August 17, 2022

The Honourable Tyler Shandro
Minister of Justice and Solicitor General, Deputy House Leader
Bowker Building
2nd Floor,
9833 – 109 Street
Edmonton, AB
T5K 2E8

Dear Minister Shandro:

Re: Pressing Need for an Amendment to the *Judicature Act* (Alberta) re Equitable Remedies

The purpose of this letter is to identify an important issue that, in our view, requires the enactment of an amendment to the *Judicature Act* (Alberta)[1] in order to bring to Albertans access to the equitable remedies of rectification and rescission which, prior to 2016, had been available to them. As a result of decisions of the Supreme Court of Canada rendered in 2016 and 2022, however, the availability of rectification and rescission have been dramatically and substantially reduced – excessively so, in our respectful submission. Curiously, as discussed below, an unacceptable provincial disparity now exists between the continuing availability of remedies to correct errors to Québec residents as opposed to the availability of similar remedies to residents of all the other provinces of Canada.

Our Concern

Too often in our tax law practice, we are retained by Alberta-resident individuals and private corporations facing adverse consequences of a *bona fide* mistake that had been made inadvertently by either them or their other professional advisors engaged to assist them in completing a particular transaction such as a freeze of their shares of a business corporation, a merger, the purchase or sale of a business or some other type of reorganization. Taking steps to resolve these kinds of innocent mistakes can last years, require substantial expenditure, be emotionally draining and involve substantial risk (owing largely to the involvement of professional liability insurers) all in an effort to seek damages through court proceedings to compensate the individual or corporation for the mistake made by a party to the transaction or its professional advisor. To make matters worse, often these kinds of mistakes lead to costly, unintended income tax consequences to the individuals and corporations impacted by them.

Prior to the rendering of the above-mentioned Supreme Court of Canada decisions, it was possible to apply to a superior court of a province for an order of rectification or rescission that could result in the mistake being corrected (in the case of a rectification order) or the transaction itself being nullified (in the

[1] Chapter J-2.

case of a rescission order), and the result of obtaining such a court order is that it is binding against the entire world, including the Canada Revenue Agency (the "**CRA**"). In the result, if rectification were ordered, the transaction would be completed in the manner originally intended, and also would be subject to the originally intended income tax consequences, and if rescission were ordered, the transaction would be rendered null and void from its inception (and any attendant adverse tax consequences eliminated). A court would grant an order of rectification or rescission only if the individual or corporate applicant for such order were able to provide sufficient evidence of the specific intention of the parties in completing the particular transaction.

Canada (Attorney General) v. Fairmont Hotels Inc.

In 2016, however, the Supreme Court of Canada rendered its decision in *Canada (Attorney General) v. Fairmont Hotels Inc.*,[2] which materially narrowed the circumstances in which a superior court could grant an order of rectification. Essentially, in that decision the Supreme Court of Canada replaced (a) the requirement that an individual or corporation seeking rectification must demonstrate that the parties' intention in concluding a transaction was not reflected in the written agreement that they executed with (b) a requirement that such parties must have previously reached a binding and enforceable agreement on all essential terms, and that those specific terms were not reflected in the written agreement ultimately executed by them. In short, the Supreme Court of Canada's new test for rectification demands a much higher degree of precision regarding the parties' prior agreement, as opposed to their establishing a specifically intended result or effect of the parties' prior agreement.

A main reason for the Supreme Court's restrictive decision in *Fairmont* was to prevent taxpayers from engaging in retroactive tax planning to the detriment of taxing authorities; however, in our view, as explained in detail below, there are other more acceptable ways in which to prevent that from occurring.

In our submission, the 2016 Supreme Court of Canada decision (which is required – by the doctrine of *stare decisis* or "binding judicial precedent" – to be followed by lower courts) has established an unduly restrictive test that must be met in order for a Justice of the Court of Queen's Bench of Alberta to be authorized under the *Judicature Act* (Alberta) to grant the equitable remedy of rectification. In brief, the effect of the *Fairmont* case was to replace a "prior common intention" standard with a "prior agreement with definite and ascertainable terms" standard. Consequently, Albertans who have suffered from an innocent mistake either of their own doing or on the part of their professional advisors no longer have access to the equitable remedy of rectification. In our respectful submission, this situation cries out for correction by the Alberta Legislature.

Canada (Attorney General) v. Collins Family Trust[3]

The tax planning involved in this case was not at all aggressive – indeed, it was consistent with a widely accepted interpretation of ITA subsection 75(2) that had long been regarded as correct by both the tax community and the CRA in documents that it had published; however, after the tax planning transaction that was the subject of this case had been completed, that long-established interpretation was reversed by the Federal Court of Appeal's decision in the *Sommerer* case, 2012 FCA 207. Specifically, the plan involved the creation of a family trust ("**Trust**") and the incorporation of a holding company ("**Holdco**") as a

[2] 2016 SCC 56; 2016 D.T.C. 5135. A companion case involving the Civil Code of Québec, *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, was decided by the Supreme Court of Canada at the same time.

[3] 2022 SCC 26, rendered on June 17, 2022.

beneficiary of that Trust. Holdco lent funds to the Trust to purchase shares of an operating corporation ("**Opco**") at fair market value, after which Opco paid dividends to the Trust. The plan assumed – based on the longstanding interpretation of ITA subsection 75(2) – that:

(a) dividends received by the Trust from Opco would be attributed for income tax purposes to Holdco pursuant to ITA subsection 75(2) (for the reason that (i) Holdco had "transferred" to Trust the Class B common shares of Opco – the dividend payer – and (ii) it was possible that those shares could – pursuant to Holdco's potential exercise of an option that had been granted by Trust to Holdco – revert back to Holdco), and

(b) Holdco would be entitled to deduct those dividends under ITA subsection 112(1).

The intent was to move cash from Opco to Trust without incurring any income tax.

Following the Tax Court of Canada's decision in the *Sommerer* case to the effect that ITA subsection 75(2) does not apply to a sale of property to a trust by a person (as opposed to those shares being gifted to, or settled on, the trust) – being a novel interpretation of subsection 75(2)) – the CRA reassessed the Trust by requiring it to include in income all dividends paid by Opco in 2008 and 2009, regardless of the fact that those dividends had been included in computing the income of Holdco, which had claimed an offsetting deduction in computing its taxable income pursuant to ITA subsection 112(1).

A chambers judge of the British Columbia Supreme Court granted an order of rescission, relying on *Re Pallen Trust*, 2015 BCCA 222, a decision of the British Columbia Court of Appeal that had concluded that a mistake about the tax consequences of a transaction justified granting rescission. The British Columbia Court of Appeal, which heard the appeal following the Supreme Court of Canada decisions in the *Fairmont Hotels* and *Jean Coutu* cases (which concluded that those cases precluded an order of rectification but did not hold that any equitable remedy – such as rescission – is precluded in the present circumstances) affirmed that chamber judge's decision.

The majority of the justices on the Supreme Court of Canada, however, allowed the appeal of the Attorney General of Canada – and thus denied the Trust's application for rescission – for the following reasons (underlining added by us):

1. "Equity has no place here, there being nothing unconscionable or otherwise unfair about the operation of a tax statute on transactions freely undertaken."

2. "It follows that the prohibition against retroactive tax planning, as stated in *Fairmont Hotels* and *Jean Coutu*, should be understood broadly, precluding *any* equitable remedy by which it might be achieved, including rescission."

3. "Equitable principles have above all a distinctive ethical quality, reflecting as they do the prevention of unconscionable conduct. ... This broad scope for courts of equity to give relief also defines its own limits (hence a "limiting" principle): transactions that *do not* call for relief as a matter of consciousness or fairness are properly outside equity's domain. ... The jurisdiction of equity to protect against fraud, undue influence, and unconscionable transactions is well settled ... generally speaking, a court of equity may grant relief where it would be unconscionable or unfair to allow the common law to operate in favor of a party seeking enforcement of the transaction. But

there is nothing unconscionable or unfair in the ordinary operation of tax statutes to transactions freely agreed upon."

4. "Unless, therefore, a statute says otherwise, taxpayers are to be taxed, in accordance with the applicable tax statute's ordinary operation, based on what they actually agreed to do, and not on what they could have done (citing the Supreme Court of Canada's comments in *Shell Canada* at paragraph 45, *Duha Printers* at paragraph 88 and *Neuman* at paragraph 63).

5. "The statements of principle in those judgments (referring to the *Fairmont Hotels* and *Jean Coutu* cases) – that tax consequences flow from legal relationships, that taxpayers' liabilities should be governed by the ordinary operation of tax statutes and on what the taxpayer agreed to do, and that legal instruments cannot be modified merely because they generate an adverse tax liability – are categorical, and not restricted to cases where rectification is sought. To be clear: they are of general application, precluding equitable relief altogether when sought to avoid an unintended tax liability that has arisen by the ordinary application of tax statutes to freely agreed upon transactions. There is no room for distinguishing *Fairmont Hotels* or *Jean Coutu* based upon the particular remedy sought.

6. "... the Minister was *bound* to apply Parliament's direction in the *Act*, as interpreted by a court of law, unless and until that interpretation is judged to be incorrect by a higher court. Unless a statue gives the Minister the power to deviate from that direction, the Minister may not deviate; nor may a court undermine that direction by resort to equity, since there is nothing unconscionable or unfair about the Minister administering the *Act* as Parliament directs. Equity is the conscience of the common law, not of Parliament."

Our Suggested Solution

Since, as a practical matter, a judicial remedy likely will not be available to reinstate the equitable remedies of rectification or rescission for the benefit of residents of Alberta, we submit that the Government of Alberta should amend the *Judicature Act* (Alberta) in the manner suggested below, in order to achieve such reinstatement for Albertans.

Enclosed is a recent article entitled *Equitable Remedies in Tax Matters: The Elusive Search for Relief*, published in Tax Disputes in Canada – The Path Forward, 2022.[4] This article includes a thorough analysis of these equitable remedies as well as the relevant case law, and concludes by recommending a legislative solution, stating as follows commencing at the bottom of page 30 (underlining added by us):

> This evolution in the types of mistake for which rectification was permitted was severely curtailed by the *Fairmont* decision, which did not reflect the generally sympathetic attitude of the lower courts toward fixing inadvertent mistakes.
>
> On the basis of the existing state of the law discussed above, rectification cannot relieve a tax mistake unless the facts that gave rise to the error are rectified or altered in a manner that alleviates the mistake. Pursuant to section 92(13) of the Constitution Act, 1867, the authority to

[4] This article was written by Elie S. Roth, Steven S. Ruby and Ryan Wolfe of the law firm Davies Ward Phillips & Vineberg LLP, Toronto.

> legislate in respect of property and civil rights has been granted to the provinces. Accordingly, if a province was of the view that it was in the best interests of its residents to have access to potential rectification of their tax mistakes, it could enact legislation that permits its superior courts to issue rectification orders in broader circumstances than are currently permitted under the jurisprudence. Such orders would be binding against all the world, including, in particular, the minister. The minister could then reassess taxpayers on the basis of the appropriate facts to the same extent as the minister has reassessed taxpayers in accordance with rectification orders issued by superior courts under their existing equitable jurisdiction. .....
>
> The importance of this suggestion for reform is that denying taxpayers and their advisers relief for inadvertent tax errors, where the fisc reaps an unjustified reward at the expense of innocent taxpayers and/or their advisors, simply should not be tolerated in a sophisticated society because of an aversion to retroactive tax planning. There are competing tax objectives at play in the circumstances. One objective is to protect the fisc from retroactive tax planning; but the flip side of this protection under the current state of the jurisprudence is to reward the fisc at the expense of innocent parties. Most observers would suggest that, as between these two objectives of preventing retroactive tax planning and relieving from innocent mistakes, the more common occurrence is the latter and that it should prevail over the former. If the provinces were to enact rectification legislation that overturned the *Fairmont* decision, protective guidelines, although not perfect, could be established that would offer sufficient protection against providing relief in circumstances of retroactive tax planning. [Passage deleted]

In our submission, justices of the Court of Queen's Bench of Alberta are eminently well equipped to distinguish between a circumstance in which a person has planned a particular tax outcome and later reverses that outcome in order to seek a preferable result on the one hand (i.e. retroactive tax planning) and a person who has made a mistake that results in an outcome that – but for the mistake – would not have occurred. Those justices should be empowered to exercise their discretion in making such a distinction, in order to decide whether to grant, or refrain from granting, equitable relief pursuant to expanded powers that we submit should be added to the *Judicature Act* (Alberta).

The next portion of our submission will summarize the relevant case law on rectification.

The *Juliar* case[5]

The Supreme Court of Canada in the *Fairmont* case rejected the reasoning of the Ontario Court of Appeal's decision that endorsed the trial court's[6] granting of a rectification order in the *Juliar* case. In the *Juliar* case, in 1989 a married couple (the "**Parents**") had transferred all their shares of a corporation ("**Opco**") that carried on their variety store business in Niagara Falls, Ontario to a newly formed corporation ("**867**") in which their two daughters owned 60 shares and the husbands of their two daughters (Paul Juliar and Harvey Roff) owned the remaining 40 shares. By 1993, 867 was operating seven variety stores, and the two couples (i.e. Paul Juliar, Harvey Roff and their wives) decided to operate independently of one another. Consequently, it was agreed to divide the business in half with one being held by a corporation controlled by the Juliars and the other half being held by a corporation controlled by the Roffs.

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[5] 2000 D.T.C. 6589 (ONCA).
[6] 99 D.T.C. 5743 (Ont. S.C.J. [Commercial List].

The lawyer for the business incorporated two new corporations, Juliar Holdings Ltd. ("**Juliar Holdings**") and Roffco Holdings Niagara Inc. ("**Roffco**") and the shares in 867 held by the Juliars were transferred to Juliar Holdings and the shares in 867 held by the Roffs were transferred to Roffco. The business assets of 867 were then transferred to Juliar Holdings and Roffco in the manner that had been agreed upon between the Juliars and the Roffs.

The evidence was that both such transfers were intended to occur without the incidence of taxation.

The Roffs effected their transfers of the shares of 867 to Roffco in exchange for shares of Roffco combined with the making a joint election under section 85 of the *Income Tax Act* ("**ITA**") to provide the Roffs with tax-deferred rollover treatment for income tax purposes. The Juliars, however – relying upon erroneous advice provided to them by their accountant – transferred their shares of 867 to Juliar Holdings in exchange for promissory notes. The reason for doing so is that their accountant had mistakenly thought that income tax had been paid by the Parents upon the 1989 transfer of their shares of Opco to 867 in exchange for shares of 867 which the Parents then had gifted equally to their daughters and their respective husbands. Based on that mistake, the accountant had believed that the Juliars' shares of 867 had an aggregate adjusted cost base totalling $470,000 (which, if true, would have exceeded the then fair market value of those 867 shares) – meaning that the Juliars could have received consideration consisting exclusively of promissory notes without incurring any income tax. However, because the Parents' transfers of their shares of Opco to 867 in fact had been effected on a tax-deferred rollover basis, no tax actually had been paid by the Parents at the time of their 1989 transfer. This meant that the adjusted cost base of the shares of 867 held by Paul Juliar and his wife was far less than the $470,000 amount which they had erroneously believed those shares had. The CRA reassessed the Juliars on the basis that ITA section 84.1 deemed them to have received a taxable dividend upon the transfer of their shares of 867 to Juliar Holdings, with the result that they incurred an immediate tax liability.

Because this tax liability resulted entirely from an error, the Juliars sought an order of the Ontario Superior Court of Justice granting rectification of the transaction (the Minister of National Revenue having refused to consent to the granting of a rectification order).

Justice Cameron of the Ontario Superior Court of Justice granted rectification, having considered the foregoing together with evidence of the Juliars' accountant that "if there were going to be tax liability, there would have been no transaction". Justice Cameron stated as follows:

> Division of a family business among the children of the founder of the business is not an uncommon occurrence and is invariably intended to be effected with little or no cash and on a basis that does not attract immediate liability for income tax. .....
> The structure of the transaction would have been in accordance with s. 85 of the *Income Tax Act* had the mistake in determining the cost of the 867 shares not been made. This intention is confirmed by the advice given by Niven to the Roffs in a parallel transaction.
> .....
>
> Denial of the application would place on the Juliars a heavy burden which they were entitled to avoid and which they sought to avoid from the inception of the transaction. It would yield to Revenue Canada a premature gain solely because of an error in understanding or communication between Paul and [the accountant].

The Ontario Court of Appeal upheld the decision of the Ontario Superior Court of Justice,[7] holding as follows (underlining added by us):

> 25 The trial judge effectively found that the true agreement between the parties here was the acquisition of the half interest in the [variety store] business ..... by transfer of shares in 867 to Juliar Holdings in a manner that would not attract immediate liability for income tax. In these circumstances, that had to be, not a transaction pursuant to s. 84.1 of the *Income Tax Act*, but a shares for shares transaction. Hence, it was appropriate for the trial judge to permit rectification to reflect that transaction.
>
> 26 The appellant quarrels with the finding of fact that "it was the intention of the Juliars that the transactions would not trigger an immediate obligation to pay income tax." The appellant argues that this finding "was based more on an inference than on clear, direct, and admissible evidence."
>
> 27 This latter is a fair comment. It is possible, even probable, that no one mentioned income tax throughout the nine or ten months in issue. The plain and obvious fact, however, is that the proposed division had to be carried out on a no immediate tax basis or not at all.
>
> 28 The affidavit of [the parties' lawyer] is perfectly clear in that regard. .....

The result in the *Juliar* case enabled the parties' intention to be implemented on a basis that corrected the accountant's misunderstanding of the adjusted cost base of the transferred shares.

Rescission

The equitable remedy of rescission was not addressed by the Supreme Court of Canada in *Fairmont*. Rescission, where ordered by a justice of a provincial superior court, retroactively cancels a transaction that has been the subject of a fundamental mistake, where the court concludes that it would be unfair to leave the transaction in place despite the occurrence of the mistake. Rescission does not seek to correct the documentation pertaining to a transaction so as to replace it with the documentation that was intended by the parties but, rather, to set the transaction aside as if it had not occurred. It is expected that the Supreme Court of Canada will be rendering a decision in a case[8] in which rescission was ordered by the British Columbia Supreme Court and upheld by the British Columbia Court of Appeal, but has been appealed by the Crown to the Supreme Court of Canada (which has heard the appeal but has not yet rendered its decision).

The Courts' Decisions in the *Fairmont* case

The Supreme Court of Canada's decision in the *Fairmont* case adopted a much more restrictive approach as to how precise the terms of the original intention reached between the parties must be. The Ontario Court of Appeal in *Juliar* essentially upheld the key finding by Justice Cameron of the Ontario Supreme Court that the underlying intention of the Juliars and Juliar Holdings was that the Juliars would transfer their shares of 867 to Juliar Holdings on a tax-deferred rollover basis, as opposed to requiring significantly greater specificity regarding the particular consideration to be provided by Juliar Holdings to the Juliars (i.e. promissory notes vs. shares) forming part of the intention of those parties – regardless of the fact that only

[7] 2000 D.T.C. 6589 (Ontario Court of Appeal).

[8] *Collins Family Trust v. Canada (Attorney General)*, 2020 BCCA 196; affirming 2019 BCSC 1030.

one type of consideration (namely, shares) would enable the parties' actual underlying intention to be realized.

The opening paragraph of the Supreme Court of Canada's decision itself reflects that Court's more restrictive approach, stating as follows (underlining added by us):

> 1 This appeal concerns the conditions under which a taxpayer may ask a court to exercise its equitable jurisdiction to rectify a written legal instrument, where the effect of that instrument was to produce an unexpected tax consequence. As I will explain, this entails inquiring into the nature and particularity of the terms which the taxpayer had intended to record in the instrument, whether the instrument contains those intended terms and, if not, whether those intended terms are sufficiently precise such that they may now be included in the instrument.

The Supreme Court of Canada proceeded to hold that the terms of the underlying agreement between parties seeking rectification (that is, well beyond the parties' clearly expressed intention) must be "sufficiently precise" to enable a court to rectify an instrument that the parties assert erroneously records what they had agreed upon.

In our respectful submission, however, the Supreme Court required an inappropriately precise degree of specificity as to the terms of the underlying agreement that the parties assert had been intended by them – far more specificity than was required by the two levels of court that had decided the *Juliar* case – with the result that the Supreme Court's approach to the equitable remedy of rectification means that very seldom will a provincial superior court judge consider that he or she has the power to grant such equitable remedy – absent legislative amendment.

Fairmont Hotels Inc. ("**Fairmont**") had decided in 2002 and 2003 to provide U.S. dollar financing to Legacy Hotels REIT ("**Legacy**") in which Fairmont owned a minority interest. The purpose of that financing was to assist Legacy to purchase two hotels located in Washington D.C. and Seattle, the management of which Fairmont hoped to obtain by entering into management contracts with Legacy. Fairmont had decided to provide this financing by causing two of its subsidiaries to enter into reciprocal U.S. dollar loan agreements with Legacy, in order to enable Fairmont to avoid exposure to potential foreign exchange tax liability. Fairmont's foreign exchange exposure on the financing was fully hedged as each of Fairmont and its two subsidiaries had a U.S. dollar denominated asset and a U.S. dollar denominated liability of equal value. Specifically, Legacy lent US $67,600,000 to Fairmont, which used those funds to subscribe for preferred shares of its directly owned Canadian subsidiary which, in turn, used those subscription proceeds to subscribe for a like amount of preferred stock of its wholly-owned U.S. subsidiary which, in turn, lent US $67,600,000 to a U.S. subsidiary of Legacy which purchased the Washington hotel. The same reciprocal financing structure was used for a US $19 million loan to purchase the Seattle hotel. The Crown specifically agreed that this financing structure was set up in order to fully hedge Fairmont's foreign exchange exposure in order to achieve the business and tax objectives of Fairmont and Legacy.

In 2006, Fairmont was purchased by Kingdom Hotels International and Colony Capital LLC and its shares ceased to be publicly traded. It was recognized that if nothing was done, that acquisition of control of Fairmont (and, indirectly, each of its subsidiaries) would frustrate their intention that no entity would realize a net foreign exchange gain or loss in connection with the reciprocal loan arrangements. In particular, the acquisition of control would cause Fairmont to realize a deemed foreign exchange loss on the preferred shares it held in each of its Canadian subsidiaries, each of which also would realize a deemed foreign exchange loss on the preferred shares it held in its respective U.S. subsidiary, but such acquisition of control would not cause these entities to realize matching foreign exchange gains. The tax advisors of Fairmont and Legacy developed a plan to cause Fairmont to realize its accrued foreign exchange gains and losses and enabled its foreign exchange exposure to be hedged. However, that plan did not address the foreign exchange exposure of its two Canadian subsidiaries. The foreign exchange losses deemed to be realized by those two Canadian subsidiaries of Fairmont on the acquisition of control could not be carried forward; consequently, the originally planned foreign exchange exposure was no longer hedged and Fairmont realized that. The evidence at trial was that Fairmont knew that it would have to find a means of ensuring that the financing structure remained tax and accounting neutral, but there was no specific plan as to how that would be achieved.

