



**SUPREME COURT OF CANADA**

**CITATION:** Quebec (Agence du Revenu) v. Services  
Environnementaux AES inc., 2013 SCC 65

**DATE:** 20131128  
**DOCKET:** 34235, 34393

**BETWEEN:**

**Agence du Revenu du Québec (formerly the Deputy Minister of Revenue of  
Quebec)**  
Appellant  
and  
**Services Environnementaux AES inc. and Centre Technologique AES inc.**  
Respondents  
- and -  
**Attorney General of Canada**  
Intervener

**AND BETWEEN:**

**Agence du Revenu du Québec**  
Appellant  
and  
**Jean Riopel, Christiane Archambault and Entreprise J.P.F. Riopel inc.**  
Respondents  
- and -  
**Attorney General of Canada**  
Intervener

**OFFICIAL ENGLISH TRANSLATION**

**CORAM:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and  
Karakatsanis JJ.

**REASONS FOR JUDGMENT:** LeBel J. (McLachlin C.J. and Fish, Abella, Rothstein,  
(paras. 1 to 56) Cromwell and Karakatsanis JJ. concurring)

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QUEBEC (AGENCE DU REVENU) v. SERVICES ENVIRONNEMENTAUX AES

**Agence du Revenu du Québec (formerly the  
Deputy Minister of Revenue of Quebec)**

*Appellant*

v.

**Services Environnementaux AES inc. and  
Centre Technologique AES inc.**

*Respondents*

and

**Attorney General of Canada**

*Intervener*

- and -

**Agence du Revenu du Québec (formerly the  
Deputy Minister of Revenue of Quebec)**

*Appellant*

v.

**Jean Riopel, Christiane Archambault and  
Entreprise J.P.F. Riopel inc.**

*Respondents*

and

**Attorney General of Canada**

*Intervener*

**Indexed as: Quebec (Agence du Revenu) v. Services Environnementaux AES inc.**

**2013 SCC 65**

File Nos.: 34235, 34393.

2012: November 8; 2013: November 28.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Contracts — Interpretation — Intention of parties — Intention declared in documents relating to transactions not reflecting common intention of parties because of errors made by professional advisors — Transactions having unforeseen tax consequences — Whether it is open to courts to intervene to find that amendments made by parties to documents associated with transactions were legitimate and necessary — Civil Code of Québec, S.Q. 1991, c. 64, art. 1425.*

Shareholders of corporations engaged in transactions to reorganize the corporations without tax consequences. As a result of errors made by the shareholders' tax advisors, the tax authorities issued notices of assessment in which they claimed tax amounts these taxpayers had not expected to pay. In the *AES* case,

the parties had agreed on share transfers involving a rollover transaction that would be conducted in accordance with the procedures provided for in the relevant tax legislation and was based on a calculation of the adjusted cost base (“ACB”) of the transferred shares. One aspect of the consideration paid for the transferred shares was the issuance and delivery of a note for an amount equal to that of their ACB. The agreement, the intended effect of which was to defer the tax payable, was vitiated by an error made in calculating the ACB of the shares. Rather than seeking to annul the contract, the parties agreed to correct the error by amending the documents that recorded and implemented their agreement, including the necessary tax forms, after which they took their case to the Superior Court by means of a motion for rectification. In the *Riopel* case, the parties had reached a verbal agreement to carry out a detailed tax plan, the essential terms of which had been recommended to them by their advisors. The agreement provided for a series of operations and acts to be completed, with precise timelines, to carry out share transfers and a corporate amalgamation in such a way as to defer the tax liability associated with those transactions by following procedures provided for in tax legislation. The parties’ advisors reversed the order of the corporate amalgamation and the share transfer. Because that error prevented the deferral of tax, they tried to correct it by amending the original acts and having their clients sign the amended acts without explaining the nature of the amendments to them. After the tax authorities issued the notices of assessment and the errors made in drafting the writings associated with the transaction were discovered, the parties agreed to give effect to their original agreement by amending the defective acts.

The Superior Court granted the application for rectification in *AES* but dismissed the one in *Riopel*. The Quebec Court of Appeal granted both applications for rectification, holding that art. 1425 *C.C.Q.* authorized the correction of the discrepancies between the common intentions of the parties and the intentions declared in the acts, because the applications were legitimate and neither correction affected the rights of third parties.

*Held:* The appeals should be dismissed.

The interplay of the civil law and tax law limits the scope of intervention of the courts. In principle, the nature and the legal consequences of transactions to which tax law applies are determined by reference to the common law and the civil law, although a court dealing with a challenge relating to civil aspects of a transaction with tax implications does not have the authority to rule on notices of assessment that were issued or notices of objection that were filed in respect of that transaction. The validity and effects of the notices in question must instead be determined, if necessary, by the courts that have been assigned jurisdiction over such matters, and those courts must also consider the consequences of judgments rendered by the civil courts with respect to the transactions that led to the issuance of the notices of assessment.

In the civil law, the law of contracts is premised on a principle of consensualism, and a fundamental distinction exists between the exchange of consents and the written expression of that exchange. The parties are free as between

themselves, although this is subject to any rights acquired by third parties, to amend or annul the contract and the documents recording it. There is nothing to prevent them from acknowledging the existence of a common error and agreeing to correct it by mutual consent. The determination by the courts of the common intention, or will, of the parties represents a true exercise of interpretation, and it was open to the courts to intervene for that purpose under art. 1425 *C.C.Q.* If a private writing contains an error, the court must, once the error is proved in accordance with the rules of evidence in civil matters, note the error and ensure that it is remedied. In the civil law, the tax authorities do not have an acquired right to benefit from an error made by the parties to a contract after the parties have corrected the error by mutual consent.

