

**SUPREME COURT OF CANADA**

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| **Citation:** Jean Coutu Group (PJC) Inc. *v.* Canada (Attorney General), 2016 SCC 55, [2016] 2 S.C.R. 670 | **Appeal heard:** May 18, 2016  **Judgment rendered:** December 9, 2016  **Docket:** 36505 |

Between:

The Jean Coutu Group (PJC) Inc.

Appellant

and

Attorney General of Canada

Respondent

- and -

Agence du revenu du Québec

Intervener

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 53):  **Dissenting Reasons:**  (paras. 54 to 95): | Wagner J. (McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Gascon and Brown JJ. concurring)  Côté J. (Abella J. concurring) |

Jean Coutu Group (PJC) Inc. *v.* Canada (Attorney General), 2016 SCC 55, [2016] 2 S.C.R. 670

The Jean Coutu Group (PJC) Inc. Appellant

v.

Attorney General of Canada Respondent

and

Agence du revenu du Québec Intervener

**Indexed as: Jean Coutu Group (PJC) Inc. *v.* Canada (Attorney General)**

2016 SCC 55

File No.: 36505.

2016: May 18; 2016: December 9.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the court of appeal for quebec

*Contracts — Interpretation — Common intention of parties — Written instruments relating to transactional scheme not reflecting common intention of parties for tax-neutrality — Transactions having unintended tax consequences — Whether, under Quebec civil law, general intention that execution of transactional scheme be tax-neutral sufficient to authorize rectification of written instruments — Civil Code of Québec, art. 1425.*

*Commercial law — Corporations — Taxation — Whether rectification of written instrument amount to retroactive tax planning.*

The Jean Coutu Group (PJC) Inc. (“PJC Canada”), is a Quebec corporation. In 2004, its subsidiary, PJC USA invested in a chain of pharmacies in the United States. To avoid the negative perceptions of PJC Canada’s investors of the variation in this investment’s value due to fluctuations in U.S. to Canadian dollar exchange rates, PJC Canada consulted professional advisors to find ways to neutralize them without adverse tax consequences. Although the chosen set of transactions succeeded in neutralizing the effect of the exchange rate fluctuations, they did not succeed in avoiding tax consequences. In 2010, the Canada Revenue Agency (“CRA”) assessed PJC Canada for CAN$2.2 million of unpaid income tax for the years 2005, 2006 and 2007. The CRA concluded that because PJC USA was a controlled foreign affiliate of PJC Canada the interest it had earned during those years on the US$70 million loan constituted foreign accrual property income (“FAPI”) under the *Income Tax Act* and was taxable as income of PJC Canada.

After the CRA audit, PJC Canada brought a motion for rectification of the documents related to the agreement and for declaratory relief under art. 1425 of the *Civil Code of Québec* (“*C.C.Q*.”). The application judge granted the motion. Because of the adverse tax consequences, he held that there was a disparity between the common intention of the parties and the documents drawn up to give effect to that intention. Therefore, PJC Canada was allowed to amend the documents by inserting new transactions, such that the interest payable by PJC Canada to PJC USA would be offset by interest payable by PJC USA to PJC Canada, reducing FAPI to zero. The Court of Appeal allowed the appeal, holding that the general intention of PJC Canada that the agreement be tax-neutral was insufficiently determinate to serve as the basis of a modified agreement.

*Held* (Abella and Côté JJ. dissenting): The appeal should be dismissed.

*Per* McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ.: 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.

In this case, PJC Canada and PJC USA agreed on the precise set of prestations they wanted to execute, and there was no error in the way their agreement was expressed or executed. It simply resulted in unforeseen and undesirable tax consequences for PJC Canada. There was a mistake in the transactions agreed to, not in the way they were expressed. If they had turned their minds to FAPI and had agreed to a transactional scheme that, if recorded and implemented properly, would have accomplished the goal of neutralizing currency fluctuations while also preventing the generation of FAPI, it would be appropriate to permit the written documents related to the transactions to be amended if that common intention was improperly transcribed in them. Allowing the amendment of the written document would not only amount to retroactive tax planning but would set an undesirable precedent. Taxpayers could immunize themselves from unforeseen tax consequences as well as from their inadvertence or mistakes, or for those of their tax advisors, in planning transactions.

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. Although they will not always lead to the same result because of differences between the two legal systems in contract law, they would in this case. Even in equity, PJC Canada’s requested amendments would not be permissible: the contracting parties did not reach a prior agreement with definite and ascertainable terms that included the new transactions that PJC Canada now wish to insert in the original agreement.

*Per* Abella and Côté JJ. (dissenting): The liberal and generous approach to rectification applied in *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838 (“*AES*”), should be followed. Departing from this approach limits the availability of an important recourse for taxpayers in the presence of an error made in good faith by them or their tax advisors and is incongruous with the realities of modern commerce. However, a mere intention to avoid taxation can never suffice to ground a request for rectification under art. 1425 *C.C.Q.* Although convergence between Quebec civil law and the common law of the other provinces is desirable from a tax policy perspective, retreating from the interpretation of art. 1425 *C.C.Q.* adopted in *AES* in order to achieve harmony with rectification in equity as considered by the majority in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, is inconsistent with the law of contract in Quebec.

PJC Canada’s motion for rectification is both necessary and legitimate. There was clearly a gap between the common and continuing intention of the parties and the operations implemented to carry out that intention. The evidence shows that tax neutrality was a *sine qua non* of the parties’ envisaged transactional scheme. The object of the agreement consisted in tax-neutral reciprocal loans creating net liabilities in U.S. dollars. Failing to consider that the loans had to be tax-neutral in order for the agreement to make commercial sense is inimical to the overall scheme of the agreement. Tax neutrality was at its very core.

The object of the contract as defined in art. 1412 *C.C.Q.* transcends the particular prestations of the agreement. As such, rectification cannot be available only where the prestation, as expressed in the written document, was specifically envisaged by the parties from the outset. In *AES*, this Court recognized that even an oral declaration of the parties’ will can depart from their common intention and that rectification is not limited to the correction of clerical errors. Further, that the tax advisors’ error in this case was one of omission, insofar as they neglected to consider FAPI, as opposed to one of commission (like miscalculating the ACB of shares), is not a principled ground on which to distinguish this case from *AES*. This distinction is at odds with the proposition that, if an expression of common intention 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, ensure that it is remedied. It is also at odd with the recognition in *AES* of a court’s power to fill gaps in the text in interpreting the parties’ common intention.

The additional transactions or prestations envisioned by the parties were sufficiently determinable within the meaning of art. 1373 *C.C.Q.*, as understood by this Court in *AES.* Indeed, under the terms of the February 7, 2005 loan agreement between PJC Canada and PJC USA, the principal could be repaid only by mutual consent of the parties. The insertion of intermediate steps involving the repayment of a demand loan therefore amounts to little more than judicial recognition of a partial discharge of an obligation that was determinable even on the terms of the parties’ original instrument. The prestations here entailed the provision of reciprocal debt financing, on the one hand, and partial repayment of that debt, on — and only on — mutual agreement of the parties. The prestations were therefore determinate and the corresponding obligation to repay was determinable.

PJC Canada’s request for rectification is not intended to rewrite the tax history of the transactions, but rather to fill in the gaps by adding two intermediate steps which maintain tax neutrality. The desired changes do not alter the nature of the original structure of the operation contemplated at the outset. The agreement was not a tax planning transaction. There is nothing here to suggest bad faith or an abuse of right on the part of PJC Canada. The tax advisors’ fault of omission was committed in good faith following the exercise of reasonable diligence by PJC Canada.

Nothing in PJC Canada’s request engaged the rights of third parties and there was no offense to the rules of evidence involved. In the absence of third party reliance, granting PJC Canada’s request promotes, rather than undermines, commercial certainty because it advances the contractual expectations of the parties. Since PJC Canada and PJC USA are in agreement as to their common intention, the concern for an illegitimate *ex post* rewriting of the initial bargain is absent here. Further, rectifying the agreement, in line with the innocent party’s duty to mitigate under art. 1479 *C.C.Q.*, is preferable to the promotion of claims against that party’s advisors.

**Cases Cited**

By Wagner J.

**Applied:** *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838; **referred to:** *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720; *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368.

By Côté J. (dissenting)

*Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838, aff’g 2011 QCCA 394; *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Walls v. Canada*, 2002 SCC 47, [2002] 2 S.C.R. 684; *Backman v. Canada*, 2001 SCC 10, [2001] 1 S.C.R. 367; *Pallen Trust, Re*, 2015 BCCA 222, 385 D.L.R. (4th) 499; *Lemair v. Canada (Procureur général)*, 2015 QCCS 1142; *Canada (Attorney General) v. Brogan Family Trust*, 2014 ONSC 6354, 2015 D.T.C. 5008; *Philippe Trépanier inc. et Deloitte, s.e.n.c.r.l.*, 2014 QCCS 2615; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3.

