Dear Colleagues:

Thank for your continued support of the IATJ. This is our third newsletter with an article written by The Honourable Donald G.H. Bowman, former Chief Justice of the *Tax Court of Canada*, which I am sure you will find of interest.

Since our last newsletter, the IATJ has launched its website which can be visited at http://iatj.net/. We have also been busy finalizing plans for the 2nd IATJ Assembly in Paris, France on September 9 and 10, 2011. The program agenda is attached. I hope to meet many of you at the Assembly.

The IATJ continues to expand its membership worldwide, in an attempt to bring as many tax judges together as is possible. If you are not already a member, please consider joining as it will be a worthwhile experience.

Kindest personal regards,

E.P. Rossiter
Secretary-General of the IATJ

The founding members of the IATJ represent tax courts from around the world. The executive for the IATJ is:

Chief Justice Gerald Rip (Canada), President;
Judge Philippe Martin (France), 1st Vice-President;
Judge Olof Olsson (Finland), 2nd Vice-President;
Associate Chief Justice Eugene Rossiter (Canada), Secretary-General;
Judge Willem Wijnen (Netherlands), Treasurer

executive members at large include: Judge Friederike Grube (Germany), Judge John Avery Jones (U.K.), Judge Kjeld Lund-Andersen (Denmark), Judge Virgilijus Valancius (Lithuania), Judge Peter Panuthos (U.S.A.), Counsellor João Francisco Bianco (Brazil), Judge Dagmara Dominik-Ogińska (Poland), Justice Richard Edmonds (Australia), and Justice P.V. Reddi (India)

Newsletter Vol. III
July, 2011

2011 IATJ 2nd Assembly – Paris

September 9th and 10th, 2011

Cercle National des Armées
La Maison des Officiers de France
8 Place St. Augustin

AGENDA

Friday, September 9th, 2011
9:00 hrs to 12:00 hrs Registration

Business Session:

13:00 hrs to 15:00 hrs Business Meeting

15:00 hrs to 15:15 hrs Health Break

15:15 hrs to 17:00 hrs Substantive Issues

First Educational Session: Tours de Table: Comparative Legal Systems

- Civil Law: France, Morocco, Finland, Others
- Common Law: India, Australia, United States, Others

17:30 hrs to 19:30 hrs Reception

Saturday, September 10th, 2011
8:00 hrs to 9:00 hrs Continued registration and refreshment

Second Educational Session: **Tours de Table : Comparative Domestic Issues**

9:00 – 12:00 hrs

- **Topic 1: ADR, Mediation and Settlement Conference Procedures**
- Chair: Judge Dr Ulrich Schallmoser, Germany
  - Panellists: Associate Chief Justice Eugene Rossiter, Canada; Judge Peter Panuthos, United States
- Tour de table on domestic approaches

- Bilateral MAP obligations between countries
- Interactive / Q&A at end of each speaker to allow countries to self-identify/comment

- **Topic 2: Appeals from Tax Judges' Decisions**
- Chair: Justice Marshall Rothstein Supreme Court of Canada
    - Panellists: Judge Dr Ulrich Schallmoser, Germany
        - [and others to be identified]
- Tour de table on domestic rights of further appeal
- Discussion of merits of different approaches
- Speakers from countries representative of differing approaches to issues

- **Topic 3: Costs Awards in Tax Appeals**
- Chair: Judge Peter Panuthos
- Brief tour de table on applicable domestic rules, considerations, ranges etc

Third Educational Session:
13:00 – 17:00 hrs

Significant Recent Developments in International Tax Law

- **Topic 1: Relevance of Foreign Court Decisions in Applying Tax Treaties**
- Philippe Martin, France
- Pramod Kumar, India

- **Topic 2: Tax Treaty Case Law Update**
- Pramod Kumar, India
- Wim Wijnen

- **Topic 3: Transfer Pricing Case Law Update**

- Michael Ryer, Canada

- **Topic 4:Significant OECD Developments in International Tax**

- Article VII Update: Hans Pijl, Netherlands
- Tax Havens, Tax Avoidance, Aggressive Tax Planning & Tax Crimes and Mutual Assistance Conventions: Justice Patrick Boyle, Canada

