Alberta Court of Appeal denies equitable "Hail Mary" in Harvest Operations Corp. v Attorney General of Canada

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The decision of the Court is the latest in a line of authority severely restricting the ability of parties to correct mistakes through rectification.

On November 23, 2017, the Alberta Court of Appeal issued a Memorandum of Judgment in *Harvest Operations Corp. v Attorney General of Canada*, 2017 ABCA 393. In the first appellate-level rectification decision since the Supreme Court of Canada released its companion judgments in *Canada v Fairmont Hotels Inc*.[1] and *Jean-Coutu Group (PJC) Inc. v Attorney General of Canada*,[2] the Court upheld the decision of the trial judge denying an application for rectification on the basis that a general intention to implement a transaction on a tax-neutral basis was not sufficient to justify rectification.

In 2005, the taxpayer (a predecessor in interest to Harvest Operations) entered into share acquisition and reorganization transactions. Although the general intention of the parties was to complete the plan on a tax-neutral basis, due to certain unforeseen occurrences (including a demand for repayment of certain debt obligations of one of the target companies) and errors that were discovered by the Canada Revenue Agency in 2008 in the course of an audit, the transaction ultimately resulted in additional tax obligations.

On April 30, 2013, the taxpayer filed an originating application seeking to rectify certain instruments prepared in the course of the share acquisition and reorganization. In denying rectification, the chambers judge followed *Graymar Equipment (2008) Inc. v Canada*[3] and concluded that "it is not enough that there be a general desire to minimize tax consequences of a transaction."[4]

The taxpayer appealed. On appeal, the Court applied the principles set out by the Supreme Court of Canada in Fairmont Hotels and determined that in order to obtain rectification of an instrument, the party seeking rectification must establish on a balance of probabilities that:

1. There was a prior agreement between the parties, whose terms are "definite and ascertainable";

2. That the agreement remained in effect at the time that the instrument was signed;
3. That the instrument does not accurately record the agreement between the parties; and
4. That the instrument, if rectified, would properly reflect and carry out the intentions of the parties.

Citing the principle that persons who sign legal documents "are supposed to have chosen their words with care," the Court remarked that rectification is "an extraordinary remedy to be sparingly granted."[5] As a result, Courts should enforce written agreements unless there is a compelling reason to permit them to be altered.

In reviewing the instruments giving rise to the tax obligations, the Court determined that the doctrine of rectification did not allow for the rectification of these instruments. In particular, the Court accepted that, in this case, the instruments accurately reflected the true agreement of the parties. The unintended adverse tax consequences of the transactions were the result of ill-advised steps and errors of fact. The Court noted that, in any event, "the means that the parties utilized in pursuit of their goal of a tax-neutral transaction, and not the goal of tax neutrality, are the primary focus of a rectification application."[6]

The applicant, citing *TCR Holding Corp. v Ontario*,[7] sought alternative relief on the broader basis that "superior courts have equitable jurisdiction to relieve persons from the effect of their mistakes."[8] The Court declined, noting that it could not accede to the applicant's "Hail Mary request"[9] without undermining the doctrine of rectification and the principles set out in *Fairmont Hotels*.

The decision of the Court of Appeal in *Harvest Operations* is the latest in a line of authority severely restricting the ability of parties to correct mistakes through rectification. Unfortunately, in addition to refusing rectification, the Court, fearful of "pump[ing] theoretical steroids into the rectification doctrine and [giving] it the strength or force that the Supreme Court of Canada recently and consistently has declined to do"[10] also declined to recognize the general equitable jurisdiction of the superior courts to do justice between parties suffering from the unintended consequences of their mistakes. The result is uncertainty as to what, if any role, equity will play in fixing tax mistakes in the future. This finding may restrict the ability of litigants to obtain other equitable relief such as rescission and declarations in the context of fixing tax mistakes. Tax advisors need to be aware of this trend in the case law and carefully consider the scope of their retainers and their liability caps, as inevitably the inability to access remedies for mistakes through the courts may leave taxpayers looking to advisors to be made whole.

[1] 2016 SCC 56 (CanLII) [***Fairmont Hotels***].

[2] 2016 SCC 55 (CanLII).

[3] 2014 ABQB 154 (CanLII). Justice Brown (then a Justice of the Court of Queen's Bench of Alberta), went on to author the decision of the Supreme Court of Canada in *Fairmont Hotels*.

[4] *Harvest Operations Corp v Canada (Attorney General)*, 2015 ABQB 327 (CanLII) para. 42-44

[5] *Harvest Operations Corp v Attorney General of Canada*, 2017 ABCA 393 [***Harvest Operations* (ABCA)**]. para. 50.

[6] *Ibid.* para. 67. Italics in original.

[7] 2010 ONCA 233 (CanLII), para. 26.

[8] Harvest Operations (ABCA), supra, para. 73.

[9] *Ibid*. para. 14.

[10] *Ibid*. para. 75. Footnotes omitted.

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