**Statutes and Regulations Cited**

*Business Corporations Act*, CQLR, c. S‑31.1, ss. 458, 459.

*Civil Code of Lower Canada*, art. 1013.

*Civil Code of Québec*, arts. 6, 7, 1371, 1373, 1374, 1375, 1378, 1385, 1410, 1412, 1425, 1479.

*Code Napoléon*, art. 1156.

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 86, 91(1), 95(1) “foreign accrual property income”.

*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, Giroux and Schrager JJ.A.), 2015 QCCA 838, [2015] 4 C.T.C. 82, [2015] AZ‑51175618, [2015] Q.J. No. 4127 (QL), 2015 CarswellQue 3542 (WL Can.), setting aside a decision of Chabot J., 2012 QCCS 6917, [2012] AZ‑50931255, [2012] J.Q. no 19046 (QL), 2012 CarswellQue 14611 (WL Can.). Appeal dismissed, Abella and Côté JJ. dissenting.

*Dominic Belley* and *Jonathan Lafrance*, for the appellant.

*Daniel Bourgeois* and *Eric Noble*, for the respondent.

*Pierre Zemaitis* and *Christian Boutin*, for the intervener.

The judgment of McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

1. Wagner J. — This is one of two companion appeals dealing with requests to modify written contracts, documents or instruments after they generated unintended tax consequences. At issue in this appeal is whether, under Quebec civil law, the general intention of contracting parties that an agreement be tax-neutral is sufficient to authorize the modification of the written documents underlying the agreement so they reflect that intention.
2. The appellant, a Quebec corporation, wanted to resolve an accounting issue without creating adverse tax consequences. To that end, the appellant and its subsidiary executed a transactional scheme recommended by its professional advisors. The transactions, however, triggered a particular tax consequence that the parties and their advisors had not foreseen, increasing the amount the appellant should have included in its income for tax purposes. Years later, when faced with an assessment for unpaid income tax after an audit by federal tax authorities, the appellant filed a motion to institute proceedings (“motion”) in the Quebec Superior Court for “rectification” of the documents relating to the transactions, in accordance with art. 1425 of the *Civil Code of Québec* (“*C.C.Q.*”). That article provides that contractual interpretation is most concerned with the common intention of the contracting parties, as opposed to the literal expression of that intention.
3. The Quebec Superior Court granted the appellant’s motion, but the Quebec Court of Appeal overturned this decision. It saw the appellant’s request as an attempt to rewrite the tax history of the agreement. It held that the appellant’s intention that the transactions have no adverse tax consequences was insufficiently determinate to serve as the basis for modifying the documents to avoid the unintended and unforeseen tax consequence they had produced.
4. I would dismiss the appeal. I agree with the Court of Appeal that a taxpayer’s intention that the agreement be tax-neutral which is not clearly defined and not related to obligations whose objects are sufficiently determinate or determinable cannot permit the documents recording and implementing the transactions to be amended to give effect to that intention, in accordance with art. 1425 *C.C.Q.* The written or oral expression of a contract can be amended if there is a discrepancy between it and the contracting parties’ true agreement. It cannot be amended where there is no such discrepancy but that true agreement merely produces unintended or unanticipated consequences. Amendments must align the written documents with the true agreement they are meant to record and implement, not with the contracting parties’ motivations for entering into the agreement or their expectations as to its consequences.
5. The result in this appeal is bolstered by important policy considerations regarding the modification of written documents in the tax context. It also aligns with the result that would be reached in the common law provinces under the equitable remedy of rectification, which is the focus of the companion appeal, *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720 (“*Fairmont*”). Although the equitable remedy and art. 1425 *C.C.Q.* stem 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.
6. Facts
7. The appellant, Jean Coutu Group (PJC) Inc. (“PJC Canada”), is incorporated and headquartered in Quebec. At the time of the agreement in question, it was the sole shareholder of Jean Coutu Group (PJC) USA Inc. (“PJC USA”), which is incorporated under the laws of Delaware.
8. In 2004, PJC USA acquired a chain of pharmacies in the United States as an investment. The value of this investment, as recorded on PJC Canada’s balance sheets, varied from quarter to quarter due to fluctuations in U.S. dollar to Canadian dollar exchange rates until the acquisition is completed. Although these value fluctuations had no tax consequences until that time, they had to be recorded as gains or losses and they thus negatively affected the perceptions of PJC Canada’s investors. PJC Canada consulted professional advisors to find ways to neutralize this effect on perceptions without adverse tax consequences. Its advisors recommended two possible scenarios, one of which PJC Canada selected and executed in 2005:

(i) Feb. 7, 2005: PJC Canada loans US$120 million to PJC USA, with interest at London Interbank Offered Rate (“LIBOR”) plus 2.5 percent.

(ii) Feb. 25, 2005: PJC Canada purchases an additional 10 common shares of PJC USA for US$70 million.

(iii) Feb. 25, 2005: PJC USA loans US$70 million to PJC Canada, with interest at LIBOR plus 2.5 percent.

1. The above transactional scheme succeeded in neutralizing the effect of the exchange rate fluctuations, but they did not succeed in avoiding tax consequences. In 2010, the Canada Revenue Agency (“CRA”) audited PJC Canada and assessed it for CAN$2.2 million of unpaid income tax for the years 2005, 2006 and 2007. The CRA concluded that because PJC USA was a controlled foreign affiliate of PJC Canada the interest it had earned during those years on the US$70 million loan it had advanced to PJC Canada constituted foreign accrual property income (“FAPI”), as defined by s. 95(1) of the *Income Tax Act*,R.S.C. 1985, c. 1 (5th Supp.), and was taxable as income of PJC Canada pursuant to s. 91(1) of that Act. PJC Canada’s advisors had neither foreseen nor raised the FAPI problem.
2. Judicial History
   1. Quebec Superior Court (Chabot J.), 2012 QCCS 6917
3. After the CRA audit, PJC Canada brought a motion in the Quebec Superior Court for rectification of the documents related to the agreement and for declaratory relief, contending that its intention that the agreement be tax-neutral was not reflected in the documents. Although the term is perhaps a useful shorthand, rectification is an equitable remedy under the common law, not a Quebec civil law remedy. The parties and the courts below in fact used the term to refer to the correction of an inconsistency between the contracting parties’ common original intention and the expression of that intention in written or oral form, by way of contractual interpretation in accordance with art. 1425 *C.C.Q.* Relying on that article, PJC Canada sought to correct the documents recording and implementing the transactional scheme outlined above by inserting new transactions (iii) and (iv) below, such that the interest payable by PJC Canada to PJC USA would be offset by interest payable by PJC USA to PJC Canada, reducing FAPI to zero:

(i) Feb. 7, 2005: PJC Canada loans US$120 million to PJC USA, with interest at LIBOR plus 2.5 percent. (unchanged)

(ii) Feb. 25, 2005: PJC Canada purchases an additional 10 common shares of PJC USA for US$70 million. (unchanged)

(iii) Feb. 25, 2005: PJC USA pays back US$70 million of the US$120 million loan referred to above. (*new*)

(iv) Feb. 25, 2005: PJC Canada loans US$70 million to PJC USA. (*new*)

(v) Feb. 25, 2005: PJC USA loans US$70 million to PJC Canada, with interest at LIBOR plus 2.5 percent. (unchanged)