- **Topic 5:Significant Value Added Tax VAT Decisions**
- Friederike Grube, Germany

Dinner Session: **Guest Speaker**: Hans Pijl, Tax Court of Appeal in The Hague, Netherlands
18:30 -- 20:30 hrs

Programme Co-Chairs:

Patrick Boyle, Tax Court of Canada, patrick.boyle@tcc-cci.ca

Pierre Collin, Conseil d'etat, France Pierre.Collin@conseil-etat.fr

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THE SETTLEMENT OF TAX DISPUTES IN CANADA

by Hon. Donald G. H. Bowman, Q.C.
Fraser Milner Casgrain LLP
Former Chief Justice, Tax Court of Canada

It is appropriate that the practice and principles relating to the out-of-court resolution of tax disputes in Canada be reviewed at this time. This essential aspect of the practice of tax law continues to be in a state of some uncertainty. The views expressed in this paper are, of course, my own and are not necessarily shared by other practitioners or all members of the judiciary.

Before I embark on these overly (and possibly inconsistently) charted waters, it might be useful to those members of the IATJ or other readers who are not familiar with the system of judicial resolution of tax disputes in Canada to summarize the essential aspects of the somewhat unique Canadian tax system. Individually, some aspects may be similar to those existing in one or other fiscal systems, but none has all of the characteristics of the Canadian system:

(a) Canada is a federal system, with legislative power distributed between the federal government and the governments of the provinces. Both levels of government have and exercise taxing jurisdiction, although the provincial powers are somewhat more limited.

(b) Federally, and in some provinces, both the legislation and the administration are bilingual. Both official languages, English and French, are of equal force and effect.

(c) Federal legislation is bijural. What this means is that the sources of law governing civil relationships in Canada spring from two important sources – the common law in all provinces except Quebec and the civil law in Quebec where the law is derived from the Quebec Civil Code. Income tax consequences frequently follow from the result of legal relationships governed by provincial laws (such, for example, as trust or fiduciary relations, contractual obligations, employment relations, agency, corporate matters, matrimonial matters, to mention only a few). Accordingly, such relationships may differ from province to province. The courts and indeed the Canada Revenue Agency ("CRA") endeavour to ensure that a federal statute, such as the Income Tax Act or the Excise Tax Act, is applied consistently and uniformly throughout Canada.

(d) The federal tax system in Canada is administered by the CRA, an agency of the Department of National Revenue. The two principal federal taxing statutes are the Income Tax Act, which imposes a tax on the income of individuals, corporations and trusts as well as withholding tax on certain payments made to non-residents, and the Excise Tax Act, which imposes a Goods and Services Tax on the price of goods sold and services provided, somewhat analogous to a tax that combines aspects of a retail sales tax and a value added tax.

(e) The taxing system in Canada is often described as "self-assessing" in that taxpayers are required annually to prepare and file with the CRA returns of income in which their income is disclosed and an estimate made of their tax.

(f) The CRA determines the tax owing and sends to the taxpayer a "notice of assessment" in which is set out the CRA's determination of the taxpayer's liability to tax interest or penalty for the year. Absent fraud or misrepresentation in the return, the CRA has generally (and subject to a number of exceptions) three years to revise its assessment of tax and send to the taxpayer a "notice of reassessment".

(g) If the taxpayer disagrees with the CRA's assessment or reassessment, it has 90 days in which to file what is known as a Notice of Objection in which the facts and reasons on which the taxpayer's objection is based are set out. The CRA, as part of its administrative review, considers the objection and can confirm, vary or vacate the assessment or reassess.

(h) The taxpayer has 90 days from the date of the CRA's action in response to the objection (or 90 days from the taxpayer's filing of the notice of objection if the CRA has taken no official action in response, such as confirming the assessment or reassessing) to file an appeal to the Tax Court of Canada.

