

**SUPREME COURT OF CANADA**

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| **Citation:** Canada (Attorney General) *v.* Fairmont Hotels Inc., 2016 SCC 56, [2016] 2 S.C.R. 720 | **Appeal heard:** May 18, 2016  **Judgment rendered:** December 9, 2016  **Docket:** 36606 |

Between:

Attorney General of Canada

Appellant

and

Fairmont Hotels Inc.,

FHIW Hotel Investments (Canada) Inc. and

FHIS Hotel Investments (Canada) Inc.

Respondents

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

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| **Reasons for Judgment:**  (paras. 1 to 42)  **Dissenting Reasons:**  (paras. 43 to 92) | Brown J. (McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring)  Abella J. (Côté J. concurring) |

Canada (Attorney General) *v.* Fairmont Hotels Inc., 2016 SCC 56, [2016] 2 S.C.R. 720

Attorney General of Canada Appellant

v.

Fairmont Hotels Inc., FHIW Hotel Investments (Canada) Inc.

and FHIS Hotel Investments (Canada) Inc. Respondents

**Indexed as: Canada (**Attorney General) *v.* Fairmont Hotels Inc.

2016 SCC 56

File No.: 36606.

2016: May 18; 2016: December 9.

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

on appeal from the court of appeal for ontario

*Contracts — Equity — Remedies — Rectification of written instrument recording prior agreement — Agreement intended by parties to operate on tax‑neutral basis — Corporate resolutions effecting share redemption — Share redemption having unintended tax consequences — Whether courts below erred in holding parties’ intention can support grant of rectification — Whether equitable remedy of rectification available.*

*Commercial law — Corporations — Taxation — Whether rectification of contract amounts to retroactive tax planning.*

Fairmont Hotels Inc. was involved in the financing of Legacy Hotels’ purchase of two other hotels, in U.S. currency. The financing arrangement was intended to operate on a tax‑neutral basis. When Fairmont was later acquired, that intention was frustrated, however, since the acquisition would cause Fairmont and its subsidiaries to realize a deemed foreign exchange loss. The parties to Fairmont’s acquisition therefore agreed on a plan, which allowed Fairmont to hedge itself against any exposure to the foreign exchange tax liability, but not its subsidiaries. There was no plan for protecting them from such exposure because the plan was deferred. The following year, Legacy Hotels asked Fairmont to terminate their financing arrangement to allow for the sale of the two other hotels. Therefore, Fairmont redeemed its shares in its subsidiaries, by resolutions passed by their directors. This resulted however in an unanticipated tax liability. Fairmont sought to avoid that liability by rectification of the directors’ resolutions. Both the application judge and the Court of Appeal granted that rectification on the basis of the parties’ intended tax neutrality.

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

*Per* McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ.: Both courts below erred in holding that the parties’ intention of tax neutrality could support a grant of rectification. A common continuing intention does not suffice. Rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. It is limited to cases where a written instrument has incorrectly recorded the parties’ antecedent agreement. In other words, rectification is not available where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement, but the agreement itself.

Where the error is said to result from a mistake common to both or all parties to the agreement, rectification of the instrument is available upon the court being satisfied that there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties’ prior agreement.

It falls to a party seeking rectification to show not only the putative error in the instrument, but also the way in which the instrument should be rectified in order to correctly record what the parties intended to do. The applicable standard of proof to be applied to evidence adduced in support of a grant of rectification is the balance of probabilities. A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the parties’ true intended course of action. On rectification, both equity and the civil law are *ad idem*, despite each legal system arriving at it by different paths — the former being concerned with correcting the document, and the latter focusing on its interpretation. This convergence is undoubtedly desirable.

These principles are to be applied in a tax context just as they are in a non‑tax context. This is to avoid impermissible retroactive tax planning. In this case, the application of these principles leads unavoidably to the conclusion that Fairmont’s application for rectification should have been dismissed, since it could not demonstrate having reached a prior agreement with definite and ascertainable terms. It is clear that Fairmont intended to limit, if not avoid altogether, its tax liability in unwinding the financing arrangement. And, by redeeming the shares, 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 that 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.

Relatedly, Fairmont has not demonstrated how its intention, held in common and on a continuing basis with its subsidiaries, was to be achieved in definite and ascertainable terms while unwinding the financing arrangement. Fairmont refers to a plan to protect its subsidiaries from foreign exchange tax liability, but that plan was not only imprecise. It really was not a plan at all, being at best an inchoate wish to protect the subsidiaries, by unspecified means.

*Per* Abella and Côté JJ. (dissenting): There is no adjustment to the test for rectification in a tax case, and in this case the test has been met. The lower court’s decisions to grant rectification resulted from the factual finding that the parties had a continuing, ascertainable intention to pursue the transaction on a tax‑free basis or not at all. The majority’s approach however unduly narrows the doctrine of rectification’s scope. A common, continuing, definite and ascertainable intention to pursue a transaction in a tax‑neutral manner has usually satisfied the threshold for granting rectification. The additional requirement that the parties clearly identify the precise mechanism by which they intended to achieve tax neutrality, and how that mechanism was mistakenly transcribed in a document, has the effect of raising the threshold and frustrating the purpose of the remedy. Whether a mistake is unilateral or mutual, rectification is, ultimately, an equitable remedy that seeks to give effect to the true intention of the parties, and prevent errors from causing windfalls. The doctrine is also based on the principle of unjust enrichment, namely, that it would be unfair to rigidly enforce an error that enriches one party at the expense of another.

While rectification seems most often to have been granted in the context of agreed upon terms having been transcribed incorrectly, since unjust enrichment can result from a mistake in carrying out the intention of the parties, the remedy is also available to correct errors in implementation. Courts have, as a result, granted rectification where a corporate transaction was conducted in the wrong sequence, where an underlying calculation in a contract was incorrect, and where the requisite steps of an amalgamation were not correctly carried out.

Whether the errors are in transcription or in implementation, courts may refuse to exercise their discretion where allowing rectification would prejudice the rights of third parties. But the mere existence of a third party will not bar rectification. Only where the third party has actually relied on the flawed agreement will rectification be barred. Just as rectification can prevent one party from enforcing an error and being unjustly enriched by the other’s mistake, rectification can also prevent a third party who has not relied on the agreement from enforcing a mistake and receiving a windfall.

Allowing the tax authorities, a third party, to profit from legitimate tax planning errors, when its own rights have not been prejudiced in any way, amounts to unjust enrichment. Businesses and individuals are legally entitled to structure their affairs in a way that minimizes their tax burden. The tax department is not entitled to play “Gotcha” any more than would any other third party who did not rely to its detriment on the mistake. On the other hand, businesses and individualsshould not be allowed to exploit rectification for purposes of engaging in retroactive tax planning.

Civil law and common law rectification in the tax context are clearly based on analogous principles, namely, that the true intention of the parties has primacy over errors in the transcription or implementation of that agreement, subject to a need for precision and the rights of third parties who detrimentally rely on the agreement. That means that there is no principled basis in either legal system for a stricter standard in the tax context simply because it is the government that is positioned to benefit from a mistake.

In this case, Fairmont was found by the application judge to have always had a clear, continuing intention to unwind the financing arrangement on a tax‑neutral basis and never to redeem the shares. Fairmont was not attempting to change its original intention because of unanticipated tax consequences. It hadanticipated the tax consequences of unwinding the arrangement with a share redemption mechanism, and it specificallyrejected this course of action. But, by mistake, the preferred share redemption terms were included in the directors’ resolutions. This is exactly the kind of mistake rectification exists to remedy. Once the application judge was satisfied of the true intention of the parties, he was entitled to give effect to it by allowing rectification of the directors’ resolutions.

To require an exhaustive account of how the unwinding was supposed to have proceeded would amount to imposing a uniquely high threshold for rectification in the tax context and would give the Canada Revenue Agency, as the tax authorities, an unintended gain because of the mistake. There is no basis for permitting a windfall to the Canada Revenue Agency that no other third party would have been entitled to.

**Cases Cited**

By Brown J.

