COURT FILE NUMBER **Q.B. No. 1455 of 2019**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE SASKATOON

IN THE MATTER OF SECTION 204 OF *THE BUSINESS CORPORATIONS ACT*, RSS 1978, c B-10

AND IN THE MATTER OF THE VOLUNTARY LIQUIDATION AND DISSOLUTION OF PRIMEWEST MORTGAGE INVESTMENT CORPORATION

BRIEF OF LAW

ON BEHALF OF KPMG INC., IN ITS CAPACITY AS LIQUIDATOR OF PRIMEWEST MORTGAGE INVESTMENT CORPORATION

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INTRODUCTION

1. Generally speaking, the liquidation and dissolution of a corporation is the process by which the ongoing operations of the same are brought to an end, its assets are realized and the proceeds derived from that realization are distributed among the creditors and the shareholders of the corporation in accordance with their respective entitlements.[1] Pursuant

[1] Kevin McGuinness, *The Law and Practice of Canadian Business Corporations*, (Markham: Butterworths Canada, 1999) at 1170. **Tab 1**

to this purpose, the liquidator is charged with ensuring that all of the estate of the corporation is settled, including both claims for and against the estate, in the simplest and least expensive way, and to distribute the assets of the corporation in the quickest possible way avoiding needless delay and expense inherent in standard litigation proceedings outside of the liquidation process, by litigation in other courts.[2] And it is with regard, in particular, to this latter duty that KPMG Inc., in its capacity as liquidator (the "**Liquidator**") of PrimeWest Mortgage Investment Corporation ("**PrimeWest**" or the "**Corporation**"), is compelled to seek the advice and direction of this Honourable Court in the discharge of its powers and assistance in carrying out the terms of the Liquidation Order and the Claims Process Order (as those terms are defined below).

2. Specifically, the Liquidator seeks an Order declaring that the allegations against Dan Anderson, Tom Archibald, Francis Bast, et al. in Q.B. No. 1727 of 2018 (the "**Class Action**") constitute a Claim pursuant to and subject to the Claims Process Order of the Honourable Mr. Justice N.G. Gabrielson dated January 10, 2020 (the "**Claims Process Order**"), and that all matters and issues in regard to the Class Action shall be determined in the Liquidation Proceedings (as that term is defined below) in such manner and procedure as prescribed by further Order of this Honourable Court.

FACTS

3. In October of 2019, PrimeWest brought an originating application pursuant to various sections of *The Business Corporations Act*,[3] seeking the voluntary liquidation and dissolution of the Corporation. Included in that application was a draft Order with the Liquidation Plan for PrimeWest appended thereto as Schedule "A" (the "**Liquidation Plan**").

4. Following service of such originating application, Merchant Law Group LLP ("**MLG**") opposed the draft Order, on behalf of the Class Action claimants, arguing that the directors of PrimeWest should not be permitted to avoid potential legal liability in the Class Action by virtue of the Corporation having sought voluntary liquidation and dissolution. In support of this position, on October 25, 2019, Anthony Merchant, Q.C., wrote to this Court with the following "primary" submissions, excerpts of which are reproduced here for convenience:

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[2] Kevin McGuinness, *The Law and Practice of Canadian Business Corporations*, (Markham: Butterworths Canada, 1999) at 1172. **Tab 1**
[3] RSS 1978, c B-10.

…

The Liquidation Application being made today concerns only one Applicant, being PrimeWest Mortgage Investment Corporation, which corporation is seeking relief under the *Business Corporations Act*.

MLG acts as counsel for Randy Koroluk, who is the plaintiff in a proposed class proceeding commenced in Regina on June 12, 2018. The original Statement of Claim for the same class action can be found at Exhibit "M" of the Affidavit of Marlene Kaminsky, sworn on October 9, 2019 (although an Amended Statement of Claim was filed on December 3, 2019, and that Amended Claim has not been placed before the Court by the Applicant). **The same class proceedings, being *Koroluk v. Anderson et al.*, has not named the Applicant Corporation (PrimeWest) as a Defendant -- and any reference to Mr. Koroluk's action (being QBG 1727 of 2018, Judicial Centre of Regina) should be remove [sic] from any Order, Plan, or other documentation that may be approved by the Court (or employed by the Liquidator).**

The claims made in Mr. Koroluk's action include assertions that the individual defendants to his class action acted recklessly or inappropriately, in their personal capacities. Respectfully, there are allegations of malfeasance by these individual defendants and whether the Applicant Corporation is appropriately entitled to seek liquidation, does not obviate the legal liability of individual defendants in a separate piece of litigation.

…

Amongst other things, whether valid indemnification agreements existed or not, at times relevant to the Koroluk class action, is immaterial (and would be immaterial to any plaintiff). Any defendant might have a hold-harmless or indemnification agreement regarding a specific type of liability, but that is an issue to be worked out *between an indemnifier and indemnified party* – i.e. the possible existence of an indemnification agreement (from a solvent or insolvent indemnifier) does not result in a Court simply striking a given party as a defendant in a lawsuit.

If the Applicant Corporation meets the legal standards and test for an Order of voluntary liquidation and dissolution, the Court may find that such a liquidation order should be granted. But the individual defendants to Mr. Koroluk [sic] class action are not seeking (and cannot seek) under the *Business Corporations Act* on [sic] order for voluntary liquidation and dissolution.

The suggestion by the Applicant that the individual defendants to the Koroluk Action can obviate their legal liabilities (without the allegations in Mr. Koroluk's class action being tried) simply because the Application seeks voluntary liquidation, is inappropriate and respectfully is an approach that should be rejected by this Court.

> The Applicant has not (and to MLG's knowledge cannot) put before the Court any applicable case law for that suggested approach, i.e.: granting to individual defendants to another action (where an Applicant Corporation is not even a co-defendant) a full discharge of their legal liabilities.
>
> ALL OF WHICH IS RESPECTFULLY SUBMITTED TO THIS HONOURABLE COURT. [Emphasis added]

5. On October 31, 2019, a hearing took place before this Court on the originating application, wherein Mr. Merchant appeared and made submissions.

6. Following this hearing, this Court issued the Order of the Honourable Mr. Justice N.G. Gabrielson dated October 31, 2019 (the "**October 31 Liquidation Order**"), wherein Article 14 of the draft Order was revised at Mr. Merchant's request to remove reference to the directors of PrimeWest, as follows:

> No Proceeding shall be commenced or continued against any of the former or current officers ~~or directors~~ of the Corporation with respect to any Claim, except with leave of this Court.

7. However, Mr. Merchant did not at that hearing request removal of the reference to the Class Action contained at Article 2(b) of that draft Order which read:

> 2. **For greater certainty, the definition of "Claim" in the Liquidation Plan and this Order includes but is not limited to**:
>
> (a) the following Court of Queen's Bench actions in which the Corporation is named as a defendant or defendant-by-counterclaim, as the case may be:
>
> (i) QB No. 1559 of 2017;
>
> (ii) QB No. 1889 of 2018;
>
> (iii) QB No. 1395 of 2018;
>
> (b) **the Court of Queen's Bench action commenced against certain current and former directors of the Corporation in QBG No. 1727 of 2018**. [Emphasis added]

8. Further, Mr. Merchant also did not request any amendment to the definition of "Claim" as contained in the Liquidation Plan, which is defined as:

> (a) any right of any Person against the Corporation in connection with any indebtedness, liability or obligation of any kind of the Corporation and any interest accrued thereon or costs payable in respect thereof, whether liquidated, unliquidated, reduced to judgment, fixed, contingent, matured,

unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any claim made or asserted against the Corporation through any affiliate or associate or any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future with respect to any matter, action, cause or chose in action; and

(b) **any existing or future right of any Person against any one or more of the Directors which arose or arises as a result of such Director's position, supervision, management or involvement as a Director or otherwise in any other capacity in connection with the Corporation**, whether such right, or the circumstances giving rise to it, arose before or after the Effective Date and whether enforceable in any civil, administrative or criminal proceeding…. [Emphasis added]

9. On November 4, 2019, Mr. Merchant wrote counsel for PrimeWest to request an amendment to the October 31 Liquidation Order, stating:

> We should jointly return to the Court for rectification under the slip rule. Perhaps you have noticed that the Order of October 31, 2019 unwittingly leaves the liquidation plan lame, contradictory, and embarrassing.
>
> Mr. Justice Gabrielson has in effect decided that QBG No. 1727 of 2018 be excluded from the liquidation proceedings, but it is still included in paragraph 2(b) of the Order.
>
> This will cause problems when the liquidator seeks Court approval for the claims process. If the class action is not resolved before dissolution, the plan leaves your client with no option but to settle. Consider paragraph 8 of the Order in light of Thursday's proceedings.
>
> Paragraph 2(b) of the Order needs to be deleted.
>
> We will apply. Will you consent?

10. On November 6, 2019, counsel for PrimeWest replied to Mr. Merchant, stating that, although Mr. Merchant's characterization of the October 31 Liquidation Order was rejected in its entirety, Mr. Merchant's proposed amendment would be accommodated:

> I am in receipt of your correspondence of November 4, 2019 wherein you request a further amendment to the form of Order that has been granted by Mr. Justice Gabrielson. Specifically, you have asked that Section 2(b) of the Order be deleted in its entirety.
>
> **I am not going to comment further on your characterization of the current form of Order as referenced in your most recent letter other than to state that we**

> **reject it in its entirety**. Having said that, it is very much the goal of PrimeWest Mortgage Investment Corporation to focus its remaining resources on an orderly liquidation in as expeditious and efficient manner as possible and so **my instructions are to accommodate your request as it does not appear to be actively harmful to the process**.
>
> Given that no other party appears to be impacted by it my suggestion is that we simply correspond with the Court and advise that the request for the change has been made and agreed to without further comment. Obviously, it is in the best interests of all stakeholders to minimize ongoing court applications and this would appear to be the most effective mechanism to accommodate your request at the least possible cost and inconvenience to the parties.
>
> If you are in agreement then please execute the attached Consent Order. The only change that has been made is that referenced in this correspondence. Immediately upon receipt of the executed Order, I will request that the Registrar post the Order in front of Mr. Justice Gabrielson and, assuming that he is comfortable with proceeding in this manner, will then arrange to issue and serve the Order on the entire service list. Conversely, if the court is not comfortable and a formal application is required then we will make the appropriate arrangements in that regard. [Emphasis added]

11. Following the submission of the above-referenced Consent Order, this Court issued the Amended and Restated Order of the Honourable Mr. Justice N.G. Gabrielson, dated November 25, 2019, (the "**Liquidation Order**") with Mr. Merchant's requested change to Article 2(b).

12. Following confirmation of its appointment and authority pursuant to the Liquidation Order, the Liquidator proceeded diligently with its mandate, including obtaining from the Court, and carrying out its attendant duties under, the Claims Process Order.

13. On January 30, 2020, Mr. Merchant delivered to counsel for the Liquidator an appearance day notice requesting that this Court provide further direction that the Class Action is excluded from the within liquidation proceedings (the "**Liquidation Proceedings**").

14. For the reasons outlined in the Liquidator's the Notice of Application, the Liquidator now is compelled to seek the advice and directions of this Honourable Court in order that it may continue to carry out its court-supervised mandate.

ISSUES

15. **Purpose of Liquidation and Dissolution:** should the Class Action be included in the Liquidation Proceedings, having regard to the well-established purpose of liquidation and dissolution?

16. **Interpretation of the Liquidation Order:** should the Liquidation Order be interpreted as including the Class Action in the Liquidation Proceedings, having regard to the well-established principles of interpretation of orders of the court?

17. **Variation of the Liquidation Order:** should the Liquidation Order be varied to exclude the Class Action from the Liquidation Proceedings?

ARGUMENT

I. In accordance with the purpose and intent of liquidation and dissolution proceedings—namely, the realization of a corporation's assets and resolution of disputes/liabilities—the Class Action should be included in the Liquidation Proceedings.

18. The purpose of the liquidation and dissolution of a corporation is to ensure an orderly end to its corporate existence through the realization and distribution of its assets and resolution of disputes in which it is involved:

> **The winding-up of a corporation is the process by which the ongoing operations of a corporation are brought to an end**, its assets are realized, its liabilities discharged, the persons liable to contribute to any shortfall are identified and collected from **and in connection therewith all necessary accountings are made, and disputes concerning it are settled or otherwise resolved**….
>
> The liquidator acts as a receiver and manager of the corporation (as well as of its assets) for the purpose of closing up the corporation's business, realizing its assets and making a legal distribution of those assets among the creditors and shareholders of the corporation. The similarity between bankruptcy and winding-up proceedings is that the **purpose of both is to get all of the estate of the corporation settled, both the claims for and against the estate, in the simplest and least expensive way, and to distribute the assets in the quickest possible way without incurring needless delay and expense by litigation in other courts**.[4] [Emphasis added]

[4] Kevin McGuinness, *The Law and Practice of Canadian Business Corporations*, (Markham: Butterworths Canada, 1999) at 1167 & 1172. **Tab 1**

19. Accordingly, integral to its mandate is the role of the Liquidator to ensure that all claims potentially impacting the assets of PrimeWest be determined expeditiously and with the least expense as practicable in the Liquidation Proceedings.

20. Proofs of Claim have been filed by the former directors of PrimeWest claiming indemnity from and against the Corporation regarding the Class Action. It is alleged by such directors that this indemnity against PrimeWest would include:

> All costs, charges and expenses, including (i) an amount paid to settle or dispose of an action or to satisfy a judgment or an award, (ii) all damages, whether punitive, exemplary or otherwise including penalties or fines levied, and (iii) all legal, professional or advisory fees and disbursements.

21. A Proof of Claim has also been filed by Ernst & Young Inc. ("**EY**"), a co-defendant in the Class Action along with the former directors, claiming indemnity from and against the Corporation in regard to the Class Action.

22. In filing such Proofs of Claim, the former directors of PrimeWest and EY have, in effect, made the Corporation a third party to the Class Action.

23. Not only as a basic matter of straightforward interpretation, but as a matter of interpretation of court orders as prescribed by the jurisprudence discussed in the next section of this Brief of Law, the Liquidator has determined that the allegations contained in the Class Action constitute a Claim.

24. Although the basis for such determination, being a matter of law guided by prior caselaw, does not depend upon the fact of the filing of the Proofs of Claim by the former directors and EY in the Claims Process, it is *bolstered* by the existence of those claims, being that the determination of such claims against the Corporation is "bound up" with determination of the Class Action.

25. Moreover, the Liquidator is not proposing to determine the Class Action summarily but, rather, that the Class Action and the related claims of the former directors and EY be determined by this Honourable Court in such manner and procedure as prescribed by further Order of the Court. In this way, the Liquidator can fulfil its mandate of having all such claims determined expeditiously and with the least expense as practicable in the Liquidation Proceedings, while at the same time, under the advice and direction of the Court,

preserving and protecting the rights of the parties to due process, including the Class Action claimants.

26. In the respectful submission of the Liquidator, excluding the Class Action from the Liquidation Proceedings raises the spectre of undischarged potential liabilities for PrimeWest in separate and protracted court proceedings, devoid of oversight by the Liquidator or this supervising Court. This is exactly what liquidation and dissolution proceedings are designed to avoid.

27. Based on all of the foregoing, it is the Liquidator's interpretation pursuant to its role as Court Officer in the Liquidation Proceedings that it is appropriate for the Class Action to be determined in the Liquidation Proceedings.

II. The Class Action is included in the Liquidation Proceedings as a matter of straightforward interpretation of the Orders of this Honourable Court in the Liquidation Proceedings.

28. Interpreting the provisions of a court order involves examining the pleadings of the action in which it is made, its language and the circumstances in which the order was granted. As held by the Saskatchewan Court of Appeal in *Campbell v Campbell*:

> 14 As a preliminary matter, let me deal with the father's argument that the review clause must be construed similar to a clause in a contract. The review clause is not a contract and resort to contractual interpretation and principles is misplaced. Once the review clause was incorporated into the judgment it became part of a court order and principles regarding interpretation of court orders apply.
>
> 15 These principles have been set forth in a number of cases. In *Sutherland v. Reeves*, 2014 BCCA 222, 61 B.C.L.R. (5th) 308 (B.C. C.A.), Bauman C.J.B.C. stated:
>
> > [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
> >
> > > [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, **whether by consent or awarded in an adjudicated disposition**, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, **the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted**.[Emphasis added.]

> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.

16 In *Sans Souci Ltd. v. VRL Services Ltd.*, [2012] UKPC 6 (Jamaica P.C.), Lord Sumption reached the same conclusion:

> [13] ... The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.

17 In *Sharpe, Re*, [1992] FCA 616 (Australia Fed. Ct.), the Court stated:

> [20] ... even if a judgment is not ambiguous, it is nevertheless proper (if not essential) in construing it to have regard to the factual context in which the judgment was given and that this context includes the pleadings, the reasons for the judgment and the course of evidence at the trial.[5]

29. With this jurisprudence in mind, the respectful submission of the Liquidator, to assist this Honourable Court in its capacity as Court Officer, is that the language of the Liquidation Order expressly provides for the inclusion of the Class Action in the Liquidation Proceedings. Namely, the Liquidation Order incorporates the following definition of "Claim" from the Liquidation Plan:

> (a) any right of any Person against the Corporation in connection with any indebtedness, liability or obligation of any kind of the Corporation and any interest accrued thereon or costs payable in respect thereof, whether liquidated, unliquidated, reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, secured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any claim made or asserted against the Corporation through any affiliate or associate or any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action,

[5] *Campbell v Campbell*, 2016 SKCA 39 at paras 14-17. **Tab 2**

cause or chose in action, whether existing at present or commenced in the future with respect to any matter, action, cause or chose in action; and

(b) **any existing or future right of any Person against any one or more of the Directors which arose or arises as a result of such Director's position, supervision. management or involvement as a Director or otherwise in any other capacity in connection with the Corporation,** whether such right, or the circumstances giving rise to it, arose before or after the Effective Date and whether enforceable in any civil, administrative or criminal proceeding….[Emphasis added]

30. The removal of Article 2(b) from the October 31 Liquidation Order at Mr. Merchant's request does nothing to alter this conclusion. At bottom, Article 2 does not limit the definition of "Claim" whatsoever.

31. Moving to the pleadings and surrounding circumstances, Mr. Merchant's prior written submissions to the Court for the October 31 hearing focus on what he characterized as an attempt by the directors of PrimeWest to "obviate" their legal liabilities through the voluntary liquidation of the Corporation. As a result, reference to "directors" of PrimeWest was removed from Article 14 of the Liquidation Order, restricting its application to officers:

> No Proceeding shall be commenced or continued against any of the former or current **officers** of the Corporation with respect to any Claim, except with leave of this Court [Emphasis added].

32. However, on November 4, 2019, Mr. Merchant wrote to counsel to PrimeWest requesting that the October 31 Liquidation Order be amended to remove the explicit reference to the Class Action contained at Article 2(b) such Order. As outlined in the Facts section of this Brief of Law, counsel to PrimeWest accommodated Mr. Merchant's request, as it did "not appear to be actively harmful to the [liquidation] process". While the aforementioned exchange of correspondence provides context, it does not aid in the interpretation of the October 31 Liquidation Order itself because, as noted by the Court in *Campbell*, "the interpretation of the order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made".[6]

33. Based on the foregoing, the Liquidator's interpretation of the resulting Liquidation Order vis-à-vis the Class Action is that:

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[6] *Campbell v Campbell*, 2016 SKCA 39 at para 20. **Tab 2**

a. the customary stay of proceedings contained in liquidation orders in favour of directors was removed at the request of Mr. Merchant, with the effect that the Class Action may continue against the directors unfettered by such customary stay; and
b. the Class Action has never been excluded from the definition of "Claim" or the Liquidation Proceedings.

III. The final Liquidation Order was a consent order and cannot now be varied.

34. Mr. Merchant's appearance day notice requests that this Court provide further direction on the final Liquidation Order and declare that it excludes the Class Action from the Liquidation Proceedings.

35. Rule 10-11 of the *Rules* provides the basis upon which applications for directions on court orders are permitted:

> **10-11**(1) Subject to subrule (2), the Court may make a further or other order and give further or other remedy that the Court considers may be required if in an action:
>
> (a) a judgment has been pronounced or an order has been made and the judgment or order has been formally drawn up and entered; and
>
> (b) it subsequently appears that further directions are necessary in order to insure to the party entitled to the benefit of the judgment or order the remedy to which he or she is entitled, whether costs or otherwise.
>
> (2) The Court may give further or other remedy only if it does not necessitate any variation of the judgment or order as to any matter decided by the original judgment or order.

36. As held by the Saskatchewan Court of Appeal in *Montreal Trust Co. v Williston Wildcatters Corp*., Rule 10-11 "does not give the court jurisdiction to change the substance of the judgment or order."[7] Accordingly, as a preliminary observation, it is respectfully submitted that reliance by the Class Action claimants on Rule 10-11 to alter the substance of the Liquidation Order is not appropriate.

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[7] *Montreal Trust Co. v Williston Wildcatters Corp*., 2009 SKCA 85 at para 40, wherein, the Court was interpreting the former iteration of Rule 10-11, namely, Rule 344. **Tab 3**

37. In terms of varying the final Liquidation Order, as held by the Saskatchewan Court of Appeal in *Gustafson v Future Four Agro Inc*., courts do not have complete discretion to vary consent orders, and any such discretion is to be exercised on principles of contract law:

> … The appellant does not seek relief in relation to a contravention of or failure to comply with *The Queen's Bench Rules*. **He seeks to vary a consent order, which is a very different matter.** *Coulthard* does not stand for the proposition that a Chambers judge always has almost complete discretion to extend a time limit, in the interests of justice, regardless of the context or the nature or source of the time limit.
>
> …
>
> This language recognizes that there are circumstances in which a consent order could be varied or set aside which do not constitute common mistake, fraud, collusion, misrepresentation, duress or illegality. However, it does not mean a court can vary a consent order if there has been a "material change of circumstances" which would be insufficient to either vitiate the underlying contract or justify non-performance based on the law of contract.
>
> …
>
> For these reasons, the Chambers judge did not, as suggested by the appellant, have a broad discretion to grant the relief sought if he concluded it was fair or in the interests of justice to do so. In this context, it bears emphasizing that if the appellant had been correct as to the test for variation, the existence of the fully executed Contract which was implemented by the Consent Order would have weighed very heavily in the analysis in any event. In our view, the bottom line decision by the Chambers judge is both fair and just.[8] [Emphasis added]

38. Here, the Class Action claimants have not put forward any basis to vary the final Liquidation Order pursuant to the principles of contract law. But for the purposes of expounding this issue, discussed below is the equitable doctrine of rectification which provides for the variation of contracts by courts.

