Court File No. CV-13-10310-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CALLIDUS CAPITAL CORPORATION

Applicant

- and –

XCHANGE TECHNOLOGY GROUP LLC, IT XCHANGE FINANCIAL SERVICES LLC, IT EXCHANGE CORP., BLUERANGE TECHNOLOGY CORP., BLUERANGE TECHNOLOGY INC., PARTSTOCK COMPUTER LLC AND IT XCHANGE INC.

Respondents

BOOK OF AUTHORITIES

January 5, 2016

DICKINSON WRIGHT LLP
Barristers & Solicitors
199 Bay Street, Suite 2200
P.O. Box 447 Commerce Court Postal Station
Toronto, Ontario M5L 1G4
Fax: (416) 865-1398

JOHN D. LESLIE
LSUC Registration No. 29956P
Email: jleslie@dickinsonwright.com
Tel: (416) 646-3801

MICHAEL J. BRZEZINSKI
LSUC Registration No. 63573R
Email: mbrzezinski@dickinsonwright.com
Tel: (416) 777-2394

Lawyers for 239314 Ontario Inc.

TO: **CHAITONS LLP**
500 Yonge St
Toronto, ON M2N 7E9

Harvey Chaiton
Tel: (416) 218-1141
Fax: (416) 218-1841

Lawyers for Duff & Phelps Canada Restructuring Inc.,
in its capacity as court-appointed Receiver of the Respondents

AND TO: **NORTON ROSE FULBRIGHT CANADA LLP**
Toronto Office – TD Centre
TD Centre, South Tower
79 Wellington St. W., Suite 2300, P.O. Box 128
Toronto, ON M5K 1H1

Alan B. Merskey
Tel: (416) 216-4805
Fax: (416) 216-3930

Lawyers for Jeffrey McFarlane and Republic Funding Ventures LLC

INDEX

Tab **Document**

1

2002 SCC 19, 2002 CSC 19
Supreme Court of Canada

Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.

2002 CarswellAlta 186, 2002 CarswellAlta 187, 2002 SCC 19, 2002 CSC 19, [2002] 1 S.C.R. 678, [2002] 5 W.W.R. 193, [2002] S.C.J. No. 20, 111 A.C.W.S. (3d) 733, 209 D.L.R. (4th) 318, 20 B.L.R. (3d) 1, 266 W.A.C. 201, 283 N.R. 233, 299 A.R. 201, 50 R.P.R. (3d) 212, 98 Alta. L.R. (3d) 1, J.E. 2002-448, REJB 2002-28038

Performance Industries Ltd. and Terrance O'Connor, Appellants/Respondents on Cross-Appeal v. Sylvan Lake Golf & Tennis Club Ltd., Respondent/Appellant on Cross-Appeal

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour, LeBel JJ.

Heard: December 14, 2000
Judgment: February 22, 2002 *
Docket: 27934

Proceedings: affirming (2000), 185 D.L.R. (4th) 269 (Alta C.A.); reversing in part (1999), 49 B.L.R. 284 (Alta. Q.B.)

Counsel: *David R. Haigh, Q.C.*, and *Brian Beck*, for appellants/respondents on cross-appeal
Lowell Westersund and *Munaf Mohamed*, for respondent/appellant on cross-appeal

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

Headnote

Contracts --- Rectification or reformation — Prerequisites — Mistake — Unilateral

Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to rectification.

Contracts --- Rectification or reformation — Bars to rectification

Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to rectification — Plaintiff's lack of due diligence was not defence to rectification.

Damages --- Damages in contract — Loss of profits consequent to breach — General principles

Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to compensatory damages for breach of contract as rectified, including losses flowing from special circumstances known to parties when contract was made.

Damages --- Exemplary, punitive and aggravated damages — Grounds for awarding exemplary, punitive and aggravated damages — Fraud

Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to rectification — Punitive damages award was not appropriate because compensatory damages adequately achieved objectives of retribution, deterrence, and denunciation.

Sale of land --- Remedies — Rectification — Of agreement

Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to rectification.

Sale of land --- Remedies — Damages — Measure of damages

Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to compensatory damages for breach of contract as rectified, including losses flowing from special circumstances known to parties when contract was made.

Contrats --- Rectification ou réformation — Conditions préalables — Erreur — Unilatérale

Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir la rectification.

Contrats --- Rectification ou réformation — Motifs interdisant la rectification

Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir la rectification — Manque de diligence raisonnable de la part de la demanderesse n'empêchait pas la rectification.

Dommages --- Dommages contractuels — Perte de profits à la suite du manquement — Principes généraux

Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir des dommages-intérêts compensatoires pour la rupture du contrat rectifié, y compris pour les pertes découlant des circonstances spéciales qui étaient connues des parties au moment de la conclusion du contrat.

Dommages --- Dommages exemplaires, punitifs ou additionnels — Motifs permettant d'accorder des dommages exemplaires, punitifs ou additionnels — Fraude

Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir la rectification — Décision d'accorder des dommages punitifs n'était pas appropriée vu que les dommages-intérêts compensatoires permettaient de répondre adéquatement aux objectifs de punition, dissuasion et dénonciation.