(i) The appeal to the Tax Court of Canada requires the filing of a Notice of Appeal setting out the facts and reasons for the taxpayer's (the appellant's) challenge to the assessment of tax, interest or penalty.

(j) Upon the filing of the appeal to the Tax Court of Canada, the matter no longer belongs to the CRA but becomes the responsibility of the Attorney General of Canada, represented by the barristers employed in the Department of Justice, which has full authority over the carriage of the lawsuit in the name of the respondent, Her Majesty The Queen, the constitutional head of the Government of Canada.

(k) The respondent must then file a Reply to the Notice of Appeal setting forth the facts relied on by the CRA in making its assessment, such further facts as the respondent relies on and the reasons and statutory provisions to be advanced in support of the assessment.

(l) Following the close of pleadings, each party must provide to the opposing side a list of documents on which they rely and agree to oral "examinations for discovery" in which each side questions the other party (or an officer of the other party) with respect to the facts which each party intends to adduce or which are within that party's possession.

(m) Following the completion of the production of documents and oral examinations for discovery, the matter is ready for hearing and may be set down for trial.

(n) At trial, the parties adduce evidence and oral testimony and witnesses may be cross-examined by opposing counsel (or by the opposing party if he or she is unrepresented).

Before I move to a discussion of settlements of tax disputes (which is what this paper is supposed to be about) from this possibly unduly lengthy summary of the procedures whereby a tax dispute moves from the assessment stage through the administrative review by the CRA to the Tax Court of Canada, there are certain aspects of the Tax Court of Canada that deserve mentioning:

(a) the Tax Court of Canada is a superior court of record. It is entirely independent of the CRA or the Department of Justice. It is in no sense a part or emanation of the administrative or legislative branches of government.

(b) the judicial system in Canada and in particular the Tax Court of Canada is essentially adversarial rather than inquisitorial. The judge, of course, is interested in the truth, but it is not the judge's function to intervene in the proceedings or cross-examine the witnesses except for purposes of clarification. It is highly improper for a judge to "descend into the arena" or to take over the examination of witnesses.[1] The philosophical basis of the adversarial system of litigation is that the truth is most likely to emerge where both sides put forward their version of the facts which is tested by cross-examination by opposing counsel rather than through the intervention of a judge who, assuming the roles of prosecutor, defence attorney, trier of fact, arbiter of questions of law and, generally, filler-in of gaps in one or other or both sides of a case, runs the risk of losing the appearance of impartiality.

(c) the onus of proof in respect of factual matters is on the taxpayer (except in the case of penalties or opening up statute-barred years). This is, of course, a simplification. The question of onus of proof forms a substantial body of jurisprudence. However, the broad generalization stated above is sufficient for the purposes of this paper. The conventional view is that the taxpayer has the burden of "demolishing" the assumptions of fact upon which the CRA based the assessment.

(d) lawyers representing the taxpayer (the appellant) or Her Majesty The Queen (the respondent), frequently referred to as "the Crown", are officers of the court and have an ethical obligation of scrupulous fairness in their depiction of the facts as well as a duty to refer to all cases or authorities relevant to an issue, whether they are favourable or unfavourable to the party's position.

(e) the Tax Court of Canada, like the Tax Court of the United States, is a specialized court. Judges must have ten years practice as members of a provincial bar and

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[1] See: *James v. The Queen* 2001 DTC 5075
Jones v. The National Coal Board [1957] 2 All ER 55.
Francis v. The Queen 2007 DTC 903.
Corsaut v. Canada 2005 TCC 112
Heron Bay Investments v. The Queen 2010 DTC 7072 (FCA)

either have or acquire an expertise in tax matters. It is generally desirable that they have extensive experience as practising litigation counsel so that they are comfortable in dealing with the multitude of procedural and evidentiary issues that arise in the course of a trial.

(f) after hearing evidence and arguments, the judge may render judgment immediately from the bench or, as is more usually the case, the judge may reserve judgment and render it in writing later.