39. Notably, the doctrine of rectification is only available in relatively narrow situations wherein an instrument does not accurately record a party's agreement regarding what was to be done. But it cannot be used to change an agreement in order to salvage what a party hoped to achieve. As held by the Supreme Court of Canada in *Canada (Attorney General) v Fairmont Hotels Inc.*:

> 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…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**

[8] *Gustafson v Future Four Agro Inc*., 2019 SKCA 68 at para 22, 29, & 33. **Tab 4**

> **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.[9]

40. In the matter presently before this Court, the evidence does not support the finding of a mutual mistake in drafting but, if anything, a unilateral mistake regarding the effect of the amendment to the October 31 Liquidation Order requested by Mr. Merchant. While Mr. Merchant may well have intended to exclude the Class Action from the Liquidation Proceedings, that was not what he achieved. Indeed, there is nothing whatsoever to indicate that the consent of counsel for PrimeWest was based on anything other than the desire to expeditiously move forward with the liquidation:

> I am not going to comment further on your characterization of the current form of Order as referenced in your most recent letter other than to state that we reject it in its entirety. Having said that, it is very much the goal of PrimeWest Mortgage Investment Corporation to focus its remaining resources on an orderly liquidation in as expeditious and efficient manner as possible and so my instructions are to accommodate your request as it does not appear to be actively harmful to the process.

41. It is further worth pointing out that consent by the Corporation to the exclusion of the Class Action would have been contrary to the well-established objectives of a liquidation.

42. In this case, both counsels had access to the Liquidation Order and the schedules attached thereto and were independently responsible for reading and considering their implications.

43. As observed by the Manitoba Court of Appeal in *Elias et al v Western Financial Group Inc*., rectification is not to be used as a substitute for due diligence.[10] While rectification can be invoked in cases of unilateral mistake, this is limited to cases involving fraud or the equivalent of fraud on behalf of the party resisting rectification.[11] There is obviously nothing in the instant case to indicate any fraud or conduct equivalent to fraud on behalf of PrimeWest in consenting to the proposed amendment.

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[9] *Canada (Attorney General) v Fairmont Hotels Inc*., 2016 SCC 56 at para 3. **Tab 5**
[10] *Elias et al v Western Financial Group Inc*, 2017 MBCA 110 at para 123. **Tab 6**
[11] *Canada (Attorney General) v Fairmont Hotels Inc*., 2016 SCC 56 at para 15. **Tab 5**

CONCLUSION

The Liquidator has brought this application seeking the direction of this Honourable Court regarding the contents of the final Liquidation Order. The wording of this Order clearly includes the Class Action in the Liquidation Proceedings. Such inclusion eminently accords with the general purpose of liquidation and dissolution proceedings. Accordingly, the Liquidator respectfully requests and recommends, as Officer of the Court, that this Honourable Court grant the relief sought herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 8th day of June, 2020.

THE W LAW GROUP LLP

PER: _____

Mike Russell and Nick Conlon,
Solicitors for the Applicant, KPMG Inc.

THIS DOCUMENT WAS DELIVERED BY:

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TO: ALL RECIPIENTS LISTED ON THE SERVICE LIST

TABLE OF AUTHORITIES

TAB 1

B. VOLUNTARY WIND-UP PROCEDURES UNDER THE OBCA

§11.5 Although a corporation is a separate legal person from its shareholders, it is axiomatic that the purpose of a corporation is to serve the interests of its shareholders. It is they, or their predecessors, who brought the corporation into existence. Similarly, they are entitled at any time to terminate the corporation. Thus subsection 193(1) of the OBCA provides that the shareholders of a corporation may "require the corporation to be wound up voluntarily" by a special resolution to that effect. A corporation is wound up where its assets are realized and the proceeds derived from that realization are distributed among the creditors and the shareholders of the corporation in accordance with their respective entitlements.[7] The corporation does not cease to exist by reason only of the wind-up, but in most cases an application will be made to dissolve the corporation once the wind-up is complete. Moreover, the powers of the corporation (and its directors and shareholders) are curtailed once the wind-up commences, so that although the corporation does not lose its status by reason of the commencement of winding-up proceedings, the capacities and powers of the corporation are limited to the extent that those powers and capacities are necessary for the purpose of the winding-up.[8]

§11.6 In order to commence a voluntary liquidation and dissolution of a corporation, it is necessary to comply with the procedures set out in the OBCA or the CBCA, as applicable.[9] Except where a corporation has only a few shareholders, the normal procedure in a voluntary winding-up is to call a special meeting of the members to consider a special resolution[10] to wind up the corporation. Generally, the same rules apply to any such meeting as would apply to any special meeting of the corporation. In particular, specific notice of the proposed resolution must be incorporated into the notice of the meeting given to the shareholders,[11] and there must, of course, be a sufficient number of shares and shareholders represented at the meeting to satisfy the requirements of a quorum (this last requirement can be burdensome where the shareholders remaining in the corporation have little remaining interest in the corporation). The resolution itself must be approved (with or without amendment) by two-thirds of the votes cast at the meeting.

§11.7 As might be imagined, there are several unique aspects of a meeting called to consider the voluntary wind up of a corporation. A decision to liquidate a corporation is not purely a private matter, since it may affect the rights of outsiders to the corporation. Accordingly, within 10 days of the approval by the

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7 *Re Irma Co-operative Co.* (1924), 5 C.B.R. 367 (Alta. T.D.), *per* Tweedie J. at p. 372.

8 *Re Canadian Cereal & Flour Mills Co.* (1921), 2 C.B.R. 158 (Ont. S.C. in bank.), *per* Orde J. at p. 160.

9 *Duncan & Gray Ltd. v. Silver Spring Brewery*, [1925] 3 W.W.R. 675 (B.C.S.C.).

10 OBCA, s. 193(1).

11 See, generally, *Re Essex Centre Manufacturing Co.* (1890), 19 O.A.R. 125 (C.A.), *per* Osler J.A. at pp. 128-29.

disposal of its assets are taken from the directors and placed in the hands of the liquidator.[13] The liquidator acts as a receiver and manager of the corporation (as well as of its assets) for the purpose of closing up the corporation's business, realizing its assets and making a legal distribution of those assets among the creditors and shareholders of the corporation.[14] The similarity between bankruptcy and winding-up proceedings is that the purpose of both is to get all of the estate of the corporation settled, both the claims for and against the estate, in the simplest and least expensive way, and to distribute the assets in the quickest possible way without incurring needless delay and expense by litigation in other courts.[15]

§11.11 A liquidator appointed by the shareholders under subsection 193(2) of the OBCA is seen to act as the agent of the shareholders — that is, the shareholders generally, rather than any individual shareholder. The shareholders may remove the liquidator by an ordinary resolution passed at a meeting called for that purpose.[16] In general, where the shareholders vote to remove a liquidator, they must appoint a replacement. However, section 194 of the Act provides that the shareholders of the corporation may delegate to a committee of inspectors the power of appointing the liquidator and filling vacancies in appointments.

§11.12 Aside from the power to appoint a replacement liquidator and the power to approve arrangements with creditors, the precise role of the inspectors is vague. In practice, they tend to exercise much the same function as the inspectors in a bankruptcy. Important matters will invariably be referred to the inspectors by the liquidator for their opinion. However, the OBCA itself is very vague as to the nature of their responsibilities.[17] In England, the incorporators have the following powers by statute:

- to fix the remuneration of the liquidator;
- to sanction continuance of the powers of the directors;
- to sanction payments to creditors and the compromise of claims;
- to sanction a reconstruction of the company;
- to determine what books and records should be kept by the company, and to approve the disposal of books and records of the corporation;
- to give instructions concerning the interim investment of funds.

At least some of these powers are inconsistent with the Ontario legislation. For instance, subsection 193(2) of the Act empowers the shareholders of a corpora-

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13 *Re Farrows Bank Ltd.*, [1921] 2 Ch. 164 (C.A.), *per* Lord Sterndale M.R.

14 *Partington v. Cushing* (1906), 3 N.B. Eq. 322 (S.C.).

15 See, generally, *Re Toronto Wood & Shingle Co.* (1894), 30 C.L.T. 353 (H.C.), *per* the Master in Ordinary, at p. 356.

16 OBCA, s. 196.

17 Under subsection 227(2), the inspectors may approve the depository into which money of the corporation is paid.

TAB 2

2016 SKCA 39
Saskatchewan Court of Appeal

Campbell v. Campbell

2016 CarswellSask 180, 2016 SKCA 39, [2016] 8 W.W.R. 631, [2016] W.D.F.L. 3282, [2016] S.C.J. No. 149, 264 A.C.W.S. (3d) 694, 399 D.L.R. (4th) 265, 476 Sask. R. 185, 666 W.A.C. 185, 78 R.F.L. (7th) 64

Shaun Norman Campbell, Appellant (Petitioner) and Kristin Ann Campbell, Respondent (Respondent)

Ottenbreit, Herauf, Whitmore JJ.A.

Heard: September 24, 2015
Judgment: March 22, 2016
Docket: CACV2663

Counsel: Sherry L. Fitzsimmons, for Appellant
Tiffany M. Paulsen, Q.C., for Respondent

Subject: Contracts; Family

Related Abridgment Classifications

Family law
X Custody and access
X.11 Variation of custody order
X.11.a Material change in circumstances

Headnote

Family law --- Custody and access — Variation of custody order — Factors to be considered — Material change in circumstances
Father and mother were separated in September 2009 and divorced in February 2012 — Father and mother entered into interspousal agreement in relation to custody, parenting time, child support and other issues in 2011 when their twins were seven years old — Terms of interspousal agreement with respect to parenting arrangements were incorporated into consent divorce judgment, child support and parenting order — Pursuant to order, primary residence for children was with mother — Father applied to vary terms of order — Chambers judge found that father had not discharged onus on him to demonstrate material change that adversely affected needs of children — Father appealed judgment dismissing application to vary parenting arrangements set forth in consent divorce judgment dated January 5, 2012 — Appeal allowed — Review clause of interspousal agreement created second avenue for review and avoided necessity of proving material change in circumstances — Party relying on review clause had onus of proving that current parenting arrangement was no longer meeting needs of children — Chambers judge failed to determine whether evidence as whole allowed for better fulfillment of children's needs — Assessment of needs of children in accordance with review clause was required.

Table of Authorities

Cases considered by *Ottenbreit J.A.*:

Balzer v. Balzer (2003), 2003 CarswellOnt 6398 (Ont. S.C.J.) — considered

Gordon v. Goertz (1996), [1996] 5 W.W.R. 457, 19 R.F.L. (4th) 177, 196 N.R. 321, 134 D.L.R. (4th) 321, 141 Sask. R. 241, 114 W.A.C. 241, [1996] 2 S.C.R. 27, *(*sub nom. *Goertz c. Gordon)* [1996] R.D.F. 209, 1996 CarswellSask 199, 1996 CarswellSask 199F (S.C.C.) — followed

Kemery v. Kemery (2012), 2012 SKCA 130, 2012 CarswellSask 850, 405 Sask. R. 231, 563 W.A.C. 231, 30 R.F.L. (7th) 87 (Sask. C.A.) — considered

Miglin v. Miglin (2003), 2003 SCC 24, 2003 CarswellOnt 1374, 2003 CarswellOnt 1375, 34 R.F.L. (5th) 255, 224 D.L.R. (4th) 193, 302 N.R. 201, 171 O.A.C. 201, [2003] 1 S.C.R. 303, 66 O.R. (3d) 736, 2003 CSC 24 (S.C.C.) — referred to

O'Reilly's Irish Bar Inc. v. 10385 Nfld. Ltd. (2006), 2006 NLCA 26, 2006 CarswellNfld 124, 255 Nfld. & P.E.I.R. 292, 768 A.P.R. 292 (N.L. C.A.) — referred to

Sans Souci Ltd. v. VRL Services Ltd. (2012), [2012] UKPC 6 (Jamaica P.C.) — considered

Sappier v. Francis (2004), 2004 NBCA 70, 2004 CarswellNB 514, 2004 CarswellNB 515, 8 R.F.L. (6th) 218, *(*sub nom. *F. (S.) v. S. (L.))* 276 N.B.R. (2d) 183, *(*sub nom. *F. (S.) v. S. (L.))* 724 A.P.R. 183 (N.B. C.A.) — considered

Sather v. McCallum (2006), 2006 ABCA 290, 2006 CarswellAlta 1271, 32 R.F.L. (6th) 233 (Alta. C.A.) — considered

Sharpe, Re (1992), [1992] FCA 616 (Australia Fed. Ct.) — considered

Sutherland v. Reeves (2014), 2014 BCCA 222, 2014 CarswellBC 1661, 61 B.C.L.R. (5th) 308, 357 B.C.A.C. 46, 611 W.A.C. 46 (B.C. C.A.) — considered

Wiegers v. Gray (2008), 2008 SKCA 7, 2008 CarswellSask 10, 47 R.F.L. (6th) 1, [2008] 4 W.W.R. 225, 307 Sask. R. 117, 417 W.A.C. 117, 291 D.L.R. (4th) 176 (Sask. C.A.) — followed

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to

s. 9(2) — considered

s. 17(5) — considered

APPEAL from judgment dismissing application to vary parenting arrangements set forth in consent divorce judgment.

***Ottenbreit J.A.*:**

I. Introduction

1 Shaun Norman Campbell (the father) appeals a Court of Queen's Bench Chambers decision dated December 17, 2014, dismissing an application to vary parenting arrangements set forth in a consent divorce judgment dated January 5, 2012. For the reasons hereinafter set forth, the appeal is allowed.

II. Facts and Background

2 The father and Kristin Ann Campbell (the mother) were separated in September 2009 and divorced in February 2012. They have twin daughters, Hailey and Hanna, now aged 12. The mother and the father entered into an interspousal agreement

(interspousal agreement) in relation to custody, parenting time, child support and other issues in 2011 when the twins were approximately seven years old.

3 The terms of the interspousal agreement with respect to parenting arrangements were incorporated into a consent divorce judgment, child support and parenting order (order). Pursuant to the order, the primary residence for the children was with the mother. The father had specified parenting time. The order also incorporated the following provision (review clause) from the parties' interspousal agreement:

> 2(d) This parenting plan shall be open for review in the event of a material change in circumstances affecting the children or in the event that the current parenting arrangement is no longer meeting the children's needs. In that event, either party may trigger a review. The review shall proceed to mediation initially with the party who triggered the review to be solely responsible for the costs associated with same;

4 In December 2013, the father applied to vary the terms of the order. He wanted to increase his parenting time within a four-week rotation from 9 days to 12 1/2 days including two full weekends, have less exchanges of the twins between the parties, and avoid early morning exchanges. He also wanted equal sharing of summer holidays. In January 2014, in accordance with the terms of the review clause, the mother and father were directed to attend four sessions of high-conflict mediation prior to either party being permitted to return the application to the Chambers list. No agreement was reached at the mediation and, as a result, the application was eventually heard by the Chambers judge.

5 Between them, the parties filed at least six affidavits before the Chambers judge. The affidavits were voluminous and detailed and, as one might expect, represented the factual thrust and parry of conflicting interpretations of what transpired between the parties and the twins since separation, and the circumstances of the lives of the parties and the twins as at the date of application. The affidavits of the father focussed on facts tending to establish that a variation was necessary and the affidavits of the mother focussed on facts tending to show the contrary. The father's affidavits outlined changes in his personal life: he had married, had a new home, benefited from two incomes and had greater assistance with child care. For the purposes of this decision, the facts need not be set out in detail although I will refer to certain of the facts with respect to the arguments of the parties.

III. Decision of the Chambers Judge

6 The Chambers judge referred to s. 17(5) of the *Divorce Act*, RSC 1985, c 3 (2d Supp) [*Act*], which governs variation of parenting orders. He also referred to the jurisprudence governing variation and the two-stage test as reflected in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.) [*Gordon*], and *Wiegers v. Gray*, 2008 SKCA 7, [2008] 4 W.W.R. 225 (Sask. C.A.) [*Gray*]. He observed that a parent seeking to vary a custody order must pass the first stage and meet a high threshold, *i.e.*, demonstration of a material change that will adversely affect the needs of the child. The Chambers judge also enunciated some of the principles governing variation applications: a material change must be to the child's circumstances, not merely to the circumstances of the party, and passage of time is itself not a material change.

7 After analyzing the review clause, the Chambers judge determined initially that its wording did not provide an additional basis to vary the parenting arrangement apart from the material change criteria required under s. 17(5) of the *Act* and *Gordon*. He questioned if it could be interpreted to provide an additional basis to vary the parenting arrangement and whether it could be given effect given what he perceived to be the mandatory direction of s. 17(5). He did not elaborate or provide any analysis on that last point.

8 Nevertheless, he stated he would proceed as if the review clause did create a second distinct and permissible test to vary the parenting arrangement. He concluded as follows:

> [12] If it creates a different test, as I interpret the words used, the conflicting evidence does not satisfy me that the current parenting arrangement is no longer meeting the children's needs. Their needs are being met. This language does not specify that their needs must be met to the highest potential level or some other standard. It simply requires their needs to be met.

> [13] Based upon the conflicting evidence before me I am not able to find a material, pivotal or fundamental change that will adversely affect the needs of the children. Their needs now are essentially the same needs they had when the judgment issued. What has changed is the petitioner's circumstances, not the needs of the children. The fact of the petitioner remarrying and obtaining housing that is better able to accommodate more parenting of the children was entirely predictable at the time of the agreement between the parties and at the time of the consent judgment, as was the certainty that the children would grow older. The petitioner has not discharged the onus on him to demonstrate a material change that adversely affects the needs of the children. I do not get beyond the first stage of the two-stage inquiry.

He dismissed the father's application to vary.

IV. Issues

9 The father raises issues which can conveniently be restated as follows:

> A. Did the Chambers Judge err by determining that the review clause did not contain a second and permissible test for review and variation of the parenting arrangements absent a material change in circumstances?
>
> B. Did the Chambers Judge err in his application of the review clause to the evidence before him?
>
> C. Did the Chambers Judge err by deciding the matter in Chambers rather than directing the matter to a Pre-Trial Conference?
>
> D. Did the Chambers Judge err by accepting a Brief of Law on behalf of the Respondent but refusing leave to counsel for the Appellant to file materials in response?
>
> E. Did the Chambers Judge err by awarding costs in favour of the Respondent?

V. Analysis

A. Did the Chambers Judge err by determining that the review clause did not contain a second and permissible test for review and variation of the parenting arrangements absent a material change in circumstances?

10 The father contends the Chambers judge erred by ultimately not construing the review clause as containing a provision for variation independent of the material change criteria. He submits that the parties to the interspousal agreement and order agreed to two distinct bases for changing the parenting arrangements which were reflected in the review clause and that the second part of the review clause is independent of whether there is a material change of circumstances. He submits he need only show "the current parenting arrangement is no longer meeting the children's needs" to justify a variation. The father argues that the review clause is like a contract and that meaning must be given to it as a bargain to review parenting without the constraints of the material change test under s. 17(5) of the *Act*.

11 The mother argues that the Chambers judge correctly interpreted the review clause and his decision must, on the basis of a stringent standard of review, be accorded the highest deference. The mother makes little argument on what the words of the clause mean, but instead refers to the judge's reliance on s. 17(5) of the *Act* and its application to the clause and the high threshold which someone applying for a variation must meet.

12 This high threshold was set forth in *Gray* at paras 13 and 14, where this Court, following *Gordon*, held that a variation under s. 17(5) of the *Act* requires a two-stage inquiry:

> (i) the reviewing judge must first determine if there has been a material change in the condition, means, needs or other circumstances of the children adversely affecting them, and
>
> (ii) if the applicant has demonstrated such material change, the court must decide whether such change is in the best

interests of the children.

In other words, if the threshold of a material change has been crossed only then should the judge consider the best interests of the children with reference to that change.

13 With this in mind, I turn to the analysis of the review clause.

14 As a preliminary matter, let me deal with the father's argument that the review clause must be construed similar to a clause in a contract. The review clause is not a contract and resort to contractual interpretation and principles is misplaced. Once the review clause was incorporated into the judgment it became part of a court order and principles regarding interpretation of court orders apply.

15 These principles have been set forth in a number of cases. In *Sutherland v. Reeves*, 2014 BCCA 222, 61 B.C.L.R. (5th) 308 (B.C. C.A.), Bauman C.J.B.C. stated:

> [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
>
> > [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
> >
> > [Emphasis added.]
>
> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.

16 In *Sans Souci Ltd. v. VRL Services Ltd.*, [2012] UKPC 6 (Jamaica P.C.), Lord Sumption reached the same conclusion:

> [13] ... The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.

17 In *Sharpe, Re*, [1992] FCA 616 (Australia Fed. Ct.), the Court stated:

> [20] ... even if a judgment is not ambiguous, it is nevertheless proper (if not essential) in construing it to have regard to the factual context in which the judgment was given and that this context includes the pleadings, the reasons for the judgment and the course of evidence at the trial.

18 With this jurisprudence in mind, I will examine the language of the order, the pleadings and the circumstances in which the order was made. I turn, first, to the language of the review clause. A plain reading of the review clause and the presence of the word "or" in the second line of the clause shows that the clause is disjunctive and, on its face, contains two possibilities for review of the parenting arrangement: (a) a material change in circumstances affecting the children, or (b) the current parenting arrangement is no longer meeting the children's needs. The second part of the review clause would be

unnecessary if the clause as a whole only purported to address variation where there is a material change in circumstances. I say this because the words "material change in circumstances" found in the first part of the clause are well known and usually connote the two-stage test for variation set forth in *Gordon* and the principles surrounding its application. The additional language of the second part of the review clause would be unnecessary or redundant if the clause as a whole only purported to refer to the test in *Gordon*. The structure and language of the review clause therefore suggests that it allows a second avenue of review apart from a variation application based on material change.