In 2007, Legacy approached Fairmont requesting that the reciprocal loan arrangements be terminated in order to allow for the sale of the Washington and Seattle hotels to a third party purchaser. Legacy's CFO requested that Fairmont approve Legacy's proposed unwinding steps that same day. Fairmont was, at that time, preoccupied with completing multiple transactions having an aggregate value of nearly one billion dollars. A senior officer of Fairmont mistakenly concluded (not having had sufficient time to analyze the matter or engage outside counsel to do so) that the requested redemption of the preferred shares held by Fairmont would not trigger any net gain. This mistake was discovered following a CRA audit of Fairmont's 2007 taxation year.

Fairmont applied for an order of the Ontario Superior Court of Justice for rectification of this mistake.[9] That Court granted the rectification order, stating as follows (underlining added by us):

> 30 Ms. Carrie Smit, the head of the tax group at Goodmans LLP, was a tax lawyer working for Colony when it acquired Fairmont in 2006. She wrote in an e-mail of November 30, 2012 of her involvement in the 2006 transaction, which she swore in her affidavit was true, and stated among other things (underlining added by us):
>
>> However, there was a concern that a redemption of the preferred shares of [the Canadian subsidiaries of Fairmont] would result in a loss denial to [Fairmont]. This loss was needed by [Fairmont] to offset the inherent foreign exchange gain in the Legacy Loans. The loss denial issue was unclear and was the subject of discussion among the advisors representing Fairmont and the investors [Colony and Kingdom]. As a result, it was determined that the preference shares of [the Canadian subsidiaries of Fairmont] would not be redeemed, but rather the loss inherent in such shares to FHI would be realized in a transfer of such shares to a new corporation. ...
>>
>> It is my clear recollection that this tax planning was based on the intention of the advisors that the preferred shares of [the Canadian subsidiaries of Fairmont] would never be redeemed. Rather, the advisors contemplated that the Legacy Financing could be unwound in the future through other transactions (including possibly the wind-up of [the Canadian subsidiaries of Fairmont] into [Fairmont], or the amalgamation of such companies with [Fairmont]). I believe that this intention was communicated to Fairmont's tax advisors, although I cannot recall at which meeting or conference call this may have occurred.
>
> .....

[9] 2014 ONSC 7302 (Ontario Superior Court of Justice [Commercial List]).

32 I think a fair conclusion from the evidence, and I so find, is that there was a continuing intention on the part of Fairmont from the time of the 2002 loan arrangements with Legacy that the loan arrangements would be carried out with a view to being tax and accounting neutral and a continuing intention from the time of the 2006 transaction in which control of Fairmont passed to the purchaser of its shares that the preference shares of [the Canadian subsidiaries of Fairmont] would not be redeemed in light of the modified plan that was carried out at that time.

.....

37 Fairmont relies on this [*Juliar*] case as authority for the proposition that the exact method to achieve a common intention to avoid tax is not required to be decided at the time of the transaction, just as the exact method to avoid tax from the unhedged position of [the Canadian subsidiaries of Fairmont] was not yet decided in 2006. This comes from the statement of the trial judge:

> The Juliars had no expectation as to how the tax neutral effect would occur except as Fast [their accountant] might advise them. The Roffs [the sister and brother-in-law] achieved it by use of s. 85 of the Income Tax Act. Fast thought he had achieved it through the existence of a cost base which was higher than the fair market value at the time of sale.

.....

39 Thus while the Juliars had no expectation as to exactly how to accomplish their tax objective, and it was not discussed with their accountant at the time, it was held that the intention to achieve the transfer of shares on a tax free basis was sufficient to rectify the corporate resolutions to permit a section 85 rollover rather than the use of promissory notes.

.....

42 In this case, the intention of Fairmont from 2002 was to carry out the reciprocal loan arrangements with Legacy on a tax and accounting neutral basis so that any foreign exchange gain would be offset by a corresponding foreign exchange loss. When control of Fairmont changed in 2006 that intention did not change and when the loan unwind occurred in 2007 that intention did not change. By reason of a mistake on the part of Mr. Zahary, the preferred shares of FHIW Canada and FHIS Canada held by FHI were redeemed in 2007, which unbeknown to Mr. Zahary by reason of his mistake caused an unintended tax assessment.

43 I do not see this as a case in which tax planning has been done on a retroactive basis after a CRA audit. The purpose of the 2007 unwind of the loans was not to redeem the preference shares of [the Canadian subsidiaries of Fairmont], but to unwind the loans on a tax-free basis. The redemption of the preference shares was mistakenly chosen as the means to do so.

44 In the circumstances denial of the application to rectify would result in a tax burden which Fairmont sought to avoid from the inception of the 2002 reciprocal loan arrangement and but for an unfortunate mistake would have been avoided in 2007. It would give CRA an unintended gain because of the mistake.

45 I allow the rectification claim of the applicants to rectify the corporate resolutions in the form set out in Schedule A and B to the Notice of Application.

The Ontario Court of Appeal upheld the decision of the Ontario Superior Court of Justice, stating as follows (underlining added by us):

> 5 Based on the evidence before him, the application judge made the following key factual findings:
>
> 1) the [taxpayer] had a continuing intention from 2002 onwards that its loan arrangements with Legacy would be carried out on a tax and accounting neutral basis through a plan whereby any foreign exchange gains would be offset by corresponding foreign exchange losses; and
>
> 2) the [taxpayer] also had a continuing intention from 2006 onwards - after the change in control occurred - that the preferred shares of the two relevant companies - [the Canadian subsidiaries of Fairmont] ... would not be redeemed; and
>
> 3) by reason of a mistake on the part of one of the members of the [taxpayer's] senior management team, the preferred shares of [the Canadian subsidiaries of Fairmont] were redeemed in 2007, triggering serious adverse, unintended tax consequences.
>
> .....
>
> 8 In these circumstances, relying on this court's decision in *Juliar*, the application judge held that the respondent was entitled to rectify the relevant corporate resolutions to correct the mistaken share redemptions. This result, the application judge noted, would avoid the imposition of an unintended tax burden that the respondent had sought to avoid from the outset, as well as an unintended tax revenue windfall to the CRA arising from the mistaken share redemptions.
>
> 9 On the factual findings of the application judge, set out above, and the binding authority of *Juliar*, we see no basis for intervention with the application judge's discretionary decision to grant rectification.
>
> 10 *Juliar* is a binding decision of this court. <u>It does not require that the party seeking rectification must have determined the precise mechanics or means by which the party's settled intention to achieve a specific tax outcome would be realized</u>. *Juliar* holds, in effect, that the critical requirement for rectification is <u>proof of a continuing specific intention to undertake a transaction or transactions on a particular tax basis</u>.
>
> 11 In this case, on the application judge's findings, the [taxpayer] had a specific and unwavering intention from the outset of its dealings with Legacy to ensure that the Legacy-related transactions were tax neutral and, to that end, that no redemptions of the relevant preference shares should occur. Nonetheless, by mistake, the redemptions were authorized by corporate resolutions.
>
> 12 Contrary to the [Crown's] argument, in these circumstances, <u>it was unnecessary that the [taxpayer] prove that it had determined to use a specific transactional device - loans - to achieve the intended tax result</u>. That the respondent mistakenly failed to employ an appropriate transactional device to achieve the intended tax result <u>does not alter the nature of the respondent's settled tax plan: tax neutrality in its dealings with Legacy and no redemptions of the preference shares in question</u>.

> 13 At the end of the day, therefore, *Juliar* and the application judge's factual findings, described above, are dispositive of this appeal. It is not open to a single panel of this court to depart from a binding decision of this court.

The Supreme Court of Canada, however, concluded that both the Ontario Superior Court of Justice and the Ontario Court of Appeal had "erred in holding that this intention [of achieving tax neutrality] could support a grant of rectification." The Supreme Court of Canada described the equitable remedy of rectification in the following terms (underlining added by us):

> 2 The present case arises from a financing arrangement which the parties had intended, both at its inception and ongoing, to operate on a tax-neutral basis. Because of the particular financing mechanism chosen, an unanticipated tax liability was incurred. Both the chambers judge at the Ontario Superior Court of Justice and the Court of Appeal for Ontario granted rectification on the grounds of the parties' intended tax neutrality.
>
> 3 Without disputing that tax neutrality was the parties' intention, for the reasons that follow it is my respectful view that both courts below erred in concluding that this intention could support a grant of rectification. Rectification is limited to cases where the agreement between the parties was not correctly recorded in the instrument that became the final expression of their agreement ... It does not undo unanticipated effects of that agreement. While, therefore, a court may rectify an instrument which inaccurately records a party's agreement respecting what was to be done, it may not change the agreement in order to salvage what a party hoped to achieve. Moreover, these rules confining the availability of rectification are generally applicable, including where (as here) the unanticipated effect takes the form of a tax liability. To be clear, a court may not modify an instrument merely because a party has discovered that its operation generates an adverse and unplanned tax liability. I would therefore allow the appeal.

The Supreme Court of Canada's reasons for judgment appear to us to have drawn an inappropriate distinction between the contracting parties' clear intention to structure a specific financing transaction on a tax-neutral basis (which intention was achieved and maintained throughout the five years preceding the unwinding of that financing) and the method that they mistakenly adopted for the purpose of unwinding that financing, which triggered a foreign exchange gain and the "unexpected tax liability". We believe that the redemption of Fairmont's shares of its Canadian subsidiaries was the result of a mistake. The rectification order granted by the Ontario Superior Court of Justice provided relief from that mistake, and prevented the Crown from inappropriately benefiting from it. That order was granted by a Justice of the Ontario Superior Court of Justice who had exercised his discretion in concluding that fairness and equity appropriately would be served by rectifying the mistake that had been made in the agreements to implement the unwinding of the financing. The responsibility of that Justice was to exercise his judgment in determining whether fairness required – or not – the granting of a rectification order, and part of his responsibility was to draw an inference from the evidence before him as to what the intended terms of the unwinding agreement likely were. That Justice had before him, among other evidence, the above-quoted unchallenged affidavit of Ms. Smit to the effect that the preference shares of the Canadian subsidiaries of Fairmont would not be redeemed, because of the tax risk that had been identified by both parties' tax counsel regarding the potential loss denial that could result therefrom to Fairmont (which loss was needed by Fairmont to offset the foreign exchange gain that was inherent in the loans made to Legacy). Ms.

Smit's further evidence was that the preferred shares of its Canadian subsidiaries could remain outstanding indefinitely, with those subsidiaries lending the necessary funds to Fairmont (because a loan would not trigger a taxable foreign exchange gain), and that it would be possible for those subsidiaries eventually to be merged into Fairmont.

The Supreme Court of Canada reversed the decisions of both levels of Ontario courts below largely on the basis that Fairmont was unable to demonstrate that it and its Canadian subsidiaries had reached an antecedent agreement regarding the specific manner in which funds would be transferred by the Canadian subsidiaries to Fairmont on a tax neutral basis. The Court seems to have disregarded the evidence of Ms. Smit that was before the Ontario Superior Court of Justice, which the Justice had specifically included in the above-quoted paragraphs 30 and 31 of his reasons for judgment.

The Supreme Court of Canada was critical of the Ontario Superior Court of Justice having emphasized the existence only of a "continuing intention of the parties", as opposed to the existence of an actual antecedent agreement between Fairmont and its Canadian subsidiaries regarding the precise manner in which funds would be moved from the Canadian subsidiaries to Fairmont using loans.

The Supreme Court of Canada concluded as follows (underlining added by us):

> 31 … Rectification does not correct common mistakes in judgment that frustrate contracting parties' aspirations or, as here, unspecified "plans"; it corrects common mistakes and instruments recording the terms by which parties, wisely or unwisely, agreed to pursue those aspirations. While my colleague [dissenting Justice Abella] suggests that the jurisprudence of this Court undermines this reasoning, that very jurisprudence requires the party seeking rectification of an instrument to show not merely an inchoate or otherwise undeveloped "intent", but rather the term of an antecedent *agreement* which was not correctly recorded therein …
>
> 39 A straightforward application of these principles to the present appeal leads unavoidably to the conclusion that the respondents' application for rectification should have been dismissed, since they could not show having reached a prior agreement with definite and ascertainable terms. I have already noted (1) the chambers judge's finding that, in 2006, Fairmont intended to address the "unhedged position of [the Canadian subsidiaries] in a way that would be tax and accounting neutral although [it] had no specific plan as to how [it] would do that" and (2) the Court of Appeal's description of Fairmont's intention as being "to unwind [the Legacy transactions] on a tax free basis". It is therefore clear that Fairmont intended to limit, if not avoid altogether, its tax liability in unwinding the Legacy transactions. And, by redeeming the shares in 2007, this intention was frustrated. Without more, however, these facts do not support a grant of rectification. … Rectification is not equity's version of a mulligan. Courts rectify instruments which do not correctly record agreements. Courts do not "rectify" agreements where their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome.

In so rejecting the approach to obtaining a rectification order comparable to that granted by the Court in *Juliar* — namely, that parties need demonstrate that they had intended to effect a particular transaction (there, a transfer of shares of 867 to Juliar Holdings) that would have a particular effect (there, a non-taxable transfer) — and require instead that a high degree of specificity originally have been agreed upon that was not recorded accurately in the finalized agreement, the Supreme Court of Canada has restricted the availability of the equitable remedy of rectification to circumstances in which the ultimate written agreement failed to correctly reflect the precise terms of the antecedent agreement.

The underlying common intention of the Juliars and Juliar Holdings was that the Juliars would transfer their shares of 867 to Juliar Holdings on a tax-deferred rollover basis. In our view, it is clear that but for the accountant's mistaken belief that the original share transfer made by the Parents to 867 had resulted in the Parents having paid income tax on their resulting gain, the consideration would have been the issuance of shares — not promissory notes — by Juliar Holdings. In our view, this is precisely the kind of circumstance in which the equitable remedy of rectification ought to be available in order to implement the common intention of the parties that failed to be implemented as a result of a mistake, and to avoid an undeserved windfall to the fisc at the parties' expense.

Because of the Supreme Court of Canada's decision in *Fairmont*, the once flexible, efficient, time and cost-saving remedy of rectification no longer is available except in narrow circumstances. Is this a reasonable situation from a policy perspective? If one or more taxpayers can establish to a court's satisfaction that (a) parties had a *bona fide* common intention to carry out a particular transaction on a non-taxable basis, and (b) solely because of an innocent mistake (which does not amount to retroactive tax planning), the documentation intended to implement that transaction gave rise to an unintended tax liability, should that taxpayer be precluded by the *Fairmont* decision from seeking an order of rectification or rescission from a court of competent jurisdiction (in Alberta, the Court of Queen's Bench of Alberta)? In our view, equity demands not.

Inappropriate Disparity between Residents of Different Provinces

Very curiously, there now exists a glaring disparity between the availability of rectification and rescission to residents of the common law provinces of Canada and the right to correct errors that is made available to residents of Québec by explicit provisions of the *Civil Code of Québec*. In a 2013 decision of the Supreme Court of Canada (*Archambault v. Canada (Agence du Revenu)*,[10] the Court upheld the decision of the Québec Court of Appeal to correct a mistake set out in written agreements in circumstances analogous to those in the *Juliar* case. Specifically, the parties to a corporate reorganization had expressed orally to their legal and accounting advisors their clear intention to defer tax when completing the reorganization. Accordingly, the tax-deferred share exchange provisions of ITA section 86 were utilized; however, as a result of an advisor's error in computing the adjusted cost base of the shares being disposed of, a promissory note was issued by the acquiring corporation in an amount considerably exceeding the actual ACB of those shares, which triggered tax. The SCC summarized the Québec Court of Appeal's decision as follows (underlining added by us):

> 18 In a unanimous decision, the Court of Appeal affirmed the Superior Court's judgment. The Court of Appeal saw no impediment to the respondents' motion in Quebec's rules of civil procedure. According to the Court of Appeal, the courts have the power in Québec civil law to correct acts in order to give effect to the parties' true common intention, and there is no need to import the common law doctrine of rectification into Québec's law of obligations. In its opinion, art. 1425 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), authorizes the correction of a discrepancy between the common intention of the parties and the intention declared in the acts, provided that the application is legitimate and that the correction does not affect the rights of third

[10] 2013 SCC 65.

parties (paras. 17-20). The Court of Appeal concluded that the application was legitimate and did not affect the rights of the tax authorities.

Accordingly, because the *Civil Code of Québec* contains provisions that differ from the common law in that they specifically grant to contracting parties the right to correct documents in order to give effect to the parties' true intention, residents of Quebec are entitled to access remedies similar to rectification and rescission which now are no longer available under the common law to persons resident anywhere else in Canada.

Our Recommended Solution

We respectfully submit that the Alberta Legislature amend the *Judicature Act* (Alberta) to improve the right of Alberta residents to access the equitable remedies of rectification and rescission. Specifically, the amendments that we think appropriate are set forth below in red.

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

Our comment: No amendment required – we have included this provision only to provide context.

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose but

(d) in considering whether or not to grant a plaintiff the equitable remedy of rectification, the Court shall be entitled to exercise discretion to determine whether, taking into account all relevant circumstances, a *bona fide* continuing intention of the plaintiff existed in respect of a transaction that the plaintiff entered into or an event in which the plaintiff participated, which intention was not correctly reflected in the provisions of a written instrument in respect of that transaction or event. The Court shall be entitled to apply the flexible principles governing the equitable remedy of rectification that were applied by the Ontario

Court of Appeal in *Juliar v. Canada (Attorney General)*, 50 O.R. (3d) 728; affirming (1999) 46 O.R. (3d) 104 and by the Ontario Court of Appeal in *Fairmont Hotels Inc. v. Canada (Attorney General)*, 2015 ONCA 441; affirming 2014 ONSC 7302, but the Court shall not apply the principles that were applied by the Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2015 SCC 56; and

(e) in considering whether or not to grant a plaintiff the equitable remedy of rescission, the Court shall be entitled to exercise discretion to determine whether, taking into account all relevant circumstances, a sufficiently grave mistake of fact or law existed in respect of a gift, trust, settlement or transaction of any kind whatever, including a mistake in respect of the tax consequences thereof, to warrant the rescission of that gift, trust, settlement or transaction. The Court shall be entitled to apply the flexible principles governing the equitable remedy of rescission that were applied by the British Columbia Court of Appeal in *Collins Family Trust v. Canada (Attorney General)*, 2020 BCCA 196; affirming 2019 BCSC 1030, but the Court shall not apply the principles that were applied by the Supreme Court of Canada in *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26.

(2) If a defendant claims to be entitled

(a) to an equitable estate or right, or

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim asserted by a plaintiff in the proceeding,

the Court shall give to each equitable defence so alleged the same effect by way of defence against the claim of the plaintiff that the High Court of Justice in England would give if the same or like matters had been relied on by way of defence in a proceeding for the same or like purpose but

(c) in considering whether or not to grant a defendant the equitable remedy of rectification, the Court shall be entitled to exercise discretion to determine whether, taking into account all relevant circumstances, a *bona fide* continuing intention of the defendant existed in regard to a transaction that the defendant entered into or event in which the defendant participated, which intention was not correctly reflected in the provisions of a written instrument respect of that transaction or event. The Court shall be entitled to apply the flexible principles governing the equitable remedy of rectification that were applied by the Ontario Court of Appeal in *Juliar v. Canada (Attorney General)*, 50 O.R. (3d) 728; affirming (1999) 46 O.R. (3d) 104 and by the Ontario Court of Appeal in *Fairmont Hotels Inc. v. Canada (Attorney General)*, 2015 ONCA 441; affirming 2014 ONSC 7302, but the Court shall not apply the principles that were applied by the

Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2015 SCC 56; and

(d) in considering whether or not to grant a defendant the equitable remedy of rescission, the Court shall be entitled to exercise discretion to determine whether, taking into account all relevant circumstances, a sufficiently grave mistake of fact or law existed in respect of a gift, trust, settlement or transaction of any kind whatever, including a mistake in respect of the tax consequences thereof, to warrant the rescission of that gift, trust, settlement or transaction. The Court shall be entitled to apply the flexible principles governing the equitable remedy of rescission that were applied by the British Columbia Court of Appeal in *Collins Family Trust v. Canada (Attorney General)*, 2020 BCCA 196; affirming 2019 BCSC 1030, but the Court shall not apply the principles that were applied by the Supreme Court of Canada in *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26.

How to Prevent Rectification Orders from enabling Retroactive Tax Planning

Retroactive tax planning can be avoided very simply. A justice of the Court of Queen's Bench of Alberta should exercise his or her discretion in favour of ordering rectification of a transaction only where the party seeking rectification establishes to that justice's satisfaction, through either oral or documentary evidence (or a combination of both), precisely what the true intention of both parties to the transaction was. Conversely, that justice should decide against ordering rectification of a transaction in circumstances where the parties had planned a particular tax outcome and subsequently changed their minds in order to achieve a preferable outcome — that is the essence of retroactive tax planning.

In the context of ordering rescission, a justice of the Court of Queen's Bench of Alberta should exercise his or her discretion in favour of ordering rescission only where the party seeking rescission establishes to that justice's satisfaction, through either oral or documentary evidence (or a combination of both), precisely what the true intention of both parties to the transaction was as well as details regarding a relevant party's mistake about matters of fact or law, including (where applicable) the tax consequences of the transaction, and should decide against ordering rescission in circumstances where the evidence discloses that the parties knew, before implementing a particular transaction, that a risk of adverse tax consequences might result from that transaction and, once such consequences were discovered by the CRA, the parties seek to nullify that transaction rather than suffer such consequences.

Conclusion

Thank you for considering our request for amendments to the *Judicature Act* (Alberta). We will gladly make ourselves available to discuss any questions that you may have arising out of the foregoing.

Yours very truly,
Moodys Tax Law

Doug S. Ewens, Q.C.
Counsel
Moodys Private Client Law LLP

cc. Kim G C Moody, FCPA, TCA, TEP
CEO, Moodys Private Client Law LLP

cc. Moodys Tax Law Website

Equitable Remedies in Tax Matters: The Elusive Search for Relief

Publication: Tax Disputes in Canada- The Path Forward, 2022

Authors: Elie S. Roth, Stephen S. Ruby, Ryan Wolfe

It is unwise to be too sure of one's own wisdom. It is healthy to be reminded that the strongest might weaken and the wisest might err.

—Mahatma Gandhi

2022 TDC 25: Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

Introduction

It is a fact of life that mistakes will happen. Taxpayers and their advisers are not immune from making mistakes as they seek to navigate an exceptionally complex statute that grows more complex with each passing year. The financial and human costs of tax mistakes can be significant and, in many cases, ruinous.

Tax mistakes, by their very nature, often come as a surprise to the affected parties. In many cases, taxpayers are not aware that a mistake has occurred until it is discovered during the course of an audit by the Canada Revenue Agency (CRA). Confronted with an unanticipated tax liability, taxpayers have few options. They can object to the reassessment and pursue the matter to the Tax Court of Canada, but the Tax Court is required to apply the provisions of the Income Tax Act [1] to the particular facts at issue, which are unlikely to be favourable to the taxpayer as a result of the mistake.