**Overruled:** *Juliar v. Canada (Attorney General)* (1999), 46 O.R. (3d) 104, aff’d (2000), 50 O.R. (3d) 728; **considered:** *Joscelyne v. Nissen*, [1970] 2 Q.B. 86; **referred to:** *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368; *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 63 S.C.R. 109; *Hart v. Boutilier* (1916), 56 D.L.R. 620; *Re Slocock’s Will Trusts*, [1979] 1 All E.R. 358; *Racal Group Services Ltd. v. Ashmore* (1995), 68 T.C. 86; *Ashcroft v. Barnsdale*, [2010] EWHC 1948, [2010] S.T.C. 2544; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Harvest Operations Corp. v. Canada (Attorney General)*, 2015 ABQB 327, [2015] 6 C.T.C. 78; *Crane v. Hegeman‑Harris Co.*, [1939] 1 All E.R. 662; *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84; *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97; *Frederick E. Rose (London) Ld. v. William H. Pim Jnr. & Co.*, [1953] 2 Q.B. 450; *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, [2016] 2 S.C.R. 670; *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Thomas Bates and Son Ltd. v. Wyndham’s (Lingerie) Ltd.*, [1981] 1 W.L.R. 505.

By Abella J. (dissenting)

*H. F. Clarke Ltd. v. Thermidaire Corp.*, [1973] 2 O.R. 57, rev’d [1976] 1 S.C.R. 319; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *Hart v. Boutilier* (1916), 56 D.L.R. 620; *Mitchell v. MacMillan* (1980), 5 Sask. R. 160; *Reed Shaw Osler Ltd. v. Wilson* (1981), 17 Alta. L.R. (2d) 81; *Bryndon Ventures Inc. v. Bragg* (1991), 82 D.L.R. (4th) 383; *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97; *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84; *Joscelyne v. Nissen*, [1970] 2 Q.B. 86; *Peter Pan Drive‑In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291, aff’d (1980), 26 O.R. (2d) 746; *Graymar Equipment (2008) Inc. v. Canada (Attorney General)*, 2014 ABQB 154, 97 Alta. L.R. (5th) 288; *I.C.R.V. Holdings Ltd. v. Tri‑Par Holdings Ltd.* (1994), 53 B.C.A.C. 72; *McLean v. McLean*, 2013 ONCA 788, 118 O.R. (3d) 216; *Swainland Builders Ltd. v. Freehold Properties Ltd.*, [2002] EWCA Civ 560; *Co‑operative Insurance Society Ltd v. Centremoor Ltd.*, [1983] 2 E.G.L.R. 52; *Royal Bank of Canada v. El‑Bris Ltd.*, 2008 ONCA 601, 92 O.R. (3d) 779; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *GT Group Telecom Inc., Re* (2004), 5 C.B.R. (5th) 230; *Oriole Oil & Gas Ltd. v. American Eagle Petroleums Ltd.* (1981), 27 A.R. 411; *Prospera Credit Union, Re*, 2002 BCSC 1806, 32 B.L.R. (3d) 145; *Wise v. Axford*, [1954] O.W.N. 822; *Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354; *Consortium Capital Projects Inc. v. Blind River Veneer Ltd.* (1988), 63 O.R. (2d) 761, aff’d (1990), 72 O.R. (2d) 703; *Kolias v. Owners: Condominium Plan 309 CDC*, 2008 ABCA 379, 440 A.R. 389; *Carlson, Carlson and Hettrick v. Big Bud Tractor of Canada Ltd.* (1981), 7 Sask. R. 337; *Love v. Love*, 2013 SKCA 31, [2013] 5 W.W.R. 662; *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Kanji v. Canada (Attorney General)*, 2013 ONSC 781, 114 O.R. (3d) 1; *Pallen Trust, Re*, 2015 BCCA 222, 385 D.L.R. (4th) 499; *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739; *Canada (Attorney General) v. Juliar* (2000), 50 O.R. (3d) 728; *McPeake v. Canada (Attorney General)*, 2012 BCSC 132, [2012] 4 C.T.C. 203; *Slate Management Corp. v. Canada (Attorney General)*, 2016 ONSC 4216; *Fraser Valley Refrigeration, Re*, 2009 BCSC 848, [2009] 6 C.T.C. 73, aff’d 2009 BCCA 576, 280 B.C.A.C. 317; *Birch Hill Equity Partners Management Inc. v. Rogers Communications Inc.*, 2015 ONSC 7189, 128 O.R. (3d) 1; *Binder v. Saffron Rouge Inc.* (2008), 89 O.R. (3d) 54; *Re: Aboriginal Diamonds Group*, 2007 NWTSC 37; *Zhang v. Canada (Attorney General)*, 2015 BCSC 1256, 2015 DTC 5084; *Husky Oil Operations Ltd. v. Saskatchewan (Minister of Finance)*, 2014 SKQB 116, 443 Sask. R. 172; *JAFT Corp. v. Jones*, 2014 MBQB 59, 304 Man. R. (2d) 86, aff’d 2015 MBCA 77, 323 Man. R. (2d) 57; *Capstone Power Corp. v. 1177719 Alberta Ltd.*, 2016 BCSC 1274; *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838.

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APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Cronk and Blair JJ.A.), 2015 ONCA 441, 45 B.L.R. (5th) 230, 2015 DTC 5073, [2015] O.J. No. 3172 (QL), 2015 CarswellOnt 8955 (WL Can.), affirming a decision of Newbould J., 2014 ONSC 7302, 123 O.R. (3d) 241, [2015] 3 C.T.C. 9, 2015 DTC 5019, 36 B.L.R. (5th) 215, [2014] O.J. No. 6086 (QL), 2014 CarswellOnt 17975 (WL Can.). Appeal allowed, Abella and Côté JJ. dissenting.

Daniel Bourgeois and Eric Noble, for the appellant.

Geoff R. Hall and Chia‑yi Chua, for the respondents.