19 The second analytical factor, the pleadings leading up to the issuance of the judgment, provides no assistance to the interpretation of the review clause. The review clause was part of a consent order and there were no pleadings touching on the issue of interpretation of the clause. There are no reasons for judgment which might inform the interpretation of the review clause. There was no evidence tendered in court prior to the issuance of the order which might help inform an interpretation of it.

20 In this Court, the parties argue that they filed affidavit material before the Chambers judge which spoke to each of their intentions with respect to the review clause prior to the order being issued and to the issue of how the review clause might be interpreted. The affidavits show the father did not want to be in a position where, when making an application to change parenting, he would be required to show that the threshold for variation had been crossed. He resisted incorporation of the parenting provisions including the review clause. The mother wanted finality to the parenting arrangements. A long process of negotiations ensued. It would appear that the parties never did agree on the interpretation of the review clause. Nevertheless, the father eventually agreed to the incorporation of the parenting provisions, including the review clause, into the judgment. Evidence of the parties' intention is therefore of no assistance. However, on the basis of the jurisprudence mentioned earlier, the interpretation of the order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made.

21 In this case, the meaning of the review clause must be found within the wording and structure of the clause itself. On that basis, it is my view the review clause purports to create a second avenue of variation apart from one based on material change and the test in *Gordon*.

22 The Chambers judge doubted whether s. 17(5) of the *Act* permitted the review clause to set up an independent avenue for review despite its wording. The father argues that s. 17(5) of the *Act* does not preclude a second avenue for review and cites the cases of *Kemery v. Kemery*, 2012 SKCA 130, 405 Sask. R. 231 (Sask. C.A.), and *Balzer v. Balzer*, 2003 CarswellOnt 6398 (Ont. S.C.J.) (WL). However, a review of these cases shows that neither of them stand for that proposition.

23 Although there is no case directly on point, there is some jurisprudence which indirectly suggests that the *Act* is not an impediment to such a clause. In *Sather v. McCallum*, 2006 ABCA 290, 32 R.F.L. (6th) 233 (Alta. C.A.), the parties had by agreement inserted a clause into a custody order to review the issue of parenting after mediation. There was no reference in the clause to a necessary change in circumstances. There was no dispute on appeal that the clause did not require the parties to show a material change. The Court agreed with the parties' positions and stated:

> [7] We agree with the parties that para. 3 of the divorce judgment allowed for court review of the residential issue, and we are satisfied that para. 3 contemplated a review and not a variation requiring a change of circumstance. It follows that the chambers judge erred in deciding the issue solely on the basis of no change of circumstance. The effect of our decision, however, is to leave open the question of the children's residence.

24 In *Sappier v. Francis*, 2004 NBCA 70, 8 R.F.L. (6th) 218 (N.B. C.A.), a custody and access order provided for a court-ordered review six months after it had been made. When the matter came to a Chambers judge for review, he dismissed the matter because there had been no change in circumstances. On appeal, the NBCA stated:

> [9] I agree with the submission of Ms. Francis that the original order provided for an automatic review hearing to take place within six months of the date of the first decision. The review therefore had to be conducted keeping in mind the best interests of the children. The reviewing judge erred in a number of ways. There was no onus on either party to prove a change in circumstances as a threshold to having the decision reviewed. ... Thirdly and most importantly, in deciding any question with respect to custody, the analytical framework to be used is the enumerated criteria found in the Act's definition of "best interests of the child." ...

25 These two cases show that court orders can either on the agreement of the parties or at the behest of the court contain variation provisions which do not require a material change in circumstances.

26 The fact that a clause providing an alternative basis for variation is not barred by the policy under s. 17(5) is supported by the reality that courts generally encourage parties to settle their differences where possible: *O'Reilly's Irish Bar Inc. v. 10385 Nfld. Ltd.*, 2006 NLCA 26, 255 Nfld. & P.E.I.R. 292 (N.L. C.A.). This policy is reflected in s. 9(2) of the *Act* which imposes on the parties' counsel a duty to encourage settlement. This section reflects Parliament's intention to promote negotiated settlement of matters corollary to a divorce: *Miglin v. Miglin*, 2003 SCC 24 (S.C.C.) at para 54, [2003] 1 S.C.R. 303 (S.C.C.). In the context of parenting issues, this general policy is, of course, always subject to the best interests of the child.

27 In my view, it is open to parties to incorporate into parenting provisions in a court order an avenue of review or variation that does not require that a material change in circumstances be shown. The terms of s. 17(5) of the *Act* do not preclude a court sanctioning such an alternative basis for variation of a parenting order.

28 Given all the foregoing, the proper interpretation of the review clause is that it creates a second avenue for review and avoids the necessity of proving a material change in circumstances before the judge is able to move on to determine the best interests of the child. It is less stringent than the material change test.

29 I turn now to the Chambers judge's treatment of the review clause. Despite his express statement that he would proceed as if the review clause created a different test apart from material change, he did not actually proceed on this basis. He treated the application as if material change was necessary. I will explain.

30 First, in dismissing the father's application, the Chambers judge stated he was unable to find "a material, pivotal or fundamental change that will adversely affect the needs of the children". This is the language of the material change test. Second, his references to what was predictable at the time of the consent judgment and the certainty at the date of the order that the children would grow older all point to the question of whether there has been a material change. Third, the Chambers judge appears to have measured the need to change the parenting against a test of whether any changes *adversely* affect the children's needs. This again reflects the *Gordon* test and the language of "material change". If the second part of the review clause creates a different test than material change then it must allow for the potential that the change, although not adverse, is better overall for the children. Fourth, in relation to the onus on the father, the Chambers judge stated that the father has failed to demonstrate a material change. Last, the Chambers judge stated he does not get beyond the first stage of the two-stage inquiry. This is a reference to the material change test enunciated in *Gordon*.

31 In my view, the Chambers judge failed to approach the review clause as if there was a test for variation which was different than the material change test.

32 As a final matter, the father also argues that the Chambers judge was wrong in making a determination that he bore the onus of proof under the second part of the review clause. In this respect, I agree with the Chambers judge. The party relying on the second part of the review clause has the onus of proving that the current parenting arrangement is no longer meeting the needs of the children.

B. Did the Chambers Judge err in his application of the review clause to the evidence before him?

33 The father accepts that the first part of the review clause sets forth the material change test for variation. He argues that the evidence shows that there is a material change which can trigger a variation. He argues that the Chambers judge never did go on to do an assessment of the best interests of the children whether a review is triggered by the first or second part of the review clause. The mother argues that the Chambers judge did not err in law or make a material error in the application of the facts. She contends that the Chambers judge's decision must, on the basis of the standard of review, be accorded deference.

34 Given my earlier comments regarding a "different test" as set out in the review clause, it is not necessary for me to determine whether the Chambers judge erred in determining that the father had not discharged his onus of meeting the material change test. I do accept, however, that the Chambers judge did not undertake a sufficient analysis of what was in the

best interests of the twins.

35 The Chambers judge concluded the children's needs were sufficiently met by way of the existing parenting arrangement. The Chambers judge took a narrow view of the words "no longer meeting the children's needs" stating that the language itself does not specify that the needs must be met to the highest potential level or some other standard. The impression left by the Chambers judge in respect of his description of the "needs" of the twins suggests that as long as the children's bare minimum needs are met, there will be no variation. This is an error.

36 The inquiry that the Chambers judge should have made in this case is whether the parenting arrangement was no longer meeting the children's needs in the context of their best interests. The inquiry regarding best interests must be contextually sensitive and individualized (*Gordon*). Assessment of a child's needs is the foundation of the best interests inquiry. In keeping with the court's *parens patriae* obligations, that assessment must not be restricted to only basic needs or result in conclusions that the manner in which the child's needs are being met is "good enough". Both these approaches are inimical to a broad and sensitive approach to the best interests inquiry. What was required in this case was that the judge assess the children's needs on the basis that any variation order to be made optimizes within reason the fulfillment of those needs based on the evidence before the judge. In short, the interpretation of the needs of the children by the Chambers judge was too narrow.

37 These errors caused the Chambers judge to fail to determine whether the evidence as a whole allowed for a better fulfillment of the children's needs. An assessment of the needs of the children in accordance with the review clause is required. This is best accomplished by moving this matter forward to a pre-trial conference and, failing agreement, a trial.

38 In view of my determination on this issue, I need not address the remaining issues raised by the father.

VI. Conclusion

39 For the reasons set forth above, the appeal is allowed. The decision is set aside. This matter will proceed to a pre-trial conference. If the issues concerning the children are not resolved at the pre-trial conference, there shall be a trial of those issues. The father shall have his costs of this appeal.

***Herauf J.A.*:**
I concur.

***Ottenbreit J.A. for Whitmore J.A.*:**
I concur.

Appeal allowed.

TAB 3

2009 SKCA 85
Saskatchewan Court of Appeal

Montreal Trust Co. v. Williston Wildcatters Corp.

2009 CarswellSask 499, 2009 SKCA 85, [2009] 10 W.W.R. 458, 179 A.C.W.S. (3d) 1073, 337 Sask. R. 95, 464 W.A.C. 95

The Long Riders Rig Corporation, Capital Developments Corp., Spalding G. Wathen Investments Ltd., The Fresno San Andreas Oil Corporation, and Gopher Oil & Gas Company Ltd. (Appellants / Defendants / Plaintiffs by Cross-Claim) and Montreal Trust Company (Respondent / Cross Appellant / Plaintiff) and T.D.L. Petroleums Inc. (Respondent / Defendant / Defendant by Cross-Claim) and Herc Oil Corp., and Fast Trucking Service Ltd. (Respondents / Defendants) and Williston Wildcatters Corporation and 600131 Saskatchewan Ltd. (Non-Parties)

Blackfire Oil Inc. (Appellant / Defendant) and Montreal Trust Company (Respondent / Cross Appellant / Plaintiff)

Vancise, Jackson, Richards JJ.A.

Heard: May 26, 2009
Judgment: August 4, 2009
Docket: 1545

Proceedings: reversing *Montreal Trust Co. v. Williston Wildcatters Corp.* (2007), 2007 SKQB 411, 2007 CarswellSask 642, (sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 308 Sask. R. 147 (Sask. Q.B.)

Counsel: John M. Williams for Appellants, Long Riders Rig Corporation, Capital Developments Corp., Spalding G. Wathen Investments Ltd., Fresno San Andreas Oil Corporation, Gopher Oil & Gas Company Ltd., Blackfire Oil Inc.
Aaron A. Fox, Q.C. for Respondents, T.D.L. Petroleums Inc., Herc Oil Corp., Fast Trucking Services Ltd.
Reginald A. Watson, Q.C. for Respondent, Montreal Trust Company

Subject: Natural Resources; Property; Civil Practice and Procedure; Estates and Trusts

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.16 Amending or varying
XXII.16.c After judgment entered
XXII.16.c.v Miscellaneous

Natural resources
III Oil and gas
III.5 Oil and gas leases
III.5.e Termination of lease
III.5.e.v Miscellaneous

Remedies
I Damages
I.15 Practice and procedure

I.15.g Appeals
I.15.g.i Grounds for appeal
I.15.g.i.A Error of law

Headnote

Natural resources --- Oil and gas — Oil and gas leases — Termination of lease — Miscellaneous
T Inc. farmed 12-8 well lease out to L Corp.'s predecessor, which drilled and operated offset well 11-8, paying T Inc. royalties — Trustee of title to 12-8, M Co., brought action against T Inc.; trial judge found that lease had terminated, that T Inc. breached farmout agreement, and that drilling and operation of 11-8 was trespass continuing until November 2001, and awarded M Co. damages based on royalty of 18 per cent less 12.5 per cent already paid, ordered T Inc. to pay damages out of gross overriding royalty, and awarded L Corp. judgment equal to 5.5 per cent gross revenues, plus pre-judgment interest — Meanwhile, parties agreed on consent order that L Corp. would continue production and pay 12.5 per cent royalty to M Co. and post-September 2001 production proceeds into court less costs, so that, by July 2007, there was $324,834.28 in trust account and $126,275.71 net well revenues plus interest in respect of September 2001 to June 2003 production, held in court — On M Co.'s appeal, appellate court found trespass period was from January 1990 to March 1992 and that L Corp. operated well with M Co.'s express leave and license from March 1992 until November 2001 — Trial judge heard M Co.'s application for directions concerning payout of funds in court and in trust and found that, among other things, M Co. was entitled to 12.5 per cent royalty, L Corp. was entitled to production costs, and T Inc. had no interest subsequent to November 2001 when interests reverted to M Co., so M Co. was entitled to post-November 2001 revenue — L Corp. appealed and M Co. cross-appealed — Appeal allowed; cross-appeal dismissed — Trial judge substantively modified granted and perfected judgments — Issued judgment was only to be amended where there was error in drawing up or where oral judgment did not express court's intentions — Appellate court did not award M Co. net production proceeds for period of leave and license or for period after consent order but confirmed trial judge's findings that M Co.'s damages were limited to what it would have received as royalty — As appellate court limited damages to 12.5 per cent royalty, trial judge erred in finding M Co. entitled to revenue realized after November 2001 — Trial judge failed to appreciate that appellate court altered his judgment and that he was to apply and direct payment as per appellate judgment, not determine whether division according to original arrangement was fair or equitable — There was no basis for T Inc. sharing in revenue during license and consent order period — Funds and interest in court after paying M Co.'s judgment were to be paid to L Corp. for distribution to well participants as per respective interests, with M Co. receiving $40,769.91 from T Inc. as agreed or from funds in court, pursuant to judgment with respect to 11-8.

Civil practice and procedure --- Judgments and orders — Amending or varying — After judgment entered — Miscellaneous
T Inc. farmed 12-8 well lease out to L Corp.'s predecessor, which drilled and operated offset well 11-8, paying T Inc. royalties — Trustee of title to 12-8, M Co., brought action against T Inc.; trial judge found that lease had terminated, that T Inc. breached farmout agreement, and that drilling and operation of 11-8 was trespass continuing until November 2001, and awarded M Co. damages based on royalty of 18 per cent less 12.5 per cent already paid, ordered T Inc. to pay damages out of gross overriding royalty, and awarded L Corp. judgment equal to 5.5 per cent gross revenues, plus pre-judgment interest — Meanwhile, parties agreed on consent order that L Corp. would continue production and pay 12.5 per cent royalty to M Co. and post-September 2001 production proceeds into court less costs, so that, by July 2007, there was $324,834.28 in trust account and $126,275.71 net well revenues plus interest in respect of September 2001 to June 2003 production, held in court — On M Co.'s appeal, appellate court found trespass period was from January 1990 to March 1992 and that L Corp. operated well with M Co.'s express leave and license from March 1992 until November 2001 — Trial judge heard M Co.'s application for directions concerning payout of funds in court and in trust and found that, among other things, M Co. was entitled to 12.5 per cent royalty, L Corp. was entitled to production costs, and T Inc. had no interest subsequent to November 2001 when interests reverted to M Co., so M Co. was entitled to post-November 2001 revenue — L Corp. appealed and M Co. cross-appealed — Appeal allowed; cross-appeal dismissed — Trial judge substantively modified granted and perfected judgments — Issued judgment was only to be amended where there was error in drawing up or where oral judgment did not express court's intentions — Appellate court did not award M Co. net production proceeds for period of leave and license or for period after consent order but confirmed trial judge's findings that M Co.'s damages were limited to what it would have received as royalty — As appellate court limited damages to 12.5 per cent royalty, trial judge erred in finding M Co. entitled to revenue realized after November 2001 — Trial judge failed to appreciate that appellate court altered his judgment and that he was to apply and direct payment as per appellate judgment, not determine whether division according to original arrangement was fair or equitable — There was no basis for T Inc. sharing in revenue during license and consent order period

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Remedies --- Damages — Practice — Appeals — Grounds for appeal — Error of law — Miscellaneous
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Table of Authorities

Cases considered by *Vancise J.A.*:

Boe v. Boe (1987), 1987 CarswellSask 44, 6 R.F.L. (3d) 383, 57 Sask. R. 7, 66 C.B.R. (N.S.) 143 (Sask. Q.B.) — followed

Co-operative Trust Co. of Canada v. Twelfth Building Ltd. (1983), 25 Sask. R. 218, 1983 CarswellSask 297 (Sask. Q.B.) — followed

Gilmour v. Gilmour (1994), 1994 CarswellSask 283, [1995] 3 W.W.R. 137, 9 R.F.L. (4th) 365, 128 Sask. R. 113, 85 W.A.C. 113 (Sask. C.A.) — followed

Kuziak v. Romuld (1966), 58 W.W.R. 462, 60 D.L.R. (2d) 286, 1966 CarswellSask 57 (Sask. C.A.) — referred to

Montreal Trust Co. v. Williston Wildcatters Corp. (2003), 2003 CarswellSask 534, [2004] 3 W.W.R. 574, 2003 SKQB 360, (sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 239 Sask. R. 57 (Sask. Q.B.) — considered

Montreal Trust Co. v. Williston Wildcatters Corp. (2004), 2004 SKCA 116, 2004 CarswellSask 583, 26 C.C.L.T. (3d) 1, 23 R.P.R. (4th) 106, [2005] 4 W.W.R. 20, (sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 254 Sask. R. 38, (sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 336 W.A.C. 38, 243 D.L.R. (4th) 317 (Sask. C.A.) — referred to

Montreal Trust Co. v. Williston Wildcatters Corp. (2007), 2007 SKQB 411, 2007 CarswellSask 642, (sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 308 Sask. R. 147 (Sask. Q.B.) — considered

> [11] The position of the defendant, T.D.L. Petroleums Inc., is that it is entitled to be paid its gross overriding royalty throughout the entire time under consideration. It is acknowledged that T.D.L. Petroleums Inc. is responsible for payment of [Montreal Trust's] damages and that it will be deducted from any entitlement.
>
> [12] The position of the defendants, The Long Riders Rig Corporation and the other defendants, the working interest partners, (henceforth "The Long Riders Group"), is that T.D.L. Petroleums Inc. has no entitlement to any monies following the trespass period. At the same time, with the exception of damages, the entitlement of [Montreal Trust] is confined to its royalty of 12.5%. All other monies should be paid out to The Long Riders Group.

38 The Long Riders' appeal specifically raises the issue of the authority of a court to amend a judgment which has been formally issued. It is common ground that the position at common law is that that should only occur in two instances:

> 1. Where there has been an error or a slip in the drawing up the formal judgment; or,
>
> 2. Where the oral judgment does not express the clear intention of the Court. See: *Storey v. Zazelenchuk* (1985), 40 Sask. R. 241 (Sask. C.A.); *Kuziak v. Romuld* (1966), 60 D.L.R. (2d) 286 (Sask. C.A.).

39 Queen's Bench Rule 344 provides the basis on which the applications for directions were made. That section reads as follows:

> Where in any action a judgment has been pronounced or an order has been made and such judgment or order has been formally drawn up and entered and it shall subsequently appear that further directions are necessary in order to insure to the party entitled to the benefit of such judgment or order, as to costs or otherwise, the relief to which he is entitled, the court may make such further or other order and give such further or other relief as the nature of the case may require; provided that such further or other relief does not necessitate any variation of the said judgment or order as to any matter decided by the original judgment or order.

40 The Court of Queen's Bench has interpreted this rule as being consistent with the common law power of the court to amend its judgment after the formal order has been issued. Mr. Justice Noble in *Co-operative Trust Co. of Canada v. Twelfth Building Ltd.*[7] described the effect of the rule in these terms:

> [9] ...As I read the rule it only applies where it is necessary for the court to give further directions in order to make certain the judgment pronounced can be carried out. This makes eminent sense because if the wording of the judgment or order is not clear enough to enforce in a practical way either as to its intent and purpose or as to costs, the whole court proceeding might be rendered impotent. Thus the rule allows the court to clarify or vary a judgment or order formally entered as to costs or otherwise but it does not give the court jurisdiction to change the substance of the judgment or order. The proviso at the end of R. 344 draws a line between varying or amending a judgment or order to make certain it is enforceable by the victorious litigant or to clarify and amend to insure the winner gets the relief the court intended by its words and varying or changing the overall result intended by the court *i.e.* to make a substantial change in the court's obvious meaning.

41 We agree with these comments. See also: *Boe v. Boe*,[8] in which Grotsky J. held that the "further and other" relief contemplated by Rule 344 is granted only for ensuring the party the relief for which it was entitled under the judgment. Mr. Justice Grotsky found the court cannot change the substance of the judgment or vary the judgment. An application for directions cannot be turned into an application to vary even assuming such right existed.

42 In *Gilmour v. Gilmour*[9] this Court held that an order which constitutes the variation of the original judgment of a matter already decided will be set aside. This applied even where the Court has expressly reserved jurisdiction to provide directions in the formal judgment, as was the case here. See: *Boe v. Boe*, *supra.*

43 Mr. Justice Gerein correctly identified the issue in his fiat when he stated:[10]

TAB 4

2019 SKCA 68
Saskatchewan Court of Appeal

Gustafson v. Future Four Agro Inc.

2019 CarswellSask 357, 2019 SKCA 68, [2019] 11 W.W.R. 50, 308 A.C.W.S. (3d) 167, 438 D.L.R. (4th) 647, 47 C.P.C. (8th) 34

Terry Gustafson (Appellant / Defendant) And Future Four Agro Inc. (Respondent / Plaintiff)

Whitmore, Ryan-Froslie, Barrington-Foote JJ.A.