An alternative route is to apply to a provincial superior court for equitable relief. Prior to the Supreme Court of Canada's decision in *Canada (Attorney General) v. Fairmont Hotels Inc.*, [2] equitable rectification was a potent remedy that could be used to correct a wide range of tax mistakes. However, the availability of rectification was severely curtailed by the majority decision in *Fairmont*, [3] and the subsequent lower court jurisprudence demonstrates that the principles set out in *Fairmont* have been applied to deny other forms of equitable relief that have traditionally been considered distinct from rectification.

The restricted availability of rectification and other equitable remedies post-*Fairmont* has greatly constrained the ability of provincial superior court judges to grant equitable relief from many types of tax mistakes. While further guidance from the Supreme Court clarifying the scope of its decision in *Fairmont* would be welcome, the current state of the jurisprudence demonstrates that a judge-made solution may not be possible. Instead, a legislative enactment may be required to restore balance between the competing policy objectives of preventing retroactive tax planning and relieving taxpayers from the effects of inadvertent mistakes. In the absence of legislative intervention, many taxpayers will find their search for relief from an innocent tax mistake to be in vain.

In this chapter, we commence with a discussion of the Supreme Court's decisions in *Fairmont* and *Jean Coutu* and the subsequent rectification jurisprudence applying the principles set down in these cases. We then discuss rescission and other equitable remedies that have traditionally been considered distinct from rectification, and the divergent views of lower courts with respect to the effect of the Supreme Court's rectification jurisprudence on the availability of these other remedies. Finally, we discuss the tax policy considerations underlying the application of equitable remedies to correct tax mistakes, including balancing the competing objectives of preventing retroactive tax planning and providing relief from the effects of innocent mistakes, and propose reforms to restore balance between these policy objectives.

Rectification Post-Fairmont and Jean Coutu

The majority decision of the Supreme Court of Canada in *Fairmont* significantly narrowed the circumstances in which equitable rectification may be available to correct tax mistakes. In *Fairmont*, the Supreme Court overruled the earlier decision of the Ontario Court of Appeal in *Juliar v. Canada (Attorney General)*, [4] which had granted rectification on the basis of a common and continuing intention of the parties to complete a transaction without attracting immediate tax consequences. [5] Brown J, writing for the majority in *Fairmont*, held that *Juliar* was irreconcilable with the Supreme Court jurisprudence on rectification and concluded that the remedy does not operate simply because an agreement failed to achieve its intended effect of tax neutrality, irrespective of whether the intention to achieve that effect was common and continuing. [6] Instead, the Supreme Court ruled that rectification as an equitable remedy is "designed to correct errors in the recording of terms in written agreements," and is not available where "their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome." [7] In particular, Brown J held that a party seeking rectification of a legal instrument to correct a common mistake must establish that

1) there was a prior agreement whose terms are definite and ascertainable;

2) the agreement was still in effect at the time the instrument was executed;

3) the instrument fails to accurately record the agreement; and

4) the instrument, if rectified, would carry out the parties' prior agreement. [8]

In the five years following the *Fairmont* decision, courts have applied this framework in both tax and non- tax rectification cases. [9] In many tax cases, the inquiry has focused on the scope and application of the first requirement. However, the degree of precision required in a prior agreement to satisfy the "definite and ascertainable" standard set out by the Supreme Court remains uncertain. In addition, given the highly technical nature of the provisions of the Act, it is often necessary to design complex, multi-step transactions in order to carry out a commercial objective in a tax -efficient manner. In this context, the availability of rectification to correct errors in implementing a series of transactions is a particularly important issue for many tax practitioners. While the jurisprudence is still developing as courts seek to interpret and apply the *Fairmont* test, it is evident that implementation errors may now be capable of rectification in only limited circumstances. In order to obtain rectification, a taxpayer is required to establish that the "correct" transaction was contemplated in a sufficiently definite and ascertainable prior agreement and that the errors arose in the course of implementing that agreement, rather than as a result of changing the agreement.

2022 TDC 25: Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

Fairmont and Jean Coutu

Fairmont involved US dollar financing arrangements entered into by Fairmont Hotels Inc. ("Fairmont") and several of its subsidiaries to facilitate the acquisition of two hotels located in the United States. Initially, the foreign exchange risk arising from these arrangements was fully hedged, but Fairmont's goal of foreign exchange neutrality was later frustrated when the company was acquired by a third party. Two plans were considered at the time to address the foreign exchange exposure resulting from the acquisition. The first plan would have fully hedged the foreign exchange risk of Fairmont and its subsidiaries, but it was ultimately abandoned owing to uncertainty regarding the tax result of the plan. Instead, a second plan was implemented whereby the foreign exchange risk of only Fairmont (and not its subsidiaries) was fully hedged. The matter of hedging the foreign exchange exposure of the subsidiaries was considered at the time, but it was determined that this risk would be addressed at a later date.

In the following year, it became necessary to terminate the financing arrangements to allow for the immediate sale of the two US hotels. On the basis of a mistaken belief that the first plan had been implemented (and thus that the foreign exchange risk of its subsidiaries had been fully hedged), Fairmont's shares of the subsidiaries were redeemed. The redemption gave rise to unanticipated foreign exchange gains in the hands of the Fairmont subsidiaries. These gains were later discovered during a CRA audit. Fairmont and its subsidiaries applied for a rectification order whereby the share redemption would be substituted with a loan arrangement that would not have triggered the foreign exchange gains. Newbould J of the Ontario Superior Court relied on *Juliar* and granted Fairmont's request for rectification. [10] The Ontario Court of Appeal similarly found *Juliar* to be dispositive of the Crown's appeal. [11]

In *Juliar*, the taxpayers were spouses who sought to transfer their 50 percent shareholding in a second-generation family business to a new holding company without incurring an immediate income tax liability. The taxpayers had originally acquired their shares in the family business from the parents of one of the spouses. Their accountant mistakenly assumed that the acquisition had occurred on a taxable basis, and thus overestimated the adjusted cost base of their shares. Proceeding under this mistaken assumption, the accountant advised the taxpayers to receive promissory notes from the new holding company as consideration for their shares, and receipt of the notes resulted in an inadvertent gain. [12] The taxpayers successfully applied to have the corporate resolutions rectified to provide for a share-for-share transaction, in substitution for a share-for-note transaction, thus permitting the taxpayers to avail themselves of the rollover provided under section 85 of the Act. The Ontario Court of Appeal held that it was appropriate for the trial judge to permit rectification on the basis that the true agreement between the parties was to acquire a 50 percent interest in the family business by transferring shares to the holding company in a manner that would not attract immediate tax liability. [13] The court stated that "[i]n these circumstances, that had to be, not a transaction pursuant to s. 84.1 of the [Act], but a shares for shares transaction." [14]

A majority of the Supreme Court in *Fairmont* rejected the reasoning in *Juliar*, stating that the Ontario Court of Appeal had "purported to 'rectify' not merely the instrument recording the parties' antecedent agreement, but that agreement itself." [15] In the view of the majority, the *Juliar* decision did not account for the Supreme Court's direction in *Shell Canada Ltd. v. R* [16] that a taxpayer should expect to be taxed "based on what it actually did, not based on what it could have done." [17] In the words of Brown J, "taxpayers should not be judicially accorded a benefit based solely on what they would have done had they known better." [18]

Having rejected the reasoning in *Juliar*, the majority of the Supreme Court in *Fairmont* held that rectification was unavailable in the facts at hand because Fairmont and its subsidiaries had failed to show that they had reached a prior agreement whose terms were definite and ascertainable. [19] The majority determined that the plan to address the foreign exchange risk of Fairmont's subsidiaries at a later date "really was not a plan at all" but was "at best an inchoate wish to protect, by unspecified means, [the subsidiaries] from foreign exchange tax liability." [20]

In light of the more stringent test for rectification set out by the majority in *Fairmont*, the result in that case is unsurprising. [21] Fairmont had admitted at trial that it did not have a specific plan for maintaining a tax -neutral structure following its acquisition by the third party, [22] and it was thus unnecessary for the court to discuss the "definite and ascertainable" standard at length. In a strong dissent, Abella J (Côté J concurring) cited numerous authorities for the view that the prior agreement need not have contractual force, nor does the parties' prior intention have to amount to a fully enforceable agreement. [23] It appears that the majority and dissent were ad idem on this issue, as Brown J stated that the oft-cited English Court of Appeal decision in *Joscelyne v. Nissen* [24] allows for rectification in "situations in which there may not have been agreement on all essential terms before the written instrument was executed." [25] However, apart from confirming that an enforceable contract is not required, the *Fairmont* decision provides little guidance on the characteristics of a prior agreement that is sufficiently definite and ascertainable to be rectified by a court.

Jean Coutu, the companion case to *Fairmont*, sheds some light on the requisite level of precision required to obtain the civil-law equivalent of rectification under article 1425 of the Civil Code of Québec.

The majority in *Jean Coutu* specifically considered whether Fairmont would have been successful in its rectification application had it been made under that provision, stating:

> 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 Fairmont had 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. [26]

While one should be cautious in seeking to apply the test under article 1425 of the Civil Code of Québec to equitable rectification, [27] the *Jean Coutu* decision may be relevant in tax rectification cases given the majority's conclusion that the "natural convergence" in the principles and outcomes under civil law and in equity is particularly desirable in the tax context. [28]

2022 TDC 25: Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

Applying the Fairmont Test

In the years following the *Fairmont* decision, Canadian courts have frequently been called upon to assess whether the terms of a prior agreement are definite and ascertainable. While this is ultimately a fact-driven determination, some guiding principles have emerged from the jurisprudence.

In *Crean v. Canada (Attorney General)*, [29] two brothers, Thomas and Michael, had a written "agreement in principle" in which Thomas would sell his interest in a group of family-owned companies to Michael. The agreement in principle contemplated a direct sale by Thomas to Michael personally, and contained a statement that "the transaction will be structured, to the extent possible, so that Tom receives capital gains treatment for tax purposes." [30] The brothers approached their tax adviser for assistance in structuring the transaction and were advised to complete a sale by Thomas to a corporation owned by Michael. However, by structuring the transaction in this manner, the parties inadvertently caused the capital gain otherwise intended to be realized by Thomas to be recharacterized as a dividend under subsection 84.1(1) of the Act. The taxpayers successfully applied to have the purchase agreement rectified to reflect the direct sale contemplated in the agreement in principle. In granting the taxpayers' application, the court held that the agreement in principle, read contextually and purposively, constituted a definite and ascertainable agreement for a direct sale from Thomas to Michael. [31] The result in *Crean* is logical, because the parties had gone the "extra mile" to prepare an agreement in principle setting out the intended structure of the sale. The purchase agreement failed to accurately reflect that intention and thus the transaction was a prime candidate for rectification.

Other forms of documentary evidence have also been held to establish a prior agreement with definite and ascertainable terms. For example, in *Buyting v. Attorney General of Canada*, [32] the court placed considerable weight on faxes sent by the taxpayer's accountant to the lawyer responsible for drafting the transaction documents. The faxes set out the steps required to effect the accountant's tax plan in respect of the transaction, but these steps were not properly reflected in the transaction documents. The court found that the instructions in the faxes evidenced "clear" terms of a prior agreement between the parties, and it rectified the transaction documents to make them conform with the tax plan. [33] Similarly, in *2484234 Ontario Inc. v. Hanley Park Developments Inc.*, [34] the Ontario Court of Appeal held that a letter from one party's lawyer setting out the proposed terms of a real estate transaction and calling for their acceptance satisfied the first stage of the *Fairmont* test. In reaching this conclusion, the court provided the following guidance regarding the degree of specificity required in an antecedent agreement in order for rectification to be available:

> [F]or the purposes of rectification, the antecedent agreement need not be a binding agreement or contain all of the relevant terms of a complete agreement. It must only express the parties' agreement on specific terms, and do so in a way which is definite, ascertainable and continuing, even if the antecedent agreement is intended to be preliminary to a more formal agreement: John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at pp. 588-89. [35]

In *Hanley Park*, the Ontario Court of Appeal determined that the application judge was entitled to infer acceptance of the agreement set out in the lawyer's letter given the absence of any dispute as to its terms or of any continuing negotiations leading up to the transfer agreement. [36] The result in *Hanley Park* can be contrasted with the result of the BC Supreme Court's decision in *Chung v. Quay Pacific Property Management Ltd.* [37] There, the court declined to rectify a share purchase agreement to make it conform with the terms of a purported oral agreement between the parties. The applicant argued that the parties had reached an oral agreement during negotiations and that the terms of the agreement were set out in two letters of intent sent by the applicant to the counterparty. However, the court held that the letters of intent merely represented offers that were never accepted. [38] In reaching this conclusion, the court appeared to focus on the express statements in the letters of intent that they were not intended to create binding legal obligations. [39] This approach stands in contrast with the Ontario Court of Appeal's conclusion in *Hanley Park* that the "without prejudice" language in the lawyer's letter was not an obstacle to finding that the letter evidenced a definite and ascertainable agreement. [40] It is noted that the court in *Chung* focused on the existence of a *valid oral contract* that was capable of rectification, [41] which may be too stringent a standard in light of the Supreme Court's guidance in *Fairmont*. [42] It is clear, however, that there must be some agreement between the parties as to the terms of a transaction in order to support a finding that there existed a definite and ascertainable agreement.

A rectification order may also be granted in the absence of documentary evidence, provided that there is sufficient other evidence of the parties' agreement. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [43] a case cited extensively by the majority in *Fairmont*, the Supreme Court of Canada granted rectification of a prior oral agreement that was incorrectly recorded. In describing the evidence required to support a rectification application, the court stated:

> It was formerly held that it was not sufficient if the evidence merely comes from the party seeking rectification. In *Ship M. F. Whalen, supra*, Duff J. (as he then was) said, at p. 127, "[s]uch parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties." Modern practice has moved away from insistence on documentary corroboration. . . . In some situations, documentary corroboration is simply not available, but if the parol evidence is corroborated by the conduct of the parties or other proof, rectification may, in the discretion of the court, be available. [44]

A similar conclusion was reached in the recent case of *Charlton v. Manulife Securities Inc.*, [45] in which the court accepted the applicants' evidence that a particular provision existed in a prior agreement despite a lack of documentary evidence establishing the precise terms of the agreement. [46]

In *5551928 Manitoba Ltd. v. Canada (Attorney General)*, [47] the BC Court of Appeal upheld the decision of the chambers judge that a definite and ascertainable agreement existed in respect of instructions given by the taxpayer's directors to its accountants. The taxpayer had realized a capital gain, and the directors instructed the accountants to calculate its capital dividend account (CDA) balance available for distribution, taking the gain into account. The accountants incorrectly calculated the taxpayer's CDA balance to be approximately equal to $298,000. [48] The chambers judge rectified the directors' resolution to substitute the mistaken CDA balance with the correct balance. The court held that there was a definite and ascertainable agreement between the directors to effectively "clean out" the taxpayer's CDA and that "there was no dispute that this is what the directors intended to do" when seeking the advice of the taxpayer's accountants and in passing the resolution. [49]

In upholding the decision of the chambers judge, the BC Court of Appeal confirmed that the focus of the rectification inquiry is identical in the case of arm's-length agreements and unilateral instruments (such as directors' resolutions). It stated:

> There can be little doubt that the "focus" of the test in *both* contexts is whether the parties who signed the document in question can show they had a definite and ascertainable intention when they signed, but that because of a mistake, the document failed to reflect that intention. [50]

The BC Court of Appeal also rejected the proposition that a motive to obtain a particular tax result is fatal to the availability of rectification. In the view of the court, the relevant inquiry was into the intention of the directors when they consented to the resolution, and into the alignment between that intention and the result sought by rectification. [51] Citing *Fairmont*, the court confirmed that this test is to be applied in the tax context just as it is in the non- tax context. [52]

While the transactions in *Crean*, *Buyting*, and *5551928 Manitoba Ltd.* were fairly straightforward, *Harvest Operations Corp. v. Attorney General of Canada* [53] involved a complex, multi-step transaction designed to complete a share acquisition and subsequent internal reorganization on a tax -neutral basis.

Specifically, the taxpayer sought to utilize the "bump" rules under section 88 of the Act to increase the tax cost of the target company's non-depreciable capital property on the acquisition. The taxpayer formed a new corporation ("Acquireco") to acquire the shares of the target company, and the acquisition was to be financed with debt issued by a financing trust in the taxpayer's corporate group ("VHT"). Acquireco purchased the shares of the target company and the two companies amalgamated to form a new corporation ("Amalco"), "bumping" the tax cost of the target company's assets in the process. Amalco then purported to distribute all of the former assets of the target to VHT in satisfaction of the acquisition financing. Finally, VHT transferred the assets to a limited partnership in which the taxpayer held an interest ("Olaf") in exchange for additional equity interests in Olaf. If the transactions had been implemented correctly, no immediate tax consequences should have arisen and the tax cost to Olaf of the former assets of the target should have been equal to approximately $154 million (being the lesser of the fair market value of those assets and the adjusted cost base of the target company's shares to Acquireco).

In support of its application for rectification, the taxpayer produced a step-by-step plan ("the steps plan") prepared by its tax advisers that would have achieved this objective had it been implemented correctly. However, two principal errors occurred that resulted in adverse tax consequences.

The first error arose as a result of a demand for payment from the target company's primary lender ("ATB") that was not contemplated in the steps plan. In response to the demand, VHT advanced approximately $35 million to the target under a promissory note, and the target used these funds to repay its outstanding debts owing to ATB. [54] The taxpayer sought an order rectifying the promissory note to change the name of the borrower from the target company to Acquireco and revising the share register of the target company to record the issuance of approximately 10.5 million common shares to Acquireco. [55]

The second error occurred in the course of completing a post-closing reorganization during which two partnership interests of greater than 99 percent, which the parties understood to represent substantially all of the assets of the target, were transferred by Amalco to VHT in satisfaction of a $171.1 million debt owing by Amalco to VHT. VHT subsequently transferred the partnership interests to Olaf in exchange for additional interests in Olaf. Unbeknownst to the parties, Amalco held certain assets valued at approximately $12.7 million that were not transferred to VHT (and thus not subsequently transferred to Olaf).

The CRA reassessed Amalco on the basis that VHT forgave approximately $12.7 million of Amalco's $171.1 million debt. It also reassessed VHT on the basis that Olaf forgave the same amount of debt owing to it by VHT. The taxpayer sought to rectify the transfer agreements between Amalco and VHT and between VHT and Olaf to amend the definition of "transferred interest" to include the $12.7 million of assets that were overlooked.

The Alberta Court of Appeal rejected both of the taxpayer's rectification requests. With respect to the share acquisition transactions, the court held that the instruments reflected the true agreement of the parties. [56] In the view of the court, "[t]he fact that [the note] was not part of the tax plan and was ill-advised—it produced undesirable tax consequences—does not mean that the legal instrument was a mistake of the type that is subject to rectification." [57] With respect to the post-closing asset transfer, the court again concluded that the legal instruments sought to be rectified reflected the agreement of the parties. [58] In particular, the court stated:

> All the transaction participants understood that the transferred assets consisted of [the target company's] holdings in the two partnerships and nothing else. The parties cannot convincingly assert that the transferred assets consisted of both interests known and unknown at the time. The

> fact that [Amalco] reported those assets in its subsequent tax filings undermines the claim that [Amalco] intended to transfer them to [VHT]. [59]

Neither the chambers judge nor the Alberta Court of Appeal expressly considered whether the steps plan evidenced a sufficiently definite and ascertainable prior agreement that was capable of rectification. However, it is submitted that if they had, they would likely have found that the plan evidenced such an agreement. As the taxpayers did in *Crean*, the taxpayer in *Harvest Operations* produced a written document setting out the intended structure of the share acquisition and reorganization transactions. [60] The taxpayer also provided evidence of the specific steps to be undertaken to achieve its intention of tax neutrality, as was the case in *Buyting*. With respect to the share acquisition transaction, it appears that the chambers judge may have been prepared to grant rectification if the "correct" tax result (taking into account ATB's demand for repayment) had been contemplated in the steps plan:

> The intent to complete a transaction in the most tax efficient manner possible is not sufficiently specific. The Applicant must establish how the parties had intended on achieving this tax objective —for example, by evidence that the issuance of additional [target company] shares and the change of lender named on the promissory note *as contemplated in the proposed arrangement* was a mistake that resulted in the Acquisition Transaction not conforming to that intent. [61]

It is also noted that the Alberta Court of Appeal rejected the taxpayer's application in respect of the share acquisition transaction on the basis that the promissory note reflected the true agreement of the parties, and not because there was not a definite and ascertainable prior agreement. Accordingly, it appears that the taxpayer's rectification request in respect of the share acquisition transaction was not denied for a failure to satisfy the first stage of the *Fairmont* test. Rather, the fatal flaw with respect to that transaction appears to have been that the agreement set out in the steps plan was no longer in effect at the time the promissory note was issued. This raises an important question regarding the appropriate manner in which to assess a change in a prior agreement where that agreement contemplates a multi-step transaction.