In these cases, the common intention of the parties was expressed erroneously in all the writings prepared to carry out the tax plans on which they had agreed. It was open to the courts to intervene to find that the amendments made by the parties to the acts at issue were legitimate and necessary. Their intervention was justified by the substantive law and was not precluded by Quebec's rules of civil procedure. The issue was argued in an adversarial process. The tax authorities were impleaded, as they had to be, and a motion for rectification was the normal way to bring the issue before the Superior Court and ask it to intervene to consider conclusions that were, first and foremost, declaratory.

## Cases Cited

**Referred to:** *Canada (Attorney General) v. Juliar* (2000), 50 O.R. (3d) 728; *Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59; *Banque de Montréal v. Européenne de Condiments S.A.*, [1989] R.J.Q. 246; *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793; *Sobeys Québec inc. v. Coopérative des consommateurs de Sainte-Foy*, 2005 QCCA 1172, [2006] R.J.Q. 100; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678.

## Statutes and Regulations Cited

*Civil Code of Québec*, S.Q. 1991, c. 64, arts. 1372, 1373, 1374, 1378, 1385, 1412, 1425, 1439, 2818, 2829.

*Code of Civil Procedure*, R.S.Q., c. C-25, art. 5.

*Companies Act*, R.S.Q., c. C-38.

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 86.

*Taxation Act*, R.S.Q., c. I-3, ss. 541 to 543.

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APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Morissette and Kasirer J.J.A.), 2011 QCCA 394, 2011 D.T.C. 5045, [2011] Q.J. No. 1911 (QL), 2011 CarswellQue 11969, SOQUIJ AZ-50727855, affirming a decision of Borenstein J., 2009 QCCS 790 (CanLII), [2009] J.Q. n<sup>o</sup> 1554 (QL), 2009 CarswellQue 1643, SOQUIJ AZ-50541289. Appeal dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Bich, Kasirer and Wagner JJ.A.), 2011 QCCA 954 (CanLII), [2011] J.Q. n° 5720 (QL), 2011 CarswellQue 5360, SOQUIJ AZ-50755104, setting aside a decision of Nantel J., 2010 QCCS 1576 (CanLII), [2010] J.Q. n° 3418 (QL), 2010 CarswellQue 3545, SOQUIJ AZ-50628627. Appeal dismissed.

*Pierre Zemaitis, Christian Boutin and Khashayar Haghgouyan*, for the appellant.

*Dominic C. Belley*, for the respondents Services Environnementaux AES inc. and Centre Technologique AES inc.

*Bruno Racine and Marc-Antoine St-Pierre*, for the respondents Jean Riopel, Christiane Archambault and Entreprise J.P.F. Riopel inc.

*Pierre Cossette and Susan Shaughnessy*, for the intervener.

English version of the judgment of the Court delivered by

LEBEL J. —

## I. Introduction

[1] The issues raised by these appeals relate to the nature and scope of agreements between taxpayers concerning corporate reorganizations, tax planning and the tax consequences thereof. Briefly, in these two cases, shareholders of corporations engaged in various transactions to reorganize the corporations in question and transfer interests in them. The intention was that their agreements would have no tax consequences. As a result of errors made by the shareholders' tax advisors, the Agence du Revenu du Québec ("ARQ") and the Canada Revenue Agency ("CRA") issued notices of assessment in which they claimed tax amounts these taxpayers had not expected to pay.

[2] After the notices of assessment were issued in these two cases, those involved agreed to correct the documents relating to their agreements in order to attain the intended tax neutrality. They applied to the Quebec Superior Court for rectification of their original documents, which, they argued, did not reflect their true agreements. The Superior Court rendered contradictory judgments in the two cases, granting one of the applications for rectification (2009 QCCS 790 (CanLII)) but dismissing the other (2010 QCCS 1576 (CanLII)). The Quebec Court of Appeal granted both applications for rectification to give effect to the true intentions of the parties to the agreements (2011 QCCA 394, 2011 D.T.C. 5045; 2011 QCCA 954 (CanLII)). For reasons that differ in part from those of the Court of Appeal, I would

dismiss the ARQ's appeals, declare that it was open to the respondents to amend their agreements, and recognize their amendments.

## II. Origins of the Cases

### A. *Services Environnementaux AES inc.*

[3] The first appeal is that of Services Environnementaux AES inc. ("AES") and Centre technologique AES inc. ("Centre technologique"). The evidence concerning the transactions that gave rise to the dispute between the tax authorities and AES is summarized in admissions the parties agreed on and filed in the Superior Court.

[4] AES is a corporation that was constituted in 1993 under Part IA of the *Companies Act*, R.S.Q., c. C-38. Centre technologique was created in 1997 under the same statute as a wholly owned subsidiary of AES. In 1998, in a reorganization of the business, AES agreed to transfer 25 percent of its shares in Centre technologique's capital stock to an investor, Groupe Sani-Gestion. For the purposes of that investment, AES and Centre technologique entered into a reorganization and tax planning agreement and instructed their tax advisors to implement it. To ensure that the agreement would be tax-neutral, AES and Centre technologique made use of certain provisions on exchanges of shares set out in s. 86 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), and ss. 541 to 543 of the *Taxation Act*, R.S.Q., c. I-3. Under those provisions, a taxpayer may defer the tax impact of an exchange of shares

on condition, *inter alia*, that the consideration other than shares does not exceed the adjusted cost base (“ACB”) of the shares received.