(g) judgments of the Tax Court of Canada are subject to appeal to the Federal Court of Appeal and, from that court, with leave, to the Supreme Court of Canada.

I have devoted this much time and space to a somewhat tedious summary of some of the salient aspects of the resolution of tax disputes at the administrative or judicial level in Canada simply because there is such a wide disparity of methods of resolving tax disputes throughout the world and I considered it useful, at least to persons who are not familiar with the Canadian system, to know something about the manner in which such disputes are resolved either judicially or extra-judicially and consensually.

I shall begin by stating what I mean by "settlement of a tax dispute". I mean any resolution of a difference relating to a tax issue that is not imposed by a judicial determination. A settlement in that sense is both consensual and extra-judicial. The fact that a settlement culminates in a consent judgment does not detract from its being a settlement within the above definition.

Several preliminary observations about settlements should be made:

(a) A settlement can occur at any stage – at the pre-assessment stage, at the objection level, prior to or after the commencement of court proceedings, after examinations for discovery, on the eve of trial, after the hearing has commenced or concluded or after judgment has been rendered if an appeal has been launched.

(b) Many settlements are reached after discoveries have been held when the parties have formed a more accurate picture of the strengths or weaknesses of their respective cases or how their witnesses will stand up under cross-examination in the heat of trial.

(c) In the Tax Court of Canada, many settlements are reached on the eve of trial. This is attributable to a number of factors. Experienced counsel are well aware of the uncertainties of litigation and the unpredictability of courts. The imminence of a trial in a few days has a very salutary effect of focusing counsel's attention on reality. Moreover, the practice in the Tax Court is to allow disclosure to the parties about a week or two in advance of trial which judge will preside at the trial. The knowledge of who will hear the case can have the effect of an electrifying epiphany.

(d) Most tax disputes are settled consensually at some stage of the proceedings. I do not have statistical evidence for this assertion, but am basing it solely on almost one half century in the field of tax litigation – as Crown counsel, tax litigator in private practice and seventeen years as a judge. If settlements cannot be made, the system breaks down. Our courts are already overburdened. They simply

> could not cope with the volume of cases if every tax dispute had to be determined by a court.

This brings me then to a highly controversial issue: the propriety of, and binding effect of, tax settlements reached between a taxpayer and the representatives of the CRA. Let me state unequivocally my position. Settlements are an essential part of the functioning of a viable tax system. For taxpayers and government agencies to be required to take all tax disputes to court constitutes an insupportable and wholly unrealistic burden on the taxpaying public and on Her Majesty's fisc and on the judicial system. Moreover, given the inconsistencies that exist in the judicial system, it would lead to far greater inconsistencies and inequities than exist in a system where fiscal disputants are encouraged to resolve their cases out of court.

Yet, the unacceptable situation I have described is precisely the consequence of a decision of the Federal Court of Appeal in *Cohen v. Her Majesty The Queen* 80 DTC 6250. The dispute in that case was whether the gain on the sale of certain lands was on income or capital account. The settlement to which the parties agreed was that the taxpayer would not appeal his assessments for 1961 to 1964, which treated the gain as being on income account, on the condition that the Crown would treat the gain in 1965 as being on capital account - a perfectly legal and ordinary settlement compromise that is made routinely and the type that I made on many occasions when I was in practice. On appeal to the Federal Court of Appeal, Pratte J. of the Federal Court of Appeal, *ex proprio motu*, said that the Minister was free to repudiate that agreement. He said:

> The appellant had agreed, said counsel, not to appeal his assessments for the 1961 to 1964 taxation years on the understanding that his income tax for 1965 would be computed on the basis that the profit here in question was a capital gain. Counsel argued that the Minister could not repudiate that understanding, particularly after the expiry of the time within which the appellant might have appealed the 1961 to 1964 assessments.
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> In my view, the trial judge correctly dismissed that argument. ".. that Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it. It follows that he cannot assess for some amount designed to implement a compromise settlement ...". (*Galway v. M.N.R.* [1974] 1 F.C. 600 at page 602, [74 DTC 6355 at page 6357]). The agreement whereby the Minister would agree to assess income tax otherwise than in accordance with the law would, in my view, be an illegal agreement. Therefore, even if the record supported the appellant's contention that the Minister agreed to treat the profit here in question as a capital gain, that agreement would not bind the Minister and would not prevent him from assessing the tax payable by the appellant in accordance with the requirements of the statute.