Vente de bien-fonds --- Réparations — Rectification — Du contrat

Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir la rectification.

Vente de bien-fonds --- Réparations — Dommages-intérêts — Évaluation des dommages

Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir des dommages-intérêts compensatoires pour la rupture du contrat rectifié, y compris pour les pertes découlant des circonstances spéciales qui étaient connues des parties au moment de la conclusion du contrat.

The plaintiff and the individual defendant entered into a verbal agreement to purchase a golf course as a joint venture, with the plaintiff and the corporate defendant each holding a one-half interest as tenants in common. The plaintiff would operate the facilities for five years for its own account, at the end of which time the defendants would buy out the plaintiff. The parties verbally agreed that the plaintiff had an option for a residential development on part of the property. The parties signed a written agreement, prepared by the defendants' lawyer, permitting the development of a strip of land 110 feet wide, rather than the 110 yards wide to which the parties had verbally agreed. The president of the plaintiff did

not read the agreement before signing it. When the plaintiff proposed to build a residential development on part of the property, the individual defendant rejected the plan by invoking the clause that restricted development to 110 feet. At the end of the five-year term, the plaintiff refused to relinquish possession of the land. The defendants obtained an order for specific performance and built a clubhouse on the disputed property. The plaintiff brought an action for rectification of the agreement, or damages in lieu, and for punitive damages and solicitor and client costs.

The trial judge allowed the plaintiff's action for damages and found that the plaintiff had mistakenly believed that the written agreement reflected the verbal agreement and that the individual defendant had chosen not to inform the plaintiff of the mistake. The trial judge found that the individual defendant's actions were fraudulent, dishonest, and deceitful, and provided the necessary support for lifting the corporate veil. The trial judge held the individual defendant personally liable, jointly and severally with his company, for $620,100 in damages, the amount of money to which the president of the plaintiff would have been entitled had he been permitted to complete the residential development in accordance with the terms of the rectified option clause. The trial judge awarded the plaintiff $200,000 for punitive damages. For their misbehaviour in the conduct of the action, the defendants were required to pay solicitor and client costs.

The Court of Appeal allowed the defendants' appeal in part. The court found that the trial judge had sufficient evidence upon which to base his conclusions on the plaintiff's unilateral mistake and the individual defendant's misconduct. The quantum of damages for loss of opportunity was generous but the court did not interfere with the award. The misconduct of the defendants was outrageous, but the compensatory damages awarded adequately satisfied the goals of punishment and deterrence. No valid reason was given for imposing punitive damages, so that award was disallowed. The trial judge had ample bases upon which to exercise his discretion and award solicitor and client costs.

The defendants appealed. The plaintiff cross-appealed, seeking restoration of the punitive damages award.

Held: The appeal and the cross-appeal were dismissed with costs.

Per Binnie J. (McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Major, Arbour JJ. concurring): The plaintiff was entitled to rectification as it met all the conditions precedent required for the remedy. The plaintiff established that the terms to which it had orally agreed were not properly written down. The trial judge found that the parties had made a verbal agreement with respect to a definite project in a definite location, although they did not discuss a metes and bounds description. The individual defendant fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. He knew that the plaintiff would not sign an agreement without the option for sufficient land to create a development with two rows of housing as specified in the prior oral contract; therefore, he knew that when the plaintiff signed the document, the plaintiff had not detected the substitution of 110 feet for 110 yards. The trial judge characterized the individual defendant's actions as "fraudulent, dishonest and deceitful." The trial judge made his key findings in respect of the prior oral agreement, the unilateral mistake of the plaintiff's president, and the individual defendant's knowledge of that mistake to a standard of "beyond any reasonable doubt."

The plaintiff's lack of due diligence was not a defence to rectification because the plaintiff sought no more than to enforce the prior oral agreement to which the defendants had already bound themselves. The president of the plaintiff had left the documentation to his lawyer without appreciating that he had given his lawyer insufficient information to check the individual defendant's figures, and, at that time, he no reason to question the individual defendant's integrity. Furthermore, the plaintiff's lack of due diligence provided no defence because of the individual defendant's fraud. The individual defendant undertook, as part of the verbal agreement, to have a document prepared setting out the terms of the agreement. The trial judge found that part of the individual defendant's fraudulent scheme was to have the document wrongly state the terms of the option, to misrepresent fraudulently to the plaintiff that the document accurately set out their verbal agreement, to allow the plaintiff to sign the document when the individual defendant knew that the plaintiff was mistaken in doing so, and then to delay any response to the plaintiff's development proposals until it was almost too late for the development

to proceed. The individual defendant admitted providing his lawyer with the erroneous metes and bounds description in the option clause.

There was no reason to disturb the trial judge's award of $620,100 in compensatory damages. The parties specifically contemplated that the optioned land would be used for residential housing and the damages for breach of the contract, as rectified, therefore properly included losses flowing from the special circumstances known to the parties when they made their contract. Although the Court of Appeal characterized the compensatory award as "substantial and generous," it was not prepared to interfere with the award and, in the absence of an error of principle or a factual record that supported the defendants' criticisms, there was no reason to interfere with the award.