1. The application judge granted PJC Canada’s motion. He found that the evidence demonstrated that the clear intention of the parties was to fix the exchange rate fluctuation problem without generating adverse tax consequences. Because such consequences had been generated in the form of FAPI, he held that there was a disparity between the common intention of the parties (*negotium*) and the legal documents drawn up to give effect to that intention (*instrumentum*). He held that he could therefore correct the series of documents to reflect the parties’ initial common intention, even if the parties had never originally contemplated the requested corrections. Furthermore, he noted that PJC Canada’s failure to consider FAPI was not due to negligence or lack of diligence. He also determined that PJC Canada’s request did not constitute an attempt to rewrite the tax history of the agreement, but rather served to correct unforeseen and unwarranted tax consequences. As such, in his opinion, the CRA’s rights were not affected by granting the request.
2. In coming to the above determinations, the application judge did not have the benefit of this Court’s reasons in the companion appeals of *AES* and *Riopel*, which were heard together and disposed of in one judgment: *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838. Therefore, no deference is owed to the application judge on his findings.
   1. Quebec Court of Appeal (Chamberland, Giroux and Schrager JJ.A.), 2015 QCCA 838, [2015] 4 C.T.C. 82
3. The Court of Appeal allowed the appeal, holding that the application judge had committed a palpable and overriding error in finding that the parties were not seeking to rewrite the tax history of the agreement.
4. Unlike the application judge, the Court of Appeal was able to benefit from the reasons of this Court in *AES*. According to the Court of Appeal, this Court’s judgment in those cases did not overturn all the previous case law in tax matters, which indicates that parties cannot rewrite the history of their agreement and change the transactional scheme because of unintended tax consequences. Rather, the Court of Appeal determined that it is authority for the proposition that parties who choose to carry out a legitimate corporate transaction for the purpose of avoiding, deferring or minimizing tax and who make an error in giving effect to that transaction may correct that error to achieve the tax consequence originally and specifically intended and agreed upon. Parties can restore their agreement to what it should have been where they made a mistake in expressing the transaction in writing, not where they made a mistake in the transaction itself. The Court of Appeal held that the general intent of PJC Canada that the transactional scheme it undertook be tax-neutral was insufficiently determinate to serve as the basis of a modified agreement that a court should recognize with retroactive effect to cancel unintended tax consequences.
5. Issue and Positions of the Parties
6. This appeal raises the following key issue: Where parties agree to undertake one or several transactions with a general intention that tax consequences thereof be neutral, but where unintended and unforeseen tax consequences result, does art. 1425 *C.C.Q.* allow the written documents recording and implementing their agreement to be amended with retroactive effect to make them consistent with that intention of tax neutrality?
7. PJC Canada asserts that the answer to the above question is yes. It makes three main arguments in support of its position that the court’s decision to grant its motion should be restored. First, it argues that, in line with contract law principles as explained in *AES*, rectification was warranted. It claims that the common intention that it and PJC USA had was precise and unequivocal, as recognized by the application judge: to neutralize the effect of exchange rate fluctuations without generating adverse tax consequences. It says that this intention was erroneously expressed in the documents underlying the transactions executed in 2005, and should thus be corrected by inserting the two proposed transactions with retroactive effect. According to PJC Canada, the fact that it did not conceptualize these transactions at the time of contract formation does not bar rectification. Second, PJC Canada argues that the Court of Appeal’s conclusion that the motion was an attempt to rewrite the tax history of the agreement is fatally flawed because it is based on a factual error. Finally, PJC Canada asks this Court to adopt certain guiding principles that it proposes should govern rectification requests under art. 1425 *C.C.Q.*, adding that its own request conforms to these principles.
8. The respondent, the Attorney General of Canada, counters that rectification is not available in the instant appeal, for two reasons based on evidence. First, the respondent argues that there is no evidence demonstrating that PJC Canada and PJC USA reached an oral agreement before accepting the written documents relating to the transactions, which means that the written documents are the manifestation of their exchange of consents and thus an accurate reflection of the juridical operation envisaged and agreed on by them. Second, and in the alternative, the respondent asserts that even if there was an oral agreement, there was no error in the written documents transcribing it that would allow for rectification, because the documents reflected exactly what the parties had agreed. The respondent says that rectification does not allow parties to add further transactions they never initially considered, and that PJC Canada is confusing the parties’ objectives in entering into the contract ― neutralizing the exchange rate problem without generating adverse tax consequences ― with common intention, which pertains to the transactions on which they agreed. However, the respondent acknowledges that the Court of Appeal made the factual error identified by PJC Canada but submits that it is immaterial. Finally, the respondent argues that there is no need for this Court to adopt the guiding principles PJC Canada proposes, as the current jurisprudence offers sufficient guidance.
9. Analysis
   1. A General Intention of Tax Neutrality Related to Obligations Whose Objects Are Not Determinate or Determinable Does Not Permit the Modification of Written Instruments in Accordance With Article 1425 C.C.Q.
      1. Contracts Under Quebec Civil Law
10. In this Court’s recent decision in *AES*, LeBel J. thoroughly canvassed the principles of contract formation under Quebec civil law, and he did so in a similar context, in which taxpayers were asking the courts to authorize and recognize amendments to written documents in accordance with art. 1425 *C.C.Q.* after transactions implemented by those documents triggered unintended tax results. LeBel J.’s reasons are thus highly instructive in the instant appeal. Article 1425 *C.C.Q.* reads: “The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.”
11. Under Quebec civil law, a contract is an agreement of wills that is formed by the exchange of consents. The agreement or contract lies in the common intention of the parties, not in the oral or written declaration of that intention, which is their declared will. See *AES*, at paras. 32 and 48; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at p. 400; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at p. 82; D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 173. Written documents can thus be amended with retroactive effect to make them consistent with the true contract or agreement between the parties (*AES*; Lluelles and Moore, at para. 1574) as was the case in *AES*. There are, however, certain principles surrounding obligations and the formation of contracts which must be kept in mind when parties rely on art. 1425 *C.C.Q.* and ask courts to modify the documents expressing their common intention. I will review them below.
12. According to art. 1371 *C.C.Q.*, “[i]t is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence.” The object of an obligation is the prestation that the debtor is bound to render to the creditor and which consists in doing or not doing something under art. 1373 *C.C.Q.* The object of the prestation is the thing that the prestation relates to. See Lluelles and Moore, at para. 1049. Further, art. 1373 provides that the prestation has to be “possible and determinate or determinable” and “neither forbidden by law nor contrary to public order”, whereas art. 1374 *C.C.Q.* reads that “[t]he prestation may relate to any property, even future property, provided that the property is determinate as to kind and determinable as to quantity.” See Baudouin and Jobin, at pp. 34‑35; Lluelles and Moore, at para. 1049.3. Such a requirement about the nature of the prestation, whether it relates to property or not, is necessary because parties must know the extent of their rights and obligations under the contract.
13. Article 1378 para. 1 *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 has a cause, which art. 1410 *C.C.Q.* defines as “the reason that determines each of the parties to enter into the contract”. It also has an object upon which the parties must agree, which art. 1412 *C.C.Q.* defines as “the juridical operation envisaged by the parties at the time of its formation, as it emerges from all the rights and obligations created by the contract”. See also *AES*, at para. 30; Pineau, Burman and Gaudet, at p. 272; Lluelles and Moore, at paras. 1049 and 1051. In other words, the underlying purpose or motivation behind the parties entering into the contract is the cause of the contract, not to be confused with its object, which is the juridical operation they agree on: Pineau, Burman and Gaudet, at pp. 285-90; Lluelles and Moore, at paras. 1061 and 1061.2.
14. As the above discussion shows, “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”: *AES*, at para. 31. Importantly, LeBel J. explained that, because an intention of tax minimization can be neither the object of a contract nor the object of an obligation under a contract, it cannot serve as a basis for modifying the written documents or instruments expressing the contract:

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 [Agence du revenu du Québec] 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. [Emphasis added; para. 54.]

1. Although LeBel J. spoke of reducing tax liability, in my view his comments apply equally to the general intention of contracting parties to achieve tax neutrality. By general intention, I mean that contracting parties have no specific tax consequence in mind (beyond a broad intention that no adverse tax consequences result) and have not agreed on a particular prestation or set of prestations that would, if expressed correctly, yield the intended consequence.
2. A taxpayer’s general intention of tax neutrality cannot form the object of a contract within the meaning of art. 1412 *C.C.Q.*, because it is insufficiently precise. It entails no sufficiently precise agreed-on juridical operation. Nor can such a general intention in itself relate to prestations that are determinate or determinable within the meaning of art. 1373 *C.C.Q.* It says nothing about what one party is bound to do or not do for the benefit of the other. Therefore, a general intention of tax neutrality, in the absence of a precise juridical operation and a determinate or determinable prestation or prestations, cannot give rise to a common intention that would form part of the original agreement (*negotium*) and serve as a basis for modifying the written documents expressing that agreement (*instrumentum*). As a result, art. 1425 *C.C.Q.* cannot be relied on to give effect to a general intention of tax neutrality where the writings recording the contracting parties’ common intention produce unintended and unforeseen tax consequences.
3. 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.
4. Such a reading of arts. 1412 and 1373 *C.C.Q.* doesn’t mean that amendments to the expression of the agreement in accordance with art. 1425 *C.C.Q.* can be available only to correct clerical errors. It upholds, however, the requirements stipulated in the *C.C.Q.* according to which the object of a contract needs to be precise and the object of an obligation sufficiently determinate or determinable to be recognized as the common intention of the parties to be sought when interpreting a contract.
   * 1. Application of the Above Principles to the Instant Appeal
        1. The Appellant’s Motion Should Not Have Been Granted
5. In my view, the Court of Appeal was right to allow the appeal. Article 1425 *C.C.Q.* does not allow PJC Canada and PJC USA to retroactively amend the documents recording and implementing their agreement in the circumstances of this case. There was no error in the way their agreement was expressed. Moreover, they did not turn their minds to FAPI or a particular means of avoiding it, but merely had a general intention that their agreement be tax-neutral.
6. PJC Canada emphasizes the application judge’s finding that it and PJC USA had the common intention of both neutralizing the effect of exchange rate fluctuations and generating no tax consequences. It accordingly argues that it did not need to conceptualize the precise set of prestations or transactions required to give effect to its intention of tax neutrality. I disagree.
7. As outlined above, a general intention of tax neutrality, not related to obligations whose objects are determinate or determinable, cannot, on its own, give rise to a common intention that would form part of the original contract and permit the requested modifications. One should not confuse the notion of a contract, which is an agreement of wills for the purpose of carrying out juridical operation, with its consequences: *AES*, at para. 28; Pineau, Burman and Gaudet, at p. 271-72. As Professors Lluelles and Moore put it:

