

The business world is in continuous evolution. In order to remain competitive, a professional must be aware of the developments that may affect or influence his or her practice. It is in this spirit that we have created "RATIO", a quarterly legal information publication intended to support you in the achievement of your professional goals.

The name of this publication is a term employed in both the legal and accounting professions. In legal circles, the word "ratio" is used to refer to the principal reasons justifying a court's decision. In the accounting world, a "ratio" is, as you know, a quotient used to compare various elements of a business's financial data.

Our expertise will add value to yours by helping you identify your clients' needs and better advise them. We hope that "RATIO" will be one more element contributing to the enhancement of our relationship!

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## Unexpected tax consequences

### Is rectification or nullification possible?

By Pascale Blanchet  
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The absence of negative tax consequences (or the attainment of a specific tax result) is often an important if not fundamental consideration when a client decides to proceed with a transaction, for example an estate freeze. When it turns out, following a notice of assessment or otherwise, that the tax consequences obtained are not those that the parties had anticipated, it is possible in certain circumstances to obtain annulment or rectification through judicial means.

Courts in Quebec recognize that a transaction may be nullified with retroactive effect when there has been an error concerning the tax consequences and the tax consequences constituted a main consideration for the parties.<sup>1</sup> Moreover, the rectification of documents, which in the past seemed to be of very limited application under Quebec civil law, was recently granted in a taxation context in the Superior Court's judgment in *Brochu v. Placements Donald Brochu Inc.*<sup>2</sup> It therefore appears that when the parties feel that the rectification of transactions entered into between them would be more appropriate than simple nullification, they may contemplate going to court to request a rectification order. The annulment or rectification of a transaction generally requires the obtaining of a judgment from a court having jurisdiction.

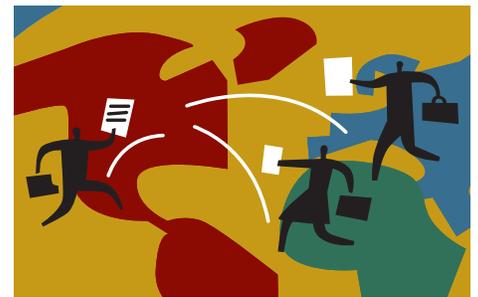
For greater clarity, it should be noted that the tax authorities will accept to be bound by an order of rectification or recognize the nullity of

a transaction declared by a court to the extent that they feel that the procedure has not been used by the parties in an abusive manner.

1. *B.E.A. Holdings Inc. v. Trafsys Inc.* Q.C.A., Montreal, no: 500-09-013408-034, February 12, 2004.
2. *Brochu v. Placements Donald Brochu Inc.*, Q.S.C. no: 200-17-008573-073, December 21, 2007.

## Shortage of manpower?

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The difficulties encountered in recruiting qualified employees and the shortage of manpower in certain economic sectors are currently causing headaches for many Canadian businesses. In this context, recourse to foreign manpower may be a solution. However, the foreigner and the Canadian business concerned ("the Canadian Business Concerned") must fulfil certain formalities before the foreigner comes to Canada, such as obtaining a work permit.

The process of obtaining a work permit begins with the Canadian Business Concerned demonstrating to Human Resources and Social

Development Canada and Immigration Québec (the “**Authorities Having Jurisdiction**”) that the hiring of the foreigner will not have any negative impact on the local labour market (“**the Confirmation Process**”). However, there are several exemptions to the Confirmation Process which are found in certain international agreements such as NAFTA. Certain particular situations may also benefit from an exemption from the Confirmation Process, such as intra-company transfers and programs for spouses and foreign students. In addition, the Authorities Having Jurisdiction acknowledge the existence of a shortage of qualified manpower in certain fields and have published a list of occupations in relation to which the usual requirements for the obtaining of a work permit have been relaxed.

Further, it should be noted that obtaining a work permit may be necessary even if the foreigner does not receive any remuneration from the Canadian Business Concerned as well as in certain situations where the foreigner and the Canadian Business Concerned do not have a true employer-employee relationship.

Lastly, substantial fines and penalties may be imposed on the Canadian Business Concerned when a foreigner works in Canada without a work permit. It is therefore important to ensure compliance with the applicable legislation from the beginning of the process of hiring a foreigner.

## Penalties on third parties

Something that concerns you!

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The *Income Tax Act* (Canada) (“ITA”) and the *Taxation Act* (Quebec) (“TA”) provide for administrative penalties on third parties, such as tax specialists, lawyers, accountants and tax shelter promoters who take part in false statements in relation to these statutes. The ITA essentially provides for two kinds of penalties commonly called the penalty on planners (the “**Planners’ Penalty**”) and the penalty on tax return specialists (the “**Return Specialists’ Penalty**”), whereas the TA only provides for the imposition of the latter penalty. The Planners’ Penalty is aimed mainly at tax shelter promoters.

The Return Specialists’ Penalty is aimed in particular at persons who prepare income tax returns on behalf of taxpayers or provide tax advice to them. Thus, a person who takes part in the inclusion of a false statement in an income tax return is liable for the Return Specialists’ Penalty just like the taxpayer.

For example, the Canada Revenue Agency or Revenu Québec (the “**Tax Authorities**”) may levy this penalty on an accountant who has discovered a false statement in a previous tax return of a taxpayer and has not corrected the inaccuracy while preparing a subsequent tax return for the taxpayer.

The Return Specialists’ Penalty can be very heavy. Indeed, in certain situations the amount imposed can exceed \$100,000.

The Tax Authorities are responsible for establishing, on a balance of probabilities, the facts justifying the imposition of a penalty. It should be noted that the usual process for contesting disputes with the tax authorities is available with respect to the imposition of these penalties.

Please don’t hesitate to contact us for any tax litigation.

## Requirement for reporting issuers

to publicly disclose certain material contracts

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Whereas reporting issuers<sup>1</sup> previously only had to publish material contracts made outside the ordinary course of business, since March 17, 2008 several kinds of material contracts entered into in the ordinary course of business must be publicly disclosed by filing them on the SEDAR Internet site ([www.sedar.com](http://www.sedar.com)).

In particular, any contract to which a director, officer or promoter is a party (except an employment agreement), any contract relating to the sale of the majority of the issuer’s products or services or the purchase of the majority of its required products or services, any financing or credit agreement, any franchise or licence agreement, any contract for external management or administration, and any contract on which the issuer’s business is substantially dependent must be filed on SEDAR.

However if the publication of certain provisions of these contracts might be seriously prejudicial to the interests of the issuer, they may be omitted under certain conditions when



the contract is filed on SEDAR, the addition of a general confidentiality clause covering the whole of a material contract would not have the effect of relieving the issuer from its duty to disclose the contract (except in certain exceptional circumstances in which an exemption might be obtained).

Thus, special attention should be paid to this new disclosure obligation when negotiating and drafting material contracts of a reporting issuer. We invite you to contact us for the preparation and drafting of your clients’ contracts to prevent inopportune disclosure of information concerning them.

1. Reporting issuers are companies that have gone public.

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