The award of punitive damages did not serve a rational purpose. Punitive damages are rational only if compensatory damages do not adequately achieve the objectives of retribution, deterrence, and denunciation, which was not the case here. This case involved a commercial relationship between businessmen who were equals. Although the individual defendant's misconduct was planned and deliberate and lasted for four and one-half years, the plaintiff obtained full compensation plus costs on a solicitor and client basis, which had a punitive effect on the individual defendant.

La demanderesse et le défendeur, un particulier, ont conclu une entente verbale selon laquelle ils devaient former une coentreprise pour acheter un terrain de golf par laquelle la demanderesse et la défenderesse, une personne morale, seraient copropriétaires et détiendraient chacune une participation de 50 pour cent. La demanderesse devait exploiter les installations pendant cinq ans pour son propre compte et, par la suite, les défendeurs devaient racheter la part de la demanderesse. Les parties se sont entendues verbalement sur une option que pouvait soulever la demanderesse dans le but de construire un complexe résidentiel sur une partie du terrain. Les parties ont signé un contrat écrit, rédigé par l'avocat des défendeurs, qui autorisait la construction sur une bande de terrain large de 110 pieds plutôt que de 110 verges, comme il avait été convenu verbalement par les parties. Le président de la demanderesse n'a pas lu le contrat avant de le signer. La demanderesse a soumis une proposition pour construire le complexe résidentiel sur une partie du terrain, mais le défendeur a refusé le projet en invoquant la clause du contrat qui limitait le développement sur une largeur de 110 pieds. Lorsque le délai de cinq ans a expiré, la demanderesse a refusé d'abandonner la possession du terrain. Les défendeurs ont obtenu un jugement ordonnant l'exécution forcée et ont construit un pavillon sur le terrain en litige. La demanderesse a intenté une action pour obtenir la rectification du contrat ou bien des dommages-intérêts; elle a aussi réclamé des dommages punitifs et les dépens sur une base avocat-client.

Le juge de première instance a accueilli l'action en dommages-intérêts de la demanderesse; il a estimé que la demanderesse avait cru par erreur que le contrat écrit reflétait les termes de l'entente verbale et que le défendeur avait décidé ne pas informer la demanderesse qu'il y avait une erreur dans le contrat. Le juge de première instance a conclu que la conduite du défendeur avait été frauduleuse, malhonnête et dolosive et qu'elle constituait un motif suffisant pour lever le voile corporatif. Il a déclaré le défendeur solidairement responsable avec sa société du paiement des dommages-intérêts de 620 100 $, lesquels dommages étaient équivalents au montant auquel aurait eu droit la demanderesse si elle avait eu la possibilité de compléter son projet résidentiel conformément aux termes de la clause d'option rectifiée. Le juge a accordé 200 000 $ à la demanderesse à titre de dommages punitifs. À cause de leur mauvaise conduite lors du déroulement de l'instance, les défendeurs ont été condamnés à payer les dépens sur une base avocat-client.

La Cour d'appel a accueilli en partie le pourvoi des défendeurs. La Cour a estimé que le juge de première instance avait suffisamment de preuve pour fonder ses conclusions relatives à l'erreur unilatérale de la demanderesse et à la mauvaise conduite du défendeur. Même si les dommages-intérêts accordés pour la perte d'une possibilité étaient généreux, ils n'ont pas été modifiés. La conduite du défendeur était scandaleuse, mais les dommages-intérêts compensatoires accordés répondaient de façon adéquate aux objectifs de punition et de dissuasion. Aucune raison valable n'a été donnée pour l'attribution de dommages punitifs et l'attribution de ces dommages a été annulée. Le juge de première instance avait amplement de preuve pouvant lui permettre d'exercer son pouvoir discrétionnaire et d'accorder des dépens sur une base avocat-client.

Les défendeurs ont interjeté appel. La demanderesse a formé un appel incident dans lequel elle a demandé que la décision relative aux dommages punitifs soit rétablie.

Arrêt: Le pourvoi et le pourvoi incident ont été rejetés avec dépens.

Binnie, J. (McLachlin, J.C.C., L'Heureux-Dubé, Gonthier, Major, Arbour, JJ., souscrivant) : La demanderesse avait le droit d'obtenir la rectification parce qu'elle a satisfait à toutes les conditions préalables donnant ouverture à ce moyen de réparation. La demanderesse a prouvé que les termes du contrat sur lesquels elle s'était entendue verbalement avec les défendeurs n'avaient pas été transcrits convenablement. Le juge de première instance a déterminé que les parties avaient conclu une entente verbale relativement à un projet précis devant être construit à un endroit précis, bien que les parties n'avaient pas discuté de la description technique du terrain. Le défendeur a fait une assertion inexacte et frauduleuse en laissant croire que le document écrit représentait fidèlement les termes de l'entente verbale antérieure. Il savait que la demanderesse ne signerait pas le contrat si ce dernier ne contenait pas une option visant suffisamment de terrain pour pouvoir y développer un complexe de deux rangées de maisons tel qu'il avait été spécifié dans le cadre de l'entente verbale antérieure. Par conséquent, il savait que la demanderesse n'avait pas vu que 110 verges avait été remplacé par 110 pieds lorsque celle-ci a signé le contrat. Le juge de première instance a qualifié les actions du défendeur de « frauduleuses, malhonnêtes et dolosives ». C'est au regard de la norme de preuve « hors de tout doute raisonnable » que le juge a tiré ses conclusions clés à l'égard de l'entente verbale antérieure, de l'erreur principale et unilatérale de la demanderesse et de la connaissance par le défendeur de l'erreur.