[translation] The object of a contract must not be confused with its effect. . . . Unlike the former Code — and most other civil law legislation — the *Civil Code of Québec* makes a clear distinction between the object of a contract (art. 1412), the object of an obligation (art. 1373) and the effect of a contract (art. 1433). [para. 1050]

The intention that no adverse tax consequences result from a contract is more accurately described as the intended consequence of the contract, while the intention of neutralizing the effect of exchange rate fluctuations is more accurately described as the cause of the contract: art. 1410 *C.C.Q.* Neither constitutes a contract, the object of a contract or the object of an obligation, and neither can ground the retroactive modification of documents that accurately record and implement what both parties actually agreed to do.

1. Written documents can be modified in accordance with art. 1425 *C.C.Q.* so that they accurately reflect the true agreement between the parties. The agreement itself cannot be modified to achieve whatever results the parties may have desired or expected in entering into it. PJC Canada and PJC USA agreed on the precise set of prestations they wanted to execute, and there was no error in the way their agreement was expressed or executed. It simply resulted in unforeseen and undesirable tax consequences for PJC Canada. In the words of the respondent, there was a mistake in the transactions agreed to, not in the way they were expressed.
2. *AES* and *Riopel* provide a useful contrast and illustrate the importance of agreeing on precise transactional scheme to achieve a certain tax result. In those cases, the contracting parties had agreed on a particular set of prestations to defer tax payable. The “agreements provided . . . 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”, namely tax deferral on a share exchange using rollover provisions in the tax legislation (*AES*) and tax deferral on a corporate amalgamation as part of a detailed tax plan, again under particular tax provisions (*Riopel*): *AES*, at para. 54 (emphasis added). Because of mistakes in the documents recording and implementing the contracting parties’ agreements, tax was not deferred. In the *AES* case, the mistake consisted of a miscalculation in the adjusted cost base (“ACB”) of the transferred shares ― the procedure agreed to by the parties required the issuance and delivery of a note for an amount precisely equal to the shares’ ACB. In the *Riopel* case, the mistake was that the parties’ tax advisors reversed the order of certain transactions, contrary to the detailed tax plan to which the parties had verbally agreed.
3. In contrast, in the appeal here, the parties to the contract did not originally and specifically agree upon a juridical operation for the purpose of turning their general intention to neutralize tax consequences into a series of specific obligations and prestations. This general intention of the parties was not sufficiently precise to establish the details of a contemplated operation: *AES*,at para. 31. The parties did not agree to carry out, for example, a detailed tax plan: *AES*,at para. 36. There is no defective act that expressed incorrectly what they would have specifically agreed to: *AES*,at para. 38. There is no gap to fill in the text in order to give effect to the parties’ common intention, as such intention was never clearly defined and related to obligations whose objects, the prestations, are determinate or determinable: *AES*,at paras. 48, 52 and 54. There is no agreement of will not implemented properly: *AES*,at para. 37. The determinate scenario agreed on by PJC Canada and PJC USA was drawn up properly, but because it was drawn up properly, it produced unintended and unforeseen tax consequences.
4. In line with the above, if PJC Canada and PJC USA had turned their minds to FAPI and had agreed to a transactional scheme that, if recorded and implemented properly, would have accomplished the goal of neutralizing currency fluctuations while also preventing the generation of FAPI, it would be appropriate to permit the written documents related to the transactions to be amended if that common intention was improperly transcribed in them. But this is not what happened.
5. PJC Canada says that it is enough that FAPI was determinable at the time of contract formation, like the ACB of the shares in *AES*. It is true that prestations do not need to be determined at the moment of the contract’s formation, as long as they are determinable, meaning that the parties agree on predetermined and objective criteria for determining them. See Pineau, Burman and Gaudet, at p. 274; Lluelles and Moore, at paras. 1049.8 to 1049.13. Yet there is a fundamental difference between a contract under which one of a party’s prestations ― necessary for obtaining the intended tax result ― is to issue and deliver a note in an objectively calculable amount equal to the ACB of transferred shares, and a contract under which there is no obligation addressing FAPI, and no prestations agreed on that would prevent its fiscal consequences. Parties to a contract must know their rights and obligations under it.
6. Although I agree with PJC Canada that modifications to written documents expressing parties’ agreement can include the insertion of transactions, this is possible only where doing so would bridge the gap between the contracting parties’ common intention and the written expression thereof. This would be the case if, for instance, PJC Canada and PJC USA had agreed on a transactional scheme that would successfully avoid the generation of FAPI but, for some reason, one or more of the transactions agreed on was mistakenly omitted. There is no such gap in the instant appeal.
7. That being said, the comparison between what was required to do in *AES* to implement the correction and what would be required in the present case if the parties’ motion is granted, is irrelevant. It is not the nature of the modifications contemplated by the parties in the present case that thwart their request, but the fact that their intention was not initially, sufficiently defined and does not relate to obligations whose objects are determinate or determinable, as to justify such modifications under art. 1425 *C.C.Q.*
   * + 1. The Court of Appeal’s Factual Error Is Inconsequential
8. The Court of Appeal stated that the rectification sought by PJC Canada was to implement the second of the two scenarios that its professional advisors had suggested and that PJC Canada had originally declined to pursue: para. 37. Both parties agree that this statement is incorrect. The scenarios that PJC Canada’s advisors presented did not include the transactions that PJC Canada now seeks to insert retroactively.
9. In my opinion, this erroneous factual conclusion is of no consequence. On my reading of the court’s reasons, it did not base its decision on this factual misconception. Rather, its reasons demonstrate that it determined that PJC Canada and PJC USA had intended to implement the very agreement that was in fact implemented. The court correctly held that the two parties could not seek to rewrite the tax history of their agreement, since a general intention to reduce tax liability was insufficiently determinate to serve as the basis for rectification in accordance with art. 1425 *C.C.Q.* In any event, the fact that PJC Canada admits it never initially considered the new transactions it now seeks to implement does not help its position, as the above discussion reveals.
   * + 1. Other Arguments
10. Given my conclusion that the intention of PJC Canada and PJC USA that the agreement be tax-neutral does not allow the documents underlying the transactional scheme to be amended, there is no need to address the respondent’s first, evidentiary argument.
11. There is also no need for this Court to address or adopt the appellant’s proposed guidelines. In my view, contract principles under Quebec civil law, together with this Court’s reasons in the instant appeal and in *AES*, provide sufficient guidance to taxpayers and lower courts regarding the amendment of written contracts, documents or instruments in accordance with art. 1425 *C.C.Q.*
    1. Tax Policy Considerations Reinforce the Result in This Appeal
12. My conclusion in the instant appeal finds additional support in two significant tax policy concerns.
13. First, accepting PJC Canada’s position would require this Court to ignore the legal relationships that it and PJC USA originally agreed to create, and actually created, in favour of the tax consequences they sought to achieve. It would thus undermine one of the fundamental principles of our tax system: that tax consequences flow from the legal relationships or transactions established by taxpayers. See P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed. 2010), at p. 578; and V. Krishna, *Income Tax Law* (2nd ed. 2012), at pp. 473 and 475. This tenet is closely related to the Duke of Westminsterprinciple, which is that taxpayers have the right to order their affairs to minimize tax payable: *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.), at p. 19, per Lord Tomlin. Both principles have been affirmed by this Court many times. See e.g. *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, at paras. 45-46; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 540, per Wilson J., and at p. 557, per Estey J.; *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795, at para. 88. For instance, in *Shell Canada*, this Court unanimously stated the following, at para. 45:

Unless the Act provides otherwise, a taxpayer is entitled to be taxed based on what it actually did, not based on what it could have done, and certainly not based on what a less sophisticated taxpayer might have done. [Emphasis added.]

