Scott Rollwagen
416-865-2896
srollwagen@litigate.com

December 22, 2016

SCC takes restrictive approach in rectification case

Scott Rollwagen was quoted in the Canadian Lawyer article *SCC takes restrictive approach in rectification case* on December 22, 2016.

The majority of the court took a restrictive approach to rectification in reaching its conclusion, Scott Rollwagen, the research partner at Lenczner Slaght in Toronto, told Legal Feeds. (A companion decision, *Jean Coutu Group (PJC) Inc v Canada (Attorney General)*, considered the corresponding principles under Quebec law, and took the same approach.)

“A tax-efficient result will often form the motivation for entering into an agreement, but the question of intention is much more specific than that,” Rollwagen says of the court’s decision. “The only common intention that will support rectification is proof that the parties actually had a prior intention of entering into a transaction having a definable structure.

“Intention is the thing that you actually want to do,” he says. “The motive is why you want to accomplish it. You can get rectification when you can clearly show that there was an intention that the written agreement doesn’t effect. . . . What was really a problem in Fairmont was not the intention but the motive.”

Fairmont executed some directors’ resolutions to redeem some shares, which wasn’t what they would have done if they knew what the tax consequence would be, he says. “The motive was to avoid tax, but [Fairmont] mistakenly formed the wrong intention in effecting that motive.” The result of the Fairmont Hotels decision is “that you can’t rectify for motive.”

One implication of the decision will be increased transaction costs for corporations, Rollwagen predicts, to “make sure they get it right.” Mistakes such as occurred in *Fairmont* often occur when dealing with real-time commercial decisions. “Some things may need to be slowed down.

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