In *Graymar*, a case involving a complex debt-restructuring transaction comprising at least 141 steps, [62] Brown J (then a justice of the Alberta Court of Queen's Bench) determined that it was appropriate to consider the transaction holistically for the purposes of rectification:

> The [debt restructuring] comprised in part a series of contracts, including subscription agreements between Graymar and FRPDI LP [the co-applicant] for Graymar's common shares and the agreement for the shareholder's loan. None of those individual contracts were put before me. In the circumstances of this matter, however, it is in my judgment unnecessary for the Applicants to show that a particular individual agreement which formed part of the [debt restructuring] did not correspond with the parties' prior oral agreement. Where, as here, those contracts were part of a series of extensive transactions among non-arm's length parties (as well as with the lending syndicate led by CIBC), I can and ought to treat the [debt restructuring] as a single transaction for the purposes of determining the availability of rectification. [63]

The chambers judge in *Harvest Operations* sought to apply a similar approach, stating:

> Similar to *Graymar*, the case at bar deals with a series of complex transactions planned together. As such, rather than look at the documents related to the specific step in the transaction, I may consider the common purpose or intention of the Acquisition Transaction as a whole. [64]

The decisions in *Graymar* and of the chambers judge in *Harvest Operations* predate the Supreme Court's decision in *Fairmont*, and the "common intention" standard discussed in those decisions has now been superseded by the requirement that a prior agreement have definite and ascertainable terms. However, the "definite and ascertainable" standard is not necessarily inconsistent with the holistic approach to rectifying multi-step transactions set out in *Graymar*. If the parties have a definite and ascertainable agreement to complete a multi-step transaction in a particular manner, it does not seem appropriate to deny rectification solely on the basis that the parties failed to demonstrate a definite and ascertainable agreement with respect to a single instrument evidencing part of the impugned transaction. As mentioned above, the Alberta Court of Appeal in *Harvest Operations* did not purport to deny rectification of the promissory note on the basis of a lack of a definite and ascertainable agreement with respect to the note. Instead, the court found that the promissory note reflected the true agreement between the parties, stating:

> There was no mistake with respect to the promissory note. The sum was exactly what the parties agreed—$35 million. The borrower and the promisor—[the target company]—and the lender and the promisee—[VHT]—were not misidentified. And the [target company's] share register correctly recorded the absence of any activity on the closing date. [65]

This view is understandable in light of the particular facts of the share acquisition transaction and, specifically, the circumstances giving rise to the issuance of the promissory note. The taxpayer had deviated from the steps plan prepared by its tax advisers in response to the unexpected demand from ATB for immediate repayment of its outstanding debt. [66] The chambers judge considered the issuance of the loan from VHT to the target company to be the result of a "business decision" to proceed with the closing, even though it meant deviating from the anticipated plan. [67]

In these circumstances, it appears that the court's conclusion that the promissory note reflected the true agreement of the parties was the result of a change in the parties' agreement from that set out in the steps plan. It is clear that the promissory note could not be said to have carried out the terms of the steps plan because the circumstances requiring the note to be issued did not exist at that time. The following passage from *Halsbury's Laws of England*, cited with approval by the BC Court of Appeal in *5551928 Manitoba Ltd.*, is instructive in this regard:

> It is not enough to establish the existence of an antecedent agreement whose terms differ from those of the instrument which it is sought to be rectified, unless it is also established that the instrument was intended to carry out the terms of the agreement and not to vary them. If the evidence shows that the parties have changed their intentions and the instrument represents their altered intentions, there is no scope for rectification. [68]

Given that the promissory note did not form part of the prior agreement set out in the steps plan, and was incompatible with the taxpayer's intention under the plan, its issuance may be better understood as having altered the parties' intention with respect to that agreement as a whole. Accordingly, the decision of the Alberta Court of Appeal with respect to the share acquisition transaction might simply be the result of the unusual factual circumstances of that transaction, rather than a narrowing of the rectification inquiry in the case of a multi-step transaction to consider a single instrument in isolation. [69]

The court's conclusion with respect to the post-closing reorganization is easily understood by contrasting the transfer agreements under the reorganization with the directors' resolution sought to be rectified in *5551928 Manitoba Ltd.* As discussed above, the directors' resolution in that case was held to evidence an intention to "clear out" the taxpayer's CDA balance, whatever it may be. The transfer agreements in *Harvest Operations* failed to evidence a similar intention with respect to the transferred assets. The principal assets of Amalco consisted of two partnership interests of greater than 99 percent and the taxpayer sought to transfer all of the assets of Amalco to VHT, [70] save for the shares of two corporations that held the remaining interest of less than 1 percent in each partnership. On the basis of a mistaken belief that Amalco's only assets were the aforementioned partnership interests and corporate shares, the transfer agreements purported to transfer only the partnership interests and nothing else. [71] On this basis, the taxpayer was unable to demonstrate that it intended for the overlooked assets to be transferred pursuant to these agreements. One is left to wonder whether rectification might have been available if the transfer agreements had expressly stated the parties' understanding that all of Amalco's assets, save for the corporate shares, were to be transferred. [72]

Rectification was also denied in *TechnoComm Solutions Inc. v. Canada (Attorney General)*, [73] a case involving a straightforward application of *Fairmont*. In *TechnoComm*, an individual owned common shares in C-Com Satellite Systems Inc. ("C-Com") with an adjusted cost base to him of $1 and a fair market value of more than $2 million. Shortly before C-Com issued shares to the public, the individual taxpayer incorporated TechnoComm Solutions Inc. ("TechnoComm") and transferred his common shares to TechnoComm in exchange for 10 million special shares of TechnoComm.

The transfer of the common shares of C-Com to TechnoComm was made pursuant to subsection 85(1) of the Act. The taxpayer elected at an amount equal to his available lifetime capital gains exemption of $500,000, such that the special shares he received from TechnoComm had an adjusted cost base and an aggregate paid-up capital (PUC) of $500,000. [74] Subsequent to this transfer, the taxpayer withdrew funds from TechnoComm from time to time. These withdrawals were recorded as shareholder loans. However, the loans were not repaid within the period specified in subsection 15(2.6) and were thus included in the taxpayer's income pursuant to subsection 15(2).

The taxpayer sought a rectification order on the basis that it was always the intention of TechnoComm to pay the funds to him tax -free. [75] The rectification order would have retroactively reduced the PUC of the special shares to $1.00 and credited the amount of the PUC reduction to the taxpayer's shareholder loan account as of April 30, 2001.

The directors' resolution effecting the PUC reduction would have characterized the payments made to the taxpayer as repayments of the taxpayer's shareholder loan account rather than as loans to him. Accordingly, if the rectification requested by TechnoComm had been granted by the court, the taxpayer would have received the payments made to him by TechnoComm as non-taxable loan repayments. The crux of the taxpayer's argument was that the rollover agreement whereby he transferred his shares in C-Com to TechnoComm had the "obvious purpose" of permitting a tax -free return of PUC. [76]

The court disagreed on the basis of the *Fairmont* decision. Unfortunately, the language in the reasons for judgment is confusing. The court understood that TechnoComm was requesting rectification so that the PUC of $500,000 could be returned to the taxpayer tax -free; however, it appears from the language used by the court that the court thought that a payment made by TechnoComm to the taxpayer by means of a PUC reduction was a tax -free capital dividend. Although the court's language was inaccurate, the court nevertheless understood that TechnoComm and the taxpayer were seeking a rectification order that would have permitted the PUC of $500,000 to be returned to the taxpayer tax - free.

However, interpreting the court's references to tax -free capital dividends as actually being references to tax -free returns of PUC, the court held that while the rollover agreement created the preconditions for a tax -free return of PUC, it did not require the corporation to reduce its PUC, nor did it speak to the timing of such a PUC reduction. This conclusion accords with the *Fairmont* decision in that the taxpayer intended to complete a transaction without incurring immediate tax liability, but was unable to demonstrate that he had a specific plan for achieving the intended result. The court compared these circumstances with those in *5551928 Manitoba Ltd.*, [77] stating as follows:

> In that case the directors had a definite and ascertainable agreement to drain the capital dividend account. They had then passed a resolution based on advice from the accountants but the calculations were in error. The Supreme Court of British Columbia allowed rectification. The corporation had a specific intention to return the capital and empty the capital dividend account. The error was a calculation error and was amenable to rectification. [78]

In addition to calculation errors, the court recognized that rectification may be available to address errors in implementing an agreement. [79] However, since the court in *TechnoComm* was unable to find that a prior agreement existed, it is clear that the taxpayer's error could not be characterized as one of implementation. As was the case in *Fairmont*, the taxpayer in *TechnoComm* merely had a general intention to minimize taxes and thus rectification was unavailable.

In light of the parameters established in the rectification jurisprudence, consider a situation in which a taxpayer had a prior agreement to complete an amalgamation that satisfied the technical requirements of section 87 of the Act but, owing to an implementation error, the amalgamation failed to qualify under that provision. Would rectification be unavailable simply because the taxpayer achieved the desired result as a corporate-law matter (that is, a merger of two corporations into a single entity)? *5551928 Manitoba Ltd.* confirms that a tax motive is not fatal to the availability of rectification, provided that the parties had a pre-existing and ascertainable agreement with respect to the erroneous instrument that would have achieved the desired tax result. In establishing the existence and terms of the parties' prior agreement, is it necessary to demonstrate that the agreement explicitly intended for the amalgamation to be governed by section 87, or could this be implied for the purposes of the *Fairmont* test in the context of a series of planned transactions? This determination may depend on the proper approach to evaluating multi-step transactions in the rectification context. On the basis of the Alberta Court of Appeal's decision in *Harvest Operations*, it is unclear whether a multi-step transaction should continue to be viewed holistically for the purposes of applying the test for rectification. While, in our view, the *Fairmont* "definite and ascertainable" standard is compatible with this approach, the availability of rectification in the case of our hypothetical amalgamation may turn on the precise nature of the mistake and whether it can be said to represent a change in the parties' intention with respect to the amalgamation.

The jurisprudence outlined above demonstrates that rectification will be available to correct tax mistakes only in limited circumstances post-*Fairmont*. To obtain rectification, it is necessary to establish that the taxpayer had a specific plan that would have achieved its tax objectives, but, as the result of a mistake, the plan was not reflected in the transaction documents. While the level of specificity required in a prior agreement remains uncertain, it is clear that a taxpayer must be able to provide some evidence that "correct" transactions were contemplated under the agreement. Taxpayers seeking to rectify one or more steps in a multi-step transaction are required to demonstrate that the mistake occurred in the course of carrying out the original transaction, not in changing or otherwise altering that transaction. Although the jurisprudence is still developing, particularly with respect to the precision required in a prior agreement and the application of the *Fairmont* test to multi-step transactions, it is clear that the once broad and flexible remedy of rectification is now being applied much more narrowly by the courts as a result of the limited scope to rectification adopted in *Fairmont*.

Rescission and Other Equitable Remedies

2022 TDC 25: Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

Rescission

The Supreme Court of Canada's decisions in *Fairmont* and *Jean Coutu* considered the availability of the remedy of rectification, but did not address the equitable remedy of rescission. As distinct from the doctrine of rectification, rescission is an equitable remedy by which a transaction entered into by a party may be retroactively cancelled, annulled, or set aside. Rescission applies in circumstances in which a mistake has been made that is fundamental to the transaction where it would be unconscionable, unjust, or unfair to leave the mistake uncorrected. Although the remedies of rectification and rescission share an equitable origin, and can be sought in the alternative on the basis of the same or similar facts, they are distinct from one another, and one remedy can be granted where the other may be unavailable or inappropriate. [80]

The majority of the Supreme Court of Canada in *Fairmont* made no reference to rescission and did not determine or otherwise address the circumstances in which the remedy of rescission can or should be granted. Although rectification and rescission share a doctrinal overlap and common evidentiary foundation, they are separate and distinct equitable remedies, and on the basis of the court's reasons for judgment, the availability of rescission should therefore have been unaffected by the decision in *Fairmont*. [81]

The authority following *Fairmont*, however, has been inconsistent with respect to this issue. The Ontario Court of Appeal's decision in *Canada Life Insurance Company of Canada v. Canada (Attorney General)*, [82] for example, accorded an extremely broad scope to the Supreme Court of Canada decisions in *Fairmont* and *Jean Coutu*, concluding that the judgments "affirm the underlying policy rationale [that] it is not possible to alter corporate transactions on a *nunc pro tunc* basis to achieve particular tax objectives," and that the Supreme Court "has signaled that retroactive tax planning by order of the Superior Court exercising its equitable jurisdiction is impermissible." [83]

The facts of *Canada Life* involved a reorganization transaction implemented with the intended objective of avoiding a mismatch in the realization of foreign exchange gains. This was to be achieved by realizing a capital loss from the disposition of a limited partnership interest in the same taxation year in which corresponding gains were recognized under hedge contracts. The taxpayer, Canada Life Insurance Company of Canada ("CLICC"), is a direct, wholly owned subsidiary of The Canada Life Assurance Company ("CLA"), which in turn is an indirect, wholly owned subsidiary of The Great-West Life Assurance Company ("GWL"). In the course of their respective insurance businesses, GWL and CLA issued insurance policies to members of the public, and in doing so incurred liabilities to their policyholders denominated in Canadian dollars. In its 2007 taxation year, CLICC reinsured, by way of indemnity insurance, insurance policies issued by GWL and CLA. CLICC also maintained an investment portfolio that matched and supported its reinsurance liabilities, which included an indirect interest in a substantial portfolio of US bonds that CLICC held through its direct and indirect ownership of MAM LP, an Ontario limited partnership in which CLICC held a 99 percent limited partner interest and CLICC GP held a 1 percent general partner interest. As a consequence of this, the value of CLICC's limited partnership interest in MAM LP was exposed to fluctuations in the value of the US dollar relative to the Canadian dollar. Because CLICC's reinsurance liabilities were denominated in Canadian dollars, CLICC entered into foreign-currency hedge contracts with arm's-length third parties. The hedge contracts were intended to eliminate the US dollar foreign exchange risks to which CLICC would otherwise have been exposed, including through CLICC's indirect investment in the US bond portfolio. During 2007, the

US dollar depreciated significantly against the Canadian dollar such that, by the end of its 2007 taxation year, CLICC had an accrued foreign exchange gain of approximately $168 million in respect of its hedge contracts, and an unrealized foreign exchange loss of approximately the same amount embedded in the tax cost of its limited partnership interest in MAM LP. Accordingly, in December 2007, it carried out an internal reorganization that was intended to cause CLICC to realize the $168 million inherent loss in the tax cost of its limited partnership interest in MAM LP in the same taxation year that CLICC recognized the gains of approximately $168 million under its hedge contracts.

The reorganization transactions resulted, in general terms, in the dissolution of MAM LP, the transfer of all of MAM LP's property to CLICC (which owned the 99 percent interest in MAM LP) and CLICC GP (which, as MAM LP's general partner, owned the remaining 1 percent interest in the limited partnership), the voluntary dissolution of CLICC GP, and the voluntary transfer by CLICC GP of all of its property to its sole shareholder, CLICC. In its 2007 income tax return, CLICC included in computing its income a gain of approximately $168 million associated with its hedge contracts, and deducted a corresponding amount in respect of the loss realized by it on the disposition of its 99 percent interest in MAM LP by reason of the intended taxable dissolution of MAM LP. On a subsequent audit, however, the CRA denied CLICC's tax loss in the amount of approximately $168 million on the basis that subsection 98(5) of the Act applied to the dissolution such that the dissolution did not crystallize the intended tax loss in December 2007.

The CRA's position was that, by reason of subsection 98(5) , the dissolution of MAM LP was effected on a rollover basis. Pursuant to subsection 98(5), a partnership dissolution will generally occur on a rollover basis if, within three months of the dissolution of the partnership, the following conditions are met:

1) a former partner carries on the partnership business;

2) the former partner continues to use, in the course of carrying on that business, property of the partnership that was used by the partnership immediately before its dissolution in carrying on its business, and was received by the former partner as proceeds of disposition for the former partner's interest in the partnership; and

3) the former partner is the only former partner of the dissolved partnership that satisfies these conditions.

The CRA took the position that the rollover provisions in subsection 98(5) applied to the disposition by CLICC of its limited partnership interest in MAM LP. It did so on the basis that, as a result of the dissolution of MAM LP,

1) CLICC carried on the business formerly carried on by the partnership;

2) CLICC continued to use property that it had received from MAM LP in exchange for its limited partnership interest on the dissolution in the course of carrying on that business; and

3) because CLICC GP was wound up on December 31, 2007, CLICC was the only former partner of MAM LP that satisfied these conditions within three months of the dissolution of MAM LP.

CLICC sought to rectify the transactions undertaken on the basis that, in designing and implementing the transactions, it committed a substantive and causative error in failing to consider the possibility that subsection 98(5) of the Act could apply to the transactions. The Ontario Superior Court of Justice granted rectification prior to the Supreme Court of Canada's decision in *Fairmont*. It ordered that CLICC had instead disposed of its partnership interest in MAM LP to CLICC GP on December 31, 2007 for its fair market value on that date, thus enabling it to realize a loss from that disposition in its 2007 taxation year. Upon CLICC GP's acquisition of CLICC's limited partnership interest in MAM LP, CLICC GP became the sole partner of MAM LP, and MAM LP thereby automatically dissolved by operation of law. Subsection 98(5) of the Act did not deny the loss so realized by CLICC because, as a result of the order granted on the application for rectification, CLICC did not carry on the business of MAM LP within three months following the dissolution of the partnership. CLICC GP was subsequently wound up into CLICC on April 30, 2008, more than three months after the dissolution of MAM LP.

Following the Supreme Court's decision in *Fairmont*, the attorney general of Canada filed a notice of appeal from the order of the Superior Court of Justice. CLICC argued on appeal that, while rectification was no longer available in light of the narrow test adopted in *Fairmont*, the remedial relief granted to CLICC in the lower court should be upheld through the court's exercise of its inherent jurisdiction to relieve against the effects of mistake in the interest of fairness and equity or, alternatively, pursuant to the equitable remedy of rescission. With respect to CLICC's rescission argument, it submitted that the remedy is available, in particular, for the purpose of unwinding a voluntary disposition of property that was effected in error—namely, the voluntary dissolution of CLICC GP and the disposition to CLICC of CLICC GP's property on the dissolution of CLICC GP.

The Ontario Court of Appeal rejected both arguments. With respect to the doctrine of rescission, it rejected CLICC's position that the UK Supreme Court's decision in *Pitt* was authority for the proposition that the dissolution of CLICC GP could be rescinded, with the property revested in CLICC GP, on the basis that the court has equitable jurisdiction to unwind a voluntary disposition of property that was effected in error. [84] While expressly declining to determine whether *Pitt* should be followed in Ontario, the court concluded, with very limited analysis, that the transfer of property at issue could not be viewed as a gratuitous transfer, since it was instead a transfer effected under a contract (the general conveyance and assumption agreement entered into on the winding up). [85] Therefore, in the court's view, the relief sought by CLICC was more accurately described as rescission of a contract entered into by mistake. [86] This test would have required the party seeking equitable rescission of the contract to establish that (1) the parties were under a common misapprehension as to the facts or their respective rights, (2) the misapprehension was fundamental, (3) the party seeking to set the contract aside was not itself at fault, and (4) one party would be unjustly enriched at the expense of the other if equitable relief were not granted. [87] Similarly, the court rejected CLICC's position that the transaction could be rescinded on the basis that rescission is an "all or nothing" remedy, and CLICC sought only to have a part of the transaction (the winding up and dissolution) rescinded, but not to fully restore it and its affiliates to their original position. [88]

With respect, neither basis for the court's conclusion with respect to the remedy of rescission is compelling: a general conveyance on a corporate winding up is more like a voluntary disposition of property than a contractual agreement, and the fact that consideration is stipulated to be payable in the conveyancing document should in no manner affect this conclusion. It is not possible for a shareholder to compensate a wholly owned subsidiary in consideration for its winding up. And while the object of rescission is to restore the parties to their original position, there does not seem to have been any reason for the court to treat every transaction in the series as inseparable, rather than considering the remedy in the context of the winding up as a separate and distinct transaction; in this regard, the court's reasoning seems inconsistent with the general concept of a series of transactions, which is utilized throughout the Act. In addition, in the context of a series of transactions, the Court of Appeal's statement that rescission is an "all or nothing" remedy is not entirely correct.

It has been said that partial rescission of a contract is not a remedy known to law. [89] This conclusion flows from the wider requirement that there cannot be rescission unless there is restitutio in integrum. [90] However, where a contract forms part of a single overall transaction, that contract can be rescinded while leaving the remainder of the transaction intact, provided that the rescinded contract is a self-contained bargain. [91] In *De Molestina & Ors v. Ponton & Ors*, the Queen's Bench Division of the England and Wales High Court considered the criteria for determining whether related contracts are sufficiently independent to permit rescission of one contract in light of the performance of another:

> If a representee is induced to enter into separate contracts A&B by the same misrepresentation, it may be that performance of contract B depends on the prior performance of contract A. In that case one cannot rescind contract A without also rescinding contract B. To permit the survival of contract B would be inconsistent with the principles of restitutio in integrum. But there may be cases where, although both contracts were induced by the same misrepresentation either can be performed without performance of the other. In that case the representee may rescind unless the contract not sought to be rescinded would never have been entered into by the parties without also entering into the other. Thus, for example, in a case where the transaction is divided into different contracts simultaneously negotiated, it may be that the consideration for the whole bargain is written into one contract, leaving only nominal consideration in the other contract. In that event it would not be open to the representee to leave open the contract that gave him the main consideration while rescinding the other contract under which his primary performance obligation lay. Again, to do otherwise would not effect restitutio in integrum. Or there may be cases where it is clear from the terms of the contracts and the matrix evidence that the subject matter of the contracts is so interrelated that, although it would be theoretically possible to perform each separately, one would never have been entered into without that contract sought to be rescinded. However, in the absence of structural interdependence between separate contracts, the most usual determinant of inseparability is likely to be the distribution of consideration for the whole bargain between the separate contracts. [92]

The *De Molestina* case involved an application for summary dismissal of certain claims brought by family members of a deceased businessman. With respect to the availability of rescission, the issue before the court was whether certain share distribution agreements ("the Share Distribution Agreements") could be rescinded while leaving two related agreements ("the Master Agreement" and "the Brunswick Agreement") intact. [93] The court held that it could not dismiss the rescission claim without a full trial, and indicated that rescission of the Share Distribution Agreements could be available if these contracts represented a third stage in a series of sequential bargains:

> The question therefore arises whether the Share Distribution Agreements and the Master Agreement or the Brunswick Agreement were inseparable parts of a single composite agreement or transaction. *Whereas it is unquestionably true that the Share Distribution Agreements would never have been entered into in the absence of either the Master Agreement or the Brunswick Agreement, that is not, in my judgment, the relevant test, for the Share Distribution Agreements could be characterised as representing merely the third stage in a series of sequential bargains for the transfer of assets which depended upon each of the earlier stages having been completed.* The relevant test is whether it was the mutual intention of the parties, expressed or to be imputed to them, that they would only enter into either of the other two earlier agreements if they also entered into the Share Distribution Agreements. In this connection, it is to be emphasised that it is not enough that one party—such as Alvaro—unilaterally held that intention. The composite character of the transaction which renders

> its individual parts inseparable depends upon the mutual intention of all the parties to the relevant contracts. That mutual intention may be established from the terms of the separate contracts as well as from what passed in the course of the negotiations in respect of all the relevant contracts. [94]

In *Kennedy & Ors v. Kennedy & Ors,* [95] the Chancery Division of the England and Wales High Court granted rescission of a severable provision of a trust appointment. While the court expressly recognized that there is authority for the proposition that there cannot be partial rescission of a contract, it held that

> [t]hat limitation makes sense in a contractual context and as preventing the court in effect imposing a different contract to the one the parties actually made. I see no reason, however, why that limitation should apply to a self-contained and severable part of a non-contractual voluntary transaction. In such a situation the allied principle that rescission can only be granted if both sides can substantially be restored to their pre-contractual positions is irrelevant. Again, no authority was cited to me on this point one way or the other. In the absence of authority to the contrary, I can see no reason in principle why, on the facts of the present case, clause 2.1(c) should not be set aside for mistake pursuant to the principles in *Pitt v Holt.* [96]

The decision in *Kennedy* reflects an eminently reasonable approach to balancing the policy considerations underlying the equitable remedy of rescission. The court recognized that equitable remedies must be interpreted and applied in a flexible manner, and where restitutio in integrum is not engaged, there is no principled basis for denying relief based on a rigid application of the general rule that there cannot be partial rescission. [97] In granting relief, the court in *Kennedy* noted that, on the basis of *Pitt,* equitable relief may be denied in cases of aggressive tax avoidance. However, the court determined that the trust appointment was not an artificial avoidance arrangement or part of one, stating that "[i]t was executed as a perfectly legitimate way of conferring benefit on Mr and Mrs Kennedy's children and grandchildren in a tax efficient manner that was contemplated by express provisions in [the statute]." [98]

The court in *Canada Life* expressly declined to determine whether the Canadian jurisprudence that had adopted *Pitt* remained good law following the Supreme Court of Canada's rectification decisions in *Fairmont* and *Jean Coutu,* and did not analyze whether *Pitt* should be followed in Ontario.