Le manque de diligence raisonnable de la part de la demanderesse ne l'empêchait pas d'obtenir la rectification puisqu'elle voulait seulement faire respecter l'entente verbale antérieure qui liait déjà le défendeur. La demanderesse a laissé aux avocats la charge de rédiger le contrat sans se rendre compte qu'elle n'avait pas donné assez d'information à son avocat pour lui permettre de vérifier les chiffres du défendeur. De plus, elle n'avait pas de raison, à ce moment-là, de douter du défendeur. En outre, le manque de diligence raisonnable de la part de la demanderesse ne constituait pas une défense vu la fraude perpétrée par le défendeur. Dans le cadre de l'entente verbale, le défendeur s'était engagé à faire mettre par écrit les modalités du contrat. Le juge de première instance a estimé que le défendeur, dans le cadre de son stratagème frauduleux, avait fait en sorte que le document énonce erronément les modalités de l'option; que le défendeur avait laissé croire à la demanderesse, de manière frauduleuse et inexacte, que le document reflétait adéquatement leur entente verbale; que le défendeur avait laissé la demanderesse signer le contrat alors qu'il savait très bien que la demanderesse commettait une erreur en le signant; et que le défendeur avait retardé toute réponse aux propositions de développement de la demanderesse jusqu'à ce qu'il soit devenu presque trop tard pour réaliser le projet de construction. Le défendeur a admis avoir donné à son avocat la description technique erronée qui figurait dans la clause relative à l'option.

Il n'y avait aucun motif pouvant justifier de modifier la somme de 620 000 $ que le juge de première instance avait accordé à titre de dommages-intérêts compensatoires. Les parties avaient spécifiquement envisagé que le terrain faisant l'objet de l'option serait utilisé pour y construire un projet résidentiel. Par conséquent, les dommages-intérêts compensatoires accordés pour la rupture du contrat rectifié incluaient à bon droit les pertes découlant des circonstances spéciales qui étaient connues des parties au moment de la conclusion du contrat. Même si la Cour d'appel a qualifié les dommages-intérêts compensatoires de « substantiels et généreux », elle n'était pas disposée à les modifier et, en l'absence d'une erreur de principe ou d'éléments factuels pouvant appuyer les critiques formulées par les défendeurs, il n'y avait pas de raison de modifier cette conclusion.

La décision d'accorder des dommages punitifs ne répondait à aucun objectif rationnel. Une telle décision n'est rationnelle que lorsque les dommages compensatoires ne permettent pas de répondre adéquatement aux objectifs de punition, dissuasion et dénonciation, ce qui n'était pas le cas en l'espèce. Il s'agissait d'une relation commerciale entre des hommes d'affaires qui étaient tous deux sur un pied d'égalité. Même si la conduite du défendeur a été préméditée, délibérée et qu'elle

a duré pendant quatre ans et demie, la demanderesse a été pleinement indemnisée et elle s'est vu adjugé les dépens sur une base avocat-client, ce qui a eu un effet punitif sur le défendeur.

APPEAL by defendants from judgment reported at 2000 CarswellAlta 360, [2000] A.J. No. 408, 2000 ABCA 116, *(sub nom. Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. (No. 2))* 255 A.R. 329, 220 W.A.C. 329, 6 B.L.R. (3d) 24 (Alta. C.A.), allowing in part defendants' appeal from judgment allowing plaintiff's action for damages and holding individual defendant personally liable jointly and severally with his company for $620,100 in damages, awarding plaintiff $200,000 in punitive damages, and solicitor and client costs, reported at 1999 CarswellAlta 599, [1999] A.J. No. 741, 49 B.L.R. (2d) 284, 246 A.R. 272 (Alta. Q.B.); CROSS-APPEAL by plaintiff seeking restoration of punitive damages award.

POURVOI des défendeurs à l'encontre de l'arrêt publié à 2000 CarswellAlta 360, [2000] A.J. No. 408, 2000 ABCA 116, *(sub nom. Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. (No. 2))* 255 A.R. 329, 220 W.A.C. 329, 6 B.L.R. (3d) 24 (Alta. C.A.), qui a accueilli en partie le pourvoi des défendeurs à l'encontre du jugement qui avait accueilli l'action intentée par la demanderesse, déclaré le défendeur particulier solidairement responsable avec sa société du paiement d'une somme de 620 000 $ à titre de dommages-intérêts et accordé à la demanderesse une somme de 200 000 $ à titre de dommages punitifs ainsi que les dépens sur une base avocat-client, publié à 1999 CarswellAlta 599, [1999] A.J. No. 741, 49 B.L.R. (2d) 284, 246 A.R. 272 (Alta. Q.B.); POURVOI INCIDENT de la demanderesse afin que soit rétablie l'attribution de dommages punitifs.