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

Brown J. —

1. Introduction
2. 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.
3. 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.
4. 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 holding 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: A. Swan and J. Adamski, *Canadian Contract Law* (3rd ed. 2012), at §8.229; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 817. 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.
5. Overview of Facts and Proceedings
   1. Background
6. The respondent Fairmont Hotels Inc. and its subsidiaries FHIW Hotel Investments (Canada) Inc. and FHIS Hotel Investments (Canada) Inc. ask the Court to rectify instruments recording a complex financing arrangement made in 2002 and 2003 between Fairmont and Legacy Hotels REIT, a Canadian real estate investment trust in which Fairmont owned a minority interest. While Fairmont’s aim in participating in this financing arrangement was to obtain the management contract for the two hotels which Legacy purchased with the financing, its participation exposed it to a potential foreign exchange tax liability, since the financing was in U.S. currency. With the goal of ensuring foreign exchange tax neutrality, Fairmont — through its subsidiaries FHIW and FHIS — entered into reciprocal loan agreements with Legacy, all of which were transacted in U.S. currency.
7. When Fairmont was acquired by Kingdom Hotels International and Colony Capital LLC in 2006, however, that goal of foreign exchange tax neutrality was frustrated, since this acquisition would cause Fairmont and its subsidiaries to realize a deemed foreign exchange loss, without corresponding foreign exchange gains, on the financing arrangement with Legacy. Fairmont, Kingdom Hotels and Colony Capital agreed on a “modified plan” which allowed Fairmont (but not its subsidiaries) to realize both its gains and losses in 2006, thereby fully hedging it against exposure to prospective foreign exchange tax liability. The matter of similarly protecting the subsidiaries from exposure was deferred, without any specific plan as to how that might be achieved.
8. In 2007, Legacy asked Fairmont to terminate the reciprocal loan arrangements “on an urgent basis” so as to allow for the sale of the hotels. Four days later, and on the incorrect assumption that the matter of the subsidiaries’ foreign exchange tax neutrality had been secured, Fairmont complied with Legacy’s request by redeeming its shares in its subsidiaries via resolutions passed by the directors of FHIW and FHIS. This resulted in an unanticipated tax liability, discovered only after the Canada Revenue Agency (“CRA”) audited the 2007 tax returns of FHIW and FHIS and questioned Fairmont on those returns.
9. The respondents now seek to avoid that liability to Fairmont by asking the Court to rectify the 2007 resolutions passed by the directors of FHIW and FHIS. Specifically, they wish to convert Fairmont’s share redemption into a loan whereby FHIW and FHIS will loan to Fairmont the same amount that they paid to Fairmont for the share redemption.
   1. Judicial History
      1. Superior Court of Justice — Newbould J. (2014 ONSC 7302, 123 O.R. (3d) 241)
10. Relying on the decision of the Ontario Court of Appeal in *Juliar v. Canada (Attorney General)* (1999), 46 O.R. (3d) 104 (S.C.J.), aff’d (2000), 50 O.R. (3d) 728 (C.A.), the chambers judge allowed the application for rectification. He found that, since 2002, Fairmont had intended that its financing arrangement with Legacy be tax-neutral in effect, and that this intention subsisted after Fairmont’s 2006 acquisition by Kingdom Hotels and Colony Capital (para. 32).
11. The chambers judge also found that, in light of the foreign exchange tax exposure presented to Fairmont’s subsidiaries by that acquisition, Fairmont intended “at some point in the future” to address “the unhedged position of [FHIW] and [FHIS] in a way that would be tax . . . neutral although they had no specific plan as to how they would do that” (para. 33). Observing (at para. 42) that the tax liability arose as a result of inadvertence by a member of Fairmont’s senior management team, he said that this was not “a case in which tax planning has been done on a retroactive basis after a CRA audit”, but rather a case in which a “redemption of the preference shares was mistakenly chosen as the means” to “unwind the loans on a tax-free basis” (para. 43). “[D]enial of the application to rectify would”, he concluded, “result in a tax burden which Fairmont sought to avoid from the inception of the 2002 reciprocal loan arrangement” while “giv[ing] CRA an unintended gain” (para. 44). And, in any event, he noted that *Juliar* was binding on him in the circumstances (para. 41).
    * 1. Court of Appeal — Simmons, Cronk and Blair JJ.A. (2015 ONCA 441, 45 B.L.R. (5th) 230)
12. In brief reasons for judgment, the Court of Appeal affirmed the chambers judge’s decision, taking note of his findings regarding Fairmont’s continuing intention from 2002 that its financing arrangement with Legacy would be carried out on a tax neutral basis; that this intention subsisted after Fairmont’s acquisition in 2006; that the adverse tax consequence was triggered by a mistake in 2007 on the part of a member of Fairmont’s senior management; and that the purpose of the 2007 resolutions was not to redeem the shares, but rather “to unwind [the Legacy transactions] on a tax free basis” (para. 7).
13. The Court of Appeal also commented on the evidentiary burden resting on the party seeking rectification. *Juliar*, it said, “does not require that the party seeking rectification must have determined the precise mechanics or means by which [its] settled intention to achieve a specific tax outcome would be realized” (para. 10). Rather, “*Juliar* holds, in effect, that the critical requirement for rectification is proof of a continuing specific intention to undertake a transaction or transactions on a particular tax basis” (para. 10). In this case, then, it was in the court’s view unnecessary for Fairmont to prove that it had resolved to use “a specific transactional device — loans — to achieve the intended tax result” (para. 12). Rather, the chambers judge’s findings regarding Fairmont’s intention, coupled with *Juliar*’s direction regarding the prerequisite intention to obtain rectification, were dispositive of the application in the respondents’ favour.
14. Analysis
    1. General Principles and Operation of Rectification
15. If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties’ agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties’ true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties’ agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties’ true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at §8.229).
16. Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is “a potent remedy” (*Snell’s Equity* (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (*Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 56, citing *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 31), be used “with great caution”, since a “relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts”: *Performance Industries*, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties’ antecedent agreement (Swan and Adamski, at §8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, *The Law of Contract* (14th ed. 2015), at para. 8-059; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368, at p. 375 (“Courts of Equity do not rectify contracts; they may and do rectify instruments”). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend *not the instrument* recording their agreement, but *the agreement itself*. More to the point of this appeal, and as this Court said in *Performance Industries* (at para. 31), “[t]he court’s task in a rectification case is . . . to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other”.
17. Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski,at§8.233. Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a *common* mistake that it accurately records the terms of their antecedent agreement. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement: *Ship M. F. Whalen v. Pointe Anne Quarries Ltd*. (1921), 63 S.C.R. 109, at p. 126; McInnes, at p. 820; *Snell’s Equity*, at p. 424; *Hanbury and Martin* *Modern Equity* (20th ed. 2015), by J. Glister and J. Lee, at pp. 848-49; *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at p. 622.
18. In *Performance Industries* (at para. 31) and again in *Shafron* (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is *unilateral* — either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in *Performance Industries* and *Shafron*) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In *Performance Industries* (at para. 31), “certain demanding preconditions” were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to “fraud or the equivalent of fraud” (para. 38).
    1. Juliar
19. As I have recounted, both courts below considered the Court of Appeal’s decision in *Juliar*, coupled with the chambers judge’s findings, to be dispositive. In my respectful view, however, *Juliar* is irreconcilable with this Court’s jurisprudence and with the narrowly confined circumstances to which this Court has restricted the availability of rectification.
20. In *Juliar*, the parties had, by a written agreement and in the course of the restructuring of a family business, transferred shares to a corporation in exchange for promissory notes for an amount equal to what the parties believed to be the value of the shares. Upon discovering that the promissory notes were worth more than the shares’ value (resulting in the taxpaying party being assessed as having received a taxable deemed dividend), the parties sought rectification in order to convert what had originally been structured as a shares-for-promissory notes transfer into a shares-for-shares transfer (which would have been tax-deferred). For the Court of Appeal, and citing the decision of *Re Slocock’s Will Trusts*, [1979] 1 All E.R. 358 (Ch. D.), Austin J.A. held that the written agreement could be rectified as sought, citing the trial judge’s finding that the parties had “a common . . . continuing intention” to transfer shares in a way that would avoid immediate tax liability (para. 19). In order to achieve that objective, Austin J.A. said, the deal “had to be . . . a shares for shares transaction” (para. 25).
21. This reasoning presents several difficulties. First, as many commentators have observed, it is indisputable that *Juliar* has relaxed the requirements for obtaining rectification, and correspondingly expanded the scope of cases in which rectification may be sought and granted beyond that which the governing principles allow (C. Brown and A. J. Cockfield, “Rectification of Tax Mistakes Versus Retroactive Tax Laws: Reconciling Competing Visions of the Rule of Law” (2013), 61 *Can. Tax J.* 563, at p. 571; N. Brooks and K. Brooks, “The Supreme Court’s 2013 Tax Cases: Side-Stepping the Interesting, Important and Difficult Issues” (2015), 68 *S.C.L.R.* (2d) 335, at p. 385; K. Janke-Curliss et al., “Rectification in Tax Law: An Overview of Current Cases”, in *Tax Dispute Resolution, Compliance, and Administration in Canada* (2013), 21:1, at pp. 21:8 and 21:9).
22. I agree with this observation. As I have stressed, rectification is available not to cure a party’s error in judgment in entering into a particular agreement, but an error in the recording of that agreement in a legal instrument. Alternatively put, rectification aligns the instrument with what the parties agreed to do, and not what, with the benefit of hindsight, they should have agreed to do. The parties’ mistake in *Juliar*, however, was not in the recording of their intended agreement to transfer shares for a promissory note, but in selecting that mechanism instead of a shares-for-shares transfer. By granting the sought-after change of mechanism, the Court of Appeal in *Juliar* purported to “rectify” not merely the instrument recording the parties’ antecedent agreement, but that agreement itself where it failed to achieve the desired result or produced an unanticipated adverse consequence — that is, where it was the product of an error in judgment. As J. Berryman observed (in *The Law of Equitable Remedies* (2nd ed. 2013), at p. 510):

In *Juliar*, the applicants had acted directly on the advice of their accountant. The accountant made a mistake as to the nature of the business ownership and the taxes that were paid prior to the arrangement he advised his clients to pursue. This is not a case for rectification. The clients intended to use the instrument given to them by their accountant. Their motive may have been to avoid tax but that is different from their intent which was to use the very form in front of them.