Heard: April 3, 2019
Judgment: July 30, 2019
Docket: CACV3305

Counsel: Kevin Mellor, for Appellant
James Rose, for Respondent

Subject: Civil Practice and Procedure; Contracts

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.13 Consent judgments or orders
XXII.13.e Miscellaneous

Headnote

Civil practice and procedure --- Judgments and orders — Consent judgments or orders — Miscellaneous
Defendant farmer purchased inputs from plaintiff — Defendant claimed that plaintiff was using fraudulent billing practices and he declined to pay for inputs he alleged were not delivered — Plaintiff commenced action for nonpayment of $1,101,311.26 plus interest — Consent order was granted that provided that if defendant failed to serve his affidavit of documents on plaintiff by specified date, defendant's statement of defence and counterclaim would be struck — Defendant failed to serve affidavit of documents by specified date, and plaintiff applied for order striking defendant's statement of defence and counterclaim — Defendant served affidavit of documents almost two weeks late, and applied for order extending deadline for service to date on which it was served pursuant to R. 13-7(2) and (3) of Queen's Bench Rules — Chambers judge declined to extend deadline for service and ordered defendant's statement of defence and counterclaim to be struck — Defendant appealed — Appeal dismissed — Rules did not change substantive law or grant chambers judge discretion to ignore substantive law in what he or she perceived to be in interests of justice — Substantive law, which was law of contract here, was not changed by R. 13-7(2) and (3) of Rules — Contract provided that defendant's statement of defence and counterclaim would be struck if affidavit of documents was not filed by specified date, and consent order implemented that agreement — Chambers judge was entitled to exercise discretion to vary consent order if there were reasonable grounds which would vitiate or excuse performance of contract — Chambers judge did not have broad discretion to grant relief if he or she concluded it was in interests of justice to do so — Chambers judge did not err in failing to find consent order was vitiated by illegality — Rules 13-7(2) and (3) of Rules were not legislation of kind that engaged contracting out principle, and contracting out issue did not arise on facts of case — Chambers judge did not err in law or disregard material facts in failing to find consent order was vitiated by frustration, as performance was not physically or legally impossible.

Table of Authorities

Cases considered:

ACT Greenwood Ltd. v. Desjardins-McLeod (2019), 2019 ONCA 158, 2019 CarswellOnt 2801 (Ont. C.A.) — considered

Arslan v. Sekerbank T.A.S. (2016), 2016 SKCA 77, 2016 CarswellSask 405, 400 D.L.R. (4th) 193, [2016] 10 W.W.R. 232, 89 C.P.C. (7th) 241, *(*sub nom. *Sekerbank T.A.S. v. Arslan)* 480 Sask. R. 235, *(*sub nom. *Sekerbank T.A.S. v. Arslan)* 669 W.A.C. 235 (Sask. C.A.) — considered

Coulthard v. Coulthard (1952), 5 W.W.R. (N.S.) 662, 1952 CarswellSask 20 (Sask. C.A.) — considered

Dunn v. Malone (1903), 6 O.L.R. 484, 2 O.W.R. 1036, 1903 CarswellOnt 696 (Ont. Div. Ct.) — considered

Egware v. Regina (City) (2016), 2016 SKQB 388, 2016 CarswellSask 773, 56 M.P.L.R. (5th) 35, 95 C.P.C. (7th) 174, 15 Admin. L.R. (6th) 111 (Sask. Q.B.) — considered

Elmtree Environmental Ltd. v. Fredericton (Region) Solid Waste Commission (2011), 2011 NBQB 108, 2011 CarswellNB 195, 972 A.P.R. 71, 377 N.B.R. (2d) 71, 2011 NBBR 108, 2011 CarswellNB 883 (N.B. Q.B.) — considered

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Houk v. Daniels Investments Saskatoon Ltd. (2016), 2016 SKCA 147, 2016 CarswellSask 745, 5 C.P.C. (8th) 272 (Sask. C.A.) — followed

Hunter v. McCorriston (2016), 2016 SKCA 144, 2016 CarswellSask 710, 86 R.F.L. (7th) 260 (Sask. C.A.) — followed

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MFI AG Services Ltd. v. Sotkowy (2014), 2014 SKCA 69, 2014 CarswellSask 373, 438 Sask. R. 289, 608 W.A.C. 289, 68 C.P.C. (7th) 251 (Sask. C.A.) — followed

Michael Hilmoe, et al. v. Dianne Hilmoe (2019), 2019 CarswellSask 265, 2019 CarswellSask 266 (S.C.C.) — referred to

Naylor Group Inc. v. Ellis-Don Construction Ltd. (2001), 2001 SCC 58, 2001 CarswellOnt 3340, 2001 CarswellOnt 3341, 10 C.L.R. (3d) 1, 55 O.R. (3d) 312 (headnote only), 204 D.L.R. (4th) 513, 17 B.L.R. (3d) 161, 277 N.R. 1, 153 O.A.C. 341, [2001] 2 S.C.R. 943, 55 O.R. (3d) 312 (note), 2001 CSC 58, 55 O.R. (3d) 312 (S.C.C.) — considered

Ontario (Human Rights Commission) v. Etobicoke (Borough) (1982), [1982] 1 S.C.R. 202, 40 N.R. 159, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 3 C.H.R.R. D/781, 1982 CarswellOnt 730, 1982 CarswellOnt 730F (S.C.C.) — considered

PS International Canada Corp. (Seaboard Specialty Grains and Foods) v. Palimar Farms Inc. (2017), 2017 SKCA 78, 2017 CarswellSask 485, [2018] 2 W.W.R. 90 (Sask. C.A.) — considered

Potash v. Royal Trust Co. (1986), [1986] 2 S.C.R. 351, 31 D.L.R. (4th) 321, 69 N.R. 286, [1986] 6 W.W.R. 550, 44 Man. R. (2d) 30, 34 B.L.R. 167, 41 R.P.R. 197, [1986] R.D.I. 725, 1986 CarswellMan 353, 1986 CarswellMan 404 (S.C.C.) — considered

Procyshyn v. Gabruch (2014), 2014 SKQB 349, 2014 CarswellSask 696, [2015] 5 W.W.R. 320, 459 Sask. R. 285 (Sask. Q.B.) — considered

R. v. Gray (2004), 2004 CarswellNB 615, 284 N.B.R. (2d) 31, 742 A.P.R. 31 (N.B. C.A.) — considered

Rimmer v. Adshead (2002), 2002 SKCA 12, 2002 CarswellSask 19, [2002] 4 W.W.R. 119, 24 R.F.L. (5th) 159, 217 Sask. R. 94, 265 W.A.C. 94 (Sask. C.A.) — considered

Saskatchewan Crop Insurance Corporation v. McVeigh (2018), 2018 SKCA 76, 2018 CarswellSask 438, [2019] 1 W.W.R. 290, 84 C.C.L.I. (5th) 255, 428 D.L.R. (4th) 122 (Sask. C.A.) — followed

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Wall Estate v. GlaxoSmithKline Inc. (2017), 2017 SKQB 149, 2017 CarswellSask 275 (Sask. Q.B.) — considered

2055190 Ontario Ltd v. Zhao (2018), 2018 SKCA 66, 2018 CarswellSask 395, [2019] 12 W.W.R. 401, 26 C.P.C. (8th) 57 (Sask. C.A.) — followed

Statutes considered:

Court of Appeal Act, 2000, S.S. 2000, c. C-42.1
s. 7(2) — considered

s. 10 — considered

Family Property Act, S.S. 1997, c. F-6.3
Generally — referred to

Interest Act, R.S.C. 1970, c. I-18
Generally — referred to

s. 10(1) — considered

Mortgage Act, R.S.M. 1987, c. M200
s. 20(6) — considered

Ontario Human Rights Code, R.S.O. 1970, c. 318
Generally — referred to

Queen's Bench Act, 1998, S.S. 1998, c. Q-1.01
Generally — referred to

s. 28 — considered

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A
Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules 2013
Generally — referred to

R. 1-3(1) — considered

R. 1-6(1) — considered

R. 5-14(1) — considered

R. 5-14(2) — considered

R. 13-7 — considered

R. 13-7(2) — considered

R. 13-7(3) — considered

APPEAL by defendant from chambers judge's decision ordering statement of defence and counterclaim to be struck.

***Per curiam*:**

INTRODUCTION

1 On December 19, 2017, a Queen's Bench judge granted a consent order [Consent Order] which provided that if the appellant failed to serve his affidavit of documents on the respondent by January 31, 2018, the appellant's statement of defence and counterclaim would be struck. The appellant failed to meet that deadline and the respondent applied to have the appellant's statement of defence and counterclaim struck. In response, the appellant served his affidavit of documents and applied to the Court of Queen's Bench for an order extending the deadline for service of the affidavit of documents to the date on which it was served, namely February 12, 2018.

2 In a September 11, 2018 fiat [*Chambers Decision*], the Chambers judge declined to extend the deadline for service and ordered that the appellant's statement of defence and counterclaim be struck. The appellant asks this Court to overturn those decisions. For the following reasons, we would dismiss the appeal.

BACKGROUND

3 The appellant is a farmer who purchased inputs from the respondent. The appellant claims the respondent was employing fraudulent billing practices and declined to pay for inputs he says were not delivered by the respondent.

4 The respondent commenced an action against the appellant for his nonpayment in the amount of $1,101,311.26, together with interest. The respondent provided its affidavit of documents on October 5, 2017. After some initial difficulty in obtaining a response from the appellant, the respondent received correspondence dated November 16, 2017, advising that the appellant would be in a position to provide his affidavit of documents by the end of November. The following day, the respondent requested receipt of the appellant's affidavit of documents by November 30, 2017, failing which it would apply to compel the appellant's compliance. The appellant did not provide his affidavit by November 30, 2017, and, as a result, the respondent applied to the Court of Queen's Bench to compel production of the affidavit by January 4, 2018.

5 On December 14, 2017, the appellant contacted the respondent and requested an extension of time to file his affidavit of documents. The parties negotiated the following agreement [Contract]:

(a) the respondent would withdraw its application to compel production;

(b) the time for the appellant to serve his affidavit of documents would be extended to January 31, 2018;

(c) the appellant would provide his crop insurance records; and

(d) the appellant's statement of defence and counterclaim would be struck if the affidavit was not served by January 31, 2018.

6 The Contract was formalized in the Consent Order, which reads as follows:

> The Court orders:
>
> 1. The Defendant, Terry Gustafson, shall serve his Affidavit of Documents on the Plaintiff on or before January 31, 2018.
>
> 2. The Defendant's Affidavit of Documents shall include all documents related to his 2015 and 2016 crop years currently in the possession of Saskatchewan Crop Insurance Corporation (the "SCIC Documents").
>
> 3. Should the Defendant fail to serve his Affidavit of Documents (along with the SCIC Documents) on or before January 31, 2018, the Defendant's Statement of Defence and Counterclaim shall be struck.

7 The respondent withdrew its application, but the appellant failed to serve his affidavit of documents by January 31, 2018. On February 1, 2018, the respondent applied for an order striking the appellant's statement of defence and counterclaim. On February 12, 2018, the appellant served his affidavit of documents on the respondent and applied pursuant to Rule 13-7 of *The Queen's Bench Rules* to extend the time for service *nunc pro tunc* to February 12, 2018. The Chambers judge heard the appellant's and respondent's applications together and disposed of both in the *Chambers Decision*.

THE CHAMBERS DECISION

8 In Chambers, as on this appeal, the appellant argued that the Chambers judge had a broad discretion pursuant to Subrules 13-7(2) and (3) to extend the January 31 deadline fixed by the Consent Order, and that he should exercise that discretion in favour of the appellant. Subrules 13-7(2) and (3) provide as follows:

> **13-7**(2) The Court may enlarge or abridge the time appointed by these rules or fixed by any order for doing any act or taking any proceeding, on any terms that the Court considers just.
>
> (3) The Court may order an enlargement of time notwithstanding that the application is not made until after the expiration of the time appointed or allowed.

9 The Chambers judge agreed he had the discretion to amend the Consent Order pursuant this Rule but found that discretion was limited. In his view, the Consent Order, like any consent order, is — as Schwann J. (as she then was) said in *Procyshyn v. Gabruch*, 2014 SKQB 349, [2015] 5 W.W.R. 320 (Sask. Q.B.) [*Procyshyn*] — "a formal expression of an agreement between the parties" (at para 28), which may only be varied or set aside "on grounds which would otherwise vitiate a contract, i.e. common mistake, fraud, collusion, misrepresentation, duress or illegality, or where there was a 'slip' in drawing up the order" (at para 31). The Chambers judge noted the reasoning in *Procyshyn* was adopted in *Arslan v. Sekerbank T.A.S.*, 2016 SKCA 77, [2016] 10 W.W.R. 232 (Sask. C.A.), at paragraph 97 [*Sekerbank*], and in *Wall Estate v. GlaxoSmithKline Inc.*, 2017 SKQB 149 (Sask. Q.B.), at paragraph 13 [*Wall Estate*]. He rejected the appellant's argument that *Procyshyn*, *Sekerbank* and *Wall Estate* are distinguishable on their facts.

10 The appellant had also argued in the alternative that the Consent Order was vitiated as a result of illegality, frustration or duress, thereby enabling the Chambers judge to exercise his discretion. The Chambers judge rejected each of those arguments. He found the Consent Order did not illegally oust the court's jurisdiction to govern its own process or fetter the court's jurisdiction, as the court retained the discretion to vary in accordance with the common law principles relating to the variation of consent orders.

11 As to frustration — a doctrine which was not referred to in *Procyshyn* — the appellant had put forward a number of reasons for his failure to serve his affidavit by January 31. He noted the demands of harvest in the fall, and that he had underestimated the time he would need to collect his documents. He said there were delays by his bank and his suppliers in producing records. He had an appointment to execute his affidavit of documents on January 26, which his counsel cancelled

to attend his grandmother's funeral. The appellant made a second appointment to execute his affidavit on January 31, but failed to attend because a lawyer acting for him on a Provincial Court matter told him he had to attend Provincial Court that day or risk losing his licence. He attended at Provincial Court and got an out of office message when he called his counsel on this action after his attendance. There was no evidence he made further calls that day. The Chambers judge concluded that these circumstances did not meet the legal test for frustration.

12 Finally, the Chambers judge found that the appellant was under stress, but there was no credible evidence that he acted under duress.

JURISDICTION AND STANDARD OF REVIEW

13 The parties agree the appellant has the right to appeal the *Chambers Decision* pursuant to s. 7(2) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1 [*Act*], and that the basis of this Court's jurisdiction to hear the appeal is s. 10 of the *Act*.

14 The Chambers judge was primarily concerned with whether he should exercise the authority conferred on him by Rule 13-7 of *The Queen's Bench Rules* to amend the Consent Order by extending the time for service of the affidavit of documents. It is uncontroverted that decision was discretionary, and that as such, the deferential standard of review relating to appeals from discretionary orders set out by this Court in *Rimmer v. Adshead*, 2002 SKCA 12, [2002] 4 W.W.R. 119 (Sask. C.A.) [*Adshead*] applies:

> [58] In turning to this issue, it is necessary to bear in mind that the powers in issue are discretionary and therefore fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise. The discretion is that of the judge of first instance, not ours. Hence, our function, at least at the outset, is one of review only: review to determine if, in light of such criteria, the judge abused his or her discretion. Did the judge err in principle, disregard a material matter of fact, or fail to act judicially? Only if some such failing is present are we free to override the decision of the judge and do as we think fit. Either that, or the result must be so plainly wrong as to amount to an injustice and invite intervention on that basis.

15 The appellant has alleged the Chambers judge did not correctly identify the law which governs the exercise of the discretion granted by Subrules 13-7(2) and (3). This would constitute an error of law, and the standard of review relating to errors of law is correctness: *Houk v. Daniels Investments Saskatoon Ltd.*, 2016 SKCA 147 (Sask. C.A.) at para 10, (2016), 5 C.P.C. (8th) 272 (Sask. C.A.), *2055190 Ontario Ltd v. Zhao*, 2018 SKCA 66 (Sask. C.A.) at para 76, (2018), [2019] 12 W.W.R. 401 (Sask. C.A.). The appellant has also alleged the Chambers judge erred in fact, and in applying the legal test for frustration to the facts, which raises a question of mixed fact and law. Both of those alleged errors are reviewable on a palpable and overriding error standard: see *Saskatchewan Crop Insurance Corporation v. McVeigh*, 2018 SKCA 76 (Sask. C.A.), at para 27, (2018), 428 D.L.R. (4th) 122 (Sask. C.A.).

ISSUES

16 The appellant raises the following issues:

> (a) Did the Chambers judge err in law by incorrectly identifying the law governing the exercise of his discretion pursuant to Subrules 13-7(2) and (3) of *The Queen's Bench Rules*?
>
> (b) Did the Chambers judge err in law in failing to find the Consent Order was vitiated by reason of illegality?
>
> (c) Did the Chambers judge err in law or disregard material facts in failing to find the Consent Order was vitiated by frustration?

ANALYSIS

Did the Chambers judge err in law by incorrectly identifying the law governing the exercise of his discretion pursuant to

Subrules 13-7(2) and (3) of The Queen's Bench Rules?

17 The appellant submits the Chambers judge erred when he found that his discretion to vary a consent order pursuant to Subrules 13-7(2) and (3) could be exercised only on grounds that would vitiate a contract. He argues that justice is the overriding consideration where applications to extend time are concerned, regardless of whether the time limit is imposed by a consent order or otherwise. On this basis, the appellant submits he should be granted relief, as he has offered cogent reasons for his failure to meet the deadline and the respondent has not suffered any prejudice as result of the brief 12-day delay in the service of the affidavit. The appellant frames all of this as a matter of fairness and access to justice.

18 In this context, the appellant relies heavily on *Coulthard v. Coulthard* (1952), 5 W.W.R. (N.S.) 662 (Sask. C.A.) [*Coulthard*]. In *Coulthard*, an action for divorce was commenced and was undefended. To set the matter for trial, the plaintiff was obliged by the Rules of Court to give notice of trial to the defendant and to file that notice. The notice of trial was given, and the defendant provided a written acknowledgment of the receipt of that notice and a consent to the action being set down for trial. However, the notice of trial was not filed within the time specified by the Rules. The filing error was discovered at trial and, although the trial judge made a decision and delivered reasons, he did not grant the divorce because the time requirement had not been met.

19 The plaintiff appealed on the basis that the trial judge should have granted an extension of time pursuant to a rule equivalent to Rule 13-7. The three members of the panel agreed the appeal should be allowed, with each writing separate reasons. Justice Procter commented that "the courts exist for the purpose of making justice available to all our citizens at a minimum of cost and inconvenience" (at para 24). He noted that the defendant waived the requirements of the Rules and consented to the trial being set. Citing *Fenchurch Export Corp. v. Sitka Spruce Lumber Co.* (1946), [1947] 2 D.L.R. 139 (B.C. C.A.) (WL), Procter J.A. explained that the "Rules of Court are the servants ... of the Court", and that judges "should interpret those Rules in the manner most likely to do justice between the parties" (at para 24). In the result, he found the Rules permitted the court to allow the late filing and that reasonable grounds had been shown to do so.

20 In his concurring reasons, Culliton J.A. (as he then was) also emphasized the interests of justice. Like Procter J.A., he relied on a rule substantially to the same effect as the current Rule 1-6, which provides as follows:

> **1-6**(1) If a person contravenes or does not comply with these rules, or if there is an irregularity in a commencement document, pleading, affidavit, Form or other document, a party may apply to the Court:
>
> (a) to cure the contravention, non-compliance or irregularity; or
>
> (b) to set aside an application, proceeding or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity.

21 Justice Culliton described that rule as standing for the general principle that failure to comply with *The Queen's Bench Rules* does not necessarily void proceedings. He described the discretion of a chambers judge under the rule in broad terms:

> [43] This Rule gives to the court almost complete discretion to relieve against any irregularity in complying with the Rules of court. In the exercise of this discretion the guiding principle must be to see that justice is done.
>
> [44] In disposing of matters of practice and procedure the court should keep in mind the statement of Armour, C.J. in *Bank of Hamilton v. Baine* (1888) 12 P.R. 439, at 442:
>
> > Having regard to modern ideas and modern legislation in matters of practice and procedure, such rules must now be applied only in the interest of and for the advancement of justice, and not in support of ancient technicality.
>
> . . .
>
> [46] The court, in relieving against an irregularity, or in exercising remedial discretion, is not bound by hard and fast

> rules or precedents, but may exercise its powers in the light of the facts and circumstances surrounding each particular case: *Eggerson v. Smith* (1913), 5 W.W.R. 579, 6 Sask. L.R. 150, 26 W.L.R. 198; *In Re Price* (1912), 2 W.W.R. 394, 5 Sask. L.R. 318, 21 W.L.R. 299.

22 Two points bear emphasis in relation to this reasoning. First, Culliton J.A.'s comments as to the existence of an "almost complete discretion to relieve against any irregularity" related to matters within the scope of a predecessor to Rule 1-6. This is not such an application. The appellant does not seek relief in relation to a contravention of or failure to comply with *The Queen's Bench Rules*. He seeks to vary a consent order, which is a very different matter. *Coulthard* does not stand for the proposition that a Chambers judge always has almost complete discretion to extend a time limit, in the interests of justice, regardless of the context or the nature or source of the time limit.

23 Second, the approach to interpreting *The Queen's Bench Rules* reflected in Procter J.A.'s reasons remains valid. As Ottenbreit J.A. put the matter in *MFI AG Services Ltd. v. Sotkowy*, 2014 SKCA 69, 438 Sask. R. 289 (Sask. C.A.):

> [10] ...the interpretation of the *Rules* is informed by several key principles. In *Coulthard v. Coulthard* (1952), 5 W.W.R. (N.S.) 662 (Sask. C.A.), at p. 669, this Court indicated that the "Rules of Court are the servants ... of the Court, whose faculty it is to interpret those Rules in the manner most likely to do justice between the parties ...". As well, the *Rules*, because they are technically a regulation by virtue of s. 2 of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, stand to be interpreted as being remedial and to best ensure the attainment of their objects in accordance with s. 10 of that *Act*. Additionally, they must be interpreted in accordance with the modern approach to statutory interpretation appearing in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), which requires that the words of every enactment are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and purpose of the enactment and the intention of the Legislature (in this case the drafters of the *Rules*).