Equally, if taxpayers agree to and execute an agreement that produce unintended tax consequences, they must still be taxed on the basis of that agreement and not on the basis of what they “could have done” to achieve their intended tax consequences, had they been better informed. Tax consequences do not flow from contracting parties’ motivations or tax objectives.

1. Second, I believe that allowing the amendment of the written documents in the instant appeal would amount to retroactive tax planning. It would set an undesirable precedent, where taxpayers could point to a common intention to effect their transactions on a tax-neutral basis to immunize themselves from unforeseen tax consequences. Such an intention would be common to many taxpayers and transactions, particularly where the parties are not at arm’s length. Allowing a general intention of tax neutrality to serve as a basis for retroactively modifying contracts would effectively enable many taxpayers to look to art. 1425 *C.C.Q.* as a kind of catch-all insurance for their inadvertence or mistakes, or for those of their tax advisors, in planning transactions.
2. I recognize that “[i]ncome tax law is notoriously complex and many taxpayers rely on tax advisors to help them comply”: *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 1. But when taxpayers agree to certain transactions and later claim that their advisors made mistakes by failing to properly advise them that the transactions they agreed to would produce unintended tax consequences, the appropriate avenue to recoup their ensuing losses is not through the retroactive amendment of their agreement. Rather, if the mistakes are of such a nature as to warrant it, taxpayers can bring a claim against their advisors, who generally have professional liability insurance, and try to prove that claim in the courts.
   1. The Natural Consistency in Outcomes Under Rectification in Quebec Civil Law and Rectification in Equity Is Desirable
3. As these reasons and those of my colleague Brown J. in *Fairmont* reveal, rectification under Quebec civil law, as the parties and the courts below referred to it, and the equitable remedy of rectification stem from different legal sources but lead to similar results. Both ultimately 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. The civil law accomplishes this goal through contractual interpretation and retroactive amendment of documents, while equity accomplishes it through the correction of written instruments to reflect the true agreement of the parties.
4. Rectification under Quebec civil law stems from principles of contract formation and interpretation, as codified in the *C.C.Q.*, particularly art. 1425. A similar provision appeared in its predecessor, the *Civil Code of Lower Canada* (art. 1013), and in the *Code* *Napoléon* (art. 1156), on which the latter was partly based.
5. Rectification under the common law is not based on legislative or statutory power, but on the equitable jurisdiction of judges. Equity, which is concerned with fairness and justice, provides remedies in particular cases where the rigidity of the common law would lead to unconscionable results. One such possible instance is where a written instrument documenting an agreement between contracting parties fails to accurately reflect that agreement. At common law, the terms of the agreement would be identified by strictly interpreting the terms of the written instrument. Judges, however, can exercise their equitable jurisdiction to give relief from that inflexibility by correcting the written instrument to bring it in line with the true agreement between the parties. Rectification is thus an exception to the parol evidence rule, by which oral evidence is not admissible to alter written instruments. See *Snell’s Equity* (31st ed. 2005), by J. McGhee, ed., at pp. 3-5 and 331-32; I. C. F. Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at pp. 630-31; *Hanbury and Martin* *Modern Equity* (20th ed. 2015), by J. Glister and J. Lee, at pp. 3-4 and 846-47.
6. Despite their different origins, both rectification under Quebec civil law and rectification in equity are strict, in the sense that only the expression or transcription of contracts can be amended; contracts themselves cannot be reformulated. See *AES*; Spry, at pp. 630-32; *Snell’s Equity* (33rd ed. 2015), by J. McGhee, at pp. 417-18; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368, at p. 375. In both cases, the true agreement is paramount, not its intended consequences or effects. Given these commonalities, it is not surprising that, when faced with the same facts, courts in both legal systems will generally reach similar results when asked to recognize amendments to the expression of the parties’ common intention in accordance with art. 1425 *C.C.Q.* or to rectify written instruments on equitable grounds. I will briefly examine the instant case and *Fairmont* to illustrate this consistency in results.
7. In the instant appeal, the contracting parties agreed to three original transactions, which were accurately expressed in the related written documents. The appellant’s requested amendments ― inserting two transactions the contracting parties had not previously contemplated, so that their general intention of tax neutrality will be achieved ― are not permissible under art. 1425 *C.C.Q.*, nor would they be in equity. The contracting parties did not reach a prior agreement with definite and ascertainable terms that included these two transactions. As such, courts in the common law provinces would view the parties’ motion as an attempt to reformulate the agreement they had originally reached, something rectification does not do.
8. In *Fairmont*, the respondent Fairmont Hotels Inc. (“Fairmont”) and two subsidiaries entered into a complex financing arrangement with a Canadian real estate investment trust. Because the financing was in U.S. currency, Fairmont’s participation exposed it and its subsidiaries to potential foreign exchange tax liability. The original arrangement fully hedged the exposure of both Fairmont and its subsidiaries to that liability. A few years later, however, Fairmont was acquired by two other companies, causing its goal of foreign exchange tax neutrality to be frustrated. Fairmont and its acquirers thus agreed on a modified plan under which Fairmont, but not its subsidiaries, would be fully hedged against its exposure to foreign exchange tax liability once again. Fairmont’s two subsidiaries were not similarly protected under the modified plan. Fairmont intended to resolve this problem in the future, but had no specific plan as to how it would do so. A year after the acquisition and implementation of the modified plan, the financing arrangement with the trust had to be wound up on an urgent basis. To that end, Fairmont redeemed its shares in its subsidiaries, on the incorrect assumption that the subsidiaries’ foreign exchange tax neutrality had been secured. This triggered taxable foreign exchange gains, which were discovered after a CRA audit. To avoid that unintended tax liability, Fairmont requested rectification of the corporate resolutions redeeming the shares, asking the courts to convert the share redemption into a loan.
9. As my colleague Brown J.’s reasons explain, the equitable remedy of rectification was unavailable to Fairmont because it could not show that it had reached a prior agreement with definite and ascertainable terms to secure foreign exchange tax neutrality for its subsidiaries after the modified plan had been put in place. If Fairmont’s request had been made under Quebec civil law, in accordance with art. 1425 *C.C.Q.*, it would also have been denied. Although Fairmonthad a particular tax consequence in mind (avoiding taxable foreign exchange gains), it did not have an agreement that would successfully ensure such avoidance for its subsidiaries during the wind up of the financing arrangement. A general intention to avoid a certain tax consequence is, like a general intention of tax neutrality, insufficiently determinate or determinable to constitute an object of an obligation or of a contract under Quebec civil law. The parties did not agree on a set of precise transactions that, if expressed correctly, would have avoided triggering the unintended tax liability for Fairmont’s subsidiaries on the wind up of the financing arrangement.
10. I acknowledge that rectification under Quebec civil law and rectification in equity will not, however, always lead to the same result. This is because of differences between the principles of contract law specific to the two legal systems and variations in the facts from case to case.
11. Still, the natural convergence in principles and outcomes I have described above is generally desirable, particularly in the tax context. Taxpayers in both Quebec and the common law provinces are subject to the same federal taxation system. They could expect to encounter similar results when they seek to amend documents that express their agreement and lead to unintended tax consequences. And, as in the case of good faith under the civil law and the common law of contracts, this is another example of the two legal systems achieving convergence despite their distinct origins and principles.
12. Disposition
13. For these reasons, I would dismiss the appeal, with costs throughout.