In *Re Pallen Trust,* [99] the BC Court of Appeal applied the equitable doctrine of mistake described in *Pitt* and granted rescission of the payment of dividends by a corporation on shares owned by a trust that were intended to be subject to the attribution rule in subsection 75(2) of the Act. The steps undertaken in *Pallen Trust* involved a sale of shares by a corporation to a trust to invoke the application of subsection 75(2) as part of a surplus-stripping plan. The plan was intended to permit a family trust to extract tax-free intercorporate dividends by engaging subsection 75(2) to attribute the dividends to a personal holding company, which was also a beneficiary under the trust. The objective was to have the attributed dividends qualify for the intercorporate dividend deduction under subsection 112(1). The planning was ultimately ineffective in light of the decision of the Tax Court, later affirmed by the Federal Court of Appeal, in *Sommerer v. The Queen,* [100] which held that subsection 75(2) does not apply when property is sold to a trust for fair market value consideration. The implication in the context of the planning in *Pallen Trust* was that subsection 75(2) would not apply to deem the dividends that were paid to the trust to be attributed to the holding company, with the result that the trust would be taxed at the highest marginal rate on the dividends it received. The taxpayer sought an order for rescission of the dividends because the tax consequences arising from the planning were unintended and the entire plan was therefore based on a mistake of law in light of the change in the jurisprudence and the CRA's prior administrative position arising from *Sommerer.*

The BC Supreme Court rescinded the payment of the dividends under the equitable doctrine of mistake based on *Pitt*, which provides that rescission may be granted when there is a mistaken understanding of the effect or the consequences of the transaction. The decision in *Pitt* differed from the earlier decision in *Gibbon v. Mitchell*, [101] which held that rescission could be granted when there was a mistaken understanding of the effect of the transaction, but not when there was a mistaken understanding of its legal consequences. [102] The BC Supreme Court stated as follows with respect to *Pitt*:

> In *Pitt*, the court rejected the distinction between effect and consequences....
> In summary, the test as set out in *Pitt* is that a court may rescind a voluntary disposition where it is found that a mistake of sufficient causative gravity was made that would make it unconscionable, unjust or unfair to leave the mistake uncorrected. [103]

Because of the result in *Sommerer*, which was decided after the completion of the transactions at issue in *Pallen Trust*, the taxpayer was mistaken that subsection 75(2) applied to attribute the trust's dividends to the corporation that sold the shares to the trust. The BC Supreme Court held that this mistake should be corrected through rescission, and on this basis ordered that the dividend declarations be rescinded. [104]

The BC Court of Appeal affirmed the lower court decision. It accepted that the declaration and payment of dividends could be rescinded because it constituted a "voluntary distribution made by corporate directors in the exercise of their discretion, and is subject to fiduciary duties—much like a trustee's decision to make a payment from the trust estate to a beneficiary." [105] The court rejected the Crown's argument that the application of equitable remedies, such as rescission, would "introduce uncertainty because of the possibility that transactions will be altered or rescinded despite clear terms and language and after commercial and tax consequences have arisen" and thus have the potential to undermine the application of tax legislation. [106] In the view of Newbury J, the facts in *Pallen Trust* were unusual and "did not involve 'aggressive' tax planning gone wrong. To the contrary, the Pallen re-organization fit squarely within an attribution rule [subsection 75(2)] that CRA had consistently stated would apply to the dividends." [107]

The court accepted the taxpayer's submission that in the absence of the decision in *Sommerer*, the CRA would have been unlikely to have contested the transactions at issue:

> What took this case "into the zone of unfairness" in the chambers judge's mind was the existence of the "common general understanding" regarding the operation of s. 75(2). Had the understanding been less certain, he said, the assumption of risk-taking on the part of the trustee would likely have led him to the opposite conclusion.
> In my opinion, it has not been shown that the chambers judge erred in weighing all the factors that were relevant to this rather unusual case, including the extent of the risk taken, and the unlikelihood of a similar situation recurring in future. He concluded that it would be unjust to refuse the equitable remedy. I am unable to say this was erroneous or that he erred in the exercise of his discretion. Nor do I agree with CRA that the chambers judge's order effected a "windfall" for the Trust. Rather, it places the Trust and the related corporations back in their "original" position. Tax will be payable on the dividend funds when they are distributed to the individual shareholders of the corporations or are otherwise taxable under the [Income Tax Act]. The "windfall" to the Trust's beneficiaries is avoided. [108]

The court concluded that it was therefore unable to determine that the chambers judge had committed a reversible error in granting rescission. Furthermore, the court rejected the CRA's final ground of appeal, which was that even if a rescission order was made, the dividends would not be void but voidable, and would not have retroactive effect, holding that it is "trite law that when rescission is granted, its effect is retroactive: it is as if the transaction never occurred." [109]

Both the chambers judge and the BC Court of Appeal in *Pallen Trust* agreed, or at least appeared to assume, that the decision of the UK Supreme Court in *Pitt* should be incorporated into Canadian law. The UK Supreme Court held that rescission is available to set aside a voluntary disposition of property, provided that the mistake in question was not the result of irresponsible risk taking and was "a causative mistake of sufficient gravity" that related to the "legal character or nature of [the] transaction, or as to some other matter of fact or law which is basic to the transaction," and the court is satisfied that it would be unjust, unfair, or unconscionable to leave the mistake uncorrected and unrelieved. [110] In so ruling, the UK Supreme Court largely abandoned the historical distinction between mistakes relating to "the effects" of a transaction and those relating to "the consequences" of a transaction. In addition, the BC Court of Appeal in *Pallen Trust* held that the use of rescission to set aside a disposition of property between related parties is subject to rules that are considerably less stringent than those that apply to the rescission of a contract between arm's-length parties, where the rules are "designed to protect bargains." [111]

In *Collins Family Trust v. Canada (Attorney General),* [112] the BC Court of Appeal revisited its analysis following the Supreme Court's decisions in *Fairmont* and *Jean Coutu*, in the context of planning identical to that in issue in *Pallen Trust*. The lower court had relied on *Pallen Trust* in rescinding the declaration and payment of dividends to a discretionary trust, finding the case to be precedentially binding. [113] However, the chambers judge also stated that *Fairmont* and *Jean Coutu* were "intended to be of more general application and were certainly intended to apply to all taxation cases," noting the distinction between rectification and rescission, but concluding that different equitable remedies should not generally give rise to dramatically different results. [114] Had the taxpayers instead applied for rectification to treat the sale of the shares as a gift so that subsection 75(2) would apply notwithstanding the *Sommerer* case, the Supreme Court decisions would have been directly applicable, as would the decision in *Fiducie Financière Satoma v. The Queen*, [115] in which a similar plan was held to constitute abusive tax avoidance subject to the general anti-avoidance rule. Accordingly, the chambers judge determined that by "framing their petitions in rescission they are, in essence, attempting to do indirectly what they are not permitted [to] do directly." [116]

However, the BC Court of Appeal in *Collins Family Trust* accorded a far narrower interpretation to *Fairmont* and *Jean Coutu*, concluding that

> neither *Fairmont* nor *Jean Coutu* have undermined the principles expressed and applied in *Pallen Trust*. While both rectification (as sought in *Fairmont*) and rescission (as sought in *Pallen Trust*) are equitable remedies, each has its own legal test, and each applies in a non-tax as well as a tax context. If applicants meet the legal test for the remedy sought, they are entitled to that remedy. *Fairmont* did not establish otherwise. [117]

The court concluded that "both the [Crown] and the chambers judge have interpreted *Fairmont* and *Jean Coutu* too broadly," [118] and that the principles expressed by the Supreme Court of Canada were consistent with earlier authorities confirming that the focus of the inquiry in a claim for rectification, applicable in both the tax and non-tax context, is whether the antecedent agreement or mechanism, in definite and ascertainable terms, was properly recorded. Accordingly, the BC Court of Appeal held that *Pallen Trust* remained a binding precedent and that the remedy of rescission was available in respect of the dividends paid:

> In my view, neither *Fairmont* nor *Jean Coutu* stand for the broad proposition that the granting of any equitable remedy in a tax context will result in "impermissible retroactive tax planning." Rather, they confirm that retroactive tax planning cannot be achieved by rectification (or amendment) of an instrument that correctly records an antecedent agreement, simply because the effect of that instrument produces an unexpected tax consequence. As Justice Brown stated in *Fairmont* at para. 24, *Juliar* allowed for "impermissible retroactive tax planning" because it erroneously departed from the principle that the inquiry is into what the taxpayer agreed to do. Similarly, Justice Wagner noted in *Jean Coutu* (at para. 42) that allowing the amendment of written documents where there is no discrepancy with the true agreement of the parties would amount to "retroactive tax planning."
>
> The corollary of this is that the remedy of rectification will be available if all of the conditions for granting rectification are met, even if a tax advantage is achieved....
>
> The same can be said for the remedy of rescission: it will be available if all the conditions for granting rescission are met, even if a tax advantage is achieved. And importantly, *Fairmont* says nothing about the test for rescission as set out in *Pitt v. Holt* and applied in *Pallen Trust*. As described above, that test—applicable in the context of a voluntary settlement or transfer of property—requires a "causative mistake of sufficient gravity," which is a mistake as to (1) the legal character or nature of a transaction, or (2) some matter of fact or law which is basic to the transaction.
>
> Contrary to the chambers judge's view, I see no principled reason why different equitable remedies may not have different results, especially since rectification and rescission serve different purposes and have different effects. Rectification is limited to a clearly-established disparity between the words of a legal document and the intentions of the parties, and is not concerned with consequences. Rescission considers consequences to be relevant to the gravity of a mistake: *Pitt v. Holt* at paras. 131-132. Rectification places the parties in the position they originally intended (which, in the tax context, achieves their tax plan), but rescission places the parties back in their original position (which does not): *Pallen Trust* at para. 57. [119]

The court distinguished the jurisprudence that considered rescission following *Fairmont*, including *Canada Life*, on the basis that these cases "simply demonstrate that an equitable remedy such as rescission will not be available where the parties are not seeking to be restored to their original position but rather to alter their transaction in order to achieve their intended tax objective." [120] The court concluded that these cases did not analyze *Fairmont* in the context of a proper claim for rescission. For example, the court distinguished *Canada Life* on the basis that CLICC was not seeking to simply unwind the entire series of transactions, but rather to alter them:

> With respect to equitable rescission, the court declined to consider whether *Pallen Trust* was still good law (Canada Life having attempted to bring itself within the parameters of a voluntary disposition) due to other impediments, most notably that rescission is an "all or nothing" remedy but Canada Life was seeking to have only part of the transactions rescinded. [121]

The BC Court of Appeal's decision in *Collins Family Trust* recognizes that rescission and rectification are distinct remedies, and that each remedy will be available if all of the conditions for its application are met, notwithstanding that a tax advantage may be achieved. While the Supreme Court confirmed in *Fairmont* that rectification is unavailable where an agreement that is correctly recorded in an instrument has led to an undesirable or otherwise unexpected outcome, such as an unanticipated tax liability, it did not consider the test for equitable rescission. In *Collins Family Trust*, rectification was not at issue; the instruments correctly recorded the relevant transactions as share transfers for fair market value consideration, not gifts, and rescission was sought to set aside the entire transaction, and not for the purpose of seeking relief similar to rectification.

The Supreme Court of Canada has now heard the Crown's appeal of the decision in *Collins Family Trust*, [122] and it is anticipated that the court's decision will clarify the scope of the equitable remedy of rescission following the decisions in *Fairmont* and *Jean Coutu*. It is hoped that the Supreme Court will expressly recognize the separate doctrinal origins, development, and application of the two remedies, and preserve the remedy of rescission so that it applies in appropriate tax cases for the purpose of enabling a transaction implemented on the basis of a fundamental mistake as to its tax consequences to be retroactively annulled or cancelled where it would be unjust or unfair to leave the mistake uncorrected. The *Collins Family Trust* appeal represents an opportunity for the Supreme Court to clarify the scope of its rectification decisions in *Fairmont* and *Jean Coutu*, which led the Ontario Court of Appeal in *Canada Life* to the conclusion that the decisions "affirm the underlying policy rationale [that] it is not possible to alter corporate transactions on a *nunc pro tunc* basis to achieve particular tax objectives," characterizing any exercise of equitable jurisdiction by the Superior Court as "impermissible" as a form of "retroactive tax planning." [123] In this regard, it would be helpful if the Supreme Court provided further guidance to assist lower courts in balancing the competing policy objectives of preventing retroactive tax planning and providing relief from innocent tax mistakes.

Confirmation by the Supreme Court of Canada that rescission remains an available equitable remedy to assist in correcting tax mistakes when the requisite preconditions to its application are satisfied would represent a welcome development. However, in our view, rescission alone remains an insufficient remedy to correct many tax mistakes, even where the consequences result from an error that is fundamental to the legal character or nature of the transaction, and it would be unjust, unfair, or unconscionable to leave it uncorrected. For example, one aspect of rescission that may affect the availability of the remedy is that it may not apply where an innocent third party has acquired rights on the basis of the transactions undertaken by the parties, or if it is otherwise not possible to effect a mutual restoration of the benefits conferred by the parties upon each other. In *Canada Life*, the Ontario Court of Appeal refused to rescind the relevant transaction (the winding up and dissolution of CLICC GP), on the basis that rescission is an "all or nothing" remedy, which would not be available unless the taxpayer and each of its affiliates could be restored in all respects to its original position. As noted above, it is not clear why one transaction in a series could not be rescinded, as opposed to viewing the entire series as being inseparable, particularly where the transaction represents a step in a series of sequential bargains or where the principle of restitutio in integrum is not engaged. This is a very narrow interpretation of what is intended to be a flexible equitable remedy, [124] further limiting its availability as a tool that can be used to correct tax mistakes. While some transactions can be reversed through rescission, like the dividends at issue in *Pallen Trust* and *Collins Family Trust*, many entail complex series of steps and involve third parties, which makes it impossible to restore the parties to their initial position.

Inherent Jurisdiction of Superior Courts of Justice

Provincial courts have, following *Fairmont* and *Jean Coutu*, been similarly reluctant to exercise their inherent jurisdiction to relieve against the effects of tax mistakes. Unlike the Tax Court of Canada, whose incidental jurisdiction can include recognizing equitable principles but does not extend to granting equitable remedies because it is not a court of equity, the provincial superior courts have inherent jurisdiction encompassing all of the powers that are necessary to do justice between the parties, including the equitable jurisdiction to relieve persons from the effects of their mistakes. In Ontario, for example, pursuant to sections 11(2) , 13(2), and 96(1) of the Courts of Justice Act, [125] justices of the Superior Court possess all of the jurisdiction, power, and authority historically exercised by courts of law and equity, including the power to grant equitable relief. Except where specifically provided to the contrary, the court's jurisdiction is "unlimited and unrestricted in substantive law in civil matters." [126] Consistent with these principles, it has been argued that a particular manifestation of the court's equitable and inherent jurisdiction is the "power to fashion a remedy, designed to relieve parties from the effects of their mistakes, by unwinding or reversing transactions that have been structured or implemented in error." [127] Prior to the Supreme Court decisions in *Fairmont* and *Jean Coutu*, provincial superior courts affirmed that their broad inherent jurisdiction coexists with and is distinct from their power to grant other equitable remedies, such as rectification and rescission, which are more technical in nature and are available only in specific circumstances. In *TCR Holding Corporation v. Ontario*, [128] for example, MacPherson JA concluded that it was within the equitable jurisdiction of the court to set aside an amalgamation nunc pro tunc despite the fact that rectification could not be granted on the facts at issue. The court invoked its broader inherent jurisdiction to produce a just and equitable result by relieving TCR Holding from the effects of its mistake in structuring and implementing the amalgamation at issue in the manner that it did. [129]

Since the decisions in *Fairmont* and *Jean Coutu*, however, provincial courts have appeared to view the Supreme Court's narrow construction of the doctrine of rectification as binding authority that could be considered to limit the court's inherent jurisdiction to relieve against the effects of mistake, even where it would be just and equitable to do so. In many cases, provincial courts have refrained from exercising their flexible inherent jurisdiction in this manner where doing so could have the effect of achieving a result similar to rectification, rather than preserving the ability to obtain an equitable remedy through alternative means that were not addressed on the facts before the court in *Fairmont*. In *Harvest Operations*, the appellant's alternative position that the court should exercise its general equitable jurisdiction to remedy the mistakes made was firmly rejected:

> The appellant asks us to adopt the opinion expressed by the Ontario Court of Appeal in *TCR Holding Corp. v. Ontario* to this effect: "Broadly speaking, a superior court has 'all of the powers that are necessary to do justice between the parties.' . . . More specifically, 'superior courts have equitable jurisdiction to relieve persons from the effects of their mistakes.' . . ."
>
> Without commenting on the merits of the assertion that a superior court has "equitable jurisdiction to relieve persons from the effect of their mistakes," we fail to see how we can do this without undermining the rectification doctrine and ignoring the precedential value of *Fairmont Hotels*.
>
> There is no principled basis, in the guise of exercising our equitable jurisdiction, to pump theoretical steroids into the rectification doctrine and give it the strength or force that the Supreme Court of Canada recently and consistently has declined to do. This is really what the appellant is asking us to do. [130]

The Ontario Court of Appeal reached a similar conclusion in *Canada Life*, concluding that the relief sought by CLICC was "simply rectification by another name." [131] Citing the Alberta Court of Appeal's decision in *Harvest Operations*, the court concluded that, while *Fairmont* does not preclude the exercise of the court's general equitable jurisdiction to relieve against mistakes in an appropriate case, the rationale underlying the court's decisions in *Fairmont* and *Jean Coutu* precluded CLICC from invoking the court's general equitable jurisdiction to achieve the objective of avoiding an unintended tax consequence. [132] The court stated as follows in this regard:

> In my view, the companion decisions in *Fairmont Hotels* and *Jean Coutu* do two things: (1) they specifically overrule the broad approach to rectification in the tax context that had been taken in *Juliar*; and (2) they recognize and give effect to the same policy concerns that form the basis for the

> second prong of the *Bramco* decision. *Fairmont Hotels* and *Jean Coutu* effectively preclude the use of this court's equitable jurisdiction to refashion a corporate transaction to achieve a specific tax objective, whether or not that was the original intention of the parties to the transaction. [133]

The court went on to note that the fact that CLICC entered into the transaction to achieve a particular tax outcome could not remove it from the scope of impermissible or retroactive tax planning, which was precluded by *Fairmont* and *Jean Coutu*:

> Both of these cases involved " tax -driven" transactions (in the sense that the choice of structure was informed by tax considerations), as did *Juliar* (where the application judge found that the transaction [at para. 27 (C.A.)] "had to be carried out on a no immediate tax basis or not at all"). Whether the court is asked to "rectify" an agreement or to unwind transactions and replace them with other steps because of an error leading to an unplanned tax liability, the objective is to reverse the factual basis of the tax assessment, in order to defeat the tax liability that resulted from the original transaction. As both *Fairmont Hotels* and *Jean Coutu* emphasize, tax consequences flow from the transaction the taxpayer undertook, and not from its motivations or objectives. [134]

The decision in *TCR Holding*, discussed above, was distinguished on the basis that the " equitable jurisdiction of the court in that case was available to relieve against a mistake resulting in TCR Holding's assumption of an unintended liability to a creditor . . . who had never bargained for such a benefit." [135] The court continued:

> It is unnecessary to attempt to define the outer limits of the equitable jurisdiction of the court to correct mistakes. The application in *TCR Holding* was not motivated by tax considerations, but to avoid an unintended windfall to a third party that would result from the mistake in including the insolvent debtor in an amalgamation. The tax authorities, although given notice, did not take a position on the application. The avoidance of unjust enrichment, and not unintended tax consequences, was the foundation of the court's intervention in equity.
>
> In the present case, the only mistake to be corrected concerns the unintended tax consequences that prevented the transaction from achieving its desired purpose. *Bramco*, *Fairmont Hotels* and *Jean Coutu* are consistent in prohibiting the adjustment of a corporate transaction to relieve against mistakes leading to unintended tax consequences. [136]

Thus, an express distinction was made in *Canada Life* between the availability of equitable remedies and reliance on its inherent jurisdiction in the tax context, as opposed to in the commercial context. In distinguishing between unjust enrichment of a third party and an unintended tax consequence, the court rejected the view that a tax mistake could result in unjust enrichment of the fisc. Instead, the court concluded that equitable relief should not be available in circumstances involving "retroactive tax planning," which it defined exceptionally broadly:

> Retroactive tax planning is not limited to attempts to secure a more favourable tax consequence than one had originally hoped to generate. It includes attempts to change one's affairs so that tax consequences that were intended, but which were prevented by a mistake, can be achieved. Brown J.'s reference to impermissible retroactive tax planning, which he noted occurred in *Juliar*, . . . involved a transaction that was undertaken to achieve a particular tax result, as did *Fairmont*—the court accepted that " tax neutrality was the parties' intention" (at para. 3). . . .
>
> The fact that CLICC entered into the transaction to achieve a particular tax outcome does not remove it from the scope of impermissible retroactive tax planning, which is precluded by *Fairmont Hotels* and *Jean Coutu*. [137]

The court's conclusion appears to conflate "retroactive tax planning" with any equitable remedy that involves relieving against the effects of mistakes in the tax context. This reasoning seems to extend the Supreme Court's decisions in *Fairmont* and *Jean Coutu* well beyond the limits of the doctrine of rectification, to unduly—and in our respectful view inappropriately—limit access to alternative equitable remedies simply because the underlying mistake at issue has a tax consequence, which is an interpretation that is not supported by the jurisprudence.

The Ontario Court of Appeal also held that it should not in any event exercise its equitable jurisdiction to relieve against mistake or order rescission of any aspect of the transaction, because CLICC had adequate alternative remedies to address the adverse tax consequences resulting from the mistake, including filing a notice of objection to appeal its notice of reassessment, bringing legal action against its professional advisers for negligence, or applying for a remission order under section 23 of the Financial Administration Act. The court noted that the "question is not whether CLICC will necessarily be successful in pursuing such alternative relief, but whether there is a remedy at law." [138] The court seemed to be unconcerned with whether the taxpayer could actually obtain or qualify for relief under the alternative legal remedies—only that such remedies exist, regardless of how circumscribed they may be. Respectfully, it is concerning that the court took such a narrow view of its equitable jurisdiction. There are undoubtedly many cases where severe injustice could arise if equitable relief were denied on the basis of the technical availability of a remedy at law that is practically unlikely to be available, or would otherwise be wholly inadequate to correct the mistake. [139]

Moreover, the court in *Canada Life* held that the result of the transaction, which was inadvertently structured so as to attract the rollover provisions of the Income Tax Act, could not be regarded as inequitable or as unjustly enriching the CRA, which the court characterized as the alleged "windfall gain" that the Supreme Court in *Fairmont* explicitly rejected as a basis for equitable relief in such circumstances. [140] Accordingly, the reasoning in *Fairmont* appears to have been extended to deny any application for equitable relief that is grounded in unjust enrichment of the fisc. This result can be contrasted with the result in *TCR Holding*, where the exercise of the court's inherent equitable jurisdiction was found to be justified on the basis of unjust enrichment of a third party. Provided that unjust enrichment remains a basis for granting equitable remedies in non-tax cases (and there was no indication to the contrary in the majority's reasons in *Fairmont*), one might question whether it is appropriate for equitable relief to be contingent upon the identity of the enriched party.

