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Tax Law for Corporate/Commercial Transactions

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How and When You Can Fix Mistakes: Rectification, Rescission and Other Tools

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HOW AND WHEN YOU CAN FIX MISTAKES: RECTIFICATION, RESCISSION AND OTHER TOOLS

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INTRODUCTION

Everybody makes mistaxes.[1]

Some mistakes, maybe even most, can be fixed at limited costs. Others at higher costs. Sometimes they can't be fixed at all.

There can be all sorts of consequences from mistakes in corporate and commercial documents. A fairly common consequence is increased tax liability.

This paper will review some of the legal tools for fixing mistakes in corporate and commercial documents. Specifically, I will review common law rectification and rescission and some useful provisions of the *Business Corporations Act*.

I will then try to provide some ideas on how to help you and your clients deal with mistakes, both when you are drafting documents and after.

RECTIFICATION – "YOUR HONOUR, IT REALLY SHOULD HAVE SAID…"

Rectification is an equitable remedy that allows the applicant (or applicants) to obtain a court order changing the wording of a legal document.

The law regarding rectification has been significantly clarified (or changed, depending on your perspective) since the Supreme Court of Canada's decision in *Canada (Attorney General) v Fairmont Hotels Inc* ("*Fairmont*").[2]

Before *Fairmont*

Fairmont is best understood in relation to the Ontario Court of Appeal decision in *Juliar v Canada (Attorney General)* ("*Juliar*").[3] *Juliar* is best known for allowing rectification if the court finds the parties had a "common, continuing intention" even when there was not an antecedent agreement. As such, *Juliar* significantly expanded when rectification could be used.

Not all jurisdictions adopted *Juliar*, and in a decision that would foreshadow his ruling in *Fairmont*, R.S. Brown J wrote in *Graymar Equipment (2008) Inc v Canada (Attorney General)* ("*Graymar*") that "[w]hile, therefore, rectification is available in order to avoid a tax disadvantage which the parties

[1] In keeping with this sentiment, any errors the reader finds here are entirely intentional to prove this point.

[2] 2016 SCC 56.

[3] [2000] OJ No 3706 (ONCA).

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