The reasons of Abella and Côté JJ. were delivered by

1. Côté J. (dissenting) — This appeal requires us to interpret and apply the guidelines governing the availability of “rectification” in Quebec civil law as established by this Court in *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838 (“*AES*”). In my view, the proper interpretation of these guidelines and their application to the case before us confirm that the appellant’s motion for rectification is both legitimate and necessary. With respect, I believe that the liberal and generous approach to rectification applied by LeBel J. in *AES* and endorsed by Abella J. in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720 (“*Fairmont*”), should be followed here. Departing from this approach, as the majority has done both in this case and in *Fairmont*, limits the availability of an important recourse for taxpayers in the presence of an error made in good faith by them or their tax advisors. A mere intention to avoid taxation can never suffice to ground a legitimate “rectification” request under art. 1425 of the *Civil Code of Québec* (“*Code*” or “*C.C.Q.*”). But this important restriction does not limit the availability of rectification on the facts of this case. I would accordingly allow the appeal.
2. Context
3. In 2004, Jean Coutu Group (PJC) Inc. (“PJC Canada”) acquired 1,800 pharmacies located in the United States on behalf of its subsidiary, Jean Coutu Group (PJC) USA Inc. (“PJC USA”). The value of the investment, as reflected in PJC Canada’s financial statements, varied due to exchange rate fluctuations. These exchange rate fluctuations had to be recorded in PJC Canada’s financial statements as either gains or losses. For example, in November 2004, PJC Canada recorded a loss of $20.1 million due to currency fluctuations. Although these fluctuations had no tax impact, they did negatively affect investor sentiment. As a result, PJC Canada consulted its auditors with the aim of developing an accounting solution that could neutralize the adverse effects of the exchange rate fluctuations on its financial statements. It was agreed and clear between the parties that any such solution would also have to be tax-neutral, given that the exchange rate fluctuations themselves gave rise to no immediate tax consequences. To make sure that tax neutrality would be achieved, the parties specifically sought out tax advice with respect to their contemplated financing agreement. Beyond merely intending that their agreement would be tax-neutral, the parties then chose the transactional scheme in light of the advice they received.
4. In February 2005, on the advice of their tax advisors, PJC Canada and PJC USA took the following steps provided by the agreed transactional scheme in order to neutralize the effects of the exchange rate fluctuations without triggering any tax consequences:

on February 7, 2005, PJC Canada loaned US$120 million to PJC USA, with interest at London Interbank Offered Rate (“LIBOR”) plus 2.5 percent, a loan that was payable only by mutual consent of the parties;

on February 25, 2005, PJC Canada purchased an additional 10 common shares of PJC USA for US$70 million; and

on February 25, 2005, PJC USA loaned US$70 million to PJC Canada, with interest at LIBOR plus 2.5 percent.

1. In 2010, following an audit of PJC Canada for the 2005, 2006 and 2007 taxation years, the Canada Revenue Agency (“CRA”) concluded that the interest paid by PJC Canada to PJC USA on the US$70 million loan constituted “foreign accrual property income” (“FAPI”) as defined by s. 95(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), and was taxable as income of PJC Canada pursuant to s. 91(1) of that Act. This resulted in an additional $2.2 million in taxes.
2. As the application judge found, although PJC Canada had taken prompt and reasonable measures to ensure that its February 2005 operation would trigger no tax consequences, the tax advisors had not considered FAPI before advising the parties on the appropriate transactional scheme. The parties were therefore under the mistaken impression that their agreement was tax-neutral in every aspect. Only the CRA audit in 2010 revealed that it was not.
3. Given that the unintended tax consequences were inconsistent with the common and continuing intention of the parties, PJC Canada applied for rectification of the agreement through the addition of two intermediate steps in the transactional scheme between PJC Canada and PJC USA:

on February 7, 2005, PJC Canada loaned US$120 million PJC USA, with interest at LIBOR plus 2.5 percent;

on February 25, 2005, PJC Canada purchased an additional 10 common shares of PJC USA for US$70 million;

*on February 25, 2005, PJC USA repaid US$70 million of the US$120 million loan to PJC Canada*;

*on February 25, 2005, PJC Canada loaned US$70 million to PJC USA*; and

on February 25, 2005, PJC USA loaned US$70 million to PJC Canada, with interest at LIBOR plus 2.5 percent.

As a result of these changes, the interest payable by PJC Canada to PJC USA was offset by the interest payable by PJC USA to PJC Canada, thereby avoiding tax consequences.

1. Analysis
   1. This Court’s Decision in AES
2. This appeal centres on the interpretation and application of the guidelines established by LeBel J. in *AES*, in which this Court considered, for the first time, the principles governing the availability of rectification in Quebec civil law. Although *AES* does not provide a complete framework dispositive of all potential rectification requests in Quebec, LeBel J.’s reasons provide the basic guidelines necessary to dispose of the present case.
3. In *AES*, Services Environnementaux AES inc. (“AES”) agreed to transfer 25 percent of its shares in Centre technologique AES inc.’s capital stock to an investor, Groupe Sani-Gestion. In order to facilitate the transaction, AES and Centre technologique entered into a reorganization and tax planning agreement. The parties planned on using rollover provisions set out in s. 86 of the *ITA*, and ss. 541 to 543 of the *Taxation Act*, R.S.Q., c. I-3, in order to avoid tax consequences. These provisions allow a taxpayer to defer the tax impact of an exchange of shares if, among other things, the consideration other than shares received at the time of transfer does not exceed the adjusted cost base (“ACB”) of the shares. However, AES’s advisors miscalculated the ACB of the shares. In reliance on that miscalculation, AES implemented the transfer and was eventually assessed for a taxable capital gain, contrary to the parties’ original bargain. The parties applied for rectification of their agreement to avoid the unintended tax consequences.
4. In *AES*, the Attorney General of Canada argued in this Court that, to the extent it existed in Quebec civil law, rectification was available only to correct clerical errors. LeBel J., writing for the Court, rejected that argument. He found that the parties’ requested modifications were both legitimate and necessary. In doing so, he reasoned that art. 1425 *C.C.Q.* permits a court to give effect to the common intention of the parties by correcting erroneous expressions of that intention (*AES*, at para. 48). According to LeBel J., this follows from the civil law’s distinction between the *negotium*, the common intention of the parties, and the *instrumentum*, the declared will of the parties. Under art. 1385 *C.C.Q.*, the contract lies in the former, not the latter, “despite the importance . . . of the declaration, oral or written” of that common intention (*AES*, at para. 32).
5. Therefore, *AES* established that art. 1425 *C.C.Q.* allows courts to give effect to the real agreement between the parties, recognizing the fact that their agreement does not necessarily lie in the written document. According to LeBel J., this power extends to the point of filling “gaps in the text” or finding “content in it that can be well hidden” (*AES*, at para. 48).
6. However, a court’s power to rectify agreements under art. 1425 *C.C.Q.* is subject to certain conditions. The corrections being sought must be necessary and legitimate (*AES*, at para. 51). They must reflect the true intentions of the parties and cannot offend the rules of civil evidence (*AES*, at paras. 49-51). Finally, they must not compromise the interests of third parties (see *AES*, at paras. 33 and 35).
7. Where parties seek to rectify an agreement producing unintended tax consequences, *AES* clearly established that 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” (para. 52). As a result, tax authorities cannot “rely on acquired rights to have an erroneous writing continue to apply even though the existence of an error has been established” (*AES*, at para. 44).
8. Nevertheless, LeBel J. insisted that 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” (*AES*, at para. 54). He added the following:

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 [Agence du revenu du Québec] 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. [Emphasis added; para. 54.]

1. In my view, the conditions laid out in *AES* are fulfilled in this case. Given the application judge’s factual findings, the modifications requested by PJC Canada are both necessary and legitimate.
   1. Application to the Facts at Hand
      1. Deference Is Owed to the Application Judge
2. The application judge found:

that the common intention of the parties was, from the start, (1) to resolve the exchange rate problem (2) without tax consequences (2012 QCCS 6917, at para. 21 (CanLII));

that the series of operations that were implemented did not reflect the entirety of this common intention (paras. 25-26);

that the rectification being sought was in conformity with the common intention of the parties (paras. 25-26); and

that the parties were not trying to rewrite their tax history, but rather, were seeking to correct an unintended tax consequence (para. 27).

It is trite law that findings of fact cannot be reversed “unless it can be established that the trial judge made a ‘palpable and overriding error’” (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10). The one such error the Court of Appeal purported to find was in the application judge’s conclusion that the “parties were not seeking to rewrite the tax history of the transaction” ((iv) above) (2015 QCCA 838, [2015] 4 C.T.C. 82, at para. 37). On this point, the Court of Appeal reversed the application judge’s finding. It found, instead, that rewriting the tax history of the transaction was “precisely what the parties were seeking to do” on the basis that they had considered and discarded the very same intermediate operations they later asked the Superior Court to recognize (*ibid.*). It was not the application judge, but the Court of Appeal, that erred in making this finding. As the Attorney General of Canada concedes in her factum, PJC Canada and PJC USA never rejected the intermediate operations in question. It follows that the application judge’s findings of fact, summarized above, are unimpugned and accordingly attract deference from this Court in its application of the law to the case at hand.