The statement by Pratte J., in my opinion, goes beyond being merely erroneous. Ignoring its arrogant and intemperate tone, it falls far short of manifesting the measured judiciousness that one is entitled to expect from our judiciary. That a judge can, with a few ill-chosen words, drive a coach-and-four through decades of practice is inexcusable. There was no basis on the evidence or in the law for the statement that the agreement was illegal.

Under the rule of *stare decisis* the Tax Court is obliged to follow this decision and therefore I did so, with misgivings, in *Consoltex v. The Queen* 97 DTC 724 where I allowed a taxpayer to repudiate an agreement made with the revenue authorities.

In the *Consoltex* case, I acknowledged the difficulty of reconciling the judgment of Pratte J. with that of the Supreme Court of Canada in *Smerchanski v. The Queen* 76 DTC 6247.

In *Smerchanski* a taxpayer agreed with the revenue authorities not to appeal an income tax assessment if the Crown would refrain from prosecuting him criminally for tax evasion. The taxpayer then appealed his income tax assessment on the grounds that the agreement was illegal and contrary to public policy.

The Supreme Court would have none of it. I think it is fair to say that the Supreme Court of Canada was more offended by the stratagem of *Smerchanski* than was Pratte J. when faced with the Crown's repudiation in *Cohen*.

The Chief Justice of Canada said in *Smerchanski*:

> The result to which I would come in this case is encased in broad statutory provisions in both England and the United States. Authorization for pecuniary settlements instead of instituting criminal proceedings has been part of the tax law in England since 1944 and is now found in the Taxes Management Act, 1970 (UK), c 9, section 105. In the United States, sections 7121 and 7122 of the Internal Revenue Code of 1954 authorize settlements and compromises of tax liability as against civil or criminal proceedings prior to reference to the Department of Justice for prosecution or defence. I do not regard these provisions as necessarily pointing to the common law invalidity of all contractual settlements made in the knowledge of probable prosecution and in order to avoid it. Rather they represent an acknowledgement of practice by seeking to put beyond dispute the power of the tax collector to settle or compromise tax liability, even if there be wilful evasion leaving the taxpayer open to possible or probable prosecution.

The saga continues. In *Cummings v. The Queen* 2009 DTC 1178 the Tax Court of Canada again reaffirmed the statement in *Consoltex* that if the Minister is not bound by a settlement agreement, neither is the taxpayer. The inconsistencies and uncertainties are perpetuated in *Garber v. The Queen* 2005 DTC 1456 (TCC). aff'd 2006 DTC 6358 (FCA in which it was held that the Crown had the authority to repudiate a negotiated settlement. By way of contrast the Tax Court in *Oberoi v. The Queen* 2006 DTC 3110 refused a taxpayer's motion to annul an out-of-court settlement, relying on *Smerchanski*. The Federal Court of Appeal in *Enterac Property Corp v. The Queen* 98 DTC 6202 noted the conflict and suggested that a future court revisit the unsatisfactory state of the jurisprudence on this question.

The fullest exposition of this unsatisfactory state of the law is found in the recent thoughtful judgment of Bowie J. of the Tax Court of Canada in *1390758 Ontario Corporation v. The Queen* 2010 DTC 1388 at paragraphs 15 to 40. I shall not quote them at length, but Bowie J.'s observations at paragraphs 35 to 37 reflect exactly my views:

> 35 I agree with Bowman C.J. and the authors Hogg, Magee and Li that there are sound policy reasons to uphold negotiated settlements of tax disputes freely arrived at between taxpayers and the Minister's representatives. The addition of subsection 169(3) to the *Act* in 1994 is recognition by Parliament of that. It is not for the Courts to purport to review the propriety of such settlements. That task properly belongs to the Auditor General.
>
> 36 The reality is that tax disputes are settled every day in this country. If they were not, and every difference had to be litigated to judgment, unmanageable backlogs would quickly accumulate and the system would break down.
>
> 37 The Crown settles tort and contract claims brought by and against it on a regular basis. There is no reason why it should not settle tax disputes as well. Both sides of a dispute are entitled to know that if they invest the time and effort required to negotiate a settlement, then their agreement will bind both parties.