Binnie J. (McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Major, Arbour JJ. concurring):

1 In this appeal the Court is called on to deal with rectification of a contract for a real estate development dream that turned into a nightmare for the warring partners. Houses were to have been built along the 18th fairway of the Sylvan Lake Golf Course, within commuting distance of Red Deer, Alberta. It did not happen because the parties fell out over the amount of land to be included in the development contract.

2 There was a written contract but the respondent's President did not bother to read it before it was signed. Had he done so, the error in reducing the parties' prior oral agreement to writing would likely have been detected and the development would have gone ahead. The appellants, who rely on the written document, say that a party who fails to exercise due diligence in its business affairs should be refused the equitable remedy of rectification. That is their strongest argument.

3 The principal witness and "directing mind" of the appellant Performance Industries Ltd. ("Performance"), which stands firm on the written document, is Terrance O'Connor. For him, the joint venture ended with his actions being characterized by the trial judge as "fraudulent, dishonest and deceitful" ((1999), 246 A.R. 272 , at para. 114). The trial judgment made him personally liable (jointly and severally with his company Performance Industries Ltd.) for $1,047,810, including a $200,000 award of punitive damages, plus costs on a solicitor-client basis. He and his company appeal to this Court on various errors of law, few of which were argued before the trial judge.

4 For his erstwhile partner, Frederick Bell, whose corporate vehicle is Sylvan Lake Golf & Tennis Club Ltd. ("Sylvan"), his commercial aspirations have been trapped in the courts for seven years. This was because, so the trial judge found, O'Connor swore false affidavits, refused to produce relevant documents, gave false testimony in the course of two separate trials, and did "everything in his power to prevent the truth from coming to light" (para. 115). Bell is now said to be a spent force, "divorced [and lacking] the initiative or drive and determination to proceed with such a development at his present age" (para. 90). Bell obtained a $200,000 punitive damage award at trial, but this was disallowed by the Alberta Court of Appeal ((2000), 255 A.R. 329, 2000 ABCA 116). In its cross-appeal, his company, Sylvan, seeks restoration of that award.

5 Because of the punitive damages issues, this appeal was heard concurrently with *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (S.C.C.), judgment, which is being released concurrently with this judgment.

6 In my view, for reasons which differ somewhat from the memorandum of judgment handed down by the Alberta Court of Appeal, the appeal should be dismissed with costs and the cross-appeal should be dismissed without costs.

I. Facts

7 Sylvan had operated a 171.53 acre, 18-hole golf course since 1979 under a lease which gave it a right of first refusal in the event the owner decided to sell the land. On November 3, 1989, a purchaser unrelated to O'Connor or Performance offered to purchase the golf course property for $1.3 million. Sylvan then had until December 31, 1989, to make the purchase on the same terms and conditions. The outside offer triggered the chain of events that led to this action.

8 O'Connor was familiar with the Sylvan Lake Golf Course, having played it frequently and having hosted his corporate tournament at that site for some years.

9 O'Connor, unbeknownst to Bell, had approached the landowner with a view to purchasing the leased golf course property, without result. He had obtained a financing commitment as early as March 31, 1989, from the Federal Business Development Bank ("FBDB"). On learning that Sylvan had exercised its right of first refusal, O'Connor approached Bell with an offer of financial assistance, which was declined. However, when Bell's former partner dropped out, and Sylvan's efforts to finance the purchase of the golf course through other means proved unsuccessful, Bell went back to O'Connor. Bell testified that at that meeting he discussed with O'Connor how Bell wanted to secure another five years of operation of the golf course with a chance at the end of that time to secure his retirement by the development of the 18th hole for residential development. Negotiations for a joint venture ensued near the end of November or early December 1989.

10 After a number of preliminary meetings, O'Connor spent about two and a half hours at Bell's home during the December 16-17 weekend. The two men met at length in O'Connor's truck a day or two later. The trial judge found that Bell and O'Connor came to a verbal agreement on the terms of their joint venture. They would pool their resources plus a $700,000 mortgage from the FBDB to purchase the property. Sylvan (Bell) would thereafter operate the facilities for five years for its own account without any day-to-day involvement of O'Connor. In brief, at the conclusion of five years, Sylvan would be bought out by Performance (O'Connor) for an agreed sum less any money then outstanding on the FBDB mortgage.

11 For present purposes, the only contentious issue was the option for a residential development to be undertaken by Bell (or a third party) "along the 18th fairway." O'Connor and Bell did not discuss a metes and bounds description of the optioned land, but Bell testified, and the trial judge accepted, that he showed O'Connor photographs and plans of the sort of development he had in mind, namely, a *double* row of houses (i.e., on both sides of a street) clustered around a *cul-de-sac* along the length of the 18th fairway (480 yards). A photograph of a comparable golf course development where Bell had lived in the Bayview area of Toronto formed part of the negotiations (and was marked at trial as Exhibit 1, Tab 67). O'Connor agreed to option the land to permit such a development; otherwise (as the trial judge found), Bell would not have agreed to the five-year joint venture. The parties agreed that the purchase price of the optioned land would be $400,000 by a third party (or $200,000 if the existing owner Sylvan (Bell) chose to develop the parcel).

