because a party has discovered that its operation generates an adverse and unplanned tax liability. I would therefore allow the appeal.
>
> [Emphasis added]

[26] This is further reflected in the Court's comments on the nature and availability of rectification:

> [13] Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" … It must, as this Court has repeatedly stated … be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts" … It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement … It is not concerned with mistakes merely in the making of that antecedent agreement: … In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend *not the instrument*

> recording their agreement, but *the agreement itself*. More to the point of this appeal, and as this Court said in *Performance Industries* [2022 SCC 19, [2002] 1 SCR 678] (at para. 31), "[t]he court's task in a rectification case is ... to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".
>
> [Citations omitted]
>
> …
>
> [19] … As I have stressed, rectification is available not to cure a party's error in judgment in entering into a particular agreement, but an error in the recording of that agreement in a legal instrument. Alternatively put, rectification aligns the instrument with what the parties agreed to do, and not what, with the benefit of hindsight, they should have agreed to do. …
>
> …
>
> [39] … Rectification is not equity's version of a mulligan. Courts rectify instruments which do not correctly record agreements. Courts do not "rectify" agreements where their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome.
>
> [Emphasis added]

[27] Subsequent to the decisions in *Fairmont* and *928 Manitoba*, the Supreme Court of Canada issued its decision in *Collins Family Trust*, which confirmed that equitable relief is not available to avoid unanticipated adverse tax consequences which arise from the ordinary operation of the *Income Tax Act*, including the avoidance of unintended tax liability. In *Collins Family Trust*, the Court summarized the principles which apply when seeking equitable relief:

> [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* [[1999] 3 SCR 622], at para. 45; *Jean Coutu*, at para. 41).
>
> I 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).

…

[22] I agree with the conclusion in *Canada Life* [2018 ONCA 562, 141 OR (3d) 321] 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.
>
> [Emphasis added]

[28] The interplay between *Fairmont* and *Collins Family Trust* was recently discussed in *Pyxis Real Estate*, where the underlying factual basis included an erroneous accounting calculation and resulted in an unintentional tax consequence. In determining that rectification was not available, Nordheimer J.A. stated on behalf of the Court of Appeal for Ontario:

> [13] In *Fairmont Hotels*, Brown J. directly addressed the situation that is before this court. Particularly apposite to this case are the following observations:
>
> > While, therefore, a court may rectify an instrument which inaccurately records a party's agreement respecting what was to be done, it may not change the agreement in order to salvage what a party hoped to achieve. (at para. 3)
> >
> > …
> >
> > Alternatively put, rectification aligns the instrument with what the parties agreed to do, and not what, with the benefit of hindsight, they should have agreed to do. (at para. 19)
> >
> > …
> >
> > … [T]he English Court of Appeal made clear that a mere intention to obtain a fiscal objective is insufficient to ground a claim in rectification: "… the court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective. …". (at para. 22)
> >
> > …
> >
> > Rectification does not operate simply because an agreement failed to achieve an intended effect (here, tax neutrality) – irrespective of whether the intention to achieve that effect was "common" and "continuing". (at para. 30)

> [14] Also relevant to the issue raised on this appeal is the Supreme Court of Canada's decision in *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26, 471 D.L.R. (4th) 1, a decision also written by Brown J. The court made it clear in *Collins Family Trust*, if it was not already clear from its earlier decision in *Fairmont Hotels*, that the mere fact that a tax objective is not achieved by an agreed transaction is not a proper ground to grant rectification. Justice Brown said, at para. 22: "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."
>
> [15] I should note that, while the decision in *Collins Family Trust* was provided to the application judge, he did not make any reference to it in his reasons.
>
> [16] I return to the factors set out in *Fairmont Hotels* respecting when rectification is properly granted. At its core, the test requires that the executed documents fail to accurately record the parties' agreement. The agreement here was for a $1.4 million tax-free capital dividend to be paid. The corporate resolutions that were signed document the payment of that dividend. In other words, they accurately reflect the agreement. The fact that the agreement did not result in the intended fiscal objective of being tax-free, or tax neutral, is not a basis for granting rectification.
>
> [17] The application judge concluded his reasons by remarking that, in his view [at para. 30], it would not be "equitable to impose an adverse tax consequence" because "an accountant made a careless error" in implementing an agreed-upon structure. As the decisions in *Fairmont Hotels* and *Collins Family Trust* make clear, that is not a proper use of the equitable relief of rectification. It is also not consistent with the general principle that rectification is a form of equitable relief that is to be used "with great caution": *Fairmont Hotels*, at para. 13.
>
> [18] The corporate resolutions that were executed accurately reflect the agreed upon structure. The fact that there was a flaw in that structure does not affect the accuracy of the written documents. Rectification was not available in this case.
>
> [Emphasis added]

[29] Here, the agreement records precisely what was intended and the terms

of the Director's Resolution are definite and ascertainable. The discovery of the adverse tax liability arises from the erroneous calculation, not from the inaccurate recording of the agreement.