24 However, these principles of interpretation do not mean *The Queen's Bench Rules* either change the substantive law, or grant a Chambers judge the discretion to ignore the substantive law in what he or she perceives to be the interests of justice. That principle was recently affirmed in *Hunter v. McCorriston*, 2016 SKCA 144, 86 R.F.L. (7th) 260 (Sask. C.A.) [*Hunter*]. In *Hunter*, the respondent had failed to make a claim for equal division of family property at the appropriate time as determined under *The Family Property Act*, SS 1997, c F-6.3. The Chambers judge, relying on Rule 1-6, nonetheless allowed the respondent's application to advance that claim. On appeal, this Court found the Chambers judges did not have the authority to do so, as the right to file a claim for division of property was not a procedural rule, but a matter of substantive law. Justice Caldwell explained the relationship between *The Queen's Bench Rules* and the substantive law, as follows:

> [39] Rule 1-6 of *The Queen's Bench Rules* is the successor to what was familiarly called the "slip rule" under the old *Queen's Bench Rules* [Old Rule 5]. While the rule was drafted in broad terms, judicial interpretation of Old Rule 5 had limited its application to curing "procedural defects" only; its application did not extend to curing non-compliance with or contravention of substantive or statutory laws. The language used in Rule 1-6 does not suggest a more expansive scope than had Old Rule 5. In fact, the new rule is more prescriptive in its language than the old rule: [Old Rule 5 omitted].
>
> . . .
>
> [45] The judicial interpretation of Old Rule 5 is consistent with the inherent limitations of the rule-making powers of the Court of Queen's Bench. Section 28 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, sets out the court's statutory rule-making power. It provides that the judges of that court may make rules regulating or respecting a number of procedural considerations and evidentiary matters and "any other thing that the judges consider expedient for better attaining the ends of justice, advancing the remedies of parties and carrying into effect this Act and the provisions of other Acts respecting the court." The Court of Queen's Bench also exercises a residual inherent common law jurisdiction to make rules for the proper administration of justice. However, neither power may be used to alter substantive law, other than as may be expressly provided in *The Queen's Bench Act, 1998* or other statute.

25 In the result, Caldwell J.A. concluded as follows:

> [48] To bring this to a close, an interpretation of Rule 1-6 as empowering a judge to cure only procedural errors arising under *The Queen's Bench Rules* is consistent with the case law and the limits of the statutory and inherent rule making powers of the Court of Queen's Bench. Moreover, like MacPherson C.J.Q.B., I conclude there is simply no sound basis in law to adopt an interpretation of the slip rule that would expand its breadth to permit the Court of Queen's Bench to alter substantive or statutory laws. Finally, a judge may not apply Rule 1-6 so as to give the rule a scope that is *ultra vires* the rule-making powers of the Court of Queen's Bench. It would be an error of law to do so.

26 These fundamental limitations on the rule-making authority of the Court of Queen's Bench, and the power of a judge applying those rules, are engaged in this case: see *Egware v. Regina (City)*, 2016 SKQB 388, 95 C.P.C. (7th) 174 (Sask. Q.B.), at para 31, where Schwann J. (as she then was), citing *Hunter*, confirmed the application of this principle to Subrule 13-7(2). More specifically, the principle adopted in *Procyshyn*, *Sekerbank*, and *Wall Estate* reflects the fact that the substantive law — in this case the law of contract — is not altered by Subrule 13-7(2) and (3) of *The Queen's Bench Rules*. The Contract provided that the appellant's statement of defence and counterclaim would be struck if the affidavit of documents was not filed by January 31. The Consent Order implemented that agreement. The appellant, having received the consideration for which he bargained — that the respondent's application would be withdrawn and the time to serve extended to January 31, 2018 — sought to resile from that fully performed contract by seeking relief from that bargain.

27 The question, then, is whether the Chambers judge correctly identified the substantive law — that is, the law of contract — which limited the exercise of his discretion. *Procyshyn* and *Wall Estate* adopted the reasoning in *R. v. Gray* (2004), 284 N.B.R. (2d) 31 (N.B. C.A.) [*Gray*], which had been adopted in *Elmtree Environmental Ltd. v. Fredericton (Region) Solid Waste Commission*, 2011 NBQB 108 (N.B. Q.B.), at para 15, (2011), 377 N.B.R. (2d) 71 (N.B. Q.B.) [*Elmtree*], with one difference. In *Gray*, Robertson J.A. said a consent order could be set aside only on grounds that would vitiate a contract, and referred to common mistake, fraud, collusion, misrepresentation, duress and illegality as *examples* of such grounds. *Procyshyn* and *Wall Estate*, on the other hand, say that one of these six listed grounds must be present, absent a slip in drawing the order. The Chambers judge adopted the same approach, stating that he had the discretion to vary the Consent Order "only in those instances where there is proof of a common mistake, fraud, collusion, misrepresentation, duress or illegality, or where there has been a 'slip' in drawing the order" (*Chambers Decision* at para 22).

28 In *Sekerbank*, Caldwell J.A. adopted a less restrictive approach, stating the test this way:

> [97] ...I agree with the analysis in *Elmtree*, where the court had faced arguments similar to those advanced by the appellants in this case and concluded that it could not terminate a consent order absent proof of grounds that would vitiate a contract — *i.e.*, fraud, common mistake, or illegality, etc. — or of a material change in circumstances. This conclusion is supported by the decisions in *Spender* and *Ontario Sugar Co., Re* cited by the Chambers judge and by the recent decisions in *Procyshyn v. Gabruch*, 2014 SKQB 349 (Sask. Q.B.) at paras 28-29, (2014), [2015] 5 W.W.R. 320 (Sask. Q.B.), *Yan v. Chen*, 2014 ONSC 3111(Ont. S.C.J. [Commercial List]) at paras 83-85, as well as *Simonelli v Ayron Developments Inc.*, 2010 ABQB 565, [2011] 3 W.W.R. 140 (Alta. Q.B.) at paras 64-87, and in *Kolodziejski v. Kolodziejski* (May 20, 2016), Doc. Saskatoon CACV 2813 (Sask. Q.B.).
>
> (Emphasis added)

29 This language recognizes that there are circumstances in which a consent order could be varied or set aside which do not constitute common mistake, fraud, collusion, misrepresentation, duress or illegality. However, it does not mean a court can vary a consent order if there has been a "material change of circumstances" which would be insufficient to either vitiate the underlying contract or justify non-performance based on the law of contract.

30 We note four examples — which are not meant to be exhaustive — of grounds that might justify variation of a consent order that do not appear in the six grounds listed in *Elmtree*. First, the *Elmtree* test does not refer to unconscionability, which, like the six listed grounds, may also result in a contract being set aside. Second, as *Sekerbank* demonstrates, the consent order at issue — in *Sekerbank*, a preservation order that served substantially the same function as a Mareva injunction — may be based on an implicit or explicit agreement that certain conditions exist or will continue to exist. If that is so, a consent order may be subject to variation if those conditions no longer exist. In contractual terms, that could be properly characterized as interpretation of the contract and consent order, based on the nature of the order and the surrounding circumstances. Third,

the doctrine of frustration — which relates to performance rather than the formation of the contract — may also be engaged, as the appellant claims in this case. Fourth, consent orders relating to custody and parenting of children and for child or spousal support are subject to variation in certain circumstances, as a matter of substantive law.

31 In the result, the test adopted by the Chambers judge as to the extent of his discretion was, while essentially correct, not entirely complete. His discretion was not limited to the specific grounds to vitiate a contract listed in *Elmtree*. He was entitled to exercise his discretion to vary the Consent Order if there were grounds which would vitiate or excuse performance of the Contract. Indeed, the fact that he did not reject the claim of frustration out of hand demonstrates that he recognized that fact.

32 The appellant submits that the cases which adopt this contract-based test are distinguishable on their facts. With respect, we disagree. This test is based on principles relating to the relationship between *The Queen's Bench Rules* and substantive law which have broad and general application and applies to both interim and final orders.

33 For these reasons, the Chambers judge did not, as suggested by the appellant, have a broad discretion to grant the relief sought if he concluded it was fair or in the interests of justice to do so. In this context, it bears emphasizing that if the appellant had been correct as to the test for variation, the existence of the fully executed Contract which was implemented by the Consent Order would have weighed very heavily in the analysis in any event. In our view, the bottom line decision by the Chambers judge is both fair and just.

34 Accordingly, the question that remains is whether grounds exist that would vitiate or excuse performance of the contract reflected in the Consent Order. The grounds identified by the appellant are illegality and frustration. We will now turn to those grounds.

Did the Chambers judge err in failing to find the Consent Order was vitiated by reason of illegality?

35 The appellant submits the Consent Order amounts to contracting out of s. 28 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 [*The Queen's Bench Act*], which grants the authority for judges of the Court of Queen's Bench to make *The Queen's Bench Rules*, as well as contracting out of *The Queen's Bench Rules* themselves. He says *The Queen's Bench Act* and *The Queen's Bench Rules* protect the public interest in the litigation process and facilitate just resolutions to disputes, and that a party cannot contract out of a statutory provision designed to protect the public interest. He relies on *Potash v. Royal Trust Co.*, [1986] 2 S.C.R. 351 (S.C.C.) [*Potash*], at paragraphs 39-40, in support of this proposition.

36 In *Potash*, the Court applied what it summarily described as "the long standing principle that parties cannot contract out of statutory provisions enacted in the public interest" (at para 37). The statutory provisions there at issue were s. 10(1) of the *Interest Act*, RSC 1970, c I-18 and s. 20(6) of *The Mortgage Act*, RSM 1970, c M200, both of which provided that a mortgagor could prepay a mortgage with a term greater than five years by paying principal, interest and three months interest. Mr. Potash submitted that the provision was designed for the protection of the public, noting that any member of the public might need its protection when they borrowed against mortgage security. He argued that "to permit contracting out would defeat the whole purpose of a legislative provision enacted in the public interest" (at para 39). Justice Wilson, without further explanation, disposed of the issue as follows:

> [40] I agree with counsel for Potash that s. 10(1) was enacted in the public interest and that the long standing rule against contracting out or waiver should apply to it....

37 The nature of this "long standing principle" was explored at greater length in *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 (S.C.C.), at 213-214 [*Etobicoke*]. In that case, the Court was concerned with a provision in *The Ontario Human Rights Code*, RSO 1970, c 318, that prohibited discrimination on the basis of age, unless age was a bona fide occupational requirement. The employer argued that a mandatory retirement clause in a collective agreement must be considered such a bona fide requirement, absent evidence to the contrary. Justice McIntyre, writing for the Court, responded to that argument as follows (at 213-214):

> While this submission is that the condition, being in a collective agreement, should be considered a *bona fide*

occupational qualification and requirement, in my opinion to give it effect would be to permit the parties to contract out of the provisions of *The Ontario Human Rights Code*.

Although the *Code* contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy. In *Halsbury's Laws of England*, 3rd ed., vol. 36, p. 444, para. 673, the following appears:

> **673. Waiver of statutory rights.** Individuals for whose benefit statutory duties have been imposed may by contract waive their right to the performance of those duties, unless to do so would be contrary to public policy or to the provisions or general policy of the statute imposing the particular duty or the duties are imposed in the public interest.

And in the fourth edition of the same work the following is to be found in vol. 9, p. 289, para. 421:

> **421. Contracting out.** As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.

By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee.

...*The Ontario Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.

(Emphasis added)

38 This analysis demonstrates that the issue is not simply whether the legislation at issue was passed "in the public interest". In the broad sense, all legislation is passed in what legislators believe to be the public interest. Nonetheless, as a general rule, a person can contract to waive benefits conferred by legislation. He or she cannot do so only if it would be contrary to public policy or contrary to the provisions or general policy of the legislation.

39 In *Potash*, the public policy purpose of the legislation was creditor and consumer protection, which would relate primarily to prospective mortgagors dealing with institutional lenders. If institutional lenders could require a waiver of that protection as a condition of lending, that purpose would be undermined. Similarly, permitting employers and employees to contract out of the human rights legislation at issue in *Etobicoke* — being the recognition and protection of human rights "for the benefit of the community at large and its individual members" — would be inconsistent with that purpose, and thus contrary to public policy. In *Dunn v. Malone* (1903), 6 O.L.R. 484 (Ont. Div. Ct.) at para 15 (QL), the court held a borrower and lender could not contract out of a provision of the *Interest Act* requiring disclosure of the rate per annum. The court found the provision was passed in the public interest for the protection of borrowers, and commented that if waivers were permitted, the Act "would speedily become a dead letter".

40 These cases reflect the fact that the contracting out principle applies only if the legislation at issue has a certain sort of public policy purpose, and then only if permitting the waiver or contracting out would be inconsistent with or undermine that purpose. The principle has limited application. The "general rule" that contracting out is permitted referred to in *Etobicoke* reflects that fact. In *Fleming v. Massey*, 2016 ONCA 70, 394 D.L.R. (4th) 647 (Ont. C.A.), the court found that employers and workers could not contract out of provisions of *The Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sched A, which provided that uninsured workers could sue their employers for workplace accidents in defined circumstances,

including employer negligence. Justice Juriansz summarized the court's reasons for that conclusion, as follows:

> [34] I recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication.
>
> (Emphasis added)

41 Here, the appellant submits that the Consent Order allowed the respondent to contract out of *The Queen's Bench Act* and *The Queen's Bench Rules*. In our view, that overstates the issue. The issue is not whether the parties could contract out of *The Queen's Bench Act* or *The Queen's Bench Rules* as a whole. It is whether the Contract — which provided that the statement of defence and counterclaim shall be struck if the affidavit of documents was not served by January 31, 2018 — was contrary to public policy.

42 In our view, it was not, for the following reasons.

43 First, Subrules 13-7(2) and (3), whether considered alone or in the context of *The Queen's Bench Rules* as a whole, are not legislation of the kind that engages the contracting out principle at all. The public policy purpose of *The Queen's Bench Rules* is specified in Rule 1-3:

> **1-3**(1) The purpose of these rules is to provide a means by which claims can be justly resolved in or by a court process in a timely and cost effective way.

44 Those who have a legal dispute are not obliged to choose this dispute settlement mechanism. They may negotiate the resolution of their dispute, with or without a mediator. They may agree to arbitrate or to litigate in another jurisdiction. They are not, by doing so, waiving or contracting out of a benefit of the kind at issue in *Etobicoke*. It may be contrary to public policy to waive or contract out of the right to assert certain statutory rights in the Court of Queen's Bench. However, the problem would not arise because a party waived the right to file a statement of claim or defence, but because it was contrary to public policy to waive or contract out of the ability to assert the statutory right.

45 Just as potential litigants can choose to go another route entirely, those who choose to pursue a claim in the Court of Queen's Bench are entitled to do so in the manner permitted by *The Queen's Bench Rules*. They are, to the extent and in the manner contemplated by *The Queen's Bench Rules* and permitted by the court, entitled to make agreements as to how they will conduct an action. They may commence an action and agree to settle on terms to be incorporated in a consent order, which may include a release of all actions and causes of action. They may agree to forego access to the full litigation menu, and, if the court agrees, deal with their dispute by stating an issue or applying for summary judgment.

46 They may also agree to take a certain position in response to an application by another party. In particular, they may agree to a consent order under a procedural rule such as Rule 13-7, including a consent order that has consequences for a failure to comply. Again, they are not, by doing so, waiving or contracting out of a benefit provided by legislation with the kind of public policy purpose at issue in cases such as *Etobicoke*.

47 Second, even if the right to apply under Subrule 13-7(2) could be characterized as a legislation that engages the contracting out principle, the contracting out issue does not arise on these facts. The Consent Order enlarged the time appointed by the *Rules* to serve the affidavit of documents. As such, it constituted the exercise by a Queen's Bench judge of his discretion pursuant to Subrule 13-7(2), on terms he considered just. The parties did not contract out of Subrule 13-7(2). To the contrary, they agreed to and received the "benefit" of a judge considering and granting an application for the Consent Order pursuant to that Subrule. The appellant received the benefit of an enlargement of the time provided to serve his affidavit of documents and avoided legal costs related to preparing for Court to deal with the respondent's action. The respondent received the benefit of a hard deadline.

48 Third, if the Chambers judge had the jurisdiction to grant the Consent Order — which, in our view, he did — the

parties were entitled to agree that such an order should be granted. It cannot be contrary to public policy for parties to an action to agree that a judge will make an order that he or she has the jurisdiction to make pursuant to *The Queen's Bench Rules*. Orders fixing deadlines and orders striking pleadings are granted as a matter of course. Where the issue is a failure to disclose documents, Rule 5-14 applies:

> **5-14**(1) In this rule, "party in non-compliance" means a party who neglects or refuses:
>
> (a) to serve an affidavit of documents in accordance with this subdivision;
>
> (b) to produce for inspection any document for which notice to produce documents for inspection has been given; or
>
> (c) to comply with any order for production or inspection pursuant to rule 5-12.
>
> (2) A party in non-compliance is liable:
>
> (a) if the party is a plaintiff, to have the party's action dismissed; or
>
> (b) if the party is a defendant, to have the party's defence, if any, struck out and to be placed in the same position as if the party had not defended.

49 Orders of this kind do not deny access to justice or the benefit of *The Queen's Bench Rules*. They are part and parcel of providing a means to resolve disputes in a timely and cost-effective manner pursuant to *The Queen's Bench Rules*, which is an essential element of access to justice.

50 The appellant relies on *Sigfusson Northern Ltd. v. Signal Energy LLC*, 2016 SKQB 46, 88 C.P.C. (7th) 416 (Sask. Q.B.). In that case, Elson J. refused to make an order in this form, which, as he notes, is sometimes referred to as a "drop dead" order. He explained his reasons for doing so, as follows:

> [14] In my view, such an order is questionable, if not outright improper. In effect, the 'drop dead' order purports to do away with, or fetter, the court's discretion, at a future time, to consider all circumstances related to the alleged or demonstrated non-compliance, including those circumstances which might arguably excuse non-compliance. While the court obviously expects its orders to be observed, it should not anticipate non-compliance by attaching an automatic and potentially prejudicial consequence to it. This is not to say that non-complying parties will not bear the burden of presenting strong and compelling evidence to excuse their failure. Clearly, they will. That said, the court should not, before the fact, deny them the opportunity to present such evidence.

See also *Lussier v. Meabry*, 2018 SKQB 302 (Sask. Q.B.), at paragraphs 26-29, (2018), 18 R.F.L. (8th) 159 (Sask. Q.B.), where the court cited these comments with approval.

51 With the greatest respect, we are of a different view. The Consent Order does not purport to fetter the discretion of the court at a future time. It does not tell another judge what to do. It provides that the statement of defence and counterclaim "shall be struck". Although the respondent chose to apply for a further order, that application was not necessary.

52 As a matter of practice, Chambers judges may be reluctant to make drop dead orders, regardless of whether they are by consent. However, practice is one thing, and jurisdiction is another. Judges have the discretion to make such orders under Subrule 13-7(2) in appropriate circumstances. Indeed, it would be an error for a judge to conclude that the court has no discretion to make such an order, regardless of the circumstances. Further, judges may often find that the consent of the parties is a very important consideration in deciding whether to do so.

53 For these reasons, this ground of appeal must fail.

Did the Chambers judge err in law or disregard material facts in failing to find the Consent Order was vitiated by

frustration?

54 The appellant argues the Chambers judge erred in his analysis of whether the doctrine of frustration operated to vitiate the Consent Order. He acknowledges the Chambers judge found frustration did not apply because of the appellant's lack of diligence in discharging his duties under the Consent Order, but says the Chambers judge failed to identify the evidence relied upon in support of his finding of no diligence. The appellant submits that this is a reversible error of fact.

55 The standard of review that applies to an alleged error of fact is palpable and overriding error. The evidence was sufficient to support the conclusion that the appellant and his counsel were not sufficiently diligent. If this ground of appeal constitutes an allegation that the Chambers judge erred in fact by failing to correctly weigh the appellant's exculpatory evidence, it fails on the basis of the standard of review.

56 Although the appellant characterizes this alleged error as an error of fact, it is properly characterized as alleging that the Chambers judge erred in principle by disregarding material facts. With respect, we do not agree the Chambers judge made such an error. The Chambers judge specifically referred to the facts on which the appellant relies as justification for his failure to meet the January 31 deadline in that portion of his decision dealing with frustration. He did not list every item of evidence, but was not required to do so. An appellate court must presume the judge has reviewed all of the evidence, unless an omission gives rise to a reasoned belief the judge has forgotten, ignored, or misconceived the evidence in a way that affected the judge's conclusion: see *Hilmoe v. Hilmoe*, 2018 SKCA 92 (Sask. C.A.) at para 35, (2018), [2019] 1 W.W.R. 118 (Sask. C.A.) [*Hilmoe*] (leave to appeal to the SCC dismissed, 2019 CanLII 50902 [2019 CarswellSask 265 (S.C.C.)]).

57 The appellant also contends the Chambers judge erred in his application of the legal test for frustration. The parties agree the Chambers judge correctly identified the governing authorities to be *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943 (S.C.C.), and *PS International Canada Corp. (Seaboard Specialty Grains and Foods) v. Palimar Farms Inc.*, 2017 SKCA 78, [2018] 2 W.W.R. 90 (Sask. C.A.) [*Palimar Farms*]. In *Palimar Farms*, this Court said of frustration:

> [38] The essential features of the doctrine of frustration are not in dispute. They were explained as follows in *Naylor Group Inc. v Ellis-Don Construction Ltd.*, 2001 SCC 58 at para 53, [2001] 2 SCR 943:
>
> > [53] Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract": *Peter Kiewit Sons' Co. v. Eakins Construction Ltd*, [1960] S.C.R. 361, *per* Judson J., at p. 368, quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.), at p. 729.