12 As part of the agreement, O'Connor undertook to have his lawyer reduce the verbal terms to writing. In due course, a document was produced. Clause 18, the option, accurately specified the 480-yard length of the proposed development, but instead of sufficient width to permit a double row of houses (approximately 110 *yards*), clause 18 allowed only enough land for a single row of houses (110 *feet*). This misstatement of the oral agreement was thus pleaded in para. 9 of the Statement of Claim:

> Paragraph 18 of the December 21st, 1989 written Agreement did not accurately reflect the terms of the oral agreement made between Performance and Sylvan in that it misdescribed the width of the lands subject to the Agreement as "One Hundred and Ten (110 ft.) feet in width east to west", when the width of the lands comprising the 18th hole was approximately 110 *yards* in width east to west. [emphasis in original]

Bell had in mind a development of about 58 homes on about 11 acres. O'Connor's draft allowed 3.6 acres. Bell testified, and the trial judge accepted, that he had specifically told O'Connor during the negotiations that a single row housing development (which is all that clause 18 would permit) would "be a waste of land and an uneconomic use of the 18th hole" (para. 42).

13 Clause 18 of the Joint Venture Agreement, as drawn up by O'Connor's lawyer, provided as follows:

> 18. The parties agree that sale of a portion of the lands for development of residential housing is contemplated by both of them within the term of Sylvan's tenancy. *Such portion of the lands is: one hundred ten (110 ft) feet in width east to west and approximately four hundred eighty (480 yds) yards in length north to south*, and abutted by the eastern border of the lands along its entire length. The parties agree that, if they are presented with an appropriate offer, those lands will be sold to a third party developer. It is agreed that such appropriate offer will offer the sum of at least four hundred thousand ($400,000) dollars cash for those lands and provide for the continued, uninterrupted existence of the golf course consisting of no less than six thousand two hundred fifty (6250 yds) yards in length with all eighteen fairways well divided, defined and reasonably wide (for reference sake the parties agree that the fairways of the golf course are, at the date of this agreement, for the most part well divided, defined and reasonably wide). [Emphasis added.]

14 On December 21, 1989, O'Connor and Bell signed the Joint Venture Agreement, as well as the documentation to finance the purchase of all of the land. The documents were then delivered to the solicitor for Sylvan, who reviewed it, and suggested revisions, which led to the signing of an amended Joint Venture Agreement on December 27, 1989. Sylvan's solicitor testified at trial that he did not discuss the optioned property dimensions with Bell, and Bell said he never read the option clause. All copies of the documents had been left with his lawyer. O'Connor's solicitor was not called to testify, an omission that caused the trial judge to draw the adverse inference that if the lawyer had testified, it would not have assisted O'Connor.

15 O'Connor knew from Bell's comment during the negotiations that he would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing. Anything less would be "a waste." O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 *feet* for 110 *yards*.

16 In 1990, Bell experienced some "cash flow difficulties" that led to a modification to the financial terms of the agreement, but pressed ahead with plans for the potential development. For a time in 1992, he worked with UMA Engineering Ltd. He subsequently retained Norman Trouth, a development consultant, who produced alternative plans and sketches for developments of 50 and 58 houses along the 18th fairway. Trouth estimated the 58-house project on or about 10.9 acres would net $820,100. In some respects, Bell was looking for more land than O'Connor had verbally agreed to. The proposals would, as contemplated from the outset, involve a measure of realignment of the 18th fairway. Bell therefore left these development proposals with O'Connor, who said he would review them. In the meantime, the lands in the golf course had been annexed to the Town of Sylvan Lake and there was potential for development of the entire 171.5 acres, much to O'Connor's benefit.

17 Time went by. In May 1993, Bell again contacted O'Connor, who promised to review the proposal, but did not respond either then or even after a later meeting arranged by Bell's wife. The clock was running because the option required the development to be completed by December 31, 1994. Finally, by letter dated June 8, 1993, O'Connor's lawyer advised Bell that "[i]t is very unlikely that Performance Industries Ltd. will approve of any development plan which is not strictly in line with the Agreement."

18 Bell testified that at that point, for the first time, he read clause 18 and realized that it did not conform to the oral agreement. O'Connor, he concluded, had slipped in a change of dimensions that turned a viable project into "a waste of land." Bell says he was incensed. He attended at O'Connor's office for what he described as a heated meeting.

19 Attempts were made to resolve the dispute, but O'Connor continued to insist that Bell's right to develop the property was limited under clause 18 of the Agreement to a strip of land 110 feet wide on the easterly boundary of the golf course adjacent to the 18th hole. Bell continued to insist that O'Connor live up to the verbal agreement, which would require 110 feet being read as 110 yards.