1. Secondly, even on its own terms, *Juliar*’s expansion of the availability of rectification cannot be justified. By way of explanation, in the case upon which Austin J.A. relied, *Re Slocock’s Will Trusts*, the plaintiff was the life beneficiary of her father’s residuary estate, with the capital and income after her death to be paid to her issue as she should appoint. She appointed her children to take after her death. Later, lands owned by her father’s family were sold to a development company, with the proceeds to be received and distributed by a management company in which the plaintiff received an allotment of shares, proportionate to her interest in the proceeds. After taking legal advice, the plaintiff and her children decided that she should surrender by deed her life interest in those proceeds as well as her shares in the management company (pp. 359-60). The deed, however, did not faithfully record the parties’ agreement, because it released only the plaintiff’s shares in the management company, and not her beneficial interest in the proceeds of sale (p. 360).
2. While the outcome sought by the plaintiff and her children would have also secured a tax advantage for the children (specifically, avoidance of capital transfer tax upon the plaintiff’s death), Graham J. granted rectification *not* to secure that tax advantage, but on the strength of his finding (*Re Slocock’s Will Trusts*, at p. 361) that the deed as recorded omitted the proceeds of the sale of the lands, thereby failing to record fully the terms of the parties’ original agreement. This was, therefore, an unremarkable application of rectification to cure an omission in the instrument recording an antecedent agreement. Nothing in *Re Slocock’s Will Trusts* justifies *Juliar*’s modified threshold for granting rectification solely to avoid an unanticipated tax liability. *Re Slocock’s Will Trusts* simply confirmed that, provided that the underlying mechanism by which the parties had agreed to seek a particular tax outcome was omitted or incorrectly recorded, and provided that all other conditions for granting rectification are satisfied, a court retains discretion to grant rectification. The focus of the inquiry remained properly fixed on whether that originally intended mechanism was properly recorded, and not on whether it achieved the desired tax outcome or resulted in a party incurring an undesired or unexpected tax outcome.
3. Subsequent English authorities confirm that *Re Slocock’s Will Trusts* created no distinct threshold for granting rectification in the tax context. In *Racal Group Services Ltd. v. Ashmore* (1995), 68 T.C. 86 (C.A.), the English Court of Appeal made clear that a mere intention to obtain a fiscal objective is insufficient to ground a claim in rectification: “. . . the court cannot rectify a document merely on the ground that it failed to achieve the grantor’s fiscal objective. The specific intention of the grantor as to how the objective was to be achieved must be shown if the court is to order rectification” (p. 106). Similarly, the court in *Ashcroft v. Barnsdale*,[2010] EWHC 1948, [2010] S.T.C. 2544 (Ch. D.), held that it could not rectify an instrument “*merely* because it fails to achieve the fiscal objectives of the parties to it”: para. 17 (emphasis in original). See also D. Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed. 2016), at para. 4-145:

A mere misapprehension as to the tax consequences of executing a particular document will not justify an order for its rectification. The specific intention of the parties (or the grantor or covenantor) as to how the objective was to be achieved must be shown if the court is to order rectification. [Emphasis deleted.]

1. Finally, *Juliar* does not account for this Court’s direction, in *Shell Canada Ltd. v. Canada*,[1999] 3 S.C.R. 622, at para. 45, that a taxpayer should expect to be taxed “based on what it actually did, not based on what it could have done”. While this statement in *Shell Canada* was applied to support the proposition that a taxpayer should not be denied a sought-after fiscal objective merely because others had not availed themselves of the same advantage, it cuts the other way, too: taxpayers should not be judicially accorded a benefit based solely on what they would have done had they known better.
2. This point goes to the respondents’ submission that “[r]ectification is necessary to . . . avoid unjust enrichment of the Crown” (R.F., at para. 76), echoing the Court of Appeal’s concern in *Juliar* (at paras. 33-34, quoting *Re Slocock’s Will Trusts*, at p. 363) for the Crown’s “accidental and unexpected windfall” and the chambers judge’s concern in the present appeal (at para. 44) about the CRA’s “unintended gain” and (at para. 52) the Crown’s “tax windfall”. With respect, the premise underlying such concerns misses the point of the inquiry, inasmuch as it concerns the CRA. Tax consequences, including those which follow an assessment by the CRA, flow from freely chosen legal arrangements, not from the intended or unintended effects of those arrangements, whether upon the taxpayer or upon the public treasury. The proper inquiry is no more into the “windfall” for the public treasury when a taxpayer loses a benefit than it is into the “windfall” for the taxpayer when that taxpayer secures a benefit. The inquiry, rather, is into what the taxpayer agreed to do. *Juliar* erroneously departed from this principle, and in so doing allowed for impermissible retroactive tax planning: *Harvest Operations Corp. v. Canada (Attorney General)*, 2015 ABQB 327, [2015] 6 C.T.C. 78, at para. 49.
   1. Two Further Concerns
3. Before applying the test for rectification — which test, I emphasize, is to be applied in a tax context just as it is in a non-tax context — to the facts of this appeal, I turn to two matters in need of clarification, the first of which was raised by the respondents.
   * 1. “Common Continuing Intention” to Avoid Tax Liability
4. The respondents argue that, in the case of a common mistake, it is unnecessary for the party seeking rectification to prove a prior agreement concerning the term or terms for which rectification is sought. Rather, they say that evidence of a “common continuing intention” — in this case, their common continuing intention that the value of the shares in FHIW and FHIS should be transferred in a way that would avoid immediate tax liability — should suffice to ground a grant of rectification.
5. This was, of course, the view of the Court of Appeal, both in *Juliar* and in the present appeal. The respondents also rely upon the decision of the English Court of Appeal in *Joscelyne v. Nissen*, [1970] 2 Q.B. 86, in which the court (at p. 95) approved of this statement of Simonds J. in *Crane v. Hegeman-Harris Co.*, [1939] 1 All E.R. 662:

. . . in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. . . . [I]t is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. [p. 664]

1. *Joscelyne*’s statement on the sufficiency of a common continuing intention has been adopted by the Ontario Court of Appeal in *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84, at para. 77, and the Newfoundland and Labrador Supreme Court in *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (C.A.), at paras. 23 and 27. It is not immediately apparent, however, that it supports the respondents’ position here. *Joscelyne*’s reference to “a common continuing intention in regard to a particular provision or aspect of the agreement”, coupled with its reference to the later discovery that “the formal instrument does not conform with that common agreement”, strongly suggests that — howsoever often *Joscelyne* has been taken as suggesting otherwise by Canadian courts — it does not posit that, in the case of a common mistake, anything less than a prior *agreement* with respect to the term to be rectified is sufficient to support a grant of rectification. While *Joscelyne* allows for situations in which a contract will be unenforceable until a corresponding written instrument is executed (for example, in the case of a transfer of an interest in realty) and for situations in which there may not have been agreement on all essential terms before the written instrument was executed, this does not detract from its implicit affirmation that rectification requires the parties to show an antecedent agreement with respect to the term or terms for which rectification is sought.
2. In any event, *Joscelyne* should not be taken as authorizing any departure from this Court’s direction that a party seeking to correct an erroneously drafted written instrument on the basis of a common mistake must first demonstrate its inconsistency with an antecedent agreement with respect to that term. In *Shafron*, this Court unambiguously rejected the sufficiency of showing mere *intentions* to ground a grant of rectification, insisting instead on erroneously recorded *terms*. As Denning L.J. said in *Frederick E. Rose (London) Ld. v. William H. Pim Jnr. & Co.*, [1953] 2 Q.B. 450 (C.A.), at p. 461 (quoted in *Shafron*, at para. 52):

Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties — into their intentions — any more than you do in the formation of any other contract.