[5] An error, attributed to AES’s advisors, was made in valuing the ACB of the transferred shares: it was valued at \$1,217,029, whereas its actual value was only \$96,001. Relying on that incorrect valuation, AES exchanged its 1,217,029 voting shares in Centre technologique’s capital stock for 4,500,000 voting participating shares in Centre technologique and a demand note from Centre technologique for \$1,217,028. Centre technologique repaid the amount of that note to AES between December 18, 1998 and September 30, 1999. In 2000, the tax authorities added a taxable capital gain of \$840,770 to the income reported by AES for the taxation year ending on September 30, 1999.

[6] Notices of assessment were issued, and notices of objection were filed. That aspect of the case is not before this Court, which must consider the consequences of the attempt made by AES and Centre technologique to correct a transaction that could not be tax-neutral as the parties had intended, because of the error made in carrying it out. On November 1, 2001, after AES had objected to the notices of assessment, the parties agreed to cancel and take back the note for \$1,217,028. A new note dated December 11, 1998 was to be issued in the amount of \$95,000 together with 1,122,029 Class C shares with a value of \$1,122,029. AES and Centre technologique then presented a motion in the Quebec Superior Court for rectification and for a declaratory judgment. They asked that court to amend the

original agreements so that they would reflect the parties' original intention, to make them retroactive to the original transaction date, that is, to December 1998, and to declare that the amendments could be set up against third parties. The Deputy Minister of Revenue of Quebec, who has now been succeeded by the ARQ, contested the motion and asked that it be dismissed, as did the CRA.

#### *B. Riopel*

[7] In 2004, the respondents Jean Riopel and Christiane Archambault, who had been married since 1984, owned 60 percent and 40 percent, respectively, of the shares of a corporation called Déchiquetage Mobile JR inc. ("Déchiquetage Mobile"). In July 2004, all Déchiquetage Mobile's assets were sold to third parties. The only asset then consisted of the proceeds of the sale of those assets. At the time, Mr. Riopel was also the sole shareholder in a holding company, Entreprise J.P.F. Riopel inc. ("JPF").

[8] On the recommendation of their accountant, Mr. Riopel and Ms. Archambault agreed to amalgamate Déchiquetage Mobile and JPF. Mr. Riopel was to become the sole shareholder of the company that would result from the amalgamation, as Ms. Archambault was to transfer all her interests in Déchiquetage Mobile to him for an agreed price. The intention was that the transaction would have no tax consequences for Ms. Archambault. The accountant and a tax lawyer were instructed to carry out this plan.

[9] On September 1, 2004, the advisors of Ms. Archambault and Mr. Riopel presented them with a detailed plan for the amalgamation of the two companies and the transfer of interests and for the deferral of the tax impact of the transaction. First of all, on October 30, 2004, Ms. Archambault was to sell her shares in Déchiquetage Mobile to Mr. Riopel for \$720,000. That price was to be paid in part with a note for \$335,000, which corresponded to the ACB of Ms. Archambault's shares. The balance of the sale price, which was equal to the difference between the fair market value of the shares and their ACB, or \$385,000, was to be paid by issuing 385,000 preferred shares in JPF with a redemption price of \$385,000. On November 1, 2004, the articles of amalgamation and certificate of amalgamation of Déchiquetage Mobile and JPF were to be completed and the two companies were to be amalgamated; the new company's name was to be Entreprise J.P.F. Riopel inc. ("JPF-2"). On November 4, 2004, JPF-2 was to repay the amount of the \$335,000 note to Ms. Archambault and redeem her preferred shares, whose total value was \$385,000. According to the tax lawyer, that redemption would generate a deemed dividend of \$385,000, but the dividend would have no tax consequences, because it was to be paid out of JPF-2's capital dividend account.

[10] Unfortunately, the transaction did not unfold as planned. The parties' advisors made a series of errors in preparing the juridical acts required to implement the plan they had recommended to their clients. The articles of amalgamation filed with the Inspector General of Financial Institutions, which were dated November 1, 2004, made no mention of the transfer of Ms. Archambault's shares, which was

supposed to have taken place on October 30. The amalgamation therefore preceded the sale of the shares, contrary to what had been planned, which meant that the transaction was not tax-neutral as the parties had intended.

[11] To correct the situation and preserve the transaction's tax effectiveness, the accountant and the tax lawyer decided on October 27, 2004 to change the legal documentation that had already been prepared, but they did not breathe a word of this to their clients. They kept November 1, 2004 as the formal amalgamation date, but restructured the planned transaction in the documents they prepared. Ms. Archambault's shares in Déchiquetage Mobile were converted to 720 common shares in JPF-2. On November 2, 2004, after the amalgamation, JPF-2 redeemed Ms. Archambault's 720 shares using the rollover provisions in the tax legislation. To pay the purchase price, JPF-2 provided a \$335,000 demand note and issued 385,000 redeemable no par value preferred shares. On November 2, Mr. Riopel and Ms. Archambault signed all the necessary contracts and documents, but their advisors did not explain to them the nature of the changes that had been made to the original plan. Moreover, they acknowledged that they had not read the documents at the time of the closing of the transaction. JPF-2 subsequently repaid the note owed to Ms. Archambault and redeemed her preferred shares for \$385,000.

[12] Suddenly, in January 2007, Ms. Archambault received notices of assessment from the CRA and from Quebec's Ministère du Revenu. Ms. Archambault was deemed to have been paid a \$335,000 taxable dividend, and an



amount of about \$150,000 in tax arrears was claimed from her, plus the usual interest. These notices of assessment meant that, in the tax authorities' opinion, the tax plan contained errors and could not meet its objective.