What conclusions can one draw from this confusing saga? The following are some that I draw:

(a) By all means go on settling cases. Assess your chances of success or failure. If possible put a percentage on them and craft your settlement in a manner consistent with your assessment of your chances. The best compromise settlement is one where both parties leave the table somewhat dissatisfied with the result. It is much preferable to the uncertainty and unpredictability of subjecting oneself to the vagaries of judicial caprice.

(b) Avoid being too obvious about the arbitrary nature of the compromise settlement. For example, do not state that you are settling at 50% of the tax in issue on the basis that 50/50 is an accurate reflection of your chances of success. Pay at least lip service to the myth of "principled settlement". Do not give a judge any basis for finding, without evidence, some excuse for treating a settlement as "illegal".

(c) The experience in the Federal Court of Appeal with such cases as *Cohen* (supra) or *Galway v. The Queen* 74 DTC 6355 in refusing to honour settlement agreements is unfortunately out of touch with the realities of commercial life.

(d) Try to settle disputes that are in court by filing an agreement with the CRA under ss.169(3) of the Income Tax Act. In this way, the terms of the settlement are never seen by the Court. The Minister merely reassesses to give effect to the settlement and the taxpayer discontinues its appeal to the Court.

I shall conclude this part of the discussion by noting that a 1998 report of the Department of Finance recommended that settlement of tax disputes be encouraged by introducing a legislative mechanism allowing the CRA to enter into compromise arrangements on the basis of the "risks of litigation". Such compromise settlements are in fact sanctioned by the Ontario Corporations Tax Act and under United States and United Kingdom legislation.

This leads logically to the next aspect of settlements, the judicial encouragement of settlements through pretrial settlement conferences. Section 126 of the Tax Court of Canada rules provides for the holding of a pretrial conference before a judge to consider the possibility of settling some or all of the issues, simplifying the issues or obtaining admissions that will shorten the trial.

The judge who presides at such a conference may not preside at the trial if the case is not settled. A pretrial conference is off the record and without prejudice. Admissions made by either party may not be referred to at trial. Such conferences can only be useful if they are open and candid.

It is an important aspect of a chief justice's role in administering the court that he or she exercise extreme care in assigning judges to preside over such conferences. A chief justice should know which judges are capable of and interested in trying to effect a settlement. Some are good, some are indifferent and some are just plainly unsuitable. The skills of a mediator (not an arbitrator), which are subsumed essentially in the role of the pretrial settlement judge, are unique. If a judge is interested he or she can develop them. A judge who seeks at such a conference to mediate a resolution of a tax case, whether it involves many issues or only one, gets to use the weapons in his or her arsenal that cannot (or should not) be used in open court. All of them should be used in a settlement conference judiciously (but not necessarily judicially) – charm, cajolery, intimidation, humour. The judge should be prepared to say how he or she would decide the case if that judge were hearing it in court. The judge should be polite but forthright and uninhibited in expressing his or her views.

Pretrial conferences serve several functions:

(a) They facilitate each counsel's becoming aware of the other side's evidence and arguments in a manner that examinations for discovery – which are essentially confrontational and adversarial – do not.

(b) They have the effect of having one or both parties (who should be at the conference) see the weaknesses of their own case. I have seen instances of particularly recalcitrant or inflexible parties – including income tax assessors - figuratively collapse at a pretrial conference when they are confronted by the evidence the other side will adduce or by a clear statement by an experienced pretrial judge that the case should be settled.