* + 1. The Requested Changes Are Necessary

1. In this case, there was clearly a gap between the common and continuing intention of the parties and the operations implemented to carry out that intention. The evidence shows that there was a common and continuing intention not only as to the object of the contract but also its tax effects. From the start, PJC Canada and PJC USA set out to resolve the exchange rate problem without triggering any tax consequences. They diligently sought advice on how to do so. Having relied on that advice, they executed a series of transactions or prestations aimed at creating net liabilities in U.S. dollars so as to nullify the impact of exchange rate fluctuations in PJC Canada’s financial statements without generating any tax consequences.
2. Tax neutrality was therefore a *sine qua non* of the parties’ envisaged transactional scheme. This is confirmed both by the circumstances giving rise to their contemplated transactions and by the parties’ testimony. As the application judge noted, because the exchange rate effects triggered no immediate tax consequences, it was essential that the financing transactions produce no adverse tax effects. Had there not been an error concerning the applicability of FAPI, the parties would have initially undertaken intermediate steps akin to those they later asked the Superior Court to recognize. These steps would have resulted in the execution of their true common intention from the start.
3. That the tax advisors’ error in this case was one of omission, insofar as they neglected to consider FAPI, as opposed to one of commission (like miscalculating the ACB of shares), is not a principled ground on which to distinguish this case from *AES*. To the contrary, this distinction renders hollow the proposition that, if an expression of common intention 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 . . . ensure that it is remedied” (*AES*, at para. 52). This distinction is also at odds with LeBel J.’s recognition of a court’s power to “fill gaps in the text” in interpreting the parties’ common intention (*AES*, at para. 48). It is precisely in a case such as this one — where the tax advisors have made an omission — that this power is properly engaged.
4. Nor is the concept of the object of the contract, as contained in art. 1412 *C.C.Q.*, so narrow as to exclude the juridical operations envisioned by the parties here. The object of the contract transcends the particular prestations of the agreement. As Professors Lluelles and Moore put it:

[translation] To distinguish it from the object of the obligations, the object of a contract could be described as “the juridical operation considered as a whole . . . .” It is thus a comprehensive concept that requires one to understand *the overall scheme* of an agreement. . . .

. . . Identifying the core prestation — “the principal juridical operation” — is therefore necessary, but it is insufficient for the purpose of characterizing the object of the agreement: the overall scheme of the agreement must be taken into account in addition to the core prestation. And that scheme will vary from one agreement to another. [Underlining added.]

(*Droit des obligations* (2nd ed. 2012), at paras. 1051-52)

1. I do not share the view that rectification is available only where the prestation, as rectified in the written document, was specifically envisaged by the parties from the outset. In practice, this would mean that rectification would be available only to correct clerical errors — an argument that was made and rejected in *AES* (para. 23). This view disregards LeBel J.’s recognition of the fact that even an oral declaration of the parties’ will can depart from their common intention (*ibid.*, at para. 28). Here, the object of the agreement consisted in tax-neutral reciprocal loans creating net liabilities in U.S. dollars. Failing to consider that the loans had to be tax-neutral in order for the agreement to make commercial sense is inimical to the overall scheme of the agreement. Tax neutrality was at the very core of the agreement. There is nothing in art. 1412 *C.C.Q.* that prevents a court from giving effect to that agreement.
2. Further, the additional transactions or prestations envisioned by the parties were sufficiently determinable within the meaning of art. 1373 *C.C.Q.*, as understood by this Court in *AES*. A closer look at the facts of *AES* will prove instructive. Prior to the contemplated reorganization, AES held 1,217,029 Class A shares of Centre technologique, and wrongfully believed that the ACB of the shares was $1,217,029. AES exchanged all of its Class A shares for 4,500,000 Class B shares of Centre technologique and a demand note for $1,217,028. Between December 1998 and September 1999, Centre technologique repaid the demand note in full. In 2000, AES was assessed for a capital gain. The motion for rectification brought by AES and Centre technologique centred on modification of the terms of the demand note. The parties asked that the Superior Court substitute the amount of $95,000 for any reference to $1,217,028, the former being the correct ACB of the transferred shares at the time of the contract. However, to implement the correction, the parties also asked that the transactional documents be modified to include the issuance of 1,122,029 Class C preferred shares (*Québec* *(Sous-ministre du Revenu) v. Services environnementaux AES inc.*, 2011 QCCA 394, at paras. 2-3 (CanLII)). In short, they changed a component of the transaction that was based entirely on a debt instrument (the demand note) into separate debt and equity components in order to implement their original intention. The added equity component — the issuance of Class C preferred shares — had never previously been considered by the parties.
3. For clarity’s sake, the factual matrix of *AES* is reproduced in the chart below in comparison with that of the instant case:

|  |  |  |
| --- | --- | --- |
|  | Original Implementation | Requested Rectification (*requested* *corrections emphasized*) |
| *AES* | (a) AES transfers 1,217,029 Class A shares of Centre technologique to Centre technologique;  (b) Centre technologique transfers 4,500,000 Class B shares of Centre technologique to AES;  (c) Centre technologique issues a demand note to AES for $1,217,028. | (a) AES transfers 1,217,029 Class A shares of Centre technologique to Centre technologique;  (b) Centre technologique transfers 4,500,000 Class B shares of Centre technologique to AES;  (c) Centre technologique issues a demand note to AES for***$95,000***;  (d) ***Centre technologique issues 1,122,029 Class C preferred shares to AES.*** |
| Instant case | (a) On Feb. 7, 2005, PJC Canada loans US$120 million to PJC USA;  (b) On Feb. 25, 2005, PJC Canada purchases an additional 10 common shares of PJC USA for US$70 million;  (c) On Feb. 25, 2005, PJC USA loans US$70 million to PJC Canada. | (a) On Feb. 7, 2005, PJC Canada loans US$120 million to PJC USA, payable only on mutual consent of the parties, with interest at LIBOR plus 2.5 percent;  (b) On Feb. 25, 2005, PJC Canada purchases an additional 10 common shares of PJC USA for US$70 million;  (c) ***On Feb. 25, 2005,* *PJC USA repays US$70 million of the US$120 million loan to PJC Canada;***  (d) ***On Feb. 25, 2005,* *PJC Canada loans US$70 million to PJC USA;***  (e) On Feb. 25, 2005, PJC USA loans US$70 million to PJC Canada, with interest at LIBOR plus 2.5 percent. |

1. Fifteen years after the original agreement in *AES*, this Court granted AES’s requested rectification. In doing so, it nullified the original demand note, replaced it with one for lesser value, and added an equity component to the agreement. This was all done for one reason: to give effect to the parties’ original intention to maintain tax neutrality. Today, when faced with a similar request from PJC Canada, the majority of this Court denies it.
2. Turning back to art. 1373 *C.C.Q.*, it is difficult to see how the addition of an originally unintended stock issuance in *AES* was any more determinate or determinable than the addition of intermediate debt transactions requested in this case. Indeed, in this case, under the terms of the February 7, 2005 loan agreement between PJC Canada and PJC USA, the principal could be repaid only by “mutual consent” of the parties. The insertion of intermediate steps involving the repayment of a demand loan amounts to little more than judicial recognition of a partial discharge of an obligation that was determinable even on the terms of the parties’ original instrument. The prestations here entailed the provision of reciprocal debt financing, on the one hand, and partial repayment of that debt, on — and only on — mutual agreement of the parties. The prestations were therefore determinate and the corresponding obligation to repay was determinable.
3. It is instructive to note that with respect to these intermediate steps, the parties here ask less of the Court than was asked in *AES*. Neither step alters the capital structure of the financing scheme or of the parties. This Court went further in *AES*, where, as explained above, rectifying an error concerning s. 86 of the *ITA* required the addition of a previously unelaborated equity transaction to the parties’ operation. In the case at bar, rectifying an error concerning s. 95(1) of the *ITA* requires the addition of intermediate debt financing transactions that were determinable even on the original demand loan agreement.
4. In my view, it follows from the above that granting PJC Canada’s motion under art. 1425 *C.C.Q.* is necessary to remedy the discrepancy between the parties’ common intention and the expression of that intention through the implementation of the transactional scheme. As I explain below, it is also legitimate in light of this Court’s reasons in *AES*.
   * 1. The Requested Changes Are Legitimate
5. PJC Canada’s request for rectification is not intended to rewrite the tax history of the transactions, but rather to fill in the gaps by adding two intermediate steps which maintain tax neutrality of the agreed upon structural scheme. As the appellant noted, the Court of Appeal’s erroneous finding that the parties initially discarded the intermediate steps they are now requesting polluted the entirety of its reasons inasmuch as it determined that the parties had changed their common intention. They did not. The desired changes do not “alter the nature of the structures contemplated at the outset” (*AES*, at para. 54).
6. Nor would judicial correction of the gaps in this case invite taxpayers “to engage in bold tax planning” (*AES*, at para. 54). Unlike *AES*, in which the parties sought to defer tax through the use of rollover provisions in the *ITA*, the agreement between PJC Canada and PJC USA was not a tax planning transaction. Neither party sought to reduce or defer taxes payable. Rather, the parties sought to remedy the exchange rate fluctuation problem while maintaining tax neutrality. Judicial correction would therefore merely give effect to their constant common intention while respecting the outlines of their original legal operation. Little has changed: the parties are the same, the amount of money is the same, and the net effect from an accounting standpoint remains the same.
7. Given that the addition of the two intermediate transactions does not modify the original agreed upon structure of the operation, there is nothing here to suggest bad faith or an abuse of right on the part of the appellant. It is well established that a tax motivation does not taint the legitimacy of the parties’ bargain (*Walls v. Canada*, 2002 SCC 47, [2002] 2 S.C.R. 684; see also *Backman v. Canada*, 2001 SCC 10, [2001] 1 S.C.R. 367, at para. 22). The tax advisors’ fault of omission was committed in good faith following the exercise of reasonable diligence by PJC Canada. No allegations of fraud or even a hint of bold tax planning have been raised in the context of these proceedings. I should note that a tax advisor’s good faith error should not constitute an automatic bar to rectification.
8. In these circumstances, rectifying the agreement so that it reflects the parties’ common and continuing intention does not convert art. 1425 *C.C.Q.* into a “catch-all insurance” policy for their “inadvertence or mistakes” (majority reasons, at para. 42). In Quebec, “[e]very person is bound to exercise his civil rights in . . . good faith” (art. 6 *C.C.Q.*), and “[n]o right may be exercised . . . in an excessive and unreasonable manner” (art. 7 *C.C.Q.*). Further, art. 1375 *C.C.Q.* provides that the parties must conduct themselves in good faith throughout the determination, execution and extinguishment of their obligations. In circumstances where an applicant failed to act diligently, or sought the benefit of an earlier mistake with a view to retroactive tax planning, a court would properly reject such a request for lack of good faith and abuse of right. These concerns are often best left to the application judge, who has the benefit of the full factual record. But no such concerns arose in this case.
9. Further, PJC Canada’s request is legitimate under the apposite provisions of its actual governing statute. Indeed, s. 458 of the *Business Corporations Act*, CQLR, c. S-31.1, provides, in relevant part, as follows:

**458.** On an application by any interested person, the court may make any order it thinks fit to correct, or modify the consequences in law of, a mistake, or to validate any act vitiated as a result of the mistake, and may give any related directions it considers necessary.

For the purposes of this subdivision, “mistake” includes an omission, defect, defect of form, error or irregularity that has occurred in the conduct of the affairs of the corporation as a result of which

. . .

(3)   an action approved or decision made by the shareholders meeting, the board of directors or one of its committees has been rendered ineffective.

In keeping with the guidance provided in *AES*, s. 459 of the same Act acknowledges that, “[u]nless the court decides otherwise, an order [under s. 458] may not prejudice the rights of any third person”.

1. In this case, granting PJC Canada’s request does nothing to affect the rights of third parties. As explained above, the tax authorities are not third party beneficiaries of the parties’ mistake (*AES*, at para. 52). It bears mentioning that the tax authorities are not parties to the contract either, and cannot pretend to invoke the same rights as a contracting party.
2. In the absence of third party reliance, granting PJC Canada’s request promotes, rather than undermines, commercial certainty because it advances the contractual expectations of the parties. The fact that PJC Canada and PJC USA are in agreement as to their common intention puts this case in stark contrast with one in which the parties disagree as to the bargain they struck. In the latter case, the potential for an illegitimate *ex post* rewriting of the initial bargain is heightened. But that concern is absent here.
3. Since *AES*, courts in Quebec and across Canada have permitted parties who were settled as to their common intention to rectify or otherwise modify their bargain regardless of the impact on the tax authority’s coffers (see, *inter alia*, *Pallen Trust, Re*, 2015 BCCA 222, 385 D.L.R. (4th) 499; *Lemair v. Canada (Procureur général)*, 2015 QCCS 1142; *Canada (Attorney General) v.* *Brogan Family Trust*, 2014 ONSC 6354, 2015 D.T.C. 5008; *Philippe Trépanier inc. et* *Deloitte, s.e.n.c.r.l.*, 2014 QCCS 2615). These cases, like the instant case and *AES*, stand in contrast to cases in which one party attempts to impose terms on the other contrary to their original agreement. In *Shafron v. KRG Insurance Brokers (Western) Inc.*,2009 SCC 6, [2009] 1 S.C.R. 157,for example, the parties disagreed as to the geographical scope of the term “Metropolitan City of Vancouver”. In the case of a proven disagreement (or an absence of agreement) between the parties, it follows as a matter of course that the request for rectification should be denied. In the language of the *Code*, in such a case there was never an “agreement of wills” (art. 1378 *C.C.Q.*).
4. This case is different. Here, the application judge found that PJC Canada and PJC USA had a clear intention to resolve the exchange rate fluctuation problem without triggering any tax consequences. In stating that the parties were “seeking to rewrite the tax history of the transaction”, the Court of Appeal inappropriately replaced the application judge’s factual finding with its own (para. 37). And, I repeat, it erred in doing so. The intermediate steps forming the subject of the parties’ rectification motion had never been discarded by them. Proper consideration of the circumstances surrounding the parties’ motion for rectification reveals that their request is a legitimate one.
   1. Conclusion
5. For these reasons, PJC Canada’s motion for rectification is both necessary and legitimate. The parties had a constant common intention and demonstrated reasonable diligence by seeking advice to carry it out. They acted in good faith in seeking to remedy their exchange rate fluctuation problem without generating any tax consequences. They asked the application judge to fill in the gaps between the operations they had implemented insofar as those operations failed to fully reflect their common intention. Nothing about their request engaged the rights of third parties and there was no offense to the rules of evidence involved. In my view, all of this puts their application squarely within the parameters established by *AES* as one meriting rectification.
6. With respect, I believe that constricting LeBel J.’s liberal and generous approach to the availability of rectification under art. 1425 *C.C.Q.* is incongruous with the realities of modern commerce. The majority reasons amount to saying that rectification in the civil law is permissible only where (i) each and every juridical act required to achieve a desired taxation outcome has been correctly identified, characterized and therefore rendered determinate, and (ii) each and every potential tax consequence has been accurately predicted. This was not the law before or after *AES*. Nor should it become the law now. A complex transactional scheme may comprise a multitude of juridical acts. In advising their clients with respect to such acts, tax professionals are often called upon to resolve complex problems under significant time constraints. Mistakes happen. Depriving taxpayers of the ability to correct those mistakes undermines their right, long recognized in Canadian law, to organize their affairs so as to minimize tax liability (*Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.); *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, at paras. 45-46).
7. The fact that this deprivation will be consistent across Canada makes it all the more troubling. I agree with my colleague that convergence between Quebec civil law and the common law of the other provinces is desirable from a tax policy perspective (para. 52). Indeed, in this Court, the parties agreed that the common law and the civil law are functionally similar with respect to the availability of rectification. But retreating from the interpretation of art. 1425 *C.C.Q.* adopted in *AES* in order to achieve harmony with this Court’s contraction of equitable discretion in *Fairmont* is inconsistent with the law of contract in Quebec. Under art. 1378 *C.C.Q.*, a contract consists in an “agreement of wills” formed by the sole exchange of consents. This provision, like every article in the *Code*, must be construed “broadly so as to favour its spirit over its letter and enable [its] purpose . . . to be achieved” (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 15). Given that contracts can be expressed orally without recourse to written instruments, *AES* left open the possibility of rectifying errors in oral expression (paras. 28 and 32). This is consistent with the civil law principle, inherent in arts. 1378 and 1425 *C.C.Q.*, that a contract is based on the common intention of the parties, not on the expression of that intention.
8. The majority’s reasons in *Fairmont* are irreconcilable with these articles of the *Code*. Rectification in Canadian common law jurisdictions is now “limited to cases where the agreement between the parties was not correctly recorded in the instrument that became the final expression of their agreement” (*Fairmont*, at para. 3). There appears to be no scope for rectifying oral agreements. With respect, to the extent that my colleague in this case would import this limitation into the civil law, the “convergence” between the two legal systems is, in my opinion, far from “natural” (majority reasons, at para. 52).
9. In the absence of an adequate recourse in rectification, one might say that in cases like the case at bar, taxpayers may bring a professional negligence action against their advisors. With respect, I would think that rectifying the agreement, in line with the innocent party’s duty to mitigate under art. 1479 *C.C.Q.*, is preferable to the promotion of claims against that party’s advisors. On this front, the majority’s position ignores the important role played by tax professionals in the modern business world, which represents a stark departure from this Court’s recent recognition that “[i]ncome tax law is notoriously complex and many taxpayers rely on tax advisors to help them comply” (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 1).
10. In my view, a solution that favours the common and consistent intention of the parties and reflects commercial realities is preferable.
11. Disposition
12. For these reasons, I would allow the appeal with costs to the appellant.

*Appeal dismissed with costs,* Abella *and* Côté JJ. *dissenting.*

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