[13] The respondents filed a notice of objection to the notices of assessment in accordance with the applicable tax legislation. That aspect of the case remains unresolved. After receiving the notices of assessment, the respondents began, in the Quebec Superior Court, a proceeding called a [TRANSLATION] "Motion to institute a proceeding in rectification of contract". According to them, the purpose of the proceeding was to obtain recognition of the agreement they had actually reached so that the documents would reflect their true intention. In bringing the proceeding, they intended to give effect to the original terms of the transaction by amending or replacing the documents signed on November 2, 2004 at their tax advisors' office.

[14] The respondents asked, first, that the date of the sale of their shares be changed retroactively from November 2 to October 30, 2004. The sale would thus be deemed to have taken place on the latter date, that is, before the amalgamation. They also asked in their motion for changes to the schedules to the articles of amalgamation that would modify the share classes established on November 2. In addition, they requested consequential changes to the T2057 and TP-518 tax forms they had filed after the amalgamation. Finally, they asked for a change to the price of the transferred shares, as well as to the classes and numbers of those shares, to make these terms consistent with the tax plan that had originally been agreed upon. The

purpose of all these changes was to ensure that the respondent Archambault would not be deemed to have been paid a taxable dividend as a result of the transfer of the shares.

[15] In the respondents' view, their motion represented a simple request for rectification of a contract in order to correct writings that were inconsistent with their actual agreement. Both the ARQ and the CRA contested the admissibility of and basis for the respondents' motion. They argued that the possibility of making such a motion in the Superior Court was not provided for in Quebec's rules of civil procedure and that the so-called application for rectification was completely foreign to Quebec's law of obligations.

### III. Judicial History

[16] The two cases, which this Court heard together, were conducted independently of one another in the Quebec courts. They were heard and decided separately both in the Superior Court and in the Court of Appeal. I will summarize the judgments rendered in the *AES* case first, followed by the judgments in the *Riopel* case.

A. AES

- (1) Quebec Superior Court, Borenstein J., 2009 QCCS 790 (CanLII)

[17] On the basis of admissions of fact filed by the parties, the Superior Court granted the motion for rectification, finding that the respondents' proceeding was not prohibited under Quebec's rules of civil procedure. Borenstein J. held that Quebec civil law authorizes a certain form of rectification to reflect the true intention of the parties to a contract. She therefore authorized the modification of all the documents relating to the transaction, declared that the amendments could be set up against the tax authorities and made them retroactive to the date originally intended for the transaction.

- (2) Quebec Court of Appeal, Chamberland, Morissette and Kasirer JJ.A., 2011 QCCA 394, 2011 D.T.C. 5045

[18] In a unanimous decision, the Court of Appeal affirmed the Superior Court's judgment. The Court of Appeal saw no impediment to the respondents' motion in Quebec's rules of civil procedure. According to the Court of Appeal, the courts have the power in Quebec civil law to correct acts in order to give effect to the parties' true common intention, and there is no need to import the common law doctrine of rectification into Quebec's law of obligations. In its opinion, art. 1425 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), authorizes the correction of a discrepancy between the common intention of the parties and the intention declared in

the acts, provided that the application is legitimate and that the correction does not affect the rights of third parties (paras. 17-20). The Court of Appeal concluded that the application was legitimate and did not affect the rights of the tax authorities.

B. *Riobel*

(1) Quebec Superior Court, Nantel J., 2010 QCCS 1576 (CanLII)

[19] The trial judge found, first, that no agreement of wills that would have led to the formation of a contract had resulted from the meeting of September 1, 2004 between the parties and their advisors. Furthermore, in any event, the alleged error was more than just a clerical error, which is the only type of error a court can correct. What was in fact being sought was a substantive restructuring of the transaction, which the Superior Court did not have the power to authorize, since the common law doctrine of rectification does not apply in Quebec civil law.

(2) Quebec Court of Appeal, Bich, Kasirer and Wagner J.J.A., 2011 QCCA 954 (CanLII)

[20] The Court of Appeal set aside the Superior Court's judgment and granted the conclusions sought by the respondents with regard to rectification, giving them retroactive effect and declaring that they could be set up against the tax authorities. It based its judgment on the principles that had been laid down in *AES*, finding that the type of motion filed by the respondents is available under Quebec's rules of civil

procedure. A court may, without applying the common law doctrine of rectification but by way of interpretation in accordance with art. 1425 *C.C.Q.*, recognize the parties' true agreement and find that it does not correspond to their declared will. The Court of Appeal held that, in light of the evidence, it was therefore open to the Superior Court to correct the identified errors in the documents.

#### IV. Analysis

##### A. *Issues and Positions of the Parties*

[21] The issues raised by these two appeals lie on the line between the law of obligations and tax law. To resolve them, it will be important to properly identify the legal nature of the parties' transactions and the instruments they used to conduct them. First, however, I must consider how the parties identify and frame the issues and how they propose to resolve them. I will then explain how I define and characterize the issues raised by these cases and how I would resolve them.

[22] The ARQ takes the same position in both *AES* and *Riopel* while noting the distinctive features of their respective fact situations. In brief, the ARQ first argues that there is nothing in the *Code of Civil Procedure*, R.S.Q., c. C-25, that authorizes the Superior Court to consider the type of motion the respondents have made. The *C.C.P.* does not authorize a court to rectify or amend a contract. The basis for a power to do so would have to be found in the substantive law established in the *C.C.Q.* However, the ARQ argues, the power to interpret contracts provided

for in art. 1425, on which the Court of Appeal relied in granting the applications, does not apply in these cases, since they do not involve interpretation in the true sense. Only “clerical” errors can be corrected under art. 1425, but the errors relied on by the respondents are not clerical errors. According to the ARQ, the errors alleged by the taxpayers relate only to the economic consequences of their transactions and do not even form a basis for an action to annul for one of the causes provided for in the *C.C.Q.* Thus, the ARQ submits that it can still rely on the agreements in the form in which they were originally set down in writing and that the changes subsequently made to their wording to record the “original” agreement may not be set up against it.