58 The appellant submits, based on this test, that the Chambers judge erred by failing to find that the performance of the Contract became a radically different thing. He says that is so because preparation, execution and service of the affidavit became very difficult due to intervening events that were not contemplated or foreseen. The appellant alleges that failing to take this into account was an error of law. However, as noted above, this is an allegation that the Chambers judge erred in relation to a mixed question of fact and law, reviewable on a palpable and overriding error standard.

59 Frustration may arise as a result of physical impossibility or impossibility resulting from supervening illegality: *ACT Greenwood Ltd. v. Desjardins-McLeod*, 2019 ONCA 158 (Ont. C.A.) at para 17 [*ACT Greenwood*]; Angela Swan, Jakub Adamski & Annie Y. Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 885. It may also arise where performance is physically and legally possible but would nonetheless be totally different from what the parties intended (*ACT Greenwood* at para 17). The Chambers judge concluded that the evidence did not support the contention that by virtue of a supervening event, performance of the contract became radically different than what was agreed to, was rendered impossible or was something the parties failed to contemplate.

60 In our view, that conclusion was available on the evidence. Performance was not physically or legally impossible. The events that resulted in the failure to serve the documents were not the result of supervening events beyond the control of the appellant and his counsel, or beyond the contemplation of the parties. The appellant overcame the delays caused by third

parties in obtaining documents. In the final analysis, the affidavit was not served because appellant's counsel, and then the appellant, chose not to attend two scheduled meetings that would have resulted in the execution and delivery of his affidavit. They gave priority to other matters and, as the deadline loomed, the appellant both failed to manage his schedule and failed make the arrangements necessary to meet the deadline.

61 In these circumstances, the Chambers judge's conclusion that the test for frustration was not met was not a palpable and overriding error. In the result, this ground of appeal also fails.

CONCLUSION

62 For the foregoing reasons, the appeal is dismissed with costs to the respondent.

Appeal dismissed.

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2016 SCC 56
Supreme Court of Canada

Canada (Attorney General) v. Fairmont Hotels Inc.

2016 CarswellOnt 19252, 2016 CarswellOnt 19253, 2016 SCC 56, [2016] 2 S.C.R. 720, [2016] S.C.J. No. 56, [2017] 1 C.T.C. 149, 2016 D.T.C. 5135, 272 A.C.W.S. (3d) 525, 404 D.L.R. (4th) 201, 58 B.L.R. (5th) 171, J.E. 2016-2123

Attorney General of Canada (Appellant) and Fairmont Hotels Inc., FHIW Hotel Investments (Canada) Inc. and FHIS Hotel Investments (Canada) Inc. (Respondents)

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

Heard: May 18, 2016
Judgment: December 9, 2016
Docket: 36606

Proceedings: reversing *Fairmont Hotels Inc. v. Canada (Attorney General)* (2015), 45 B.L.R. (5th) 230, 2015 ONCA 441, 2015 CarswellOnt 8955, 2015 D.T.C. 5073 (Eng.), E.A. Cronk J.A., Janet Simmons J.A., R.A. Blair J.A. (Ont. C.A.); affirming *Fairmont Hotels Inc. v. Canada (Attorney General)* (2014), [2015] 3 C.T.C. 9, 2014 CarswellOnt 17975, 2014 ONSC 7302, 36 B.L.R. (5th) 215, 2015 D.T.C. 5019 (Eng.), 123 O.R. (3d) 241, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Daniel Bourgeois, Eric Noble, for Appellant
Geoff R. Hall, Chia-yi Chua, for Respondents

Subject: Contracts; Income Tax (Federal)

Related Abridgment Classifications

Contracts
VIII Rectification or reformation
  VIII.1 General principles

Tax
II Income tax
  II.25 Miscellaneous

Headnote

Contracts --- Rectification or reformation — General principles
Business entered into reciprocal loan transaction with real estate investment trust, and money was routed through related corporation — Potential foreign exchange tax issue was made neutral by establishing two subsidiaries to business — Because of sale of business, possibility existed that foreign exchange gain or loss would be realized in connection with reciprocal loan arrangements — Reciprocal loan agreements were unwound with regard to certain hotels, and subsidiaries cashed preferential shares by mistake, which triggered unintended taxable foreign exchange gains — Chambers judge granted business' application to rectify plan documents — Judge found that purpose of unwind of loans was to unwind loans on tax-free basis, and redemption of preference shares was mistakenly chosen as means to do so — Court of Appeal dismissed Attorney General of Canada's appeal — Court held that business had specific and unwavering intention that transactions would be tax neutral and that no redemptions of relevant preferential shares should occur, but redemptions was authorized by mistake —

Attorney General of Canada appealed — Appeal allowed — Rectification was limited to cases where agreement between parties was not correctly recorded in instrument that became final expression of their agreement — Party seeking rectification must show not only putative error in instrument, but also way in which instrument should be rectified in order to correctly record what parties intended to do — Business was not entitled to rectification as it could not show having reached prior agreement with definite and ascertainable terms — Parties' intention of tax neutrality could not support grant of rectification.

Tax --- Income tax — Miscellaneous
Rectification — Business entered into reciprocal loan transaction with real estate investment trust, and money was routed through related corporation — Potential foreign exchange tax issue was made neutral by establishing two subsidiaries to business — Because of sale of business, possibility existed that foreign exchange gain or loss would be realized in connection with reciprocal loan arrangements — Tax plan to address situation did not hedge foreign exchange exposure of subsidiaries — Reciprocal loan agreements were unwound with regard to certain hotels, and subsidiaries cashed preferential shares, by mistake, which triggered unintended taxable foreign exchange gains — Chambers judge granted business's application to rectify plan documents — Judge held that tax planning had not been done on retroactive basis after audit — Judge found that purpose of unwind of loans was to unwind loans on tax-free basis, and redemption of preference shares was mistakenly chosen as means to do so — Court of Appeal dismissed Attorney General of Canada's appeal — Court held that business had specific and unwavering intention that transactions would be tax neutral and that no redemptions of relevant preferential shares should occur but redemptions were authorized by mistake — Attorney General of Canada appealed — Appeal allowed — Parties' intention of tax neutrality could not support grant of rectification — Court may not modify instrument merely because party discovered that its operation generated adverse and unplanned tax liability — Business could not show having reached prior agreement with definite and ascertainable terms so it was not entitled to rectification.

Contrats --- Rectification ou réformation — Principes généraux
Entreprise a conclu un contrat de prêt réciproque avec une fiducie canadienne d'investissement immobilier et l'argent a été acheminé par le truchement d'une société liée — Problème fiscal potentiel concernant les opérations de change a été neutralisé par l'entreprise à la suite de la création de deux filiales — En raison de la vente de l'entreprise, il y avait une possibilité que le contrat de prêt réciproque donne ouverture à la réalisation d'un gain ou d'une perte sur change — Liens contractuels découlant du contrat de prêt réciproque ont été dénoués à l'égard de certains hôtels et les filiales ont encaissé des actions privilégiées par erreur, ce qui a involontairement provoqué des gains sur change imposables — Juge siégeant en son cabinet a accordé la demande déposée par l'entreprise visant à faire rectifier les documents relatifs au scénario — Juge a conclu que le dénouement des prêts avait pour but de dénouer les prêts sans incidences fiscales et le rachat des actions privilégiées a été choisi par erreur comme le moyen d'y parvenir — Cour d'appel a rejeté l'appel interjeté par le procureur général du Canada — Cour a estimé que l'entreprise avait exprimé l'intention spécifique et inébranlable que les opérations n'aient aucune incidence fiscale et qu'aucun rachat des actions privilégiées en question ne survienne et que le rachat avait été autorisé par erreur — Procureur général du Canada a formé un pourvoi — Pourvoi accueilli — Rectification n'est justifiée que dans les cas où une entente entre des parties n'a pas été correctement consignée dans l'instrument qui est devenu l'expression finale de leur entente — Partie qui sollicite la rectification doit non seulement démontrer l'erreur putative, mais également la façon dont l'instrument devrait être rectifié afin de consigner correctement ce que les parties avaient l'intention de faire — Entreprise n'avait pas droit à la rectification dans la mesure où elle ne pouvait démontrer qu'elle avait conclu une entente antérieure dont les modalités étaient déterminées et déterminables — Intention des parties concernant la neutralité fiscale ne justifiait pas l'octroi d'une rectification.

Taxation --- Impôt sur le revenu — Divers
Rectification — Entreprise a conclu un contrat de prêt réciproque avec une fiducie canadienne d'investissement immobilier et l'argent a été acheminé par le truchement d'une société liée — Problème fiscal potentiel concernant les opérations de change a été neutralisé par l'entreprise à la suite de la création de deux filiales — En raison de la vente de l'entreprise, il y avait une possibilité que le contrat de prêt réciproque donne ouverture à la réalisation d'un gain ou d'une perte sur change — Scénario fiscal visant à gérer cette situation n'a pas protégé les filiales contre les risques découlant des opérations de change — Liens contractuels découlant du contrat de prêt réciproque ont été dénoués à l'égard de certains hôtels et les filiales ont encaissé des actions privilégiées par erreur, ce qui a involontairement provoqué des gains sur change imposables — Juge siégeant en son cabinet a accordé la demande déposée par l'entreprise visant à faire rectifier les documents relatifs au scénario — Juge a estimé que la planification fiscale n'avait pas été faite rétroactivement après la vérification — Juge a conclu que le dénouement des prêts avait pour but de dénouer les prêts sans incidences fiscales et le rachat des actions privilégiées a été choisi par erreur comme le moyen d'y parvenir — Cour d'appel a rejeté l'appel interjeté par le procureur général du Canada — Cour a estimé que l'entreprise avait exprimé l'intention spécifique et inébranlable que les opérations n'aient aucune

incidence fiscale et qu'aucun rachat des actions privilégiées en question ne survienne et que le rachat avait été autorisé par erreur — Procureur général du Canada a formé un pourvoi — Pourvoi accueilli — Intention des parties concernant la neutralité fiscale ne justifiait pas l'octroi d'une rectification — Tribunal ne peut modifier un instrument simplement parce qu'une partie a découvert que son exécution faisait naître une obligation fiscale préjudiciable et imprévue — Entreprise n'avait pas droit à la rectification dans la mesure où elle ne pouvait démontrer qu'elle avait conclu une entente antérieure dont les modalités étaient déterminées et déterminables.

A business entered into a reciprocal loan transaction with a real estate investment trust, and money was routed through a related corporation. The potential foreign exchange tax issue was made neutral by establishing two subsidiaries to the business. Because of the sale of the business, the possibility existed that a foreign exchange gain or loss would be realized in connection with the reciprocal loan arrangements. The tax plan to address this situation did not hedge the foreign exchange exposure of the subsidiaries. The reciprocal loan agreements were unwound with regard to certain hotels, and the subsidiaries cashed preferential shares, by mistake, which triggered unintended taxable foreign exchange gains.

The chambers judge granted the business's application to rectify the plan documents. The judge held that tax planning had not been done on a retroactive basis after the audit. The judge found that the purpose of the unwinding of the loans was to unwind the loans on a tax-free basis, and the redemption of the preference shares was mistakenly chosen as the means to do so.

The Court of Appeal dismissed the Attorney General of Canada's appeal. The Court held that the business had a specific and unwavering intention, that the transactions would be tax neutral, and that no redemptions of relevant preferential shares should occur. The redemptions were authorized by mistake. The Court found it unnecessary for the business to prove that it had determined to use a specific transaction device of loans to achieve the intended tax result.

The Attorney General of Canada appealed.

Held: The appeal was allowed.

Per Brown J. (McLachlin C.J.C., Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring): Tax neutrality was the parties' intention, but this intention could not support a grant of rectification. Rectification was limited to cases where the agreement between parties was not correctly recorded in the instrument that became the final expression of their agreement. Rectification did not undo unanticipated effects of an agreement.

The Ontario Court of Appeal case that was relied on by the chambers judge and the Court of Appeal was irreconcilable with the narrowly confined circumstances to which the Supreme Court of Canada had restricted the availability of rectification. Tax consequences, including those which followed an assessment by the Canada Revenue Agency, flowed from freely chosen legal arrangements, not from intended or unintended effects of those arrangements.

The party seeking rectification must 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 may not modify an instrument merely because a party discovered that its operation generated an adverse and unplanned tax liability.

The application of these principles to this case led to the conclusion that the business's application for rectification should be dismissed, since it could not show having reached a prior agreement with definite and ascertainable terms. The business intended to limit its tax liability and that intention was frustrated, but this did not support a grant of rectification.

Per Abella J. (dissenting) (Côté J. concurring): The appeal should be dismissed.

Rectification was an equitable remedy that sought to prevent unfairness which resulted from enforcing a mistake, including the unfairness inherent in unjust enrichment and windfalls. The approach by the majority unduly narrowed the scope of rectification. A common, continuing, definite and ascertainable intention to pursue a transaction in a tax-neutral manner had usually satisfied the threshold of 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 the document, had the effect of raising the threshold. Since unjust enrichment can result from a mistake in carrying out the intention of parties, the remedy was available to correct errors in implementation.

Allowing tax authorities to profit from legitimate tax planning errors, when its own rights have not been prejudiced in any way, amounted to unjust enrichment. However, allowing parties to rewrite documents and restructure their affairs based solely on a generalized and all-encompassing preference for paying lower taxes was not consistent with the equitable principles that informed rectification.

The test for rectification was met in this case. The chambers judge was satisfied that the business had an unwavering intention to unwind the reciprocal loan structure in way that ensured that any foreign exchange gains and losses would be offset against each other. By mistake, the preferred share redemption terms were included in the directors' resolutions, which was the type of mistake that rectification existed to remedy. To require an exhaustive account of how a transaction was supposed to have proceeded would amount to imposing a uniquely high threshold for rectification in the tax context.

Une entreprise a conclu un contrat de prêt réciproque avec une fiducie canadienne d'investissement immobilier et l'argent a été acheminé par le truchement d'une société liée. Le problème fiscal potentiel concernant les opérations de change a été neutralisé par l'entreprise à la suite de la création de deux filiales. En raison de la vente de l'entreprise, il y avait une possibilité que le contrat de prêt réciproque donne ouverture à la réalisation d'un gain ou d'une perte sur change. Le scénario fiscal visant à gérer cette situation n'a pas protégé les filiales contre les risques découlant des opérations de change. Les liens contractuels découlant du contrat de prêt réciproque ont été dénoués à l'égard de certains hôtels et les filiales ont encaissé des actions privilégiées par erreur, ce qui a involontairement provoqué des gains sur change imposables.

Le juge siégeant en son cabinet a accordé la demande déposée par l'entreprise visant à faire rectifier les documents relatifs au scénario. Le juge a estimé que la planification fiscale n'avait pas été faite rétroactivement après la vérification. Le juge a conclu que le dénouement des prêts avait pour but de dénouer les prêts sans incidences fiscales et le rachat des actions privilégiées a été choisi par erreur comme le moyen d'y parvenir.

La Cour d'appel a rejeté l'appel interjeté par le procureur général du Canada. La Cour a estimé que l'entreprise avait exprimé l'intention spécifique et inébranlable que les opérations n'aient aucune incidence fiscale et qu'aucun rachat des actions privilégiées en question ne survienne. Le rachat a été autorisé par erreur. La Cour a conclu qu'il n'était pas nécessaire que l'entreprise prouve que son intention était que les prêts soient utilisés comme mécanisme opérationnel pour atteindre le résultat fiscal voulu.

Le procureur général du Canada a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Brown, J. (McLachlin, J.C.C., Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, JJ., souscrivant à son opinion) : La neutralité fiscale était l'intention des parties, mais cette intention ne justifiait pas l'octroi d'une rectification. Une rectification n'est justifiée que dans les cas où une entente entre des parties n'a pas été correctement consignée dans l'instrument qui est devenu l'expression finale de leur entente. Elle n'annule pas les effets imprévus de cette entente.

La décision de la Cour d'appel de l'Ontario sur laquelle le juge siégeant en son cabinet et la Cour d'appel se sont appuyés pour trancher le litige était incompatible avec les circonstances très restreintes auxquelles la Cour suprême du Canada a limité le recours en rectification. Les conséquences fiscales, y compris celles qui font suite à une cotisation de l'Agence du revenu du Canada, découlent directement d'ententes juridiques librement choisies, et non des effets recherchés ou non recherchés de ces ententes.

La partie qui sollicite la rectification doit non seulement démontrer l'erreur putative, mais également la façon dont l'instrument devrait être rectifié afin de consigner correctement ce que les parties avaient l'intention de faire. Le tribunal ne peut modifier un instrument simplement parce qu'une partie a découvert que son exécution faisait naître une obligation fiscale préjudiciable et imprévue.

L'application de ces principes au présent dossier menait à la conclusion que la demande de rectification de l'entreprise devrait être rejetée, puisqu'elle n'a pu démontrer qu'elle avait conclu une entente antérieure dont les modalités étaient déterminées et déterminables. Il était vrai que l'entreprise comptait limiter son obligation fiscale et que cette intention a été contrecarrée, mais ceci ne justifiait pas l'octroi d'une rectification.

Abella, J. (dissidente) (Côté, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté.

La rectification est une réparation en equity visant à prévenir l'injustice qui découle du fait d'avoir donné effet à une erreur, y compris l'injustice inhérente à l'enrichissement injustifié et aux gains fortuits. L'approche suivie par les juges majoritaires restreignait indûment la portée de cette réparation. L'intention commune, constante, déterminée et déterminable de réaliser une opération sans incidences fiscales satisfait habituellement au critère permettant l'octroi d'une rectification. L'exigence supplémentaire selon laquelle les parties doivent désigner clairement le mécanisme précis au moyen duquel elles ont l'intention d'atteindre la neutralité fiscale, ainsi que la manière dont ce mécanisme a été incorrectement transcrit dans le document, avait pour effet de restreindre le critère. Puisque l'enrichissement injustifié peut résulter d'une erreur dans la réalisation de l'intention des parties, on pouvait aussi recourir à la rectification pour corriger les erreurs de mise en oeuvre.

Permettre aux autorités fiscales de tirer profit des erreurs commises dans une planification fiscale légitime, alors qu'il n'a été nullement porté atteinte à ses droits, équivalait à un enrichissement injustifié. En revanche, le fait de permettre aux parties de réécrire des documents et de réorganiser leurs affaires simplement parce qu'elles préfèrent généralement et globalement payer moins d'impôt n'était pas compatible avec les principes d'equity qui régissent la rectification.

Le test permettant la rectification était satisfait en l'espèce. Le juge siégeant en son cabinet était convaincu que l'entreprise avait fait preuve d'une intention inébranlable de dénouer la structure de prêts réciproques de façon à ce qu'il y ait compensation entre les gains et les pertes sur change. Or, par erreur, les modalités de rachat des actions privilégiées ont été incluses dans les résolutions adoptées par les administrateurs, ce qui était le genre d'erreur que la rectification visait à corriger. Exiger une description détaillée de la manière dont l'opération était censée se dérouler reviendrait à imposer un critère exceptionnellement strict de rectification dans le domaine fiscal.