20 In December 1994, the 5-year duration of the joint venture coming up for expiry, O'Connor tendered the funds required to buy out Sylvan's interest. Bell refused to allow Sylvan to relinquish possession of the land, and O'Connor commenced an action for specific performance. The Alberta Court of Queen's Bench granted an order for specific performance and O'Connor assumed possession of the property and built a clubhouse at the 18th hole. Also in late 1994, Sylvan commenced the present

action against Performance and O'Connor for rectification of the Agreement or damages in lieu thereof, punitive damages and solicitor-client costs.

II. Judicial History

A. Alberta Court of Queen's Bench (1999), 246 A.R. 272

21 Wilkins J. noted that the onus was on the plaintiff "to establish both that Bell was mistaken as to the description of the development property when he signed the Agreement and that O'Connor knew of his mistake" (para. 66).

22 In the view of Wilkins J., "O'Connor's conduct in attempting to take advantage of the mistake he knew Bell to have made in signing the Agreement is equivalent to a fraud or a misrepresentation amounting [to] fraud or sharp practice" (para. 87). He concluded that "[i]t would be unjust, inequitable and unconscionable for this court not to offer redress to Bell in the face of that conduct" (para. 87). Accordingly, it was "clear from the evidence" that Bell is entitled to rectification of clause 18 of the Agreement. Sylvan was awarded damages in lieu of specific performance of the rectified Joint Venture Agreement.

23 The compensatory damages were assessed on the basis of "the amount of money that Bell would have been entitled to [receive] had he been permitted to complete the residential development of the 18th hole in accordance with the terms of the rectified clause 18" (para. 92). Wilkins J. was satisfied that a development of 58 houses could have "been constructed and substantially marketed prior to December 31, 1994" (para. 93). In the result, he assessed damages on the basis of the 58-lot development on the 480-yard 18th fairway in the amount of $820,100. From this he subtracted $200,000 (being the amount Sylvan (Bell) would have had to pay Performance (O'Connor) to exercise the $400,000 option), for a net of $620,100.

24 With respect to punitive damages, Wilkins J. reiterated that he found "the actions of O'Connor to be tantamount to fraud, equivalent to a misrepresentation in the nature of fraud, and sharp practice" (para. 109). O'Connor's "actions demand an award which will stand as an example to others and at the same time assure that [he] does not unduly profit from his conduct" (para. 109). Wilkins J. stated that "[this] latter statement is the only proper basis for an award of punitive damages" (para. 109) in this case. Accordingly, O'Connor's punitive damages should be awarded "at least to the extent of disgorging the base profit he has realized by his improper conduct" (para. 110). Punitive damages were assessed at $200,000. For their misbehaviour in the conduct of the action, the defendants (now appellants) were required to pay solicitor-client costs.

25 O'Connor argued that he should not be personally liable for any judgment against Performance in favour of the plaintiff, but Wilkins J. rejected this argument "in its entirety" (para. 119). He said that every step taken in furtherance of this joint venture was directed by O'Connor, as was every attempt to defeat Bell's legitimate interests in the protracted litigation. "Surely there could never be a clearer case in which the court must pierce the corporate veil and attribute" (para. 119) liability personally to O'Connor. And so he did.

B. Alberta Court of Appeal (2000), 255 A.R. 329, 2000 ABCA 116

26 In a *per curiam* decision, the Court of Appeal upheld Wilkins J.'s rulings that the Agreement could be rectified and that the corporate veil could be lifted. It also upheld the damages award, with the exception of the award for punitive damages, which it set aside. The order for solicitor-client costs was similarly upheld.

27 With respect to compensatory damages, the Court of Appeal was "not prepared to interfere with the award of damages in this case" (para. 27). It did, however, describe the trial judge's award as "generous" (para. 27).

28 The Court of Appeal agreed with the trial judge that "the misconduct of the defendants was so outrageous that punishment and deterrence [were] required" (para. 28), but that punitive damages "should be awarded only if they achieve some rational purpose" (para. 28). In the Court of Appeal's view, the "substantial and generous compensatory damages awarded" (para. 29) by the trial judge satisfy both the punishment and deterrence objectives in this case. The Court of Appeal was also of the view that this was not a case where it was necessary to award punitive damages to ensure that the defendant does not profit from

his misconduct. O'Connor would have profited under the Agreement even if he had not misbehaved. Accordingly, the Court of Appeal set aside the punitive damages award. In all other respects, the appeal was dismissed.

III. Analysis

29 When reasonably sophisticated business people reduce their oral agreements to written form, which are prepared and reviewed by lawyers, and changes made, and the documents are then executed, there is usually little scope for rectification. Nor does a falling out between business partners usually attract an award of punitive damages. This case is unusual because of the findings of fraud and deceit made against the appellant O'Connor by the trial judge. The appellants are therefore obliged to try to make their case, if at all, out of the mouth of Bell, with such help as they can find in the law books for their position.