[23] The Attorney General of Canada has intervened in both the appeals in support of the ARQ. According to him, the power of the courts to correct supposedly defective writings is limited in Quebec civil law to the correction of clerical errors. Thus, the proceedings instituted in *Riopel* and in *AES* have no basis in the civil law. He agrees with the ARQ that the Court of Appeal gave too broad a scope to the power to interpret contracts provided for in art. 1425 *C.C.Q.* Finally, the Attorney General of Canada criticizes the common law courts for unduly extending the concept of rectification in tax cases since the Ontario Court of Appeal’s decision in *Canada (Attorney General) v. Juliar* (2000), 50 O.R. (3d) 728. In any event, he argues, this concept of rectification does not apply in the civil law context. In his view, this Court should even intervene to correct that part of the case law and bring it into line with the Court’s most recent decisions in this regard.

[24] The respondents in *AES* and in *Riopel* advance arguments that are substantially similar despite the significant differences in their respective fact situations. They submit, first, that their proceedings are not precluded by Quebec's rules of civil procedure. *AES* and Centre technologique even seem to suggest that the Superior Court's implicit powers could form one legal basis for a procedure for the correction of contracts. In oral argument, the respondents in *AES* and in *Riopel* forcefully stressed that they are not asking for the annulment of the contracts at issue. On the contrary, far from seeking to amend their agreements, they want the true nature of the agreements to be established and recognized so as to ensure that their declared will, as expressed in their written documents, is consistent with their true intention. In their view, that would be an interpretation exercise permitted by art. 1425 *C.C.Q.* Finally, the respondents deny that they are trying to import the common law doctrine of rectification into the civil law. Rather, the form of rectification they are invoking is one for which a proper basis exists in the civil law of Quebec, in the law of obligations, and that is consistent with the principles of that area of the law. They argue that the correction of the writings can have retroactive effect and can be set up against the tax authorities.

#### B. *Nature of the Issues*

[25] Thus, the dispute between the parties raises both procedural and substantive issues. First, are the proceedings instituted by the respondents consistent with Quebec's rules of civil procedure? And second, are the respondents'

proceedings to amend or correct contracts, which the Court of Appeal found to be acceptable, permitted in Quebec civil law? This second issue is the main one. The procedural issues raised in these cases are of only minor importance.

[26] However, the way the evidence was adduced in these cases certainly had a significant impact on the consideration of the issues, as it facilitated proof of the taxpayers' allegations. In *AES*, the evidence consists of written admissions and exhibits filed jointly by the parties at trial. In *Riopel*, the respondents presented extensive documentary and testimonial evidence — to which no objections were made — in the Superior Court in order to establish what they alleged to be the true nature of their agreement and the errors made by their advisors in carrying it out. The admissibility of that evidence was not at issue at trial. The relevant questions of law must therefore be considered and decided on the basis of that uncontested evidence establishing the nature of the agreements that resulted from the exchanges of consents between the parties. Nevertheless, to help in resolving similar cases in the future, I should, in view of how the evidence was adduced, make a few comments on the possible impact of the rules of evidence on the resolution of substantive issues. It must first be determined whether the agreements in question are contracts in the civil law sense.

### *C. Concept of Contract*

[27] Although the civil law concept of contract is, generally speaking, clearly understood, these two cases show that there can sometimes be disagreement, in a



given situation, over whether a contract legally exists and over the time at which the contract is formed and binds the parties. The parties do not always agree on the content of the contract or on the point at which it crossed the threshold of legal existence. In this context, a review of some basic concepts will be helpful.

[28] In Quebec civil law, the contract is defined in the law of obligations as an agreement of wills for the purpose of carrying out juridical operations. The formation of a contract is subject to the principle of consensualism. A contract is formed by the exchange of consents. No particular form is required except where the legislature intervenes to impose one. The common intention of the parties is not equivalent to the expression — oral or written — of their declared will. As a general rule, the writing is not an autonomous act, unlike such documents as bills of exchange and certain types of letters of guarantee, that in a sense become the undertaking and are usually disconnected from the circumstances that led to their creation (*Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59, at pp. 70-71; *Banque de Montréal v. Européenne de Condiments S.A.*, [1989] R.J.Q. 246 (C.A.); N. L'Heureux, É. Fortin and M. Lacoursière, *Droit bancaire* (4th ed. 2004), at pp. 290-92).

[29] These appeals will therefore require a reflection on contracts. What is a contract and when does it come into existence? What is the relationship between a contract and the expression thereof?

[30] Article 1378 *C.C.Q.* defines a contract as “an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation”. A contract is an agreement that is intended to produce legal effects (D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 53; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), at p. 51, § 20; P.-G. Jobin and N. Vézina, eds., *Les obligations* (7th ed. 2013), at p. 82; J. Ghestin, “La notion de contrat” (1990), 12 *Droits* 7, at p. 19). The creation of legal effects that bind the parties is the distinctive function of the contract. The formation of a contract requires agreement on an object, which is defined in art. 1412 *C.C.Q.* as “the juridical operation envisaged by the parties” at the time of the contract’s formation. Furthermore, the contract gives rise to an obligation (art. 1372 *C.C.Q.*), the object of which is “the prestation that the debtor is bound to render to the creditor” (art. 1373 *C.C.Q.*). The prestation itself may relate to any property, but the property must be sufficiently determinate or determinable in accordance with objectively verifiable standards or practices of determination or calculation (art. 1374 *C.C.Q.*; Baudouin and Jobin, at pp. 34-35; J. Deslauriers, *Vente, louage, contrat d’entreprise ou de service* (2nd ed. 2013), at para. 67; P.-C. Lafond, ed., *JurisClasseur Québec — Collection droit civil — Obligations et responsabilité civile* (loose-leaf), fasc. 1, at p. 26; B. Moore, “Flexible contrat”, in B. Moore, ed., *Mélanges Jean-Louis Baudouin* (2012), at pp. 569 and 574). Once an agreement of wills is reached in accordance with these principles, the contract establishes a set of rules applicable to the parties, which have legal authority for them, for the purpose of carrying out what thereby becomes a common operation or plan.