1. This Court’s statement in *Performance Industries* (at para. 31) that “[r]ectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable” is to the same effect. The point, again, is that rectification corrects the recording in an instrument of an agreement (here, to redeem shares). Rectification does not operate simply because an agreement failed to achieve an intended effect (here, tax neutrality) — irrespective of whether the intention to achieve that effect was “common” and “continuing”.
2. In this regard, my colleague Justice Abella relies upon the chambers judge’s finding that “when the 2006 transaction was undertaken, Fairmont had an intent that at some point in the future [it] would have to deal with the unhedged position of [FHIW and FHIS] in a way that would be tax and accounting neutral although [it] had no specific plan as to how [it] would do that” (para. 33, cited by Abella J. at para. 87). In my respectful view, however, it was an error for the chambers judge to ascribe any significance to that finding. Rectification does not correct common mistakes in judgment that frustrate contracting parties’ aspirations or, as here, unspecified “plans”; it corrects common mistakes in instruments recording the terms by which parties, wisely or unwisely, agreed to pursue those aspirations. While my colleague suggests that the jurisprudence of this Court undermines this reasoning (paras. 79-85), 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: *Performance Industries*, at para. 37.
3. It therefore falls to a party seeking rectification to show not only the putative error in the instrument, but also the way in which the instrument should be rectified in order to correctly record what the parties intended to do. “The court’s task in a rectification case is corrective, not speculative”: *Performance Industries*, at para. 31. Where, therefore, an instrument recording an agreed-upon course of action is sought to be rectified, the party seeking rectification must identify terms which were omitted or recorded incorrectly and which, correctly recorded, are sufficiently precise to constitute the terms of an enforceable agreement. The inclusion of imprecise terms in an instrument is, on its own, not enough to obtain rectification; absent evidence of what the parties had specifically agreed to do, rectification is not available. While imprecision may justify setting aside an instrument, it cannot invite courts to find an agreement where none is present. It was for this reason that the Court in *Shafron* declined to enforce the restrictive covenant covering the “Metropolitan City of Vancouver”. The term was imprecise, but there was “no indication that the parties agreed on something and then mistakenly included something else in the written contract”: *Shafron*, at para. 57.
4. As is apparent from the reasons of my colleague Justice Wagner in *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, [2016] 2 S.C.R. 670, on this question both equity and the civil law are *ad idem*, despite each legal system arriving at that same conclusion via different paths — the former being concerned with correcting the document, and the latter focusing on its interpretation. This convergence is undoubtedly desirable in the context of applying federal tax legislation. More particularly, the cautionary note struck by the Court in *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838, at para. 54, regarding “common intention” as a factor in rewriting parties’ agreements under art. 1425 of the *Civil Code of Québec* — which precaution is expressly relied upon by Wagner J. in *Jean Coutu* (at para. 21) — is equally apposite in applying the equitable doctrine of rectification:

Taxpayers should not view this . . . as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to redo their contracts retroactively should that planning fail. A taxpayer’s intention to reduce his or her tax liability would not on its own constitute the object of an obligation within the meaning of art. 1373 *C.C.Q.*, since it would not be sufficiently determinate or determinable. Nor would it even constitute the object of a contract within the meaning of art. 1412 *C.C.Q.* Absent a more precise and more clearly defined object, no contract would be formed. In such a case, art. 1425 could not be relied on to justify seeking the common intention of the parties in order to give effect to that intention despite the words of the writings prepared to record it.

* + 1. Standard of Proof

1. The second point requiring clarification is the standard of proof. In *Performance Industries*, at para. 41, this Court held that a party seeking rectification will have to meet all elements of the test by “convincing proof”, which it described as “proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil ‘more probable than not’ standard”. This, as was observed in *Performance Industries*, was a relaxation of the standard from the Court’s earlier jurisprudence, in which the criminal standard of proof was applied: see *Ship M. F. Whalen*, at p. 127, and *Hart*, at p. 630, per Duff J.
2. In light, however, of this Court’s more recent statement in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40, that there is “only one civil standard of proof at common law and that is proof on a balance of probabilities”, the question obviously arises of whether the Court’s description in *Performance Industries* of the standard to which the elements of the test for obtaining rectification must be proven is still applicable.
3. In my view, the applicable standard of proof to be applied to evidence adduced in support of a grant of rectification is that which *McDougall* identifies as the standard generally applicable to all civil cases: the balance of probabilities. But this merely addresses the standard, and not the quality of evidence by which that standard is to be discharged. As the Court also said in *McDougall* (at para. 46), “evidence must always be sufficiently clear, convincing and cogent”. A party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed. A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party’s true, if only orally expressed, intended course of action. This idea was helpfully encapsulated, in the context of an application for rectification of a common mistake, by Brightman L.J. in *Thomas Bates and Son Ltd. v. Wyndham’s (Lingerie) Ltd.*, [1981] 1 W.L.R. 505 (C.A.), at p. 521:

The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties’ intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties’ intention because it is a document signed by the parties.

1. In brief, while the standard of proof is the balance of probabilities, the essential concern of *Performance Industries* remains applicable, being (at para. 42) “to promote the utility of written agreements by closing the ‘floodgate’ against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification”.
   1. Application to the Present Appeal
2. To summarize, rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties’ prior agreement. In the case of a unilateral mistake, the party seeking rectification must also show that the other party knew or ought to have known about the mistake and that permitting the defendant to take advantage of the erroneously drafted agreement would amount to fraud or the equivalent of fraud.
3. 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 [FHIW and FHIS] in a way that would be tax and accounting neutral although [it] had no specific plan as to how [it] would do that” (para. 33); and (2) the Court of Appeal’s description of Fairmont’s intention as being “to unwind [the Legacy transactions] on a tax free basis” (para. 7). 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. The error in the courts below is of a piece with the principal flaw I have identified in the Court of Appeal’s earlier reasoning in *Juliar*. 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.
4. Relatedly, the respondents do not show how Fairmont’s intention, held in common and on a continuing basis with FHIW and FHIS, was to be achieved in definite and ascertainable terms while unwinding the Legacy transactions. The respondents’ factum refers to “the original 2006 plan”, but that plan was not only imprecise: it really was not a plan at all, being at best an inchoate wish to protect, by unspecified means, FHIW and FHIS from foreign exchange tax liability.
5. The respondents’ application for rectification therefore fails at the first hurdle. They show no prior agreement whose terms were definite and ascertainable.
6. Conclusion and Disposition
7. I would allow the appeal, with costs in this Court and in the courts below.

The reasons of Abella and Côté JJ. were delivered by

1. Abella J. (dissenting) — I agree that there is no adjustment to the test for rectification if the context is a tax case. With respect, however, I do not agree that the test was not met in this case.
2. The doctrine of rectification has many strands. The jurisprudence addresses errors in the transcription and implementation of documents, different types of mistakes, the rights of third parties, and how the remedy applies in various legal contexts. A coherent approach to all of these strands flows from the underlying theory that parties should not be prevented from having their true intentions implemented because of these errors. It is, after all, an equitable remedy that seeks to prevent the unfairness that results from enforcing a mistake, including the unfairness inherent in unjust enrichment and windfalls.
3. I see the approach applied by my colleague as unduly narrowing its scope. A common, continuing, definite, and ascertainable intention to pursue a transaction in a tax-neutral manner has usually satisfied the threshold for granting rectification. The additional requirement that the parties clearly identify the precise mechanism by which they intended to achieve tax neutrality, and how that mechanism was mistakenly transcribed in a document, has the effect of raising the threshold and frustrating the purpose of the remedy. It also has the regrettable effect of imposing a narrower remedy in the common law than exists under civil law.
4. The Application Judge concluded that the intention of the parties had been mistakenly implemented and that rectification was justified. The Court of Appeal agreed. As do I. Based on the factual findings and the applicable jurisprudence, the threshold has been met. I would dismiss the appeal.