[30] It is undisputed that Keystone wanted to minimize tax implications by limiting the payment of dividends to what was available in the CDA. On the calculations and advice of the Accountant, the Director's Resolution set the amount of capital dividends at $721,465.

[31] The issue is that the Accountant's calculations were erroneous when he advised Mr. Gerry of the amount that could be withdrawn tax-free. What the applicants are asking the Court to do is to "undo" the error in the Accountant's calculation. In my view, that is not an appropriate basis for rectification as it is contrary to the guidance offered by the Supreme Court in *Fairmont* and *Collins Family Trust*.

[32] Rectification requires a valid antecedent decision to carry out a particular transaction that was incorrectly transcribed on paper (see: *Fairmont*, para 42). The applicants have not demonstrated that the Director's Resolution does not accurately record the prior agreement. The transaction was correctly transcribed. The mistake was in the advice underlying the agreement, not in the transcribing of that agreement.

[33] Rectification in this case would not operate to correct an erroneous transcription in the written instrument, but rather to correct an accounting error. It would act contrary to the cautions set out in *Fairmont* and relax the approach to rectification by substituting for the due diligence required at the time the Director's Resolution was entered. As the Attorney General noted, a corporation may request its CDA balance from the CRA as at a specific date. The CRA has no record of receiving such a request on behalf of Keystone.

[34] There was a mistake in the calculation underlying the transaction, but not

in the way the agreement was expressed or executed. Rather, the resulting Director's Resolution simply resulted in undesirable tax consequences for Keystone.

[35] It is only because of the unintended tax consequences that the applicants seek rectification. However, the Supreme Court has made clear that a court may not modify an instrument merely because a party discovered that its operation generates an adverse and unplanned tax liability. As stated in *Collins Family Trust*, there is nothing unconscionable or otherwise unfair about the operation of a tax statute on transactions freely undertaken:

> [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* [[2013] UKSC 26, [2013] 2 AC 108] and *Re Pallen Trust* [(2016), 35 ETPJ 135] cannot, in my respectful view, be taken as stating the law of British Columbia.
>
> [Emphasis added]

[36] While taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, they are also to be taxed in accordance with the ordinary operation of the *Income Tax Act* based on what they agreed to do and not what they could have done. There is nothing unfair or unconscionable about paying taxes in accordance with the provisions of the *Income Tax Act*. That is the outcome the

applicants seek to avoid. However, as has been made clear through the Supreme Court's decisions in *Fairmont*, *Jean Coutu* and *Collins Family Trust*, a taxpayer is barred from resorting to equity in order to undo, alter or modify a concluded transaction or its documentation to avoid a tax liability arising from the ordinary operation of a tax statute.

[37] Further, while the applicants suggest the dissenting comments of Justice Côté at paras. 59 and 60 of *Collins Family Trust* support the conclusion that rectification is the appropriate remedy and that there is no alternative adequate remedy, these circumstances align far more with the comments of Justice Wagner (as he then was) on behalf of the majority in *Jean Coutu*, where he addressed errors made by advisors resulting in unintended tax consequences:

> [43] I recognize that "[i]ncome tax law is notoriously complex and many taxpayers rely on tax advisors to help them comply": *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 1. But 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.

Conclusion

[38] The intention of Mr. Gerry may have been to receive capital dividends without triggering tax consequences. The applicants do not propose there is an error in how the Director's Resolution was written, nor in the election form submitted to CRA other than the erroneous amount provided by the Accountant.

[39] However, both the Director's Resolution and the payment of capital dividends were made in accordance with the advice of the Accountant. Having acted

on this professional advice, the issue then becomes whether the Court should cure that defect through rectification of the Director's Resolution.

[40] There is no evidence before me that there was an error in the recording of the Director's Resolution. In fact, the Director's Resolution clearly reflects the advice received from the Accountant and the resulting instructions from Mr. Gerry. The error is not with the agreement or the transcription of that agreement in the Director's Resolution, but rather with the underlying advice and calculations. As the Supreme Court of Canada noted in *Fairmont*, a relaxed approach to rectification should not be a substitute for due diligence.

[41] Rectification is not available in this case. The corporation received professional advice in this transaction and relied on that advice in executing the Director's Resolution. The resulting tax consequences are neither unfair nor unconscionable. The application is dismissed.

Costs

[42] While I have determined in favour of the respondent, I make no order as to costs.

_____J.
N.D. CROOKS