[31] From this perspective, for a contract to exist and become a legal reality, the parties' undertakings must be sufficiently precise to establish the details of the contemplated operation. In some cases, the details of the operation will be clear immediately. In other cases, a plan will take shape gradually and will come into legal existence as a contract that is binding on the parties and represents the law applicable to them once its details are sufficiently clear.

[32] Moreover, as I mentioned above, the formation of a contract is subject to the principle of consensualism. In principle, it does not require a physical sign or medium. In Quebec civil law, a contract is formed by a meeting of the parties' minds, as is confirmed by art. 1385 *C.C.Q.* As a rule, the formation of a contract does not depend on the adoption of a particular form. It is true that agreements are often required by law to be in writing, one example being the marriage contract, which must be in authentic form and established by a notarial act. In other cases, particularly those involving types of contracts that are highly regulated, as in the field of consumer law, a writing is required and detailed formal requirements must be met. Nevertheless, the principle remains the same. A contract is distinct from its physical medium. In the Quebec law of obligations, a distinction is maintained between the "*negotium*" and the "*instrumentum*", to repeat the words used by the Court of Appeal in the cases at bar, that is, between the common intention and the declared will. The agreement lies in the common intention, despite the importance — as between the parties and in relation to third parties — of the declaration, oral or written, of that intention.

[33] The existence of formal requirements for acts contributes to the complexity of the legal environment of contracts. The use of a written instrument may also bring into play certain requirements of the law of civil evidence that reflect a concern with protecting the legal certainty and the stability of transactions. These requirements must be considered when going beyond the intention declared in the writing to determine the parties' true intention. Evidentiary requirements will also have an impact on the situations of third parties or assignees whose interests are alleged to be affected by the contract.

[34] In these two cases, therefore, this Court is concerned with the relationship between what the parties claim to have been their true intention and their declared will. Because the testimonial and documentary evidence was adduced without any objections, the requirements of the law of evidence are of no consequence in the analysis on this issue.

[35] Obviously, the validity of consent depends on its integrity. Various types of errors may vitiate consent. Moreover, the contract belongs to the parties. They are free as between themselves, although this is subject to any rights acquired by third parties, to amend or annul the contract and the documents recording it. This means that there is nothing to prevent them from acknowledging the existence of a common error and agreeing to correct it by mutual consent. Although the contract as defined in the *C.C.Q.* remains the law applicable to the parties, the parties are free to annul their contract or modify its terms (art. 1439 *C.C.Q.*). In a sense, the result is a new

contract whose purpose is to modify or extinguish the existing agreement. In light of these principles, I must now determine whether the parties to the transactions at issue entered into contracts and, if they did, inquire into the content of those contracts and of the acts and documents that are alleged to have expressed the agreements of wills.

*D. Nature of the Juridical Operations in Riopel and AES*

[36] In *Riopel*, the fact situation is clear and well established. It is not open to dispute that, on September 1, 2004, the parties reached a verbal agreement to carry out a detailed tax plan, the essential terms of which had been recommended to them by their tax advisors. That agreement was a contract within the meaning of the *C.C.Q.* The agreement of wills defined all the operations and acts required to carry out the share transfers and corporate amalgamation in such a way as to defer the tax liability associated with those transactions by following procedures provided for in tax legislation. The agreement established timeframes for executing the acts and specified the order in which they were to be completed. It required a variety of writings to be drawn up, including contracts, company resolutions, articles of amalgamation, and tax forms that had to be prepared and sent. Those writings gave effect to and recorded the agreement, but the agreement itself nevertheless existed as of September 2004.

[37] The agreement of wills was not implemented properly, however. The parties' advisors made two errors in succession. First, they reversed the order of the corporate amalgamation and the transfer of Ms. Archambault's shares. Because that

error prevented the deferral of tax, they tried to correct it. To do so, they amended the original acts and had their clients sign the amended acts without explaining the nature of the amendments to them.

[38] After the tax authorities issued the notices of assessment and the errors made in drafting the writings associated with the transaction were discovered, the parties agreed to give effect to their original agreement by amending the defective acts that expressed it incorrectly.

[39] Although the fact situation in *AES* is different, the admissions in the record confirm the existence of a tax planning agreement. The parties had agreed on share transfers involving a rollover transaction that would be conducted in accordance with the procedures provided for in the relevant tax legislation and was based on a supposedly accurate calculation of the ACB of the transferred shares. The agreement, the intended effect of which was to defer the tax payable, was vitiated by the error made in calculating the ACB. One aspect of the consideration paid for the transferred shares was the issuance and delivery of a note for an amount equal to that of their ACB. The agreement with respect to this particular prestation was dependent on the ACB being accurate, and therefore on its being consistent with s. 86 of the *Income Tax Act* and the corresponding provisions of Quebec's *Taxation Act*. At the time of the agreement of wills, the ACB was at the very least determinable by means of accepted accounting principles and practices (V. Krishna, *The Fundamentals of Canadian Income Tax* (9th ed. 2006), at pp. 1206-7). Given the importance of this

factor, the error made in establishing or calculating the ACB could no doubt have served, under the law of obligations, as a basis for annulling the contract at the initiative of one of the parties.