(c) Moreover, and importantly, pretrial conferences result in settlements.

As a corollary to this discussion of settlement conferences I should mention briefly the matter of costs.

Rule 147 of the Tax Court Rules provides that in exercising its discretionary power to award costs, the court may take into account a variety of matters, including any offer of settlement made in writing. Proposed Rule 147(3.1) is more detailed and complex with respect to costs when an offer in writing has been made. It provides that when a judgment is obtained that is as favourable as or more favourable than an offer in writing, a successful party is entitled to substantial indemnity costs from the date of the offer. This significantly removes a portion of the discretion of the Court contemplated by Rule 147.

Finally I should mention briefly the concept of rectification that in recent years has become a potent weapon in the arsenal of practitioners as a means of settlement where a taxpayer has made an error in a transaction that has unanticipated tax consequences. The first remedy that should be considered is to move in a court of equitable jurisdiction (generally provincial superior courts) to rectify the problem. One of the first and certainly leading cases of the exercise of equitable jurisdiction is *Juliar v. Canada* 2000 DTC 6589, a decision of the Ontario Court of Appeal. The parties intended to transfer property to a corporation by means of a tax free rollover whereby shares were taken back. A mistake was made and debt rather than the shares were taken back, which prevented the rollover from being tax free. The court permitted rectification to be made substituting shares for debt. The principles are stated clearly in the Ontario Court of Appeal as follows:

> In *Slocock's Will Trusts, Re* (1978), [1979] 1 All E.R. 358 (Eng. Ch. Div.) the court was concerned with an application for rectification of a deed designed to reduce or avoid payment of tax on the death of a party, but which deed mis-described the property involved due to a solicitor's error. In granting rectification Graham J. said the following at pp. 361 and 363:
>
> The general principle in regard to rectification is clearly stated in *Snell's Principles of Equity* [now *Snell's Equity*, 30th ed. p. 693] in the following words:
>
> If by mistake a written instrument does not accord with the true agreement between the parties, equity has power to reform, or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself but a mistake in the way in which the transaction has been expressed in writing. Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of the contract.
>
> …..
>
> The true principles governing these matters I conceive to be as follows. (1) The court has a discretion to rectify where it is satisfied that the document does not carry out the intention of the parties. This is the basic principle. (2) Parties are entitled to enter into any transaction which is legal, and, in particular, are entitled to arrange their affairs to avoid payment of tax if they legitimately can. The Finance Acts 1969 and 1975 tell them explicitly how they can do so in the case of estate duty and capital transfer tax. (3) If a mistake is made in a document legitimately designed to avoid the payment of tax, there is no reason why it should not be corrected. The Crown is in no privileged position qua such a document. It would not be a correct exercise of the discretion in such circumstances to refuse rectification merely because the Crown would thereby be deprived of an accidental and unexpected windfall. (4) As

> counsel for the trustees submitted, neither *Whiteside v. Whiteside* [[1949 2 All E.R. 913]] nor any other case contains anything which compels the court to the conclusion that rectification of a document should be refused where the sole purpose of seeking it is to enable the parties to obtain a legitimate fiscal advantage which it was their common intention to obtain at the time of the execution of the document.
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> I agree with these propositions and it appears to me that the facts of the instant case fall squarely within them. I would therefore dismiss the appeal with costs.

The remedy of rectification has been used on numerous occasions since the *Juliar* decision and the courts have generally shown themselves to be willing to go to considerable lengths to correct errors made in a transaction to avoid unforeseen results. Indeed although the rectification is equitable in that it arises from English equitable concepts as developed in the courts of Chancery which are strictly not concepts contemplated by the Quebec Civil Code, nonetheless the Quebec Court of Appeal (2011 QCCA) has affirmed the authority of the Quebec Superior Court to rectify documents in a tax case.

Limitations of space do not permit a full discussion of the myriad of cases where rectification has been successfully used. It could be the subject of a lengthy article in itself. It should be used as an extremely valuable means of resolving issues in tax matters that arise from errors.