Table of Authorities

Cases considered by *Brown J.*:

"M.F. Whalen" (The) v. Point Anne Quarries Ltd. (1921), 63 S.C.R. 109, 63 D.L.R. 545, 1921 CarswellNat 38 (S.C.C.) — referred to

Archambault c. Canada (Agence du Revenu) (2013), 2013 SCC 65, 2013 CarswellQue 11299, 2013 CarswellQue 11300, (sub nom. *Québec (Agence du Revenu) v. Services Environnementaux AES Inc.)* 2013 D.T.C. 5174 (Eng.), (sub nom. *Québec (Agence du Revenu) v. Services Environnementaux AES Inc.)* 2013 D.T.C. 5175 (Fr.), 365 D.L.R. (4th) 535, (sub nom. *Agebce du Revenu du Québec v. Services Environnementaux AES inc.)* 453 N.R. 119, (sub nom. *Quebec (Agence du revenu) v. Services Environnementaux AES inc.)* [2013] 3 S.C.R. 838, 21 B.L.R. (5th) 1 (S.C.C.) — considered

Ashcroft v. Barnsdale (2010), [2010] S.T.C. 2544, [2010] 32 E.G. 61, [2010] W.T.L.R. 1675, [2010] EWHC 1948, 13 I.T.E.L.R. 516, [2010] S.T.I. 2514 (Eng. Ch. Div.) — considered

C. (R.) v. McDougall (2008), 2008 SCC 53, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 83 B.C.L.R. (4th) 1, [2008] 11 W.W.R. 414, 60 C.C.L.T. (3d) 1, 61 C.P.C. (6th) 1, (sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, 61 C.R. (6th) 1, (sub nom. *F.H. v. McDougall)* 380 N.R. 82, (sub nom. *F.H. v. McDougall)* 260 B.C.A.C. 74, (sub nom. *F.H. v. McDougall)* 439 W.A.C. 74, (sub nom. *F.H. v. McDougall)* [2008] 3 S.C.R. 41 (S.C.C.) — considered

Crane v. Hegeman-Harris Co. (1939), [1939] 1 All E.R. 662 (Eng. Ch. Div.) — considered

Dynamex Canada Inc. v. Miller (1998), 161 Nfld. & P.E.I.R. 97, 497 A.P.R. 97, 1998 CarswellNfld 88, 37 C.C.E.L. (2d) 41 (Nfld. C.A.) — referred to

Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co. (1953), [1953] 2 Q.B. 450, [1953] 2 Lloyd's Rep. 238, 70 R.P.C. 238, 33 Can. Bar Rev. 164, [1953] 2 All E.R. 739, [1953] 3 W.L.R. 497 (Eng. C.A.) — considered

Hart v. Boutilier (1916), 56 D.L.R. 620, 1916 CarswellNS 43 (S.C.C.) — referred to

Harvest Operations Corp. v. Canada (Attorney General) (2015), 2015 ABQB 327, 2015 CarswellAlta 958, 2015 D.T.C. 5067 (Eng.), [2015] 6 C.T.C. 78, 44 B.L.R. (5th) 271, 617 A.R. 281 (Alta. Q.B.) — referred to

Joscelyne v. Nissen (1969), [1970] 2 Q.B. 86, [1970] 1 All E.R. 1213 (Eng. C.A.) — considered

Juliar v. Canada (Attorney General) (1999), 1999 CarswellOnt 2970, 99 D.T.C. 5743, 46 O.R. (3d) 104, 49 B.L.R. (2d) 243, [2000] 2 C.T.C. 464, 103 O.T.C. 294 (Ont. S.C.J. [Commercial List]) — overruled

Juliar v. Canada (Attorney General) (2000), 2000 CarswellOnt 3518, (sub nom. *Attorney General of Canada v. Juliar)* 2000 D.T.C. 6589, (sub nom. *Canada (Attorney General) v. Juliar)* 50 O.R. (3d) 728, 8 B.L.R. (3d) 167, 136 O.A.C. 301, [2001] 4 C.T.C. 45 (Ont. C.A.) — overruled

KRG Insurance Brokers (Western) Inc. v. Shafron (2009), 2009 SCC 6, 2009 CarswellBC 79, 2009 CarswellBC 80, 70 C.C.E.L. (3d) 157, 68 C.C.L.I. (4th) 161, 87 B.C.L.R. (4th) 1, (sub nom. *Shafron v. KRG Insurance Brokers (Western) Inc.)* 2009 C.L.L.C. 210-010, [2009] 3 W.W.R. 577, 52 B.L.R. (4th) 165, 383 N.R. 217, (sub nom. *Shafron v. KRG Insurance Brokers (Western) Inc.)* 301 D.L.R. (4th) 522, 265 B.C.A.C. 1, 446 W.A.C. 1, (sub nom. *Shafron v. KRG Insurance Brokers (Western) Inc.)* [2009] 1 S.C.R. 157, D.T.E. 2009T-86 (S.C.C.) — considered

Mackenzie v. Coulson (1869), L.R. 8 Eq. 368 (Eng. V.-C.) — referred to

Racal Group Services Ltd. v. Ashmore (1995), [1995] S.T.C. 1151, 68 T.C. 86 (Eng. C.A.) — considered

Shell Canada Ltd. v. R. (1999), 1999 CarswellNat 1808, 1999 CarswellNat 1809, (sub nom. *Shell Canada Ltd. v. Canada)* 178 D.L.R. (4th) 26, 99 D.T.C. 5669 (Eng.), 99 D.T.C. 5682 (Fr.), (sub nom. *Minister of National Revenue v. Shell Canada Ltd.)* 247 N.R. 19, [1999] 4 C.T.C. 313, (sub nom. *Shell Canada Ltd. v. Canada)* [1999] 3 S.C.R. 622 (S.C.C.) — considered

Slocock's Will Trusts, Re (1978), [1979] 1 All E.R. 358 (Eng. Ch. Div.) — considered

Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. (2002), 2002 SCC 19, 2002 CarswellAlta 186, 2002 CarswellAlta 187, 20 B.L.R. (3d) 1, 209 D.L.R. (4th) 318, [2002] 5 W.W.R. 193, 98 Alta. L.R. (3d) 1, 283 N.R. 233, 299 A.R. 201, 266 W.A.C. 201, 50 R.P.R. (3d) 212, (sub nom. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.)* [2002] 1 S.C.R. 678, 2002 CSC 19 (S.C.C.) — considered

Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd. (1980), [1981] 1 W.L.R. 505, [1981] 1 All E.R. 1077 (Eng. C.A.) — considered

Wasauksing First Nation v. Wasausink Lands Inc. (2004), 2004 CarswellOnt 936, 184 O.A.C. 84, [2004] 2 C.N.L.R. 355, 43 B.L.R. (3d) 244 (Ont. C.A.) — referred to

Cases considered by *Abella J.* (dissenting):

Aboriginal Diamonds Group Ltd., Re (2007), 2007 NWTSC 37, 2007 CarswellNWT 42 (N.W.T. S.C.) — refered to in a minority or dissenting opinion

Archambault c. Canada (Agence du Revenu) (2013), 2013 SCC 65, 2013 CarswellQue 11299, 2013 CarswellQue 11300, (sub nom. *Québec (Agence du Revenu) v. Services Environnementaux AES Inc.)* 2013 D.T.C. 5174 (Eng.), (sub nom. *Québec (Agence du Revenu) v. Services Environnementaux AES Inc.)* 2013 D.T.C. 5175 (Fr.), 365 D.L.R. (4th) 535, (sub nom. *Agebce du Revenu du Québec v. Services Environnementaux AES inc.)* 453 N.R. 119, (sub nom. *Quebec (Agence du revenu) v. Services Environnementaux AES inc.)* [2013] 3 S.C.R. 838, 21 B.L.R. (5th) 1 (S.C.C.) — considered in a minority or dissenting opinion

Augdome Corp. v. Gray (1974), 3 N.R. 235, 49 D.L.R. (3d) 372, [1975] 2 S.C.R. 354, 1974 CarswellOnt 244, 1974 CarswellOnt 244F (S.C.C.) — considered in a minority or dissenting opinion

Binder v. Saffron Rouge Inc. (2008), 2008 CarswellOnt 284, 2008 D.T.C. 6112 (Eng.), 89 O.R. (3d) 54, 42 B.L.R. (4th) 94 (Ont. S.C.J.) — refered to in a minority or dissenting opinion

Birch Hill Equity Partners Management Inc. v. Rogers Communications Inc. (2015), 2015 ONSC 7189, 2015 CarswellOnt 17928, [2016] 1 C.T.C. 264, 23 C.C.P.B. (2nd) 88, 128 O.R. (3d) 1, 50 B.L.R. (5th) 300 (Ont. S.C.J.) —

refered to in a minority or dissenting opinion

Bryndon Ventures Inc. v. Bragg (1991), 58 B.C.L.R. (2d) 229, 2 B.C.A.C. 140, 5 W.A.C. 140, 82 D.L.R. (4th) 383, 37 C.P.R. (3d) 489, 1991 CarswellBC 189 (B.C. C.A.) — refered to in a minority or dissenting opinion

Capstone Power Corp. v. 1177719 Alberta Ltd. (2016), 2016 BCSC 1274, 2016 CarswellBC 1885 (B.C. S.C.) — refered to in a minority or dissenting opinion

Carlson v. Big Bud Tractor of Canada Ltd. (1981), [1981] 3 W.W.R. 237, 7 Sask. R. 337, 1981 CarswellSask 111 (Sask. C.A.) — refered to in a minority or dissenting opinion

Consortium Capital Projects Ltd. v. Blind River Veneer Ltd. (1988), 47 R.P.R. 225, 63 O.R. (2d) 761, 1988 CarswellOnt 645 (Ont. H.C.) — considered in a minority or dissenting opinion

Consortium Capital Projects Ltd. v. Blind River Veneer Ltd. (1990), 72 O.R. (2d) 703, 1990 CarswellOnt 2738 (Ont. C.A.) — refered to in a minority or dissenting opinion

Copthorne Holdings Ltd. v. R. (2011), 2011 SCC 63, 2011 CarswellNat 5201, 2011 CarswellNat 5202, 339 D.L.R. (4th) 385, [2012] 2 C.T.C. 29, 2012 D.T.C. 5006 (Fr.), 2012 D.T.C. 5007 (Eng.), *(*sub nom. *Copthorne Holdings Ltd. v. Minister of National Revenue)* 424 N.R. 132, *(*sub nom. *Copthorne Holdings Ltd. v. Canada)* [2011] 3 S.C.R. 721 (S.C.C.) — refered to in a minority or dissenting opinion

Dynamex Canada Inc. v. Miller (1998), 161 Nfld. & P.E.I.R. 97, 497 A.P.R. 97, 1998 CarswellNfld 88, 37 C.C.E.L. (2d) 41 (Nfld. C.A.) — refered to in a minority or dissenting opinion

Fraser Valley Refrigeration, Re (2009), 2009 BCSC 848, 2009 CarswellBC 1678, [2009] 6 C.T.C. 73 (B.C. S.C.) — refered to in a minority or dissenting opinion

Fraser Valley Refrigeration, Re (2009), 2009 BCCA 576, 2009 CarswellBC 3396, [2010] 2 C.T.C. 172, 280 B.C.A.C. 317, 474 W.A.C. 317 (B.C. C.A.) — refered to in a minority or dissenting opinion

GT Group Telecom Inc., Re (2004), 2004 CarswellOnt 4262, 5 C.B.R. (5th) 230 (Ont. S.C.J. [Commercial List]) — refered to in a minority or dissenting opinion

Graymar Equipment (2008) Inc. v. Canada (Attorney General) (2014), 2014 ABQB 154, 2014 CarswellAlta 443, 2014 D.T.C. 5051 (Eng.), [2014] 8 W.W.R. 524, 97 Alta. L.R. (5th) 288, 24 B.L.R. (5th) 193 (Alta. Q.B.) — considered in a minority or dissenting opinion

H.F. Clarke Ltd. v. Thermidaire Corp. (1973), [1973] 2 O.R. 57, 33 D.L.R. (3d) 13, 9 C.P.R. (2d) 203, 1973 CarswellOnt 851 (Ont. C.A.) — considered in a minority or dissenting opinion

H.F. Clarke Ltd. v. Thermidaire Corp. (1974), [1976] 1 S.C.R. 319, 3 N.R. 133, 17 C.P.R. (2d) 1, 1974 CarswellOnt 253, 1974 CarswellOnt 253F, 54 D.L.R. (3d) 385, 18 C.P.R. (2d) 32, 54 D.L.R. (3d) 385 at 399, [1976] 1 S.C.R. 340 (note) (S.C.C.) — refered to in a minority or dissenting opinion

Hart v. Boutilier (1916), 56 D.L.R. 620, 1916 CarswellNS 43 (S.C.C.) — refered to in a minority or dissenting opinion

Husky Oil Operations Ltd. v. Saskatchewan (Minister of Finance) (2014), 2014 SKQB 116, 2014 CarswellSask 263, 443 Sask. R. 172 (Sask. Q.B.) — refered to in a minority or dissenting opinion

I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd. (1994), 41 R.P.R. (2d) 312, 53 B.C.A.C. 72, 87 W.A.C. 72, 2 B.C.L.R. (3d) 289, 1994 CarswellBC 85 (B.C. C.A.) — refered to in a minority or dissenting opinion

JAFT Corp. v. Jones (2014), 2014 MBQB 59, 2014 CarswellMan 148, *(*sub nom. *Jaft Corporation v. Canada (Attorney General))* 2014 D.T.C. 2565 (Eng.), [2014] 5 C.T.C. 163, 304 Man. R. (2d) 86, [2014] 9 W.W.R. 404 (Man. Q.B.) — refered to in a minority or dissenting opinion

JAFT Corp. v. Jones (2015), 2015 MBCA 77, 2015 CarswellMan 456, [2015] 6 C.T.C. 155, 389 D.L.R. (4th) 131, [2015] 11 W.W.R. 476, 2015 D.T.C. 5095, 26 C.C.E.L. (4th) 25, 323 Man. R. (2d) 57, 657 W.A.C. 57 (Man. C.A.) — refered to in a minority or dissenting opinion

Joscelyne v. Nissen (1969), [1970] 2 Q.B. 86, [1970] 1 All E.R. 1213 (Eng. C.A.) — refered to in a minority or dissenting opinion

Juliar v. Canada (Attorney General) (2000), 2000 CarswellOnt 3518, *(*sub nom. *Attorney General of Canada v. Juliar)* 2000 D.T.C. 6589, *(*sub nom. *Canada (Attorney General) v. Juliar)* 50 O.R. (3d) 728, 8 B.L.R. (3d) 167, 136 O.A.C. 301, [2001] 4 C.T.C. 45 (Ont. C.A.) — considered in a minority or dissenting opinion

KRG Insurance Brokers (Western) Inc. v. Shafron (2009), 2009 SCC 6, 2009 CarswellBC 79, 2009 CarswellBC 80, 70 C.C.E.L. (3d) 157, 68 C.C.L.I. (4th) 161, 87 B.C.L.R. (4th) 1, *(*sub nom. *Shafron v. KRG Insurance Brokers (Western) Inc.)* 2009 C.L.L.C. 210-010, [2009] 3 W.W.R. 577, 52 B.L.R. (4th) 165, 383 N.R. 217, *(*sub nom. *Shafron v. KRG Insurance Brokers (Western) Inc.)* 301 D.L.R. (4th) 522, 265 B.C.A.C. 1, 446 W.A.C. 1, *(*sub nom. *Shafron v. KRG Insurance Brokers (Western) Inc.)* [2009] 1 S.C.R. 157, D.T.E. 2009T-86 (S.C.C.) — considered in a minority or dissenting opinion

Kanji v. Canada (Attorney General) (2013), 2013 ONSC 781, 2013 CarswellOnt 1160, 114 O.R. (3d) 1, [2013] 3 C.T.C. 141, 2013 D.T.C. 5058 (Eng.) (Ont. S.C.J. [Commercial List]) — considered in a minority or dissenting opinion

Kolias v. Condominium Plan 309 CDC (2008), 2008 ABCA 379, 2008 CarswellAlta 1747, 74 R.P.R. (4th) 1, 98 Alta. L.R. (4th) 209, 440 A.R. 389, 438 W.A.C. 389, 303 D.L.R. (4th) 314 (Alta. C.A.) — refered to in a minority or dissenting opinion

Love v. Love (2013), 2013 SKCA 31, 2013 CarswellSask 162, 85 E.T.R. (3d) 205, [2013] 5 W.W.R. 662, 2013 C.E.B. & P.G.R. 8026 (headnote only), 25 R.F.L. (7th) 1, 359 D.L.R. (4th) 504, 20 C.C.L.I. (5th) 1, 417 Sask. R. 5, 580 W.A.C. 5 (Sask. C.A.) — considered in a minority or dissenting opinion

McLean v. McLean (2013), 2013 ONCA 788, 2013 CarswellOnt 17995, 118 O.R. (3d) 216, *(*sub nom. *McLean Estate v. McLean)* 313 O.A.C. 364, 39 R.P.R. (5th) 181, 370 D.L.R. (4th) 167 (Ont. C.A.) — considered in a minority or dissenting opinion

McPeake v. Canada (Attorney General) (2012), 2012 BCSC 132, 2012 CarswellBC 200, *(*sub nom. *McPeake v. R.)* 2012 D.T.C. 5042 (Eng.), [2012] 4 C.T.C. 203 (B.C. S.C.) — refered to in a minority or dissenting opinion

Mitchell v. MacMillan (1980), 5 Sask. R. 160, 1980 CarswellSask 262 (Sask. C.A.) — refered to in a minority or dissenting opinion

Oriole Oil & Gas Ltd. v. American Eagle Petroleums Ltd. (1981), 27 A.R. 411, 24 Alta. L.R. (2d) 121 at 130, 1981 CarswellAlta 133 (Alta. C.A.) — refered to in a minority or dissenting opinion

Pallen Trust, Re (2015), 2015 BCCA 222, 2015 CarswellBC 1326, 385 D.L.R. (4th) 499, 2015 D.T.C. 5061 (Eng.), [2016] 1 C.T.C. 25, 76 B.C.L.R. (5th) 256, 373 B.C.A.C. 37, 641 W.A.C. 37, [2016] 1 W.W.R. 1 (B.C. C.A.) — considered in a minority or dissenting opinion

Peter Pan Drive-In Ltd. v. Flambro Realty Ltd. (1978), 22 O.R. (2d) 291, 93 D.L.R. (3d) 221, 1978 CarswellOnt 1309 (Ont. H.C.) — considered in a minority or dissenting opinion

Peter Pan Drive-In Ltd. v. Flambro Realty Ltd. (1980), 26 O.R. (2d) 746, 106 D.L.R. (3d) 576, 1980 CarswellOnt 1471 (Ont. C.A.) — refered to in a minority or dissenting opinion

Prospera Credit Union, Re (2002), 2002 BCSC 1806, 2002 CarswellBC 3275, 32 B.L.R. (3d) 145, 32 B.L.R. (4th) 145 (B.C. S.C.) — refered to in a minority or dissenting opinion

Reed Shaw Osler Ltd. v. Wilson (1981), 17 Alta. L.R. (2d) 81, 35 A.R. 451, 62 C.P.R. (2d) 58, 1981 CarswellAlta 93

(Alta. C.A.) — refered to in a minority or dissenting opinion

Royal Bank v. El-Bris Ltd. (2008), 2008 ONCA 601, 2008 CarswellOnt 5098, 46 C.B.R. (5th) 161, 298 D.L.R. (4th) 281, 50 B.L.R. (4th) 161, 92 O.R. (3d) 779 (Ont. C.A.) — considered in a minority or dissenting opinion

Shell Canada Ltd. v. R. (1999), 1999 CarswellNat 1808, 1999 CarswellNat 1809, *(*sub nom. *Shell Canada Ltd. v. Canada)* 178 D.L.R. (4th) 26, 99 D.T.C. 5669 (Eng.), 99 D.T.C. 5682 (Fr.), *(*sub nom. *Minister of National Revenue v. Shell Canada Ltd.)* 247 N.R. 19, [1999] 4 C.T.C. 313, *(*sub nom. *Shell Canada Ltd. v. Canada)* [1999] 3 S.C.R. 622 (S.C.C.) — refered to in a minority or dissenting opinion

Slate Management Corp. v. Canada (Attorney General) (2016), 2016 ONSC 4216, 2016 CarswellOnt 10515, [2016] 6 C.T.C. 156 (Ont. S.C.J. [Commercial List]) — refered to in a minority or dissenting opinion

Swainland Builders Ltd. v. Freehold Properties Ltd. (2002), 17 E.G. 154, 23 E.G. 123, [2002] EWCA Civ 560, [2002] 2 E.G.L.R. 71 (Eng. & Wales C.A. (Civil)) — considered in a minority or dissenting opinion

Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. (2002), 2002 SCC 19, 2002 CarswellAlta 186, 2002 CarswellAlta 187, 20 B.L.R. (3d) 1, 209 D.L.R. (4th) 318, [2002] 5 W.W.R. 193, 98 Alta. L.R. (3d) 1, 283 N.R. 233, 299 A.R. 201, 266 W.A.C. 201, 50 R.P.R. (3d) 212, *(*sub nom. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.)* [2002] 1 S.C.R. 678, 2002 CSC 19 (S.C.C.) — considered in a minority or dissenting opinion

Wasauksing First Nation v. Wasausink Lands Inc. (2004), 2004 CarswellOnt 936, 184 O.A.C. 84, [2004] 2 C.N.L.R. 355, 43 B.L.R. (3d) 244 (Ont. C.A.) — refered to in a minority or dissenting opinion

Wise v. Axford (1954), [1954] O.W.N. 822, [1955] 1 D.L.R. 508, 1954 CarswellOnt 345 (Ont. C.A.) — refered to in a minority or dissenting opinion

Zhang v. Canada (2015), 2015 BCSC 1256, 2015 CarswellBC 2034, *(*sub nom. *Zhang v. Canada (Attorney General))* 2015 D.T.C. 5084 (B.C. S.C.) — refered to in a minority or dissenting opinion

771225 Ontario Inc. v. Bramco Holdings Co. (1995), 43 R.P.R. (2d) 70, 21 O.R. (3d) 739, 77 O.A.C. 75, 1995 CarswellOnt 194 (Ont. C.A.) — considered in a minority or dissenting opinion

Statutes considered by *Brown J.*:

Code civil du Québec, L.Q. 1991, c. 64
art. 1425 — referred to

Statutes considered by *Abella J.* (dissenting):

Code civil du Québec, L.Q. 1991, c. 64
en général — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 245 — referred to

APPEAL by Attorney General of Canada from judgment reported at *Fairmont Hotels Inc. v. Canada (Attorney General)* (2015), 2015 ONCA 441, 2015 CarswellOnt 8955, 2015 D.T.C. 5073 (Eng.), 45 B.L.R. (5th) 230 (Ont. C.A.), dismissing Attorney General of Canada's appeal from judgment granting business's application to rectify plan documents.

POURVOI formé par le procureur général du Canada à l'encontre d'une décision publiée à *Fairmont Hotels Inc. v. Canada (Attorney General)* (2015), 2015 ONCA 441, 2015 CarswellOnt 8955, 2015 D.T.C. 5073 (Eng.), 45 B.L.R. (5th) 230 (Ont. C.A.), ayant rejeté l'appel interjeté par le procureur général du Canada à l'encontre d'un jugement ayant accordé la demande d'une entreprise visant à faire rectifier les décuments relatifs à une planification.

Brown J. **(McLachlin C.J.C., Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring):**

I. Introduction

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.

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 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.

II. Overview of Facts and Proceedings

A. Background

4 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.

5 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.

6 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.

7 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.

B. Judicial History

(1) Superior Court of Justice — Newbould J. (2014 ONSC 7302, 123 O.R. (3d) 241 (Ont. S.C.J. [Commercial List]))

8 Relying on the decision of the Ontario Court of Appeal in *Juliar v. Canada (Attorney General)* (1999), 46 O.R. (3d) 104 (Ont. S.C.J. [Commercial List]), aff'd (2000), 50 O.R. (3d) 728 (Ont. 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).

9 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).

(2) Court of Appeal — Simmons, Cronk and Blair JJ.A. (2015 ONCA 441, 45 B.L.R. (5th) 230 (Ont. C.A.))

10 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).

11 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.

III. Analysis

A. General Principles and Operation of Rectification

12 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).

13 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 (*KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6, [2009] 1 S.C.R. 157 (S.C.C.), at para. 56, citing *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (S.C.C.), 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 (Eng. V.-C.), 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 Ltd.* (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".

14 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: *"M.F. Whalen" (The) v. Point Anne Quarries Ltd.* (1921), 63 S.C.R. 109 (S.C.C.), 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.

15 In *Performance Industries Ltd.* (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 Ltd.* 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 Ltd.* (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).

B. Juliar

16 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.

17 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 *Slocock's Will Trusts, Re* (1978), [1979] 1 All E.R. 358 (Eng. Ch. Div.), 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).

18 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).

19 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.

20 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, *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).

21 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 (*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 *Slocock's Will Trusts* justifies *Juliar*'s modified threshold for granting rectification solely to avoid an unanticipated tax liability. *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.

