

Rectification of Documents to Avoid Adverse Tax Consequences

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Jean Coutu Group (PJC) Inc v Canada (AG), [2016 SCC 55](#)

[companion case [Canada \(Attorney General\) v. Fairmont Hotels Inc.](#), 2016 SCC 56]

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This is an important Supreme Court of Canada decision that deals with the increasing use of the rectification remedy to obtain tax outcomes intended but not achieved.

NOTE - this is a case of rectification under the Civil Code of Quebec. However, the decision provides guidance for practitioners in common-law jurisdiction. This decision was meant to align the results in Civil and Common-Law jurisdictions in Canada under Federal law (para 5). The hurdle set by the majority appears both reasonable and easily surmountable by reasonably competent advisors.

In this 7:2 decision of the Court, the majority held that a general intention for tax neutrality (and presumably any tax outcome), cannot give rise to a common intention that forms part of the original agreement on the basis of which rectification is then obtained. Contractual interpretation must focus on what the parties agreed to and not what the parties' motivations were (or desired consequences were).

Unintended tax consequences that result from a contract motivated in part by taxation can only be rectified where:

- The unintended tax consequence was originally and specifically the one the contract aimed to avoid; and
- The documents, if properly expressed and carried out would have actually succeeded in obtaining the specific tax outcome.

Where an agreement gives rise to unforeseen, undesirable tax consequences, and this is a result of a mistake in the transaction and not its expression, rectification is not available. To find otherwise would open the door to retroactive tax planning.

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ANALYSIS

The majority held that a taxpayer's general intention of tax neutrality cannot form the object of the contract under Civil Law (Article 1412 of the CCQ) (para 23). This is because such a general intention is not sufficiently precise - the parties has no specific tax consequences in mind (para 22). What is needed is a specific juridical operation and determined or determinable presentations of the parties to the agreement (para 23).

The majority stated, at paragraph 24:

[24] In my opinion, 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 in accordance with art. 1425 C.C.Q. can be available only under two conditions. First, if the unintended tax consequences were originally and specifically sought 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. This is because contractual interpretation focuses on what the contracting parties actually agreed to do, not on what their motivations were in entering into an agreement or the consequences they intended it to have.

NOTE: The dissent felt that a more generous approach was more appropriate in today's commercial reality. With respect, complexity if a reality that is often the result of actions or choices by commercial actors and, even if a feature of business generally, cannot be a basis for making the crown the insurer of private actors. The risk that actors take in entering transactions and hiring advisors must be borne by them and their advisors.

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