[40] Instead, the parties agreed to correct the error by amending the documents that recorded and implemented their agreement, including the necessary tax forms, thereby restoring the integrity of their original agreement. The amendments made to the contract documents eliminated the inconsistency between the parties' original agreement and the manner in which it had been expressed.

[41] In light of these conclusions on the nature of the parties' agreements, and in view of the context established by the evidence in this regard, it will be necessary to determine whether the proceedings instituted by the respondents in *AES* and in *Riopel* are admissible and whether the conclusions they seek are acceptable. It must be asked whether, within the civil law's legal framework for the law of obligations, the tax authorities can rely on acts that have been proved to contain errors, or whether such acts can be amended so that the taxpayers can have their tax situation subsequently assessed on the basis of the amended acts.

#### E. *Situation of the Revenue Agencies*

[42] The appellant, the ARQ, and the intervener, the Attorney General of Canada, find themselves engaged in a dispute regarding the nature and effect of certain operations carried out by the respondents that involve the application of

Quebec civil law. As we have already seen, however, the acts in question have tax consequences. This interplay of the civil law and tax law limits the scope of this Court's intervention, and of that of the Court of Appeal and the Superior Court.

[43] Actual challenges to the notices of assessment issued in these cases would have to be raised in the courts on which the tax legislation has conferred jurisdiction over such matters. As this Court pointed out with regard to an attempt to use the judicial review process to respond to the issuance of notices of assessment, the specific avenues established by Parliament for tax appeals cannot be circumvented (*Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793, at para. 11; see also C. Campbell, *Administration of Income Tax 2013* (2013), at pp. 564-70). This means that a court dealing with a challenge relating to civil aspects of a transaction with tax implications does not have the authority to rule on notices of assessment that were issued or notices of objection that were filed in respect of that transaction. The validity and effects of the notices in question must instead be determined, if necessary, by the courts that have been assigned jurisdiction over such matters. It would also be up to those courts to consider the consequences of judgments rendered by the civil courts with respect to the transactions that led to the issuance of the notices of assessment.

[44] Nevertheless, the dispute in the two appeals before us necessarily concerns the ARQ and the CRA. Because of their situations, it must be asked whether they can rely on acquired rights to have an erroneous writing continue to



apply even though the existence of an error has been established and it has been shown that the documents filed with the tax authorities are inconsistent with the parties' true intention.

[45] For such a conclusion to be reached, it would have to be found that, once the respondents completed their operations, the revenue agencies became special assignees that were entitled to collect part of the economic proceeds of the transactions, and that they could rely forever on the parties' declared will. I do not dispute the fact that the tax collection procedures, remedies and types of security established by law to facilitate the recovery of tax debts give the agencies rights in the proceeds of a variety of juridical operations. For example, they may become assignees of a series of claims or holders of rights in a trust in respect of certain property affected by transactions. Under the civil law itself, the agencies can also prove that simulation existed and demonstrate the true nature of transactions they allege to be shams. In addition, tax legislation may recharacterize contractual or economic transactions for its own purposes by overriding the legal categories established by the common law and the civil law. With the exception of such situations, however, tax law applies to transactions governed by, and the nature and legal consequences of which are determined by reference to, the common law or the civil law.

[46] But the parties are not yet at these later stages of their respective cases. For now, therefore, what must be determined is the true nature of the operations

transacted in *AES* and *Riopel*. The tax consequences of this determination will, if necessary, be decided in another forum. This Court must decide whether the parties' juridical acts, which led to the notices of assessment, are consistent with their true common intention and whether the tax authorities are entitled to have an erroneous declaration of intention continue to apply. I will therefore consider whether the respondents have a right to amend the acts and documents expressing their common intention or to have them corrected, and to have the amended or corrected acts and documents recognized.

F. *Validity of Amendments to the Acts*

[47] The ARQ argues emphatically that under Quebec law the respondents cannot amend the documents associated with their tax planning. Its argument focuses primarily on two grounds. First, the courts should not have interpreted documents that were clear and unambiguous. It was not open to them to intervene to correct those acts on the basis of the power with respect to interpretation conferred on them in art. 1425 *C.C.Q.* Second, if there was an error, it would have to serve as the basis for an action to annul, not an attempt to correct the acts.

[48] In the context of the application of art. 1425 *C.C.Q.*, I agree with the Court of Appeal that the determination of the common intention, or will, of the parties represents a true exercise of interpretation. The discrepancy seen in the evidence between the common intention of the parties and the expression of that intention — or the declared will — in itself raises an interpretation issue. It is necessary to determine

what the parties intended and where that intention can be found, in the initial exchange of consents or in the written expression thereof. A court must resolve this discrepancy, and under art. 1425, it is not limited to determining what the parties intended, but can also determine where their intention is to be found. Often, this will involve employing various techniques of interpretation to ascertain the meaning of words or expressions in an act in order, if necessary, to fill gaps in the text or find content in it that can be well hidden.