22 Subsequent English authorities confirm that *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 (Eng. 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 (Eng. Ch. Div.), 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.]

23 Finally, *Juliar* does not account for this Court's direction, in *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.), 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 Ltd.* 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.

24 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 *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 (Alta. Q.B.), at para. 49.

C. Two Further Concerns

25 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

26 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.

27 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* (1969), [1970] 2 Q.B. 86 (Eng. C.A.), 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 (Eng. Ch. Div.):

> ... 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]

28 *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 (Ont. C.A.), at para. 77, and the

Newfoundland and Labrador Supreme Court in *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (Nfld. 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.

29 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) Ltd. v. William H. Pim Junior & Co.*, [1953] 2 Q.B. 450 (Eng. 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.

30 This Court's statement in *Performance Industries Ltd.* (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".

31 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 Ltd.*, at para. 37.

32 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 Ltd.*, 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.

33 As is apparent from the reasons of my colleague Justice Wagner in *Jean Coutu Group (PJC) Inc. v. Canada (Attorney*

General), 2016 SCC 55 (S.C.C.), 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 *Archambault c. Canada (Agence du Revenu)*, 2013 SCC 65, [2013] 3 S.C.R. 838 (S.C.C.), [hereinafter *AES*] 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 Group (PJC) Inc.* (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.

(2) Standard of Proof

34 The second point requiring clarification is the standard of proof. In *Performance Industries Ltd.*, 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 Ltd.*, was a relaxation of the standard from the Court's earlier jurisprudence, in which the criminal standard of proof was applied: see *"M.F. Whalen" (The)*, at p. 127, and *Hart*, at p. 630, per Duff J.

35 In light, however, of this Court's more recent statement in *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), 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 Ltd.* of the standard to which the elements of the test for obtaining rectification must be proven is still applicable.

36 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 & Son Ltd. v. Wyndham's (Lingerie) Ltd.* (1980), [1981] 1 W.L.R. 505 (Eng. 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.

37 In brief, while the standard of proof is the balance of probabilities, the essential concern of *Performance Industries Ltd.* 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".

D. Application to the Present Appeal

38 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.

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 [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.

40 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.

41 The respondents' application for rectification therefore fails at the first hurdle. They show no prior agreement whose terms were definite and ascertainable.

IV. Conclusion and Disposition

42 I would allow the appeal, with costs in this Court and in the courts below.

***Abella J.* (dissenting) (Côté J. concurring):**

43 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.

44 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.

45 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.

46 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

47 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.

48 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.

49 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.

50 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.

51 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.

52 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.

53 The Ontario Court of Appeal unanimously dismissed the appeal (Simmons, Cronk, and Blair JJ.A.).

Analysis

54 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).

55 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 (Ont. C.A.), at p. 65, per Brooke J.A., rev'd on other grounds, (1974), [1976] 1 S.C.R. 319 (S.C.C.), 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.)

56 While the remedy of rectification had been historically confined to cases of mutual mistake, in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678 (S.C.C.), this Court expanded its scope to include circumstances where the mistake was unilateral.

57 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.

58 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. 620 (S.C.C.), at pp. 621-22 and 630; *Mitchell v. MacMillan* (1980), 5 Sask. R. 160 (Sask. C.A.), at para. 8; *Reed Shaw Osler Ltd. v. Wilson* (1981), 17 Alta. L.R. (2d) 81 (Alta. 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 (Ont. C.A.), at para. 77.)

59 Nor does the parties' prior intention have to amount to a fully enforceable agreement: *Joscelyne v. Nissen* (1969), [1970] 2 Q.B. 86 (Eng. C.A.), followed in *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (Ont. H.C.), aff'd (1980), 26 O.R. (2d) 746 (Ont. C.A.). As Brown J. explained in *Graymar Equipment (2008) Inc. v. Canada (Attorney General)* (2014), 97 Alta. L.R. (5th) 288 (Alta. 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.)

60 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 (B.C. C.A.).

61 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 (Ont. C.A.), at para. 46, citing *Swainland Builders Ltd. v. Freehold Properties Ltd.*, [2002] EWCA Civ 560 (Eng. & Wales C.A. (Civil)), at para. 34; see also *Co-operative Insurance Society Ltd. v Centremoor Ltd.*, [1983] 2 E.G.L.R. 52, 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.]

62 What matters instead is that the substance of the intention "can be ascertained with a reasonable level of comfort": *Performance Industries Ltd.*, 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 v. El-Bris Ltd.* (2008), 92 O.R. (3d) 779 (Ont. 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.

63 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.)

64 The common law principles of rectification were recently applied in *KRG Insurance Brokers (Western) Inc. v. Shafron*, [2009] 1 S.C.R. 157 (S.C.C.). *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.

65 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.

66 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. [Commercial List]), where an underlying calculation in a contract was incorrect (*Oriole Oil & Gas Ltd. v. American Eagle Petroleums Ltd.* (1981), 27 A.R. 411 (Alta. 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.)).

67 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 (Ont. C.A.)). But the mere existence of a third party will not bar rectification. In *Augdome Corp. v. Gray* (1974), [1975] 2 S.C.R. 354 (S.C.C.), 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 Ltd. v. Blind River Veneer Ltd.* (1988), 63 O.R. (2d) 761 (Ont. H.C.), at p. 766, aff'd (1990), 72 O.R. (2d) 703 (Ont. 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. Condominium Plan 309 CDC* (2008), 440 A.R. 389 (Alta. C.A.); *Carlson v. Big Bud Tractor of Canada Ltd.*. (1981), 7 Sask. R. 337 (Sask. C.A.), at paras. 24-26.)

68 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.

69 This brings us to the tax context.

70 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. R.*, [2011] 3 S.C.R. 721 (S.C.C.), 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.

71 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. R.*, [1999] 3 S.C.R. 622 (S.C.C.), 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.

72 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.

73 As the trial judge noted in *Kanji v. Canada (Attorney General)* (2013), 114 O.R. (3d) 1 (Ont. S.C.J. [Commercial List]), "[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 (B.C. C.A.), 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]

74 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 (Ont. 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.

75 A different result occurred in *Juliar v. Canada (Attorney General)* (2000), 50 O.R. (3d) 728 (Ont. 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. 25-27]

76 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.

77 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.

78 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 (Ont. S.C.J. [Commercial List]), 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 (B.C. C.A.)). 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 (Ont. S.C.J.), at paras. 32 and 40-41; *Binder v. Saffron Rouge Inc.* (2008), 89 O.R. (3d) 54 (Ont. S.C.J.), at paras. 16-18 and 22-25; *Aboriginal Diamonds Group Ltd., Re*, 2007 NWTSC 37 (N.W.T. S.C.), at paras. 38-43 (CanLII); *Zhang v. Canada*, 2015 D.T.C. 5084 (B.C. S.C.), at paras. 21 and 34; *Husky Oil Operations Ltd. v. Saskatchewan (Minister of Finance)* (2014), 443 Sask. R. 172 (Sask. Q.B.), at paras. 417 and 424-25; *JAFT Corp. v. Jones* (2014), 304 Man. R. (2d) 86 (Man. Q.B.), at paras. 31, 39 and 43-44, aff'd (2015), 323 Man. R. (2d) 57 (Man. C.A.); *Capstone Power Corp. v. 1177719 Alberta Ltd.*, 2016 BCSC 1274 (B.C. S.C.), at paras. 27-54 (CanLII); *Kanji*, at paras. 22 and 33.

79 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*: *Archambault c. Canada (Agence du Revenu)*, [2013] 3 S.C.R. 838 (S.C.C.). 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*.

80 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]

81 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.

82 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]

83 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.

84 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.

85 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.

86 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.

87 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)

88 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]

89 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.

90 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.

91 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.

92 I would dismiss the appeal with costs.

Appeal allowed.
Pourvoi accueilli.

TAB 6

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: Elias v. Western Financial Group Inc. | 2017 CarswellMan 616 | (S.C.C., Jan 11, 2018)

2017 MBCA 110
Manitoba Court of Appeal

Elias et al v. Western Financial Group Inc

2017 CarswellMan 532, 2017 MBCA 110, [2018] 2 W.W.R. 501, 285 A.C.W.S. (3d) 75, 417 D.L.R. (4th) 695, 76 B.L.R. (5th) 38

ARTHUR ELIAS, JACK ELIAS and DOUGLAS SIGURDSON as Trustees of The Elias Family Trust, and ROSSANO D'ASCANIO, PATRIZIA D'ASCANIO and ALESSANDRA RESCINITI as Trustees of The D'Ascanio Family Trust (Plaintiffs / Respondents) and WESTERN FINANCIAL GROUP INC. (Defendant / Appellant)

Michel A. Monnin, Holly C. Beard, Jennifer A. Pfuetzner JJ.A.

Heard: June 12, 13, 2017
Judgment: November 15, 2017
Docket: AI 16-30-08716

Proceedings: reversing *Elias Family Trust (Trustees of) v. Western Financial Group Inc.* (2016), 2016 MBQB 75, 2016 CarswellMan 129, 327 Man. R. (2d) 153, [2016] 10 W.W.R. 779, 55 B.L.R. (5th) 264, Bryk J. (Man. Q.B.)

Counsel: L.W. Bowles, K.L. Dixon, for Appellant
S.F. Vincent, J.A. Baigrie, for Respondents

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
III.2 Shares
III.2.g Payment
III.2.g.iv Liability for unpaid balance
III.2.g.iv.C Miscellaneous

Contracts
VII Construction and interpretation
VII.4 Resolving ambiguities
VII.4.c Reasonableness

Contracts
VIII Rectification or reformation
VIII.1 General principles

Contracts
VIII Rectification or reformation
VIII.4 Evidence

VIII.4.b Parol evidence

Headnote

Contracts --- Rectification or reformation — General principles
Plaintiffs owned successful insurance brokerage — In 2006, defendant began process of buying out plaintiffs by purchasing shares in brokerage in multiple tranches — After initial 2006 share purchase, parties entered into unanimous shareholders agreement ("USA") to govern their future relationship as shareholders — By 2009, defendant owned all shares in brokerage — Series of contracts memorialized agreements reached by parties in respect of sale of each tranche of shares to defendant — Contracts further provided for shares to be re-valued with any increase in value being paid to plaintiffs — These purchase price adjustments were referred to as "bumps" — In 2010, after plaintiffs had sold all their shares to defendant, dispute arose between parties as to calculation of final bumps — Plaintiffs brought action — Action allowed — Plaintiffs claimed that they had mistakenly agreed to incorrect valuation formula in share purchase agreements ("SPA") that dealt with sale of shares in 2008 and 2009, thus were underpaid for their shares — Trial judge ordered rectification of 2008 SPA — Trial judge found that defendant had breached both 2008 and 2009 SPA and awarded damages — Defendant appealed award of damages — Plaintiffs cross-appealed trial judge's finding regarding interest on damages award — Appeal allowed; cross-appeal dismissed — Rectification cannot be used as substitute for due diligence by plaintiffs — Relaxed application of doctrine undermined importance of certainty and finality in commercial relations — Rectification undermined reasonable expectations of defendant — Plaintiffs sought to rectify agreement itself, not error in recording of agreement — Trial judge erred in his application of doctrine of rectification.

Contracts --- Rectification or reformation — Evidence — Parol evidence
Plaintiffs owned successful insurance brokerage — In 2006, defendant began process of buying out plaintiffs by purchasing shares in brokerage in multiple tranches — After initial 2006 share purchase, parties entered into unanimous shareholders agreement ("USA") to govern their future relationship as shareholders — By 2009, defendant owned all shares in brokerage — Series of contracts provided for shares to be re-valued with any increase in value being paid to plaintiffs — In 2010, dispute arose between parties as to calculation of final purchase price adjustments — Plaintiffs brought action — Action allowed — Plaintiffs claimed that they had mistakenly agreed to incorrect valuation formula in share purchase agreements ("SPA") that dealt with sale of shares in 2008 and 2009 — Trial judge ordered rectification of 2008 SPA and awarded damages — Defendant appealed award of damages — Plaintiffs cross-appealed trial judge's finding regarding interest on damages award — Appeal allowed; cross-appeal dismissed — Rectification proceedings are not subject to parol evidence rule — Court, by necessity, must look to evidence outside of written document and surrounding circumstances to determine whether document does not accurately record agreement reached between parties — After finding section 9.06(b) of USA to be ambiguous, trial judge relied on parol evidence of contractual negotiations and statements of parties' subjective intention to give meaning to section that extended well beyond plain meaning of words used, considered in light of surrounding circumstances — Fundamental error of trial judge was in finding that section 9.06(b) of USA was ambiguous — Meaning of section 9.06(b) of USA was not ambiguous; it clearly provided that future equity injections made on or subsequent to date of closing of future share sale would be deducted from subsequent price adjustment on those shares — Trial judge's initial legal error in misapplying test for legal ambiguity led him to consider parol evidence of contractual negotiations and subjective intention that was simply not relevant and should not have been considered.

Business associations --- Specific matters of corporate organization — Shares — Payment — Liability for unpaid balance — Miscellaneous
Plaintiffs owned successful insurance brokerage — In 2006, defendant began process of buying out plaintiffs by purchasing shares in brokerage in multiple tranches — After initial 2006 share purchase, parties entered into unanimous shareholders agreement ("USA") to govern their future relationship as shareholders — By 2009, defendant owned all shares in brokerage — Series of contracts provided for shares to be re-valued with any increase in value ("bumps") being paid to plaintiffs — In 2010, after plaintiffs had sold all their shares to defendant, dispute arose between parties as to calculation of final bumps — Plaintiffs brought action — Action allowed — Plaintiffs claimed that they had mistakenly agreed to incorrect valuation formula in share purchase agreements ("SPA") that dealt with sale of shares in 2008 and 2009, thus were underpaid for their shares — Trial judge concluded that plaintiffs had met their case on balance of probabilities that "rectification of the 2008 SPA is justified" and he ordered that equity injection adjustment clause, section 2.6(a) of 2008 SPA, be rectified by deleting specific reference to 2006 equity — Trial judge found that defendant had breached both 2008 and 2009 SPA and awarded damages — Defendant appealed award of damages — Plaintiffs cross-appealed trial judge's finding regarding interest on

damages award — Appeal allowed; cross-appeal dismissed — There was no evidence to support conclusion that parties had agreed not to deduct 2006 equity but made mistake in recording agreement — In fact, all evidence pointed to opposite conclusion: that, in 2008, they clearly did agree to deduct 2006 equity — Trial judge also erred when he found that defendant breached 2009 SPA by deducting 2006 equity in calculating bump payments under 2009 SPA.

Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness
Plaintiffs owned successful insurance brokerage — In 2006, defendant began process of buying out plaintiffs by purchasing shares in brokerage in multiple tranches — After initial 2006 share purchase, parties entered into unanimous shareholders agreement ("USA") to govern their future relationship as shareholders — By 2009, defendant owned all shares in brokerage — Series of contracts provided for shares to be re-valued with any increase in value ("bumps") being paid to plaintiffs — In 2010, after plaintiffs had sold all their shares to defendant, dispute arose between parties as to calculation of final bumps — Plaintiffs brought action — Action allowed — Plaintiffs claimed that they had mistakenly agreed to incorrect valuation formula in share purchase agreements ("SPA") that dealt with sale of shares in 2008 and 2009, thus were underpaid for their shares — Trial judge ordered rectification of 2008 SPA — Trial judge found that defendant had breached both 2008 and 2009 SPA and awarded damages — Defendant appealed award of damages — Plaintiffs cross-appealed trial judge's finding regarding interest on damages award — Appeal allowed; cross-appeal dismissed — Trial judge erred in his interpretation of section 9.06(b) of USA — Interpretation of section 9.06(b) should be of minimal relevance in this case, as both 2008 SPA and 2009 SPA were separate stand-alone agreements — However, trial judge applied his construction of equity injection adjustment clause in USA to construe equity injection adjustment clauses in 2008 SPA and 2009 SPA — Trial judge erred when he stated that there was "absence of any evidence excluding the USA" — Existence and terms of 2008 SPA were overwhelming evidence that parties had struck new deal — There was nothing in USA that prevented parties from agreeing to arrangement that was not in strict compliance with USA — Trial judge made palpable and overriding error in finding that parties' intention in 2006, which he found was expressed in USA, continued unabated in 2008 — This finding was incompatible with his finding that plaintiffs knowingly offered to sell their 24 per cent interest in 2008 using valuation formula that deducted 2006 equity — Both intentions could not logically co-exist in 2008 — Only reasonable conclusion was that, by 2008, intentions of the parties, as expressed by them in 2008 SPA, had changed.

Table of Authorities

Cases considered by *Jennifer A. Pfuetzner J.A.*:

Ahone v. Holloway (1988), 30 B.C.L.R. (2d) 368, 1988 CarswellBC 336 (B.C. C.A.) — considered

Canada (Attorney General) v. Fairmont Hotels Inc. (2016), 2016 SCC 56, 2016 CSC 56, 2016 CarswellOnt 19252, 2016 CarswellOnt 19253, 404 D.L.R. (4th) 201, [2017] 1 C.T.C. 149, 58 B.L.R. (5th) 171, 2016 D.T.C. 5135, [2016] 2 S.C.R. 720 (S.C.C.) — considered

Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co. (1979), [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. 1-1176, 1979 CarswellQue 157, 1979 CarswellQue 157F, 29 O.R. (2d) 720 (S.C.C.) — referred to

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

Distillery, Rectifying, Wine & Allied Workers' International Union of America, Local 153 v. Canadian Park & Tilford Distilleries Ltd. (1973), 36 D.L.R. (3d) 632, 1973 CarswellBC 297 (B.C. S.C.) — referred to

Fairmont Hotels Inc. v. Canada (Attorney General) (2015), 2015 ONCA 441, 2015 CarswellOnt 8955, 2015 D.T.C. 5073 (Eng.), 45 B.L.R. (5th) 230 (Ont. C.A.) — considered

Fontaine v. Canada (Attorney General) (2014), 2014 MBCA 93, 2014 CarswellMan 599, [2014] 12 W.W.R. 211, [2015] 1 C.N.L.R. 162, 310 Man. R. (2d) 162, 618 W.A.C. 162 (Man. C.A.) — referred to

116 As explained, on a rectification application, parol evidence of negotiations and subjective intention is relevant and therefore admissible. The trial judge examined parol evidence of the negotiations and subjective intentions of the parties leading up to the execution of the USA. He found that, in 2006, the parties did not intend to deduct the 2006 equity in future share sales. This finding was open to him on the record.

117 The trial judge also properly found that both Elias and D'Ascanio knowingly agreed to a valuation formula in the 2008 SPA that deducted the 2006 equity. Moreover, it was the plaintiffs who offered to sell their shares in 2008 to the defendant at a price that was calculated by specifically deducting the 2006 equity.

118 After making these findings, the trial judge was faced with two facts: in 2006, the parties did not intend to deduct the 2006 equity on future transactions; and, in 2008, the parties agreed to deduct the 2006 equity on the sale of the plaintiffs' 24% interest in HED. In my respectful view, the trial judge made a palpable and overriding error in finding that the parties' intention in 2006, which he found was expressed in the USA, continued unabated in 2008. This finding is incompatible with his finding that the plaintiffs knowingly offered to sell their 24 per cent interest in 2008 using a valuation formula that deducted the 2006 equity. Both intentions could not logically co-exist in 2008. The only reasonable conclusion is that, by 2008, the intentions of the parties, as expressed by them in the 2008 SPA, had changed.

119 The trial judge erred when he stated that there was an "absence of any evidence excluding the USA" (at para 235). The existence and terms of the 2008 SPA were overwhelming evidence that the parties had struck a new deal. There is nothing in the USA that prevented the parties from agreeing to an arrangement that was not in strict compliance with the USA.

120 The plaintiffs say that they were improperly advised by Sigurdson as to the terms of the USA and that is why they agreed to deduction of the 2006 equity in 2008. Even so, Sigurdson's involvement in the preparation of the 2008 SPA only began after the plaintiffs had offered to sell their shares using a valuation formula that deducted the 2006 equity and the defendant had accepted that offer.

121 There was absolutely no mistake in the recorded terms of the 2008 SPA as required by *Fairmont* . It perfectly reflected the agreement of the parties. What the plaintiffs characterize as a "mistake" is, in reality, their error in judgment in offering to sell their remaining shares on terms that they subsequently regretted.

122 The application of the principles of rectification, confirmed in *Fairmont* , to the facts found by the trial judge leads only to one conclusion: rectification of the 2008 SPA is not available to the plaintiffs.

123 The policy reasons for not allowing rectification in these circumstances are clear: rectification cannot be used as a substitute for due diligence by the plaintiffs; the relaxed application of the doctrine undermines the importance of certainty and finality in commercial relations; rectification would undermine the reasonable expectations of the defendant; and the plaintiffs are seeking to rectify the agreement itself, not an error in the recording of the agreement.

124 In conclusion, the trial judge erred in his application of the doctrine of rectification. There was no evidence to support a conclusion that the parties had agreed not to deduct the 2006 equity but made a mistake in recording the agreement. In fact, all the evidence pointed to the opposite conclusion: that, in 2008, they clearly did agree to deduct the 2006 equity.

3. Did the trial judge err in finding a breach of the 2009 SPA?

125 The third issue raised by the defendant is whether the trial judge erred in finding a breach of the 2009 SPA. This issue raises the question of the proper construction of the 2009 SPA. I will also briefly address the proper construction of the 2008 SPA.

126 In his reasons, the trial judge construed the 2009 SPA and the rectified 2008 SPA together. The result of his application of the doctrine of rectification was to make the equity injection adjustment clause of the 2008 SPA (section 2.6(a)) virtually the same as the equity injection adjustment clause of the 2009 SPA (section 2.9(a)). The trial judge stated that "[t]he rectified s. 2.6(a) of the 2008 SPA does not deduct the [2006 equity] from the 2008 and 2009 bump calculations in the 2008 SPA. However, that is precisely what was done. The 2009 bump calculations in the 2009 SPA were also deducted"