The decisions in *Harvest Operations* and *Canada Life* demonstrate that the Supreme Court's decisions in *Fairmont* and *Jean Coutu* are being interpreted broadly to foreclose the possibility of provincial superior courts exercising their flexible inherent jurisdiction to do justice and relieve against mistakes as an alternative to, or in addition to, the remedy of rectification. Accordingly, the effect of the Supreme Court jurisprudence has gone far beyond limiting the equitable remedy of rectification to preclude all manner of equitable relief in tax cases to relieve against the effects of mistake, even when the principles of fairness and justice clearly demand a remedy. As we will argue below, this is a grave mistake.

Declaratory Judgments

There has also been limited judicial redress for tax mistakes through other sources of equitable relief. Superior courts have, for example, been reluctant to grant applications for declaratory judgments in circumstances that could potentially be viewed as interfering with the Tax Court's jurisdiction, even where a declaration would have the effect of correcting a tax mistake. While the Tax Court may not grant equitable relief, it does, as noted above, have exclusive original jurisdiction in respect of references and appeals on matters under the Act, including in respect of all matters of provincial law that are collateral thereto. [141] A declaratory judgment is a "formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs." [142] While provincial courts have, in limited cases, granted declaratory judgments that were considered binding on the CRA, superior courts have declined jurisdiction in circumstances where the matters could be addressed by, and would otherwise impact or influence the conduct of, the statutory tax appeal process. In *Sheila Holmes Spousal Trust v. Canada (Attorney General),* [143] for example, the trustee of a spousal trust sought a declaration from the Alberta Court of Queen's Bench that the trust was validly constituted with the applicant as the sole trustee and that the trust existed under the laws of Alberta. The declaration was sought following an audit in which the CRA had adopted the position that the trust was a sham and was not validly constituted, and that the income and gains of the trust should thus be taxable to the settlor and not to the trust. The court declined to exercise its jurisdiction to make any declaration respecting the trust, on the basis that the matter at issue was "essentially a tax dispute for which Parliament has established a specific process which . . . should not be circumvented by incidental litigation," particularly where there was no evidence suggesting that the trustee would be "prejudiced by the issues being determined through the tax process as compared to the litigation process before the Alberta Courts." [144] The courts have reached the same conclusion in cases concerning issues such as whether a person was an employee or an independent contractor [145] and the validity and legal effect of a gift. [146]

Where provincial superior courts have exercised their equitable jurisdiction to make declaratory orders, the scope of such orders has been carefully limited to minimize their encroachment on the statutory tax appeal process. For example, in *Danso-Coffey v. Ontario,* [147] the Ontario Court of Appeal refused to grant a declaratory order that the taxpayer, who had been incorrectly registered as a director of a bankrupt corporation, was not liable for unremitted retail sales tax under the Retail Sales Tax Act. [148] Instead, the court declared that the taxpayer had never been a director of the company. [149] In *Orman v. Marnat Inc.,* [150] the court refused to make a declaratory order with respect to the tax treatment of certain payments received by two taxpayers who were victims of a Ponzi scheme. However, the court declared that the payments were returns of capital, and not interest payments (as had been reported by the taxpayers in their tax returns). [151]

More recently, in *Robert Mandel et al. v. 1909475 Ontario Inc. et al.,* [152] the Ontario Superior Court of Justice refused to assume jurisdiction over an application in which the taxpayers sought a declaration under section 23(3) of the OBCA to the effect that certain control shares were never validly issued because they had not been paid for. The CRA had reassessed the applicants to include a $15 million shareholder benefit in income on the basis that the shares so issued had a fair market value that substantially exceeded their issue price. Koehnen J dismissed the application, concluding as follows:

> First, the court should not assume jurisdiction over the application. The real issue involves the tax assessment. Parliament has created a specialized court, the Tax Court of Canada to deal with tax assessments. The Tax Court has jurisdiction to interpret and apply s. 23(3) of the *OBCA*.
> Second, if I am wrong about the jurisdiction issue, I would, in any event, decline the application for a declaration that the shares were not validly issued. There is conflicting evidence on whether the applicants paid for their shares and there is no dispute within any of the Child Corporations about shareholdings or any other issue. The Child Corporations are free to adjust their shareholdings to eliminate any controlling interest the applicants are alleged to hold. Indeed, the Child Corporations

did just that after this application was commenced. The absence of a declaration does not prejudice the applicants because they remain free to argue before the Tax Court that they were never shareholders of the Child Corporations.

Third, I would also decline the request to rectify corporate records to reflect that the applicants were never shareholders of the Child Corporations. The claim for rectification is based on the alleged failure to pay for the shares. I decline rectification given that I have declined the declaration. In addition, rectification would not be appropriate because it is available to correct documents which do not reflect the intentions of the parties. The share registers of the Child Corporations do reflect the intention of the parties in 2014 and 2015 to give the applicants controlling shares. Rectification is not available where documents accurately reflect the original intention but the parties want to change that intention because it did not have the anticipated effect. [153]

2022 TDC 25: Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

Correcting Mistakes Under Corporate Statutes

The scope to correct tax mistakes under federal and provincial corporate statutes is also narrow and has been circumscribed significantly by the jurisprudence. The Canada Business Corporations Act [154] and provincial corporate statutes each contain provisions pursuant to which certain errors in corporate documents may be corrected with effect as of the date the document was issued. These statutory provisions provide their own code for correcting corporate errors, and the availability of these rules to relieve against the effects of a mistake will depend in each case on the specific statutory regime provided for as a matter of corporate law. [155] In many cases, these corporate statutory provisions may be too limited or restrictive in their scope to be relied upon for the purposes of fixing mistakes in tax cases. For example, the CBCA provisions relate specifically to public documents issued to the corporation by the director under the CBCA or maintained on file with the corporate registry. [156] In addition, there is jurisprudence suggesting that the scope of these provisions may be limited to mistakes that require correction in order to remain compliant with the specific corporate-law statute. [157] These provisions will apply only in circumstances that are in accordance with their statutory terms to enable an error that falls within their scope to be corrected on a retroactive basis and with binding effect on the CRA. One recent example is *Lau v. Canada (Attorney General)*, [158] in which the BC Supreme Court considered whether a mistake in the drafting of a company's articles of incorporation could be rectified. The share terms at issue provided that their redemption amount was equal to the fair market value of the property transferred to the corporation, but the articles were defective because they failed to provide for a redemption amount for shares issued in satisfaction of a stock dividend. The CRA alleged that the shares that had been paid as a stock dividend had never been validly issued because no power to determine a redemption value existed in the company's articles. The CRA therefore reassessed the taxpayer to include an amount in income under subsection 15(2) of the Income Tax Act on the basis that the existing obligations owing by him to certain corporations that he controlled were not repaid because the transactions were legally ineffective. The court accepted the shareholders' evidence that the parties intended the company's directors to have the power to determine the redemption price of the shares when issued as a stock dividend and no transfer of property was involved. [159] The absence of language in the articles in respect of this power was a result of an error by the company's lawyer. The court exercised its power under the Business Corporations Act (British Columbia) [160] to correct the mistake in the articles nunc pro tunc from the date of incorporation. [161]

The court in *Lau* considered sections 229 and 230 of the BCBCA, which provided for the ability to remedy corporate mistakes. Section 229(1) defines a "corporate mistake" to mean an omission, defect, error, or irregularity that has occurred in the conduct of the business or affairs of a company as a result of which a breach of a provision of the statute or the regulations has occurred; there has been default in compliance with the memorandum, notice of articles, or articles of the company; proceedings at or in connection with meetings or the shareholders or directors have been rendered ineffective; or a consent resolution or equivalent records have been rendered ineffective. Section 229(2) of the statute provides that a court, either on its own motion or on the application of any interested party, may make an order to "correct or cause to be corrected, to negative or to modify or cause to be modified the consequences in law of a corporate mistake or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the corporate mistake, and may give ancillary or consequential directions it considers necessary." [162] Section 230(2) of the BCBCA provides that if information is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, a company's basic records, the company, a shareholder of the company, or any aggrieved person may apply to the court for an order that the basic records be corrected. [163] These provisions are considerably broader than the CBCA provisions in section 265 described above; they permit the court to modify the consequences of the mistake at law, and to validate any act taken as a result. They also grant the court broad discretion that extends beyond correcting the mistake. In addition, these provisions allow the court to correct circumstances of non-compliance in corporate records more generally, and not solely to correct non-compliance with the statutory requirements themselves. [164]

In contrast, in *Greither Estate v. Canada (Attorney General),* [165] the BC Supreme Court refused to issue an order to remedy a tax-planning error in a decision that illustrates the limitations of relying solely on corporate statutory provisions to effectively correct mistakes. The deceased taxpayer was subject to a gain arising as a result of a deemed disposition immediately prior to death pursuant to subsection 70(5) of the Income Tax Act in respect of shares of a BC corporation that owned Canadian real property. The estate subsequently transferred the shares, which had an adjusted cost base equal to their fair market value, to a related Canadian corporation in consideration for a promissory note equal to their fair market value and a class A preferred share with a redemption value of $1.00. Following the estate's request for a clearance certificate, the CRA proposed to assess the estate for withholding tax on a deemed dividend equal to the fair market value of the promissory note issued, on the basis that section 212.1 had applied to the transfer. The evidence of the taxpayer's accountant was that he failed to consider the application of section 212.1 in the circumstances, and had he considered its application he would have recommended instead that the consideration for the shares transferred by the estate be a promissory note in the principal amount of $1.00 and preferred shares with a redemption value equal to the balance of the fair market value of the transferred shares.

The court refused to exercise its discretionary power under section 229(2) of the BCBCA to correct this mistake. It noted that its discretion to make an order to remedy a corporate mistake under section 229(2) was limited to the correction of a mistake that falls specifically within the provisions of sections 229(1)(a) through (d), none of which were held to be at issue:

> In this case, the mistake of not completing the Transaction in the most tax effective manner does not in my view, fall within these subsections. As a result I find that a corporate mistake engaging my discretionary power pursuant to s. 229(2) of the *BCA* has not occurred.
> The Greither Estate did what it planned to do—it sold Karoline Greither's share in 627291 B.C. Ltd. in exchange for a note in the amount of approximately $1.95 million and one preferred share of Old Flora. There was no omission, defect, error or irregularity resulting in one of the prescribed events. The Transaction simply did not have the desired tax effect. Although I have sympathy for the Greither Estate in that it may now be required to pay more tax than they would otherwise have paid if the Transaction had completed differently, I am constrained by the limitations of s. 229(2) of the *BCA*.

> Where s. 229(2) of the *BCA* does not apply a party of course has recourse to seek application of the remedy of equitable rectification—but in this case the Greither Estate is not applying for equitable relief.
>
> Even if the Greither Estate was seeking the remedy of equitable rectification, or otherwise relying on the decision of the Supreme Court in *Fairmont Hotels*, I am not satisfied that the facts of this case would justify such relief based on the law outlined by the Supreme Court. In particular, I consider that it would not be open to me, on the basis of equity, to rectify Schedule "A" to the Share Purchase Agreement and Promissory Note, both dated July 30, 2015—which were completed as intended—simply because the conclusion of such instruments led to an undesirable or otherwise unexpected tax result. [166]

The court cited the decision in *Fairmont* for the proposition that taxpayers should not be entitled to rectification in circumstances where they have engaged in retroactive tax planning, noting that, as stated by the dissent in that case, "allowing parties to rewrite documents and restructure their affairs based solely on a generalized and all-encompassing preference for paying lower taxes is not consistent with the equitable principles that inform rectification." [167]

Tax Policy and Proposals for Reform

As discussed in detail above, although the decision of the Supreme Court of Canada in *Fairmont* did not completely eliminate the application of the equitable remedy of rectification in the tax context, it imposed rather severe constraints on its availability, with the result that rectification now appears to apply only to a narrow set of circumstances such as where there is an inadvertent mistake in the implementation of a tax plan that is sufficiently definite and ascertainable and would have achieved the "correct" tax result.

The majority and dissenting judgments in *Fairmont* highlight the conflicting policy concerns that were before the Supreme Court in that case. The majority was not prepared to stray from the traditional concept of rectification according to which the remedy is available only to amend a written agreement to reflect the precise terms of an antecedent agreement. In the tax context, if agreements or certain transactions do not reflect the intentions of the parties, regardless of the circumstances, there is no ability to rectify those agreements and the parties are bound by those agreements or transactions, notwithstanding the unintended tax consequences that may flow from them.

The fact that in the tax context mistakes can result in financial hardship or even ruin did not attract the sympathy of the majority of the court. A concern of the majority was that rectification could give rise to retroactive tax planning. [168] However, the dissenting judgment observed that in the tax context there has to be a balance between guarding against retroactive tax planning and simply adhering to a strict interpretation of the doctrine of rectification regardless of the financial consequences of inadvertent mistakes. [169]

In particular, in the view of Abella and Côté JJ, rectification should be given a more flexible interpretation. Parties to an agreement should be entitled to rectification provided that their "true intention" is sufficiently clear and certain to permit the courts to correct the error without resorting to speculation as to what the parties had agreed upon. [170] In their view, the additional requirements imposed by the majority had the effect of raising the threshold for rectification and frustrating the purpose of the remedy. [171] Moreover, Abella and Côté JJ adopted a broader justification for a more pragmatic approach to rectification. In their view, the principles of unjust enrichment underlying the doctrine of rectification should apply with equal force where it is the fisc that reaps a windfall because of an error. [172] The reasons of the majority and the dissenting opinions in the *Fairmont* case thus highlight the competing principles of preventing retroactive tax planning while also preventing the fisc from reaping an unintended windfall profit.

The language of taxing statutes is complex and often impenetrable, and when that language is coupled with a myriad of complicated facts and circumstances, inadvertent errors are bound to occur. Errors can take many forms. They could be calculation errors, errors involving the ordering of events, errors involving the interpretation of the law—just about anything, really. If an error is truly inadvertent, should relief be denied and should the fisc be able profit from it? And in many cases, money is not the only issue. There is usually significant psychological stress suffered by the tax adviser who made the error and by the client who incurs the financial loss. These human factors are not often discussed but they are common and they are real. The question is whether an obsessive concern to protect against retroactive tax planning can be used to justify not remedying an inadvertent mistake, particularly where the absence of relief results in the government being unjustly enriched through an innocent error.

Moreover, if the justice system itself does not provide relief, there are few practical avenues available to taxpayers to recoup their losses. Lawsuits are usually lengthy and costly, and even if they are successful there is no guarantee of full or even partial reimbursement. For example, the error may have resulted in a significant financial loss to a taxpayer far beyond the insurance limits maintained by her tax adviser. In these circumstances, which are not uncommon, the only winner is the fisc. In other circumstances, the tax adviser will almost never admit to having been negligent, so the taxpayer is in for costly and lengthy litigation, which will take its toll on everyone involved. Remission orders have often been suggested, but where a request is made for such an order because a private tax adviser provided faulty advice, the CRA has stated in its guide on remission orders that it will be unlikely even to review a remission order request. [173]

In circumstances where the tax mistake is inadvertent and innocent, such as an error in computing the adjusted cost base of a property to be transferred to a corporation by an individual, or an inadvertent failure to issue shares on a transfer of property that was intended to be effected on a rollover basis pursuant to section 85, or a similar mistake in circumstances involving non-aggressive tax planning, should relief be forfeited in favour of a strict, inflexible interpretation of retroactive tax planning that produces a windfall for the fisc?

The Act is not without its relieving provisions. For example, subsection 220(3.1) permits the minister to waive interest and penalties for up to 10 preceding years upon application therefor by a taxpayer. [174] Pursuant to subsection 220(2.1) , the minister can waive the requirement to file a prescribed form, receipt, or other document or to provide prescribed information. Subsection 220(3.2) permits the minister to extend the time for making an election or to grant permission to amend or revoke an election contemplated under any of the provisions prescribed in regulation 600. These relieving provisions are restricted to interest and penalties. In addition, pursuant to subsection 85(7.1) , the minister, where she considers that it would be just and equitable to do so, may permit an election under subsection 85(1) to be late-filed or amended. [175]

Of more direct relevance are those provisions of the Act that have their own specific waiver provisions in respect of tax , such as subsections 204.1(4) and 204.91(2) and section 207.06. [176] For example, subsection 204.1(4) permits the minister to waive the tax imposed in respect of excess contributions to a registered retirement savings plan where certain conditions are satisfied. One of the criteria to qualify for relief of the tax otherwise imposed is that the excess contribution that triggers the tax arose as a consequence of reasonable error. [177]

This is merely a sample of statutory relief provisions that, in general, are quite narrow and specific. In the context of rectification or rescission, relief for taxes that arise as a consequence of reasonable error would be welcome, although in many if not most cases, such relief would fall short of the taxpayer's desired intention to correct the error. This is particularly true where there has been a series of transactions intended to either create or dissolve particular relationships. In these latter circumstances, a statutory provision would need to provide sufficient scope to be able to accomplish these objectives, and would therefore be mandated to provide for more flexible relief than a simple waiver of taxes that were inadvertently triggered. However, there are impediments to enacting legislation that would permit the minister to do anything other than waive taxes.

In this regard, it is settled law that the minister can assess taxpayers only on the basis of the law as it applies to the facts at hand. [178] Accordingly, successful rectification cases heard in provincial superior courts result in those courts issuing orders that retroactively result in a change in the facts to rectify the mistake and pursuant to which the minister can then properly reassess on the basis of the appropriate facts in accordance with the *Galway* principle. However, absent a retroactive change in the facts by means of a court order, [179] tax relief is not available. These common-law constraints restrict the ability of the minister to provide the broad type of relief that rectification and other equitable remedies afford.

Moreover, as a result of the decisions in the *Fairmont* and subsequent cases such as *Canada Life*, court-ordered rectification and other equitable remedies such as rescission have been severely curtailed, if not virtually eliminated, except perhaps in the clearest of cases.

A combination of the *Galway* case, the *Sussex Square Apartments* case, and the *Fairmont* case (as broadly interpreted by lower courts) has created a jurisprudential wall that in most cases will deny relief from tax mistakes. The *Galway* case holds that the minister can assess only on the basis of the application of the law to the facts, and the *Sussex Square Apartments* case strongly suggests that only an order of a provincial superior court can retroactively correct the facts so that they are changed against the entire world, including the minister. Lastly, the broad interpretation of *Fairmont* by lower courts severely restricts the ability of superior courts to retroactively correct the facts underlying a reassessment of tax, no matter how sympathetic the case for relief may be.

Given the current state of affairs, where do we go from here? As a matter of tax policy, most observers would agree that there ought to be a means of alleviating the human and financial hardship that results from an inadvertent tax error. However, there is no easy avenue for obtaining relief based on the current state of the law.

From a tax policy perspective, engaging in retroactive tax planning to achieve a more favourable result than had been initially intended may be perceived as offensive. On the other hand, most observers would also agree that the correction of an adverse unintended tax consequence should be permitted in many circumstances such that, for example, the outcome in *Juliar* was the right result. As mentioned above, the mistake in *Juliar* was that the taxpayers' accountant incorrectly thought that the shares of 867871 Ontario Limited transferred by the Juliars to Juliar Holdings Ltd. had a high adjusted cost base such that no capital gain would arise on the issuance of the promissory note by Juliar Holdings Ltd. in consideration for the shares. It turned out, however, that the accountant was mistaken and, in fact, the adjusted cost base of the transferred shares was low, which resulted in an unintended gain that was recharacterized under section 84.1 as a taxable dividend received by the Juliars. The correction in this case was to retroactively substitute shares of Juliar Holdings Ltd. for the promissory note as the consideration received by the Juliars since, in these corrected circumstances, section 84.1 did not apply to deem a taxable dividend to arise.

As a technical matter, the rectification order issued in the *Juliar* case was retroactive, but it was issued so that the intended transaction could be completed on a basis that corrected for the accountant's misunderstanding of a critical fact. Nevertheless, as noted above, the decision in *Juliar* was found by the majority of the Supreme Court of Canada in *Fairmont* to be wrongly decided. This conclusion conformed to the majority's view that rectification is available only where the parties seek to amend the instrument containing their agreement, but not the agreement itself. [180]

In the tax context, this means that if an agreement is not implemented as the parties intended, rectification should be available to correct the error. If, however, the agreement itself rather than its implementation produces an adverse tax result, rectification is not available. Recall the example discussed above in which two or more companies are amalgamated and it is intended that the amalgamation will qualify as an amalgamation that complies with the requirements of subsection 87(1), including the requirement that all of the shareholders receive shares of the amalgamated corporation in exchange for their shares of a predecessor corporation. Assume that, through inadvertence, a shareholder of a predecessor corporation does not receive shares of the amalgamated corporation. If there is clear and convincing evidence that the failure to issue shares to the shareholder was a mistake in implementation, rectification appears to be available so that the amalgamation will qualify as an amalgamation as defined in subsection 87(1). However, if the evidence is not clear and convincing that all shares (other than intercorporate shares) of the predecessor corporations are to be exchanged for shares of the amalgamated corporation, it is not at all clear that a court would consider the mistake to have been made in carrying out the agreement. It is more likely that the court would regard the mistake as a substantive error in the agreement itself, which would not qualify for rectification. [181]

Given its view of the scope of rectification in the context of tax mistakes, the Supreme Court of Canada was simply not prepared to endorse the flexible concept of rectification that was adopted in *Juliar* and applied in subsequent cases. Instead, it adhered to the classic concept of rectification as it has historically been applied in non-tax cases to written agreements that do not accurately reflect the agreement between the parties.

However, given the complexity of the Act, one has to question whether the inflexible approach adopted by the majority decision of the Supreme Court of Canada in *Fairmont* is appropriate, particularly in light of the subsequent jurisprudence, which has extended *Fairmont* to deny the availability of other equitable remedies.

To be sure, there is a fundamental tension inherent in determining the boundaries of the application of the doctrine of rectification to tax mistakes. If the boundaries are too elastic, rectification can not only take on the appearance of retroactive tax planning, but can actually constitute retroactive tax planning, which is not condoned. On the other hand, too little elasticity results in an undeserved windfall to the fisc at the same time as it causes financial and emotional hardship to the involved taxpayers and their advisers.

After the decision in *Juliar* and prior to the decision in *Fairmont*, the jurisprudence reflected the tension between using rectification to correct inadvertent mistakes and refusing rectification where it had all of the indicia of retroactive tax planning. [182] In this regard, although clear "do-overs" were not allowed, over time the courts appeared to be more accepting of a general intent to avoid adverse tax consequences as a justification for permitting rectification, particularly where the tax consequences were fundamental to the transaction. This evolution in the types of mistakes for which rectification was permitted was severely curtailed by the *Fairmont* decision, which did not reflect the generally sympathetic attitude of the lower courts toward fixing inadvertent mistakes.