[49] In these two appeals, the determination of meaning goes back to the root of the obligation. Which should prevail, the proven common intention or the intention identified in the apparent act? Although the interpretation exercise comes down to this basic choice, its purpose nevertheless continues to be to seek the parties' intention in accordance with art. 1425 *C.C.Q.* (F. Gendron, *L'interprétation des contrats* (2002), at p. 31). The situation that emerges from the evidence in the case before the court is of critical importance to this choice. If there had been a dispute between the parties about the nature of their intention or if third parties had acquired rights in relation to the legal situation created by the acts, the law of evidence in civil matters would have placed certain obstacles in the way of this interpretation exercise. For example, authentic acts and private writings are proof of their content (arts. 2818 and 2829 *C.C.Q.*). Moreover, the imperatives of certainty and stability of transactions and of protection of the rights of third parties support this cautious approach dictated by the law of evidence when it comes to contradicting or modifying

the terms of a writing (*Sobeys Québec inc. v. Coopérative des consommateurs de Sainte-Foy*, 2005 QCCA 1172, [2006] R.J.Q. 100 (C.A.), at para. 54, *per* Bich J.A.).

[50] There is no such obstacle in the cases at bar. It has been established that the true agreements of wills were as described by the parties. The parties acknowledged the errors made in the writings giving effect to their agreements and agreed to correct them. The correction of the acts resulted from the actual will of the parties. There was no need to rely for this purpose on a supposed power to correct based on the implicit powers of the Superior Court. Moreover, since the parties could not turn back time, they changed the “legal time” applicable to their agreements by, *inter alia*, changing the dates originally contemplated for their performance to dates that would enable them to be carried out effectively. Such a stipulation, although once again subject to the rights of third parties, was valid as between the parties (M. Cresp, *Le temps juridique en droit privé: essai d’une théorie générale* (2013), at pp. 116-26).

[51] It was open to the courts to intervene to find that the amendments made by the parties to the acts at issue were legitimate and necessary. Their intervention was justified by the substantive law and was not precluded by Quebec’s rules of civil procedure. The issue was argued in an adversarial process. The revenue agencies were impleaded, as they had to be, in accordance with art. 5 *C.C.P.* and the fundamental rules of civil procedure. Since there was a real dispute about the nature of the parties’ common intention, the issue could be brought before the Superior

Court, and a motion for rectification was the normal way to do so. The motion enabled that court to intervene to consider conclusions that were, first and foremost, declaratory. What was often called rectification in the course of these proceedings basically involved recognizing the parties' amendments and finding that they were legitimate and necessary.

[52] In the final analysis, the court's intervention was based on the fundamental rules of contract law, which is premised on a principle of consensualism and in which a fundamental distinction exists between the exchange of consents and the written expression of that exchange. Quebec's law of evidence in civil matters reinforces this distinction between internal will — or true intention — and declared will. For example, although that law gives particular weight to the probative value of authentic acts, it nonetheless includes a procedure — improbation — for challenging such acts. Improbation enables a court to rectify an act in which the public officer responsible for executing it, such as a notary, inserted false statements. It is now accepted that a court can correct such an act to make it consistent with the parties' intention (P.-Y. Marquis, "L'inscription de faux et la correction des actes notariés" (1990), 92 *R. du N.* 407, at p. 426). The private writing is also a form of expression of a common intention. If such a writing contains an error, particularly one that can, as here, be attributed to the taxpayer's professional advisor, the court must, once the error is proved in accordance with the rules of evidence in civil matters, note the error and ensure that it is remedied. In the civil law, the tax authorities do not have an

acquired right to benefit from an error made by the parties to a contract after the parties have corrected the error by mutual consent.

[53] The common intention of the parties was expressed erroneously in all the writings prepared to carry out the tax plans on which they had agreed. The Court of Appeal held that it was possible to remedy those errors and correctly identified the common intention of the parties. I would not interfere with its decisions.

[54] However, the judicial recognition of the validity of the amendments made by the parties in this case to the writings recording their agreements must be accompanied by certain reservations and a word of warning. Taxpayers should not view this recognition of the primacy of the parties' internal will — or common intention — as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to redo their contracts retroactively should that planning fail. A taxpayer's intention to reduce his or her tax liability would not on its own constitute the object of an obligation within the meaning of art. 1373 *C.C.Q.*, since it would not be sufficiently determinate or determinable. Nor would it even constitute the object of a contract within the meaning of art. 1412 *C.C.Q.* Absent a more precise and more clearly defined object, no contract would be formed. In such a case, art. 1425 could not be relied on to justify seeking the common intention of the parties in order to give effect to that intention despite the words of the writings prepared to record it. As I mentioned above, the agreements between the parties in both appeals were validly formed in that, according to evidence that the ARQ did not

contradict, they provided for obligations whose objects were sufficiently determinable. These agreements provided, for the corporations in question, for the establishment of determinate structures that would, had they been drawn up properly, have made it possible to meet the objectives being pursued by the parties. The subsequent amendments did not alter the nature of the structures contemplated at the outset. All they did was amend writings that were supposed to give effect to the common intention, an intention that had been clearly defined and that related to obligations whose objects were determinate or determinable.

#### G. *Review of Juliar*

[55] In oral argument, the intervener, the Attorney General of Canada, asked this Court to consider and reject a line of authority that has developed, he said, since the Ontario Court of Appeal's decision in *Juliar*. In his view, that line of authority has broadened the scope of application of the common law remedy of rectification in tax cases and is incompatible with the conditions for exercising the power of rectification as laid down by this Court in *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, and *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (see also A. Swan and J. Adamski, *Canadian Contract Law* (3rd ed. 2012), at pp. 768-70). The two appeals heard by this Court are governed by Quebec civil law and are not appropriate cases in which to reconsider the common law remedy of rectification. I

will therefore refrain from criticizing, approving or commenting on the application of that remedy by the Canadian courts on the basis of *Juliar*.

## V. Conclusion

[56] For these reasons, I would dismiss the ARQ's appeals in these two cases, with costs against it throughout, in both cases.

*Appeals dismissed with costs throughout.*

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