Background

1. Fairmont Hotels Inc. is a hotel management company. In 2002 and 2003, Fairmont agreed to help Legacy Hotels REIT, a Canadian real estate investment trust in which it owned a minority interest, finance the purchase of two hotels in Washington, D.C. and Seattle, Washington. For tax reasons, Legacy did not directly purchase the hotels. Instead, Legacy and Fairmont created a complex reciprocal loan structure, set up in U.S. dollars, whereby Legacy and Fairmont loaned each other money through their subsidiary corporations. The reciprocal loan structure was designed so that no foreign exchange gains or losses would be realized by Fairmont or its subsidiaries. It was expected to remain in place for 10 years.
2. In 2006, two companies, Kingdom Hotels International and Colony Capital LLC, purchased Fairmont. Fairmont’s tax advisors realized that the change of control would immediately cause Fairmont and its subsidiaries to experience net foreign exchange losses. Fairmont’s advisors, in a memo dated March 3, 2006, therefore initially proposed a plan to protect Fairmont and its subsidiaries from those losses. Under this plan, the reciprocal loan structure could later be unwound with a preferred share redemption without triggering any taxable foreign exchange gains. But the tax advisors of Kingdom Hotels and Colony Capital expressed concern that this plan would create other tax problems.
3. Fairmont, Kingdom Hotels, and Colony Capital eventually agreed on a *modified* plan, described in a memo dated March 23, 2006, in which Fairmont would realize certain accrued foreign exchange gains and losses while protecting itself from new gains and losses going forward. This modified plan did not address Fairmont’s subsidiaries, which, due to the acquisition, would no longer be protected from foreign exchange exposure. Fairmont was aware that its subsidiaries’ exposure would result in a taxable foreign exchange gain if the reciprocal loan structure was later unwound with a share redemption. Since the reciprocal loan structure was to remain in place for several more years, Fairmont decided that, at a later date, it would determine how to unwind the structure without a share redemption so that no accrued gains or losses would be triggered.
4. In 2007, Legacy asked Fairmont to end the reciprocal loan agreement ahead of schedule so that it could sell the two hotels it had acquired in 2003. Fairmont’s Vice-President of Tax, under the mistaken impression that it was the initial March 3, 2006 plan that had been implemented, instructed the directors of Fairmont’s subsidiaries to pass resolutions that would unwind the reciprocal loan structure with a share redemption. The directors passed these resolutions implementing the redemption of the preferred shares on September 14, 2007.
5. The share redemption would have been tax-neutral if the initial plan had in fact been the plan that was implemented. The result of the mistake was to trigger a significantly larger tax liability.
6. Fairmont learned of this mistake after an audit by the Canada Revenue Agency. It applied to the Ontario Superior Court of Justice to rectify the September 14, 2007 directors’ resolutions that had authorized the preferred share redemption. Newbould J. allowed rectification of these resolutions on the grounds that Fairmont never intended to redeem the preferred shares and always intended to unwind the reciprocal loan structure on a tax-neutral basis.
7. The Ontario Court of Appeal unanimously dismissed the appeal (Simmons, Cronk and Blair JJ.A.).

Analysis

1. Rectification is a centuries-old equitable remedy that gave courts discretion to correct “errors in integration” if signed documents did not reflect the true intention of the parties: see John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 589; see also Geoff R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 188-89. Where such an error occurs, “[t]he court will therefore put the agreement right . . . to conform with the parties’ true intentions” (S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at p. 240).
2. The available judicial discretion to retroactively implement the parties’ true intention has been described as follows:

The Court will not write a contract for businessmen or others but rather through the exercise of its jurisdiction to grant rectification in appropriate circumstances, it will reproduce their contract in harmony with the intention clearly manifested by them, and so defeat claims or defences which would otherwise unfairly succeed to the end that business may be fairly and ethically done . . . .

(*H. F. Clarke Ltd. v. Thermidaire Corp.*,[1973] 2 O.R. 57 (C.A.), at p. 65, per Brooke J.A., rev’d on other grounds, [1976] 1 S.C.R. 319, at pp. 323-24. See also Waddams, at pp. 240-41; G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 776; McCamus, at p. 587.)

1. While the remedy of rectification had been historically confined to cases of mutual mistake, in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678,this Court expanded its scope to include circumstances where the mistake was unilateral.
2. The rationale for the remedy is that no one should be allowed “to take unfair advantage of another’s mistake”: Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (7th ed. 2007), at p. 299; see also Hall, at pp. 190-91. In accordance with this purpose, rectification “should not be circumscribed by anomalous or artificial rules, but should be applied where appropriate in order to give better effect to equitable doctrines”: I. C. F. Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 632.
3. The test for rectification requires courts to assess the true intention of the parties:

In order for rectification to be available, it is necessary to identify a “true agreement” which precedes (and is not accurately recorded by) the written instrument. Such an agreement may itself be contained in a written instrument; but it may be oral, and need not itself have contractual force.

(*Snell’s Equity* (31st ed. 2005), by John McGhee, ed., at p. 332. See also Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 820; Angela Swan and Jakub Adamski, *Canadian Contract Law* (3rd ed. 2012), at pp. 772-73; Goff and Jones, at p. 295; *Hart v. Boutilier* (1916), 56 D.L.R. 20 (S.C.C.), at pp. 621-22 and 630; *Mitchell v. MacMillan* (1980), 5 Sask. R. 160 (C.A.), at para. 8; *Reed Shaw Osler Ltd. v. Wilson* (1981), 17 Alta. L.R. (2d) 81 (C.A.), at p. 89; *Bryndon Ventures Inc. v. Bragg* (1991), 82 D.L.R. (4th) 383 (B.C.C.A.), at pp. 402-3; *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (Nfld. C.A.), at para. 23; *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84, at para. 77.)

1. Nor does the parties’ prior intention have to amount to a fully enforceable agreement: *Joscelyne v. Nissen*, [1970] 2 Q.B. 86 (C.A.), followed in *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (H.C.J.), aff’d (1980), 26 O.R. (2d) 746 (C.A.). As Brown J. (as he then was) explained in *Graymar Equipment (2008) Inc. v. Canada (Attorney General)* (2014), 97 Alta. L.R. (5th) 288 (Q.B.):

Rectification is available . . . 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. [para. 36]

(See also *Snell’s Equity* (33rd ed. 2015), by John McGhee, at pp. 424-25; McCamus, at p. 558; Waddams, at p. 243.)

1. But the intention does have to be sufficiently clear and certain that courts can correct the error without resorting to speculation about what the parties had wanted to do in the first place: see *I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72.
2. While parties seeking rectification must provide evidence of what they actually intended, they are not required to provide “an expressed antecedent agreement in order to found a successful claim”: *Peter Pan Drive-In Ltd.*, at p. 296. Courts have long recognized that “the exact form of words in which the common intention is to be expressed is immaterial” (*McLean v. McLean* (2013), 118 O.R. (3d) 216 (C.A.), at para. 46, citing *Swainland Builders Ltd. v. Freehold Properties Ltd.*, [2002] EWCA Civ 560, at para. 34 (BAILII); see also *Co-operative Insurance Society Ltd. v. Centremoor Ltd.*, [1983] 2 E.G.L.R. 52 (C.A.), at p. 54, per Dillon L.J.; *Snell’s Equity* (33rd ed. 2015), at pp. 426-37). In other words, as Professor Swan explains:

. . . it is “sufficient if [the party] establishes a common continuing intention in regard to the particular provision in question”. There is no need to hedge the remedy about with requirements that are no more than technical and to require precise agreement on every point in the actual agreement to prevent the court from giving relief where it is clearly justified in doing so to prevent injustice. [Footnote omitted; p. 773.]