On the basis of the existing state of the law discussed above, rectification cannot relieve a tax mistake unless the facts that gave rise to the error are rectified or altered in a manner that alleviates the mistake. Pursuant to section 92(13) of the Constitution Act, 1867, the authority to legislate in respect of property and civil rights has been granted to the provinces. Accordingly, if a province was of the view that it was in the best interests of its residents to have access to potential rectification of their tax mistakes, it could enact legislation that permits its superior courts to issue rectification orders in broader circumstances than are currently contemplated under the jurisprudence. Such orders would be binding against all the world, including, in particular, the minister. The minister could then reassess taxpayers on the basis of the appropriate facts to the same extent that the minister has reassessed taxpayers in accordance with rectification orders issued by superior courts under their existing equitable jurisdiction.

In the enactment of any such rectification legislation, care should be taken to ensure that it does not encourage aggressive tax planning on a "fail-safe" basis while at the same time offering relief from inadvertent mistakes. However, a legislative solution that clearly distinguishes between innocent errors that are entitled to relief and those that result from overly aggressive tax plans is not possible because ultimately, and especially in the more difficult cases, the distinction between the two is a question of judgment. In terms of the relief that a court could provide, the legislation should make it clear that in considering whether to grant an application and how to grant relief, the court is not bound by common-law principles and is free to grant equitable relief in a manner that would be defined in the enabling legislation, such as rectification, rescission, declaration, and other forms of relief. Care would need to be taken to ensure that such rectification legislation does not unduly infringe on the jurisdiction of the Tax Court of Canada.

The importance of this suggestion for reform is that denying taxpayers and their advisers relief for inadvertent tax errors, where the fisc reaps an unjustified reward at the expense of innocent taxpayers and/or their advisers, simply should not be tolerated in a sophisticated society because of an aversion to retroactive tax planning. There are competing tax objectives at play in the circumstances. One objective is to protect the fisc from retroactive tax planning; but the flip side of this protection under the current state of the jurisprudence is to reward the fisc at the expense of innocent parties. Most observers would suggest that, as between these two objectives of preventing retroactive tax planning and relieving from innocent mistakes, the more common occurrence is the latter and that it should prevail over the former. If the provinces were to enact rectification legislation that overturned the *Fairmont* decision, protective guidelines, although not perfect, could be established that would offer sufficient protection against providing relief in circumstances of retroactive tax planning. [183]

In conjunction with the enactment of provincial rectification legislation, consideration could also be given to amending the Income Tax Act to establish a rectification committee composed of senior members of the CRA and the Department of Justice. [184] The purpose of the committee would be to review proposed rectification applications to a superior court and determine whether they should be opposed by the CRA or allowed to proceed. The regulations under the Act could set out broad guidelines for the benefit of both taxpayers and the committee indicating generally the types of mistakes that would qualify for rectification, such as implementation mistakes, computational errors, and factual errors, as well as defining the types of situations in which the committee would oppose relief, such as where retroactive tax planning intended to obtain an unintended tax benefit rather than avoid an inadvertent mistake appears to be the predominant reason for the application. There would obviously be a broad range of situations in which the committee could provide only limited guidance, but just as the CRA issues advance income tax rulings and technical interpretations, the committee could publish its decisions in redacted form with the permission of the taxpayers concerned. Committee decisions could also be made subject to judicial review by the Federal Court of Canada. [185]

The combination of provincial legislation that enables superior courts to grant equitable relief in a tax context and a rectification committee composed of senior members of the CRA and the Department of Justice from which taxpayers could obtain guidance as to whether their rectification applications would be opposed or allowed to proceed would, in our view, establish a system with adequate protections that could both prevent retroactive tax planning intended to retroactively obtain a tax benefit and provide a meaningful opportunity for the correction of inadvertent tax errors.

Conclusion

Following the Supreme Court of Canada's decisions in *Fairmont* and *Jean Coutu*, the availability of rectification to correct tax mistakes has been significantly circumscribed, and is arguably limited to the correction of errors in implementing a specific plan that would have achieved the desired tax result.

In addition, lower courts have applied *Fairmont* and *Jean Coutu* broadly to deny the availability of other equitable remedies that have traditionally been considered distinct from rectification. In doing so, courts appear to have largely abandoned the balance achieved by the pre-*Fairmont* jurisprudence between preventing retroactive tax planning and granting relief from innocent mistakes, further reducing taxpayers' ability to access equitable remedies to correct tax mistakes.

It is hoped that the Supreme Court will clarify the scope of its rectification jurisprudence and provide further guidance to lower courts with respect to the distinction between retroactive tax planning and the correction of innocent mistakes in its upcoming decision in *Collins Family Trust*. However, even if the court confirms the continued availability of rescission and other equitable remedies as alternatives to obtaining rectification where the relevant tests are satisfied, this would be insufficient in our view to effectively remedy many types of tax mistakes.

Accordingly, legislative intervention by the provinces through the powers granted to their superior courts may be necessary to provide taxpayers and their advisers with appropriate relief from the financial and human costs of their mistakes. Any such legislation could be coupled with amendments to the Act to establish a rectification committee that could provide taxpayers with guidance regarding their applications for rectification and other equitable relief, and the development of authority with precedential value that could ensure consistency and fairness in the resolution of relief applications.

In the absence of such legislative reforms, taxpayers will continue to have difficulty obtaining equitable relief from tax mistakes as they find themselves boxed in by a body of jurisprudence that is increasingly unsympathetic to their plight, even where fairness demands judicial intervention to prevent an inequitable result.

Notes

* Of Davies Ward Phillips & Vineberg LLP.

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this chapter are to the Act.

2 2016 SCC 56.

3 As was its civil-law equivalent under article 1425 of the Civil Code of Québec, CQLR c. CCQ-1991, in the companion case of *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55.

4 2000 DTC 6589 (ONCA).

5 For detailed discussion of the genesis of this case law, which is beyond the scope of this chapter, see Stephen S. Ruby and Elie S. Roth, "Fixing Mistakes (and All That Jazz)," in *2009 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2009), 14:1-46.

6 Supra note 2, at paragraph 30.

7 Ibid., at paragraphs 38 and 39.

8 Ibid., at paragraphs 14 and 38.

9 In *Fairmont*, ibid., at paragraph 25, Brown J emphasized that the test for rectification applies equally in the tax and non-tax contexts.

10 *Fairmont Hotels Inc. et al. v. AG Canada*, 2014 ONSC 7302, at paragraph 41.

11 *Fairmont Hotels Inc. v. Canada (Attorney General)*, 2015 ONCA 441, at paragraph 13.

12 This gain was recharacterized as a dividend received by the taxpayers pursuant to subsection 84.1(1) of the Act.

13 Supra note 4, at paragraph 25.

14 Ibid.

15 Supra note 2, at paragraph 19.

16 99 DTC 5669 (SCC).

17 Supra note 2, at paragraph 23, citing *Shell*, supra note 16, at paragraph 45.

18 Supra note 2, at paragraph 23. These comments are reminiscent of Brown J's statements in *Graymar Equipment (2008) Inc. v. Canada (Attorney General)*, 2014 ABQB 154, at paragraphs 68-69, an earlier decision in which he considered but did not follow *Juliar*.

19 Supra note 2, at paragraph 39.

20 Ibid., at paragraph 40.

21 Brown J described the result in *Fairmont* as "unavoidabl[e]" based on a "straightforward application" of these principles (ibid., at paragraph 39).

22 Supra note 10, at paragraph 13.

23 Supra note 2, at paragraphs 58-59.

2022 TDC 25 Footnote-24 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

24 [1970] 1 All ER 1213 (CA).

2022 TDC 25 Footnote-25 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

25 Supra note 2, at paragraph 28. See also, in this regard, the following statement by Brown J in *Graymar*, supra note 18, at paragraph 36:

> Most cases of rectification involve contracts. Rectification is available, however, even where the parties have not concluded an agreement, so long as there is sufficiently convincing evidence that the parties had arrived upon a common intention.

2022 TDC 25 Footnote-26 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

26 Supra note 3, at paragraph 50.

2022 TDC 25 Footnote-27 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

27 The majority acknowledged that rectification under Quebec civil law and in equity may not always lead to the same result, given the differences between the principles of contract law specific to the two legal systems (ibid., at paragraph 51).

2022 TDC 25 Footnote-28 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

28 Ibid., at paragraph 52.

2022 TDC 25 Footnote-29 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

29 2019 BCSC 146.

2022 TDC 25 Footnote-30 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

30 Ibid., at paragraph 8.

2022 TDC 25 Footnote-31 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

31 Ibid., at paragraphs 53-55.

2022 TDC 25 Footnote-32 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

32 2017 NBQB 190.

2022 TDC 25 Footnote-33 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

33 Ibid., at paragraphs 22-24.

2022 TDC 25 Footnote-34 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

34 2020 ONCA 273.

2022 TDC 25 Footnote-35 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

35 Ibid., at paragraph 46. These comments closely align with Abella J's statements in *Fairmont*, supra note 2, at paragraphs 58-59.

2022 TDC 25 Footnote-36 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

36 Supra note 34, at paragraph 45.

2022 TDC 25 Footnote-37 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

37 2020 BCSC 714.

2022 TDC 25 Footnote-38 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

38 Ibid., at paragraph 143.

2022 TDC 25 Footnote-39 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

39 Ibid., at paragraphs 142-43.

2022 TDC 25 Footnote-40 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

40 Supra note 34, at paragraph 46.

2022 TDC 25 Footnote-41 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

41 Supra note 37, at paragraph 143.

2022 TDC 25 Footnote-42 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

42 Even if the court in *Chung* had applied a less rigorous test, it is doubtful that rectification would have been granted. In this regard, the court also determined that the applicant had failed to demonstrate the precise form by which the share purchase agreement could have been corrected, because there were no fewer than six versions of the alleged agreement (ibid., at paragraph 157).

2022 TDC 25 Footnote-43 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

43 2002 SCC 19.

2022 TDC 25 Footnote-44 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

44 Ibid., at paragraph 43.

2022 TDC 25 Footnote-45 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

45 2021 NBQB 75.

2022 TDC 25 Footnote-46 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

46 Ibid., at paragraph 29.

2022 TDC 25 Footnote-47 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

47 2019 BCCA 376.

2022 TDC 25 Footnote-48 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

48 The error was subsequently realized when the taxpayer received a notice of assessment from the CRA setting out the correct CDA balance of $113,212.

2022 TDC 25 Footnote-49 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

49 *5551928 Manitoba Ltd. (Re)*, 2018 BCSC 1482, at paragraph 25. The clear intention of the directors in *5551928 Manitoba Ltd.* can be contrasted with the circumstances resulting in erroneous capital dividend payments in *RJ McLeod Investments Inc. v. McLeod*, 2021 ABQB 439, and *Alexei Melnitchouck and Intelmax Corp v. Her Majesty the Queen in Right of Canada*(March 28, 2019), action no. 1801 01460 (ABQB). In *McLeod*, the corporate taxpayer paid to its sole shareholder capital dividends totalling $550,000, a portion of which was satisfied by the issuance of a promissory note. The capital dividends were declared and paid on the basis of advice received from the taxpayer's accountants that its CDA balance was equal to $563,027. However, the accountants did not take into account a capital dividend paid several years earlier that had reduced the taxpayer's CDA balance to zero. The taxpayer sought to rescind the payment of the capital dividends or, in the alternative, to rectify the director's resolutions and the promissory note to reduce the amount of the capital dividends and the note to zero. With respect to the taxpayer's request for rectification, the court held that the remedy was unavailable because the taxpayer was seeking to rectify the transaction itself, not the recording of it. In *Intelmax*, the taxpayer had sold software to another corporation on June 1, 2015 and the first instalment of the sale proceeds was paid one year later, on June 1, 2016. Pursuant to erroneous advice received from its accountant, the taxpayer declared and paid a capital dividend in 2015 in excess of its CDA and a second capital dividend in 2016. The taxpayer sought to rectify the directors' resolutions to change the dates of the capital dividends to occur in 2016 and 2017, respectively, which would have resulted in the dividends being received tax-free. The court rejected the taxpayer's application, holding that there was no error in the resolutions and that they clearly evidenced the instructions and advice received from its accountant.

2022 TDC 25 Footnote-50 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

50 Supra note 47, at paragraph 32 (emphasis in original).

2022 TDC 25 Footnote-51 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

51 Ibid., at paragraph 38. The Alberta Court of Queen's Bench adopted a similar approach in *Glenmac Corporation Ltd. v. Canada (Attorney General)*, 2021 ABQB 576. In *Glenmac*, the directors passed a resolution on April 26 purporting to redeem preferred shares of the corporation held by an individual shareholder on May 2 and electing under subsection 83(2) of the Act to treat the vast majority of the deemed dividend arising on the redemption as a capital dividend. Unfortunately, the shareholder passed away on May 1, and the failure to redeem the preferred shares prior to his death led to adverse tax consequences. The court dismissed the taxpayer's application to rectify the resolution to change the effective date of the redemption to April 26 on the basis of its finding that the directors intended the effective date to be May 2. In the view of the court, the taxpayer's mistake was in assuming that the individual shareholder would be alive on May 2, and not in recording that date in the resolution.

2022 TDC 25 Footnote-52 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

52 Supra note 47, at paragraph 38.

2022 TDC 25 Footnote-53 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

53 2017 ABCA 393.

2022 TDC 25 Footnote-54 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

54 Since VHT advanced the loan directly to the target company, Acquireco was unable to obtain additional "bump room" under section 88 of the Act in respect of the $35 million principal amount of the note. Under the steps plan, it was intended that the purchase price of the target company's shares (and thus the adjusted cost base of those shares to Acquireco) would be equal to $171 million. Instead, the adjusted cost base of the target company's shares to Acquireco was only $136 million, and Amalco realized a capital gain on the transfer of the assets to VHT.

2022 TDC 25 Footnote-55 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

55 This would have increased the adjusted cost base of the target's shares to Acquireco to the approximately $171 million figure contemplated under the steps plan.

2022 TDC 25 Footnote-56 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

56 Supra note 53, at paragraph 61.

2022 TDC 25 Footnote-57 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

57 Ibid., at paragraph 63.

2022 TDC 25 Footnote-58 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

58 Ibid., at paragraph 70.

2022 TDC 25 Footnote-59 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

59 Ibid.

2022 TDC 25 Footnote-60 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

60 The chambers judge (*Harvest Operations Corp. v. Canada (Attorney General)*, 2015 ABQB 327, at paragraph 64) stated:

> The Step Memorandum provides insight into the advice given to the [taxpayer] and the proposed plan or options that the [taxpayer] considered implementing. While it is not determinative of intent, *it is some evidence in understanding the framework of what likely was the transaction agreed to in principle by the parties.* It also serves as evidence as to the importance of the tax objectives related to the Acquisition Transaction. [Emphasis added.]

61 Ibid., at paragraph 82 (emphasis in original). It is noted that the taxpayer did not seek rectification of the name of the lender under the promissory note, but rather the borrower. If the taxpayer's application had been granted, the funds advanced under the note would have been contributed by Acquireco to the target company in consideration for the issuance of approximately 10.5 million additional common shares to Acquireco.

62 Supra note 18, at paragraph 4.

63 Ibid., at paragraph 41.

64 Supra note 60, at paragraph 56.

65 Supra note 53, at paragraph 62.

66 While the chambers judge in *Harvest Operations* did not make a conclusive factual finding that the demand from ATB was unforeseen by the taxpayer, she assumed for the purposes of her decision that this was the case (supra note 60, at paragraph 5). With respect to the steps plan, the chambers judge stated, at paragraph 64:

> [T]he Step Memorandum [did] not specifically address the situation that the parties were faced with on the day of closing. It certainly [did] not reflect the issuance of additional shares from [the target company] and an additional loan from [Acquireco] (rather than VHT), as the Applicant now suggests as having been the parties' intent.

67 Ibid., at paragraph 86. The Court of Appeal described the issuance of the loan as an "impromptu decision" taken so that the share acquisition transaction could close as planned: *Harvest Operations*, supra note 53, at paragraphs 54-55.

68 *Halsbury's Laws of England* (4th ed., 1992), vol. 16, at paragraph 682, quoted in *5551928 Manitoba Ltd.*, supra note 47, at paragraph 11.

69 This is consistent with the following statement by the majority in *Jean Coutu*, supra note 3, at paragraph 34:

> 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.

The court held that this would have been the case if the parties had agreed on a transactional scheme that would have successfully avoided the negative tax consequence arising in that case but, for some reason, one or more of the transactions agreed on was mistakenly omitted.

70 And subsequently from VHT to Olaf.

71 The steps plan also only referred to the partnership interests: supra note 60, at paragraph 92.

72 For example, by including a recital to this effect, as was the case in *5551928 Manitoba Ltd.* A similar expression of intent could have been included in the definition of "transferred interest" as well.

73 2019 ONSC 924.

74 The court noted that there was likely an error in the election form relating to the PUC of the acquired TechnoComm shares. However, the court decided to address the taxpayer's rectification claim on the presumption that the form could be amended to provide for the intended PUC of $500,000. The court was not asked to rectify the election form.

75 Supra note 73, at paragraph 29.

76 Ibid., at paragraph 22.

77 Ibid., at paragraph 29.

78 Ibid., at paragraph 36.

2022 TDC 25 Footnote-79 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

79 Ibid., at paragraph 38.

2022 TDC 25 Footnote-80 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

80 See, for example, *S & D International Group Inc. v. Canada (Attorney General)*, 2011 ABQB 230, at paragraphs 1 and 109-10. In *Pitt v. Holt*, sub nom. *Futter & Anor v. Revenue & Customs*, [2013] UKSC 26, the UK Supreme Court rejected the relevance of the rectification precedent cited by the Inland Revenue in assessing whether the remedy of rescission was available to unwind a voluntary disposition of property that was effected in error. The court considered that the only relevance of the rectification case law relied upon by the Inland Revenue, when considering the different equitable remedy of rescission, was that both remedies are discretionary in nature, and on this basis the court refused to accept the Crown's argument that rescission could not be used to assist the taxpayer in unwinding a trust that had been settled in error. The court rejected this contention as "much too wide, and unsupported by principle or authority" (ibid., at paragraph 132).

2022 TDC 25 Footnote-81 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

81 For detailed discussion of this issue, see Timothy Fitzsimmons and Elie S. Roth, "Rectification, Rescission, and Other Equitable Remedies After Fairmont Hotels Inc.," in *Report of Proceedings of the Sixty-Ninth Tax Conference*, 2017 Conference Report (Toronto: Canadian Tax Foundation, 2018), 30:1-63, at 30:25-34.

2022 TDC 25 Footnote-82 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

82 2018 ONCA 562.

2022 TDC 25 Footnote-83 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

83 Ibid., at paragraph 46.

2022 TDC 25 Footnote-84 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

84 In *Pitt*, supra note 80, at paragraphs 122 and 132, the UK Supreme Court held that it is generally appropriate to rescind a gift, trust, or settlement for a mistake of fact or law, including a mistake about the tax consequences thereof, if the consequences of the mistake are sufficiently grave.

2022 TDC 25 Footnote-85 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

85 Supra note 82, at paragraph 88.

2022 TDC 25 Footnote-86 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

86 Ibid., at paragraph 89.

2022 TDC 25 Footnote-87 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

87 See, for example, *Miller Paving Ltd. v. B. Gottardo Construction Ltd.* (2007), 86 OR (3d) 161 (CA). CLICC did not satisfy these requirements, nor did it attempt to do so (supra note 82, at paragraph 89).

2022 TDC 25 Footnote-88 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

88 Supra note 82, at paragraph 90.

2022 TDC 25 Footnote-89 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

89 See the decision of McLachlin JA (as she then was) in *Kingu v. Walmar Ventures Ltd.*, 1986 CanLII 142 (BCCA). The Judicial Committee of the Privy Council in *United Shoe Machinery Co. of Canada v. Brunet*, [1909] AC 330 (PC), at paragraph 18, described this principle as follows: "the party defrauded cannot avoid one part of a contract and affirm another part, unless indeed the parts are so severable from each other as to form two independent contracts."

2022 TDC 25 Footnote-90 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

90 See, for example, *De Molestina & Ors v. Ponton & Ors*, [2001] EWHC 521 (Comm), and *Mirage Consulting Ltd. v. Astra Credit Union Ltd.*, 2017 MBQB 63.

2022 TDC 25 Footnote-91 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

91 See *415703 BC Ltd. v. JEL Investments Ltd.*, 2010 BCSC 202, at paragraph 203, citing the following passage from Dominic O'Sullivan, Steven Elliott, and Rafal Zakrzewski, *The Law of Rescission* (New York: Oxford University Press, 2008), at paragraph 19.05:

> The rule against partial rescission applies to bargains rather than instruments. Rescission will accordingly be refused where the contract in question is part of a wider transaction, the components of which are commercially interdependent in the sense that they were contracted each in consideration or contemplation of the others. For example, in *Maguire v Makaronis* the High Court of Australia reversed the decision of the court below, which had been to rescind a mortgage while leaving the underlying contractual covenants intact. The effect of that had been to leave the borrower in possession of the loan money while depriving the lender of his security. The High Court considered this to involve an impermissible reformation of a single bargain comprised of two instruments.
>
> *By contrast, where a contract or wider transaction is severable according to conventional principles, there is no difficulty with rescinding one severable part and leaving the remainder on foot. In effect the court must find that the obligations in respect of which rescission is claimed form a self-contained bargain.* [Emphasis in original.]

2022 TDC 25 Footnote-92 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

92 Supra note 90, at paragraph 6.9.

2022 TDC 25 Footnote-93 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

93 The salient facts in *De Molestina* were as follows. The deceased ("LN") owned a substantial business empire valued at over $1 billion. LN and his first wife had six children, Luis, Isabel, Diana, Alvaro, Maria Elena, and Maria Leonor. At the time of his death, LN's second wife, Mercedes, held an indirect 52 percent interest in LN's holding company ("FSL") through two trusts. The remaining 48 percent interest was held by a trust for the benefit of Isabel, Diana, and Maria Elena. Isabel's 16 percent interest in FSL was subsequently transferred to a new trust ("Brunswick"). Under the master agreement, Mercedes agreed to sell the entirety of her interest in FSL back to the company. Similarly, under the Brunswick agreement, Brunswick agreed to sell 14.5 percent of Isabel's interest back to FSL. The interests in FSL were then redistributed among LN's children under the share distribution agreements (SDAs). Pursuant to the SDAs, Alvaro acquired a 25.1 percent interest in FSL, Maria Elena acquired a 25 percent interest, and Maria Leonor, who was incapacitated at the time, acquired a 25 percent interest through a company controlled by Alvaro on her behalf under a power of attorney. Alvaro subsequently acquired Maria Elena's 25 percent interest, giving him a controlling interest in FSL. Isabel and Maria Elena sought to have the SDAs rescinded on the basis that Alvaro induced them to enter into these agreements through fraud. At trial, the rescission claim was abandoned and it was ultimately determined that Isabel's and Maria Elena's fraud claims could not be established: *Molestina & Ors v. Ponton & Ors*, [2002] EWHC 2413 (Comm).

