

Telemark • Volume 22 • Issue 2

February 2017

In this issue: Corporations Canada Notice • Article: Can a common intention of the parties for tax-neutrality – in itself – justify granting a rectification by the court? • Recent Case Law.

News

Corporations Canada Notice

On February 13, Corporations Canada sent out this Notice:

Notice – July 31, 2017: Last chance for not-for-profits to transition

All corporations created under the *Canada Corporations Act*, Part II need to have completed their transition to the *Canada Not-for-profit Corporations Act* and received their certificate of continuance by July 31, 2017.

If the transition is not completed by that date, the corporation – including registered charities – will be dissolved. This means that the corporation will no longer exist as a legal entity. In the case of registered charities, dissolution could lead to the revocation of their registration as a charity. See [Operating a registered charity](#) for more information.

If you have already filed a transition request but have not received your certificate of continuance from Corporations Canada, this means that you have not completed the transition.

There is still an opportunity to transition and keep your corporation active. To find out more, read the [Transition Guide](#).

Marque d'or offers this service. For more information or if you would like to proceed with the transition of a corporation, please contact us: mdu.info@thomsonreuters.com.

Article

Can a common intention of the parties for tax-neutrality – in itself – justify granting a rectification by the court?

The Supreme Court rules on two transactions that had unintended tax consequences.

These decisions clarify the position the Court had adopted in the decision *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, November 28, 2013, Supreme Court of Canada, [EYB 2013-229841](#).

Groupe Jean Coutu (PJC) inc. v. Canada (Attorney General), December 9, 2016, Supreme Court of Canada, [EYB 2016-273667](#).

A general intention of tax neutrality, in the absence of a precise juridical operation and a determinate or determinable prestation or prestations within the meaning of art. 1373 C.C.Q. cannot give rise to a common intention that would form part of the original agreement and serve as a basis for modifying the written documents expressing that agreement under art. 1425 C.C.Q.

Contractual interpretation focuses on what the parties actually agreed to do, not on what their motivations were in entering into an agreement or the consequences they intended it to have. Therefore, when unintended tax consequences result from a contract whose desired consequences, whether in whole or in part, are tax avoidance, deferral or minimization, amendments to the expression of the agreement can be available only under two conditions:

- First, if the unintended tax consequences were originally and specifically to be avoided, through sufficiently precise obligations which objects, the prestations to execute, are determinate or determinable; and
- Second, when the obligations, if properly expressed and the corresponding prestations, if properly executed, would have succeeded in doing so.

There was a mistake in the transactions agreed to, not in the way they were expressed.

Although rectification under Quebec civil law and in equity stems from different legal sources, they share similar principles and lead to similar results. Such similar results are particularly welcome in the tax context, where the same federal tax legislation applies throughout the country. Both have the same purpose: to ascertain that the true agreement between the contracting parties is accurately expressed in the written instruments reflecting either the terms of the agreement or the execution of the obligations themselves.

Both are strict: only the expression or transcription of the contract can be amended; the contract itself cannot be. Further, in both legal systems, the true agreement is paramount, not its intended consequences or effects. Appeal dismissed.

Canada (Attorney General) v. Fairmont Hotels Inc., December 9, 2016, Supreme Court of Canada, [EYB 2016-273668](#).

Both courts below erred in holding that the parties' intention of tax neutrality could support a grant of rectification. A common continuing intention does not suffice.

Rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. It is limited to cases where a written instrument has incorrectly recorded the parties' antecedent agreement. In other words, rectification is not available 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.

On rectification, both equity and the civil law are *ad idem*, despite each legal system arriving at it by different paths – the former being concerned with correcting the document, and the latter focusing on its interpretation. This convergence is undoubtedly desirable.

These principles are to be applied in a tax context just as they are in a non tax context. This is to avoid impermissible retroactive tax planning.

Jurisprudence

Halperin c. Brouillette

December 16, 2016, Superior Court, [EYB 2016-274162](#)

An author seeks the personal condemnation of a former director and officer of a publishing house for royalties, sales of rights and advances due under publishing contracts. However, the circumstances in which the corporate veil can be lifted are not present in the present case. The defendant is not the sole or majority shareholder of the publishing house. Moreover, the evidence does not establish that he was personally involved in a fraudulent act or an abuse of rights. There was no evidence that the publishing house was insolvent when the publishing contracts were concluded, or that the defendant made false representations. The fact that the latter registered two hypothecs on the assets of the publishing house without informing the applicant does not constitute an extracontractual fault.

Bois Américana inc. c. Corporation Polystar inc.

November 29, 2016, Superior Court, [EYB 2016-274187](#)

The plaintiffs were victims of a plan put in place by the defendants to take over the assets of Corporation Polystar inc. to their detriment. Victims of oppression, they are entitled to reimbursement, as a remedy, of the value of the shares they held in Polystar. The value of these shares, at the time of Bérubé's termination, amounted to \$4,012,950. In addition, the latter, terminated in an abusive and illegal manner, obtains a sum of \$360,000. In addition, the liability of the defendant's directors, who acted in bad faith and in an abusive manner, is held solidarily. Finally, the provisional execution of the present judgment is ordered in order to take account of the actual prejudice suffered by the applicants for a possible appeal by the defendants who have up to now adopted a dilatory behavior in order to unduly prolong the delays in this case.

Papeterie Bloc-Notes inc. c. Castilloux

November 24 2016, Québec Court, [EYB 2016-274815](#)

A supplier cannot claim the reimbursement of unpaid invoices by a corporation to another corporation having in common the same director in the absence of any contractual link between them. Similarly, it cannot claim from the director the reimbursement of the invoices if the latter acted within his mandate and did not commit any extracontractual fault.

Société en commandite 5-D c. Québec (Ville de)

July 7 2016, Superior Court, [EYB 2016-274956](#)

The contribution of a property from a special partner to the common stock of the limited partnership constitutes a transfer of ownership within the meaning of the *An Act Respecting Duties on Transfers of Immovables*.