1. What matters instead is that the substance of the intention “can be ascertained with a reasonable level of comfort”: *Performance Industries*, at para. 47. In ascertaining these intentions, courts are free to make logical inferences based on the evidence before them. In *McLean*, for example, a husband and wife transferred property to their son and daughter-in-law. The wife later sought rectification of the memorandum of agreement that contained the terms of the transfer, claiming that the total purchase price was incorrect. The Ontario Court of Appeal rectified the memorandum even though it was not immediately obvious what the correct price was supposed to be. The court deduced the correct price based on “the totality of the evidence”, noting that “[o]nly when the related documents are considered as a whole does the intention of the parties emerge”: paras. 60 and 62. Similarly, in *Royal Bank of Canada v. El-Bris* *Ltd.* (2008), 92 O.R. (3d) 779 (C.A.), a business owner mistakenly signed a personal guarantee for $700,000 *and* a collateral mortgage for the same amount, when he had only intended to create one debt obligation. The Ontario Court of Appeal allowed rectification of both the guaranteed loan and the mortgage based on the true intention of the parties, even though the mechanics of the necessary corrective transactions had never been previously set out.
2. Whether a mistake is unilateral or mutual, rectification is, ultimately, an equitable remedy that seeks to give effect to the true intention of the parties, and prevent errors from causing windfalls. The doctrine is also “based on simple notions of relief against unjust enrichment”, namely, that it would be unfair to rigidly enforce an error that enriches one party at the expense of another: Waddams, at p. 240. As Professor Waddams notes, “[t]he doctrine is a far-reaching and flexible tool of justice” (p. 243). (See also McInnes, at pp. 820-21; Fridman, at pp. 782-83; *El-Bris*, at paras. 13 and 36; *McLean*, at para. 73; Patrick Hartford, “Clarifying the Doctrine of Rectification in Canada: A Comment on *Shafron v. KRG Insurance Brokers (Western) Inc.*”(2013), 54 *Can. Bus. L.J.* 87, at p. 88.)
3. The common law principles of rectification were recently applied in *Shafron* *v.* *KRG Insurance Brokers (Western) Inc.*, [2009] 1 S.C.R. 157. *Shafron* involved an employment contract that included a restrictive covenant, prohibiting Mr. Shafron from working as an insurance broker in the “Metropolitan City of Vancouver” for three years after his employment with KRG Western ended. “Metropolitan City of Vancouver” was not a legally defined term, but Mr. Shafron thought it referred to the City of Vancouver, while KRG Western thought it referred to the larger Greater Vancouver Regional District.
4. KRG Western applied to rectify the contract by substituting “Greater Vancouver Regional District” for “Metropolitan City of Vancouver”, to prevent Mr. Shafron from working as an insurance broker in the suburb of Richmond. The Court held that rectification was unavailable because KRG Western could not establish that there had been a prior agreement in which “Metropolitan City of Vancouver” was defined in sufficiently precise terms.
5. While I acknowledge that rectification seems most often to have been granted in the context of agreed upon terms having been *transcribed* incorrectly, since unjust enrichment can also result from a mistake in *carrying out* the intention of the parties, the remedy is also available to correct errors in implementation. Courts have, as a result, granted rectification where a corporate transaction was conducted in the wrong sequence (*GT Group Telecom Inc., Re* (2004), 5 C.B.R. (5th) 230 (Ont. S.C.J.)), where an underlying calculation in a contract was incorrect (*Oriole Oil & Gas Ltd. v. American Eagle Petroleums Ltd.* (1981), 27 A.R. 411 (C.A.)), and where the requisite steps of an amalgamation were not correctly carried out (*Prospera Credit Union, Re* (2002), 32 B.L.R. (3d) 145 (B.C.S.C.)).
6. Whether the errors are in transcription or in implementation, courts may refuse to exercise their discretion where allowing rectification would prejudice the rights of third parties (*Wise v. Axford*,[1954] O.W.N. 822 (C.A.)). But the mere existence of a third party will not bar rectification. In *Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354, this Court concluded that the presence of a third party is only a bar to rectification where the third party has actually relied on the flawed agreement. This principle was subsequently explained by Gray J. in *Consortium Capital Projects Inc. v. Blind River Veneer Ltd.* (1988), 63 O.R. (2d) 761 (H.C.J.), at p. 766, aff’d (1990), 72 O.R. (2d) 703 (C.A.): “. . . the proper test is whether the third party relied on the document as executed and took action based on that document”. (See also McCamus, at p. 595; Spry, at pp. 630-31; *Kolias v. Owners: Condominium Plan 309 CDC* (2008), 440 A.R. 389 (C.A.); *Carlson, Carlson and Hettrick v. Big Bud Tractor of Canada Ltd.* (1981), 7 Sask. R. 337 (C.A.), at paras. 24-26.)
7. This is consistent with one of the underlying purposes of rectification, namely to prevent unjust enrichment: Waddams, at p. 240; *El-Bris*,at paras. 13 and 36; *McLean*,at para. 73. Just as rectification can prevent one party from enforcing an error and being unjustly enriched by the other’s mistake, rectification can also prevent a third party who has not relied on the agreement from enforcing a mistake and receiving a windfall. This theory was on display in *Love v. Love*, [2013] 5 W.W.R. 662 (Sask. C.A.). The Saskatchewan Court of Appeal allowed the rectification of a life insurance contract, in which a husband had designated his wife as the beneficiary of his life insurance policy. When the couple divorced, the husband completed a new form to designate his son as the policy’s beneficiary instead of his former wife. He filled the paperwork out incorrectly. After he died, the former wife and the son both attempted to claim the proceeds of the insurance policy. The court rectified the contract to reflect what it saw as the husband’s true intention, namely to designate his son as the beneficiary.
8. This brings us to the tax context.
9. Allowing the tax authorities, a third party, to profit from legitimate tax planning errors, when its own rights have not been prejudiced in any way, amounts to unjust enrichment. Businesses and individuals are legally entitled to structure their affairs in a way that minimizes their tax burden. The General Anti-Avoidance Rule in s. 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), for example, permits transactions that are primarily designed to avoid taxes so long as they do not circumvent the *Act* in an abusive manner: *Copthorne Holdings Ltd. v. Canada*, [2011] 3 S.C.R. 721, at para. 32. There is, as a result, an inherent unfairness in enforcing errors in transcription or implementation that result in allowing the tax authorities to collect a windfall.
10. It is true that a taxpayer should expect to be taxed based on what is actually done, not based on what could have been done (*Shell Canada Ltd. v. Canada*,[1999] 3 S.C.R. 622, at para. 45), but this principle does not deprive equity of a role where what a party or parties genuinely intended to do was transcribed *or* implemented incorrectly.
11. On the other hand, parties should not be given *carte blanche* to exploit rectification for purposes of engaging in retroactive tax planning. Courts will not permit parties to undo decisions simply because they have come to regret them later. 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.
12. As the trial judge noted in *Kanji v. Canada (Attorney General)* (2013), 114 O.R. (3d) 1 (S.C.J.), “[t]ax-driven claims for rectification must be approached with care since common sense tells us that most taxpayers would like to minimize the amount of tax they must pay to the government”: para. 36. The British Columbia Court of Appeal expressed similar views in *Pallen Trust, Re* (2015), 385 D.L.R. (4th) 499, when it said:

Carrying out a fact-focussed analysis should ensure that the “social evil” of aggressive tax avoidance can, where it is just to do so, be appropriately disincentivized, and on the other hand that where the taxpayer’s conduct has been reasonable . . . he or she is not unfairly penalized . . . . [para. 53]

1. How then should rectification be seen in the tax context? In my view, the two most helpful common law cases on rectification in the tax context were decided by the Ontario Court of Appeal. In *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739 (C.A.), a purchaser utilized a company she owned to buy property, intending to minimize her personal income tax. She erroneously thought that her company was an Ontario company and assumed that she would pay the residential land transfer tax rate of 2 percent. The company, it turned out, was subject to the higher rate of 20 percent. This mistake resulted in a liability of $1.7 million instead of $84,745. The court denied rectification on the grounds that this was an “attemp[t] to rewrite history in order to obtain more favourable tax treatment” (p. 742). The purchaser intended the transaction to minimize her income tax — which it did — and was simply caught off-guard by land transfer tax consequences.
2. A different result occurred in *Canada (Attorney General) v. Juliar* (2000), 50 O.R. (3d) 728 (C.A.). Two couples co-owned a company through which they operated a convenience store chain. They decided to split the business into two separate corporations so that each couple could operate independently. They mistakenly believed, based on an erroneous assumption by their tax advisor, that this would not trigger any immediate income taxes. When it did, they applied for rectification. Austin J.A. granted the remedy, stating:

. . . the true agreement between the parties here was the acquisition of the half interest in the . . . tobacco business . . . in a manner that would not attract immediate liability for income tax.

. . .