2022 TDC 25 Footnote-94 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

94 Supra note 90, at paragraph 7.4 (emphasis added).

2022 TDC 25 Footnote-95 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

95 [2014] EWHC 4129 (Ch).

2022 TDC 25 Footnote-96 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

96 Ibid., at paragraph 46.

2022 TDC 25 Footnote-97 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

97 The court's conclusion in *Kennedy* is consistent with paragraph 19.07 of *The Law of Rescission*, supra note 91, where the authors state:

> Because it is concerned with bargains, the rule against partial rescission does not apply to gifts and other unilateral dispositions. Thus in *Barron v Willis* the House of Lords upheld a declaration that certain deeds were not binding on the plaintiff so far as they deprived her of a power of appointment she had enjoyed under an earlier deed. Without having had independent advice, the plaintiff had been induced to execute these aspects of the deeds by her family solicitor in circumstances where their practical effect was to ensure that the solicitor's son would receive a gift. Where gifts are concerned there is no question of rebalancing a bargain or depriving the defendant of a benefit for which he has paid. *Another way of looking at it is that a purely gratuitous element of a wider transaction can always or almost always be severed.* [Emphasis added.]

2022 TDC 25 Footnote-98 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

98 Supra note 95, at paragraph 39.

2022 TDC 25 Footnote-99 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

99 2014 BCSC 305; aff'd 2015 BCCA 222.

2022 TDC 25 Footnote-100 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

100 2011 TCC 212; aff'd 2012 FCA 207.

2022 TDC 25 Footnote-101 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

101 [1990] 3 All ER 338 (Ch. D.).

2022 TDC 25 Footnote-102 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

102 Ibid., at 343.

2022 TDC 25 Footnote-103 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

103 Supra note 99 (BCSC), at paragraphs 32 and 34.

2022 TDC 25 Footnote-104 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

104 Ibid., at paragraph 57.

2022 TDC 25 Footnote-105 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

105 Supra note 99 (BCCA), at paragraph 4.

2022 TDC 25 Footnote-106 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

106 Ibid., at paragraph 41.

2022 TDC 25 Footnote-107 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

107 Ibid., at paragraph 54.

2022 TDC 25 Footnote-108 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

108 Ibid., at paragraphs 56-57.

2022 TDC 25 Footnote-109 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

109 Ibid., at paragraph 61.

2022 TDC 25 Footnote-110 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

110 *Pitt*, supra note 80, at paragraphs 114 and 122-29.

2022 TDC 25 Footnote-111 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

111 Supra note 99 (BCCA), at paragraph 4. As mentioned above, the Chancery Division of the England and Wales High Court relied on *Pitt* to rescind a severable provision of a trust appointment on the grounds of equitable mistake in its decision in *Kennedy*, supra note 95.

2022 TDC 25 Footnote-112 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

112 2020 BCCA 196; aff'g 2019 BCSC 1030.

2022 TDC 25 Footnote-113 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

113 Ibid. (BCSC), at paragraph 100.

2022 TDC 25 Footnote-114 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

114 Ibid., at paragraphs 98 and 97.

2022 TDC 25 Footnote-115 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

115 2017 TCC 84; aff'd 2018 FCA 74; leave to appeal to the Supreme Court of Canada dismissed, [2018] SCCA no. 230.

2022 TDC 25 Footnote-116 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

116 Supra note 112 (BCSC), at paragraph 97.

2022 TDC 25 Footnote-117 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

117 Supra note 112 (BCCA), at paragraph 45.

2022 TDC 25 Footnote-118 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

118 Ibid., at paragraph 50.

2022 TDC 25 Footnote-119 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

119 Ibid., at paragraphs 53-56.

2022 TDC 25 Footnote-120 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

120 Ibid., at paragraph 62.

2022 TDC 25 Footnote-121 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

121 Ibid., at paragraph 59. The court also, at paragraph 58, distinguished *Harvest Operations*, supra note 53, and *BC Trust v. Canada (Attorney General)*, 2017 BCSC 209, on the basis that the primary remedy sought in each case was rectification, with alternative positions attempting to ground relief under the court's general equitable jurisdiction where the relief sought was essentially the same type of relief as that provided by rectification.

2022 TDC 25 Footnote-122 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

122 Case no. 39383, March 25, 2021.

2022 TDC 25 Footnote-123 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

123 Supra note 82, at paragraph 46.

2022 TDC 25 Footnote-124 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

124 See, for example, *Re 0741508 BC Ltd. and 068723 BC Ltd.*, 2014 BCSC 1791.

2022 TDC 25 Footnote-125 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

125 RSO 1990, c. C.43.

2022 TDC 25 Footnote-126 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

126 *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] OJ No. 1713 (CA), at paragraph 9; and *TeleZone Inc. v. Canada*, 2008 ONCA 892, at paragraphs 6-8; aff'd 2010 SCC 62 and 2010 SCC 63.

2022 TDC 25 Footnote-127 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

127 Fitzsimmons and Roth, supra note 81, at 30:34. See 30:34-44 for more detailed analysis of this position and the relevant jurisprudence.

2022 TDC 25 Footnote-128 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

128 2010 ONCA 233; aff'g on other grounds 2009 CanLII 3432 (ONSC).

2022 TDC 25 Footnote-129 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

129 See also *Telus Communications Inc. v. Canada (Attorney General)*, 2015 ONSC 6245, in which Hainey J granted rectification, holding that Telus had intended to make a multi-tier alignment election to align the fiscal period of two partnerships, but had made an honest mistake that frustrated its intention to do so because it was unaware of the minority interest held in a third partnership, which did not appear on the organizational chart attached to the election. In reaching this conclusion, Hainey J stated, at paragraphs 20-21:

> In the alternative, if I am wrong in concluding that there should be a rectification order pursuant to the principles established in *Juliar* and *Fairmont*, I rely on the equitable jurisdiction of this court to relieve the Applicants from the effect of their mistake. The Ontario Court of Appeal made it clear that this is an alternative basis for granting the relief sought by the Applicants in *TCR Holding Corp. v. Ontario*, 2010 ONCA 233. . . . In my view, the same reasoning applies to the Applicants' inadvertent mistake in connection with the Election. I see no reason not to grant the relief requested for the same reason as the application judge in *TCR Holding*.

A similar approach was adopted in *1756215 Ontario Inc. v. 2095417 Ontario Inc.*, 2011 ONSC 6597, in which the court also relied on the approach in *TCR Holding* to revive a dissolved corporation nunc pro tunc, on the basis that "the plaintiffs should not be deprived of equitable relief otherwise available in the face of mistake," and that "the application of those principles referred to by the Court of Appeal in *TCR* . . . favour granting the relief" (at paragraphs 17 and 19). See also

Slate Management Corporation v. Canada (Attorney General), 2017 ONCA 763; but see, adopting the contrary position, the decision of Brown J in *Graymar*, supra note 18, in which he described the existence of the inherent jurisdiction of superior courts as "indisputable and certain," though he went on to note, at paragraph 24,

> [t]hat does not mean . . . that inherent jurisdiction is an amorphous source of boundless authority derived from a common law's ancient mists, permitting superior court judges to do whatever they feel they must. An unbounded conception of inherent jurisdiction undermines the rule of law, which presupposes limits on the powers of the state (including the judiciary).

Considering instead that inherent jurisdiction has a confined scope, the court described it, ibid., at paragraph 26, as a "functional tool, which steps in to provide a remedy, whether procedural or substantive, when no other alternative forum or mechanism is available," and is to be exercised specifically for the purpose of discharging the court's function as a court. While the scope of inherent jurisdiction is therefore necessarily broad, the court may not, for example, invoke or "exercise this authority where an alternative mechanism, albeit one with limits, already exists" (ibid., at paragraph 30). Brown J did not refer to his earlier reasons for judgment in *Graymar* in his majority opinion in *Fairmont*.

2022 TDC 25 Footnote-130 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

130 Supra note 53, at paragraphs 73-75 (footnotes excluded).

2022 TDC 25 Footnote-131 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

131 Supra note 82, at paragraph 80.

2022 TDC 25 Footnote-132 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

132 Ibid., at paragraph 82.

2022 TDC 25 Footnote-133 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

133 Ibid., at paragraph 63.

2022 TDC 25 Footnote-134 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

134 Ibid., at paragraph 72.

2022 TDC 25 Footnote-135 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

135 Ibid., at paragraph 78.

2022 TDC 25 Footnote-136 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

136 Ibid., at paragraphs 78-79.

2022 TDC 25 Footnote-137 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

137 Ibid., at paragraphs 69 and 72.

2022 TDC 25 Footnote-138 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

138 Ibid., at paragraph 92.

2022 TDC 25 Footnote-139 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

139 In *5551928 Manitoba Ltd.*, supra note 47, the BC Court of Appeal upheld the chambers judge's conclusion that the alternative remedies submitted by the Crown (including the two alternative remedies cited by the court in *Canada Life* —an application for a remission order and a professional negligence suit against its advisers) involved such risk and expense that they did not outweigh the equities favouring rectification, stating, at paragraph 41:

> I doubt that Equity would force upon a party such as the respondent an "alternative" that is neither practical nor certain and the cost of which might well exceed the penalty Canada seeks to impose.

Similarly, in *Collins Family Trust*, supra note 112, at paragraph 86, the court accepted the taxpayer's submission that a remission order was "neither practical, adequate nor appropriate given its nature."

2022 TDC 25 Footnote-140 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

140 *Canada Life*, supra note 82, at paragraph 93.

2022 TDC 25 Footnote-141 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

141 For discussion, see Diana Aird, "Limits of Equitable Remedies To Fix Tax -Planning Mistakes," in the 2017 Conference Report, supra note 81, 31:1-9, at 38:3-4.

2022 TDC 25 Footnote-142 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

142 *R.G. v. K.G.*, 2017 ONCA 108, at paragraph 47, quoting Jeremy Woolf, *Zamir & Woolf: The Declaratory Judgment*, 3d ed. (London: Sweet & Maxwell, 2002), at paragraph 1.02.

2022 TDC 25 Footnote-143 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

143 2013 ABQB 489.

2022 TDC 25 Footnote-144 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

144 Ibid., at paragraph 74.

2022 TDC 25 Footnote-145 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

145 See *JAFT Corp. v. Jones et al.*, 2015 MBCA 77.

2022 TDC 25 Footnote-146 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

146 See *Felsen Foundation v. Jabs Construction Ltd. et al.*, 98 DTC 6454 (BCSC).

2022 TDC 25 Footnote-147 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

147 2010 ONCA 171.

2022 TDC 25 Footnote-148 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

148 RSO 1990, c. R.31 (RSTA).

2022 TDC 25 Footnote-149 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

149 The court noted that its order would have the effect of providing several potential remedies to the taxpayer, including a reassessment by the minister to vary or vacate the original assessment, statutory rectification under section 250(1) of the Business Corporations Act (Ontario), RSO 1990, c. B.16 (OBCA), or, at the minister's discretion, an exemption from tax under the RSTA where the imposition of such tax would be inequitable.

2022 TDC 25 Footnote-150 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

150 2012 ONSC 549.

2022 TDC 25 Footnote-151 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

151 In making the order, the court acknowledged, ibid., at paragraphs 58-61, the subtle distinction between declarations as to the tax treatment of a particular factual truth and declarations as to the existence of the factual truth itself:

> This factual determination is binding on the Taxman and the Taxpayers who are parties to this proceeding. However, this factual determination is not a legal determination of the legal propriety of the Taxman's treatment of this factual truth.
>
> The question of law as to whether a payment or a receipt is on account of income or of capital is a determination to be determined under the procedures of the Income Tax Act and the Corporate Tax Act. . . .
>
> This subtle distinction between influencing an administrator's decision in law and making the legal decision for the administrator was recognized in *Danso-Coffey v. Ontario* and explains why Justice Weiler's judgment is so careful and intricate. In that case, it was appropriate for the judge at first instance to declare that Ms. Danso-Coffey was not a director, but it was wrong for him to declare that she was not liable as a director to remit retail sales tax .
>
> Similarly, in the case at bar, it would be wrong of me to declare how for tax purposes the monies received by [the taxpayers] as investment income but now know in truth to be something other than genuine investment income should be treated for tax purposes. At this juncture, the determination of the legal effect of the nature of the payments received by [the taxpayers] is for the Minister of National Revenue and the Minister of Finance, subject to judicial review in the Federal Court with respect to the Income Tax Act or this court with respect to corporate tax under the Corporate Tax Act.

2022 TDC 25 Footnote-152 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

152 2020 ONSC 5343.

2022 TDC 25 Footnote-153 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

153 Ibid., at paragraphs 5-7.

2022 TDC 25 Footnote-154 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

154 RSC 1985, c. C-44, as amended (CBCA).

2022 TDC 25 Footnote-155 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

155 For example, section 265 of the CBCA provides that if there is an error in articles, a notice, certificate, or other document, the directors or shareholders of the corporation shall, on the request of the director under the CBCA, pass the resolutions and send to the director the documents required to comply with the statute, and take such other steps as the director may reasonably require so that the director may correct the document. The director may also accept a correction to any of those documents at the request of the corporation or any other interested person, if the correction is either approved by the directors of the corporation or the error is obvious or was made by the director, in each case if the director is satisfied that the correction would not prejudice any of the shareholders or creditors of the corporation and that the correction reflects the original intention of the corporation or the incorporators, as the case may be. Pursuant to section 265(7) of the CBCA, a corrected document shall bear the date of the document it replaces, unless (a) the correction is made with respect to the date of the document, in which case the document shall bear the corrected date, or (b) the court decides otherwise. Other provisions of the CBCA provide for an application to be made to court to rectify certain corporate records. Under section 243, for example, if the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, the registers or other records of a corporation, the corporation, a security holder of the corporation, or any aggrieved person may apply for a court order that the registers or records be rectified. The court has broad powers in connection with an application under this provision, including the power to order the registers or other records of the corporation to be rectified, to restrain the corporation from calling or holding a shareholders' meeting or paying a dividend before such rectification, to make an order determining the right of a party to have the party's name entered or deleted from the registers or records of the corporation, or to compensate a party who has incurred a loss.

2022 TDC 25 Footnote-156 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

156 See section 265(6) of the CBCA, and the detailed discussion in Jeff Oldewening, Rachel A. Gold, and Chris Sheridan, "Statutory Ratification," Corporate Tax Planning feature (2016) 64:1 *Canadian Tax Journal* 293-325.

2022 TDC 25 Footnote-157 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

157 Oldewening et al., supra note 156, at 314-15. The authors cite the decision in *Allsco Building Supplies Ltd. v. McAllister* (1990), 44 BLR 201 (NBQB), at 205, in which it was held that the authority conferred on the director under section 189(1) of the Business Corporations Act (New Brunswick), SNB 1981, c. B-9.1, as amended—an equivalent provision to section 265(6) of the CBCA—"seems to contemplate an error which requires correction in order to ensure compliance with the Act."

2022 TDC 25 Footnote-158 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

158 2014 BCSC 2384. See also *Prospera Credit Union (Re)*, 2002 BCSC 1806, in which the court rectified corporate steps relating to the timing of the transfer of certain assets on the amalgamation of two credit unions and cancelled certain others pursuant to the statutory rectification provisions in section 107(1) of the Credit Union Incorporation Act, RSBC 1996, c. 82. The court noted that, as a direct result of the error, the proceedings of the meetings of the credit unions at which the amalgamation agreement was approved were rendered ineffective because the intended tax plan as contemplated by the agreement was not achieved.

2022 TDC 25 Footnote-159 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

159 *Lau*, supra note 158, at paragraphs 116-17.

2022 TDC 25 Footnote-160 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

160 SBC 2002, c. 57, as amended (BCBCA).

2022 TDC 25 Footnote-161 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

161 *Lau*, supra note 158, at paragraph 124.

2022 TDC 25 Footnote-162 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

162 Pursuant to section 229(4) of the BCBCA, such an order does not prejudice the rights of any third party who acquired such rights for valuable consideration and without notice of the corporate mistake that is the subject of the order.

2022 TDC 25 Footnote-163 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

163 For this purpose, "basic records" are defined in section 230(1) to mean the company's articles, notice of articles or memorandum, the minutes of any meeting of shareholders or directors, any resolution passed by shareholders or directors, the company's register of directors, and the company's central securities register. In connection with an application made under this provision, the court may make any order it considers appropriate.

2022 TDC 25 Footnote-164 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

164 Some other provincial corporate statutes contain similar provisions; see, for example, section 458 of the Business Corporations Act (Quebec), CQLR c. S-31.1, which appears to have been modelled on the equivalent BC legislation. The Quebec courts have given broad effect to the provision: see, for example, *Phillippe Trepanier Inc. et Deloitte*, 2014 QCCS 2615, which was quoted in approval in support of rectification under the Civil Code in the dissenting opinion of Côté J in *Jean Coutu*, supra note 3, at paragraph 87.

2022 TDC 25 Footnote-165 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

165 2017 BCSC 994.

2022 TDC 25 Footnote-166 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

166 Ibid., at paragraphs 37-40.

2022 TDC 25 Footnote-167 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

167 Ibid., at paragraph 41, citing paragraph 72 of Abella J's decision in *Fairmont*, supra note 2.

2022 TDC 25 Footnote-168 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

168 Supra note 2, at paragraph 24.

2022 TDC 25 Footnote-169 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

169 Ibid., at paragraphs 70-72.

2022 TDC 25 Footnote-170 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

170 Ibid., at paragraphs 58-60.

2022 TDC 25 Footnote-171 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

171 Ibid., at paragraph 45.

2022 TDC 25 Footnote-172 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

172 Ibid., at paragraphs 70, 84, and 91.

2022 TDC 25 Footnote-173 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

173 See CRA Remission Guide—A Guide for the Remission of Income Tax , GST/HST, Excise Tax , Excise Duties or FST under the Financial Administration Act, October 2014.

2022 TDC 25 Footnote-174 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

174 See *Information Circular* IC 07-1R1, "Taxpayer Relief Provisions," for a description of the guidelines used by the CRA in determining whether to grant relief for interest and penalties.

2022 TDC 25 Footnote-175 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

175 In the recent case of *Brent Carlson Family Trust v. Canada (National Revenue)*, 2021 FC 506, the Federal Court allowed the taxpayer's application for judicial review of the CRA's refusal to permit elections under subsection 85(1) of the Act to be amended pursuant to subsection 85(7.1). The court held that the minister's decision to deny the taxpayer's request to amend the elections was unreasonable owing, in part, to the minister's reliance on *Fairmont* and *Canada Life* in concluding

that the requested amendment amounted to "retroactive tax planning." The court considered the amendments sought by the taxpayer to be distinct from the equitable remedies of rectification and rescission, and determined that the discretion granted to the minister under subsection 85(7.1) "suggests an acceptable ambit for retroactive tax planning and the correction of unintended tax consequences" (ibid., at paragraph 52). In the view of the court, it was incumbent on the minister "to review all of the taxpayer's circumstances and explain why the requested amendment, which will inevitably have been prompted by an unintended tax consequence, is not just and equitable " (ibid.).

2022 TDC 25 Footnote-176 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

176 These so-called penalty taxes are taxes, not penalties, and therefore do not qualify for relief under subsection 220(3.1), which provides relief for interest and penalties.

2022 TDC 25 Footnote-177 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

177 Paragraph 204.1(4)(a).

2022 TDC 25 Footnote-178 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

178 See *Galway v. MNR*, 74 DTC 6355 (FCA).

2022 TDC 25 Footnote-179 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

179 See *Sussex Square Apartments Limited v. The Queen*, 99 DTC 443 (TCC); aff'd 2000 DTC 6548 (FCA).

2022 TDC 25 Footnote-180 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

180 *Fairmont*, supra note 2, at paragraphs 13 and 19.

2022 TDC 25 Footnote-181 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

181 See, for example, *Amalgamation of Aylwards (1975) Ltd., Re*, 2001 CanLII 32734 (NLSC), in which rectification in such circumstances was granted.

2022 TDC 25 Footnote-182 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

182 See, for example, the jurisprudence cited by Abella J in *Fairmont*, supra note 2, at paragraph 78.

2022 TDC 25 Footnote-183 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

183 These guidelines could be established with reference to the rectification jurisprudence predating *Fairmont*. John Sorensen, " Equitable Remedies and Tax Mistakes: The Door Closes a Bit More" (2018) 21:3 *Tax Litigation* 2-6, at 5, has also suggested the following approach to distinguishing between retroactive tax planning and correcting inadvertent mistakes:

> [I]f a taxpayer plans a particular tax outcome, later reversing that outcome to seek a preferable result may be seen as retroactive tax planning and a deprivation to the fisc; on the other hand, if a taxpayer makes a mistake that results in an outcome that, but for the mistake, would not have occurred, the fisc is just a finder of a lost wallet who refuses to return it to its rightful owner.

While a particular set of facts may not fit neatly within this dichotomy, it provides, in our view, a reasonable line of demarcation that may be useful in determining the circumstances in which equitable relief should be granted.

2022 TDC 25 Footnote-184 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

184 Currently, the Department of Justice has a rectification committee that reviews applications for rectification from across the country. This committee is composed of a representative from each of the offices of the Department of Justice in Vancouver, Edmonton, Saskatoon, Winnipeg, Toronto, Ottawa, Montreal, and Halifax and includes two national coordinators, one from each of Toronto and Montreal. Its purpose is to determine whether to oppose applications for rectification and to ensure that Justice's approach to such applications is consistent and uniform across the country. The decisions of the committee and their reasons are not available to the public and are not subject to judicial review. The rectification committee that we propose would differ from the existing committee in a number of respects. It would be composed of senior members of the CRA and the Department of Justice from across the country. Its workings would be transparent, in that its decisions would be published (subject to redaction for privacy purposes), and searchable, thereby creating a base of precedents. Its decisions would be subject to judicial review by the Federal Court of Canada. We appreciate that in suggesting that decisions by the proposed rectification committee be subject to judicial review, there may be situations where there is jurisdictional overlap between the Federal Court of Canada and the provincial superior courts that would have to be addressed in the enabling legislation that creates the proposed rectification committee. Existing jurisdictional overlap between the provincial superior courts and the Tax Court of Canada and between the Federal Court of Canada and the Tax Court of Canada may offer some helpful guidance in this regard.

2022 TDC 25 Footnote-185 Equitable Remedies in Tax Matters: The Elusive Search for Relief (Roth, E. et al.)

185 In this regard, the Federal Court Rules would be amended to ensure that the rectification committee was a "federal board, commission or other tribunal" as defined in section 2(1) of the Federal Courts Act, RSC 1985, c. F-7, for the purpose of an application for judicial review pursuant to section 18.1 of the Federal Courts Act of a decision made by the rectification committee.

2022 TDC 25 Author Information

AUTHOR INFORMATION

Elie S. Roth, Stephen S. Ruby, and Ryan Wolfe - Of Davies Ward Phillips & Vineberg LLP.

2022 TDC 25 Bibliographic Information

BIBLIOGRAPHIC INFORMATION

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