. . . The plain and obvious fact . . . is that the proposed division had to be carried out on a no immediate tax basis or not at all. [paras. 25 and 27]

1. The Court of Appeal distinguished this case from *Bramco* on the grounds that the couples’ intention to avoid income tax was a primary and continuing objective of the transaction, whereas in *Bramco* the concern over the land transfer tax arose only after the transaction had been completed.
2. I am aware that this distinction has attracted some negative commentary: Lionel Smith, “Can I Change My Mind? Undoing Trustee Decisions” (2008), 27 *E.T.P.J.* 284, at pp. 289-90; Swan and Adamski, at pp. 768-69. But in my view, the Court of Appeal’s decision to allow rectification in *Juliar* can easily be explained by — and flows seamlessly from — the factual findings of the Application Judge in that case. In particular, the decision to grant rectification resulted from the factual finding that the Juliars had a continuing, ascertainable intention to pursue the transaction on a tax-free basis or not at all. Seen in this way, *Juliar* did not relax the standards for rectification in the tax context. Rather, it represents a straightforward application of the test for rectification: see Joel Nitikman, “Many Questions (and a Few Possible Answers) About the Application of Rectification in Tax Law” (2005), 53 *Can. Tax J.* 941, at p. 963.
3. Nor do I accept the floodgates concern that courts will be unable to distinguish between legitimate mistakes and attempts at retroactive tax planning. Those courts which have applied *Juliar* appear to have very comfortably recognized the distinction. Sometimes rectification was granted (see *McPeake v. Canada (Attorney General)*, [2012] 4 C.T.C. 203 (B.C.S.C.), at paras. 21-22 and 46; *Slate Management Corp. v. Canada (Attorney General)*, 2016 ONSC 4216, at paras. 10 and 16 (CanLII); *Fraser Valley Refrigeration, Re*, [2009] 6 C.T.C. 73 (B.C.S.C.), at paras. 22-24 and 48, aff’d (2009), 280 B.C.A.C. 317). But at other times, it was denied because, while the parties had a general desire to minimize their tax burden, they could not prove that the tax objective was an intended and fundamental aspect of the transaction: *Birch Hill Equity Partners Management Inc. v. Rogers Communications Inc.* (2015), 128 O.R. (3d) 1 (S.C.J.), at paras. 32 and 40-41; *Binder v. Saffron Rouge Inc.* (2008), 89 O.R. (3d) 54 (S.C.J.), at paras. 16-18 and 22-25; *Re:* *Aboriginal Diamonds Group*, 2007 NWTSC 37, at paras. 38-43 (CanLII); *Zhang v. Canada (Attorney General)*, 2015 DTC 5084 (B.C.S.C.), at paras. 21 and 34; *Husky Oil Operations Ltd. v. Saskatchewan (Minister of Finance)* (2014), 443 Sask. R. 172 (Q.B.), at paras. 417 and 424-25; *JAFT Corp. v. Jones* (2014), 304 Man. R. (2d) 86 (Q.B.), at paras. 31, 39 and 43-44, aff’d (2015), 323 Man. R. (2d) 57 (C.A.); *Capstone Power Corp. v. 1177719 Alberta Ltd.*,2016 BCSC 1274, at paras. 27-54 (CanLII); *Kanji*, at paras. 22 and 33.
4. This brings us to this Court’s most recent, and in my view most pertinent, discussion of rectification in the tax context in the companion appeals of *AES* and *Riopel*: *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, [2013] 3 S.C.R. 838. Although LeBel J. expressly declined to comment on *Juliar* because he was applying the *Civil* *Code of Québec*, he took an approach to the rectification of tax planning errors consistent with *Juliar*.
5. In *AES*, the company underwent a reorganization which involved transferring 25 percent of its shares to a subsidiary. It intended that this transaction be tax-neutral, but AES’s advisors made an error when calculating the value of the shares, resulting in a large, unintended, and entirely avoidable tax liability. Similarly, in the companion appeal of *Riopel*, a couple attempted to amalgamate two companies. To minimize taxes, they structured the amalgamation in a particular sequence of transactions that involved selling shares, and issuing new shares and promissory notes. The couple’s tax advisors erroneously enacted the sequence out of order, resulting in a significant tax liability. LeBel J. explained that under the *Code*, if the true intention is erroneously expressed in writing, courts will rectify the mistake as long as the intention was sufficiently precise:

. . . the dispute in the two appeals before us necessarily concerns the [Agence du revenu du Québec] and the [Canada Revenue Agency]. Because of their situations, it must be asked whether they can rely on acquired rights to have an erroneous writing continue to apply even though the existence of an error has been established and it has been shown that the documents filed with the tax authorities are inconsistent with the parties’ true intention.

. . .

. . . For now, therefore, what must be determined is the true nature of the operations transacted in *AES* and *Riopel*. . . . This Court must decide whether the parties’ juridical acts, which led to the notices of assessment, are consistent with their true common intention and whether the tax authorities are entitled to have an erroneous declaration of intention continue to apply. [paras 44-46]

1. Rectification was granted in both *AES* and *Riopel* based on these principles. As LeBel J. explained, “the agreements between the parties in both appeals were validly formed in that . . . they provided for obligations whose objects were sufficiently determinable”: para. 54.
2. LeBel J. concluded that “the tax authorities do not have an acquired right to benefit from an error made by the parties to a contract after the parties have corrected the error by mutual consent”: *AES*, at para. 52. In other words, the tax authorities were not entitled to get a windfall from the errors. But he also warned that these principles do not allow parties to engage in retroactive tax planning:

Taxpayers should not view this recognition of the primacy of the parties’ internal will — or common intention — as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to redo their contracts retroactively should that planning fail. [para. 54]

1. The requirements for rectification in the tax context articulated in *AES* are, in my respectful view, functionally equivalent to the test under the common law. Civil law and common law rectification in the tax context are clearly based on analogous principles, namely, that the true intention of the parties has primacy over errors in the transcription or implementation of that agreement, subject to a need for precision and the rights of third parties who detrimentally rely on the agreement.
2. That means that there is no principled basis in either the common or civil law for a stricter standard in the tax context simply because it is the government which is positioned to benefit from a mistake. The tax department is not entitled to play “Gotcha” any more than any other third party who did not rely to its detriment on the mistake.
3. Notably, both *AES* and *Riopel* involved errors of implementation: the error in *AES* was a faulty calculation and the error in *Riopel* was that a complex transaction was conducted in the wrong sequence. The application of rectification in these circumstances clearly confirms that rectification is *not* confined only to correcting terms that were omitted, accidentally added, or articulated incorrectly in a written document, but is no less available when the parties’ true intention is erroneously implemented.
4. In the case before us, as the Application Judge noted, this was not a situation where Fairmont merely misapprehended the consequences of unwinding the reciprocal loan structure with a share redemption. Newbould J. made explicit findings of fact that Fairmont had a continuing intention *never* to unwind the reciprocal loan structure by redeeming the preferred shares, because doing so would trigger taxable exchange gains or losses. The parties, he concluded, were aware that unwinding the reciprocal loan structure with a share redemption would trigger a substantial tax liability, and expressly agreed in emails and in-person discussions that “no redemption of the preferred shares should occur at any time”. They agreed to decide at a later date what the exact mechanics of unwinding the reciprocal loan structure in a tax-neutral way would be.
5. Relying on this evidence, Newbould J. concluded 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 [Fairmont’s subsidiaries] would not be redeemed in light of the modified plan that was carried out at that time*.

I also think a fair conclusion from the evidence . . . that when the 2006 transaction was undertaken, Fairmont had an intent that at some point in the future they would have to deal with the unhedged position of [Fairmont’s subsidiaries] in a way that would be tax and accounting neutral although they had no specific plan as to how they would do that. [Emphasis added.]

((2014), 123 O.R. (3d) 241, at paras. 32-33)

1. Newbould J. was accordingly satisfied that Fairmont had an unwavering intention to unwind the reciprocal loan structure in a way that ensured that any foreign exchange gains and losses would be offset against each other:

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. . . .

I do not see this as a case in which tax planning has been done on a retroactive basis after a [Canada Revenue Agency] audit. The purpose of the 2007 unwind of the loans was not to redeem the preference shares of [Fairmont’s subsidiaries], 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. [paras. 42-43]

1. This means that Fairmont was not attempting to change its original intention because of unanticipated tax consequences. It *had* anticipated the tax consequences of unwinding the reciprocal loan structure with a preferred share redemption, and it rejected this course of action.
2. Fairmont was found by Newbould J. to have always had a clear, continuing intention to unwind the reciprocal loan structure on a tax-neutral basis and never to redeem the preferred shares. But, by mistake, the preferred share redemption terms were included in the directors’ resolutions. This is exactly the kind of mistake rectification exists to remedy. Once Newbould J. was satisfied of the true intention of the parties, he was entitled to give effect to it by allowing the replacement loan arrangement terms to be inserted into the directors’ resolutions.
3. To require an exhaustive account of how the transaction was supposed to have proceeded would amount to imposing a uniquely high threshold for rectification in the tax context. As Newbould J. explained, denying the application to rectify the agreement in these circumstances would “give [the Canada Revenue Agency] an unintended gain because of the mistake”: para. 44. There is no basis for permitting a windfall to the Canada Revenue Agency that no other third party would have been entitled to.
4. I would dismiss the appeal with costs.

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

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