30 Counsel for the appellants (who was not counsel at trial) seeks to raise three issues, which he describes as follows: (1) the relationship between the plea of unilateral mistake and the remedy of rectification (particularly where the mistake is the product of the plaintiff's own negligence), (2) the kind of pleading and proof that a plaintiff who seeks rectification must offer, as well as the proper standard of proof to apply in rectification cases, and (3) the proper method of quantifying damages ordered in lieu of rectification in cases where the subject matter of the rectified contract is an option for the sale of land. The respondent, as stated, cross-appeals against the quashing of the award of punitive damages.

A. Rectification of the Contract

31 Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud." The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud." The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at p. 630, *"M. F. Whalen" (The) v. Point Anne Quarries Ltd.* (1921), 63 S.C.R. 109 (S.C.C.), at pp. 126-127, *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550 (Ont. C.A.), at p. 558, Gerald Henry Louis Fridman, *The Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999), at p. 867, Stephen M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999), para. 336. In *Hart*, *supra*, at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution." Apart from everything else, 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.

B. Preliminary Objection

32 The respondent says the appellants ought not to be allowed to argue various objections to rectification that were not raised at trial. The alleged uncertainty about the terms of the prior oral agreement, for example, is an issue that did not come into bloom until after the appellants had lost in the Alberta Court of Appeal. There is some merit in this objection. Unless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited. As Duff J. put it in *Lamb v. Kincaid* (1907), 38 S.C.R. 516 (S.C.C.), at p. 539:

> A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

33 In my view, the appellants' contentions on the rectification issues are fact-based, but are manageable on the evidentiary record and raise important issues of law and equity. The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice.

34 Here the respondents sought and obtained an equitable remedy to rectify a situation which need never have arisen had Bell properly read the draft document in December 1989. He who seeks equity must do equity. If equitable relief had been wrongfully granted, we should not close our eyes to a fatal objection because of counsel's oversight at trial. The facts vital to the appellants' new legal position are readily ascertainable in the evidence and the necessary findings are implicit, if not always explicit, in the trial judge's reasons.

C. The Conditions Precedent to Rectification

35 As stated, high hurdles are placed in the way of a business person who relies on his or her own unilateral mistake to resile from the written terms of a document which he or she has signed and which, on its face, seems perfectly clear. The law is determined not to open the proverbial floodgates to dissatisfied contract makers who want to extricate themselves from a poor bargain.

36 I referred earlier to the four conditions precedent, or "hurdles," that a plaintiff must overcome. To these the appellants wish to add a fifth. Rectification, they say, should not be available to a plaintiff who is negligent in reviewing the documentation of a commercial agreement. To the extent the appellants' argument is that in such circumstances the Court *may* exercise its discretion to refuse the equitable remedy to such a plaintiff, I agree with them. To the extent they say the want of due diligence (or negligence) on the plaintiff's part is an absolute bar, I think their proposition is inconsistent with principle and authority and should be rejected.

37 The first of the traditional hurdles is that Sylvan (Bell) must show the existence and content of the inconsistent prior oral agreement. Rectification is "[t]he most venerable breach in the parol evidence rule" (Waddams, *supra*, at para. 336). The requirement of a prior oral agreement closes the "floodgate" to unhappy contract makers who simply failed to read the contractual documents, or who now have misgivings about the merits of what they have signed.

38 The second hurdle is that not only must Sylvan (Bell) show that the written document does not correspond with the prior oral agreement, but that O'Connor either knew or ought to have known of the mistake in reducing the oral terms to writing. It is only where permitting O'Connor to take advantage of the error would amount to "fraud or the equivalent of fraud" that rectification is available. This requirement closes the "floodgate" to unhappy contract makers who simply made a mistake. Equity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed. Mere unilateral mistake alone is not sufficient to support rectification but if permitting the non-mistaken party to take advantage of the document would be fraud or equivalent to fraud, rectification may be available: *Hart*, *supra*, at p. 630, *"M. F. Whalen" (The)*, *supra*, at pp. 126-127.

39 What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C. S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. . . . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it," but " 'all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken' ": *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19. See also *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257 (Sask. C.A.), *per* Wakeling J.A., *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11 (Ont. C.A.), *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (Ont. H.C.), *per* Grange J. (as he then was), at pp. 362-363, and Waddams, *supra*, at para. 342.

40 The third hurdle is that Sylvan (Bell) must show "the precise form" in which the written instrument can be made to express the prior intention (*Hart, supra, per* Duff J., at p. 630). This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not. The court's equitable jurisdiction is limited to putting into words that - and only that - which the parties had already orally agreed to.

41 The fourth hurdle is that all of the foregoing must be established by proof which this Court has variously described as "beyond reasonable doubt" (*"M. F. Whalen" (The), supra*, at p. 127), or "evidence which leaves no 'fair and reasonable doubt' " (*Hart, supra*, at p. 630), or "convincing proof" or "more than sufficient evidence" (*Augdome Corp. v. Gray* (1974), [1975] 2 S.C.R. 354 (S.C.C.), at pp. 371-372). The modern approach, I think, is captured by the expression "convincing proof," i.e., 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.

42 Some critics argue that anything more demanding than the ordinary civil standard of proof is unnecessary (e.g., Waddams, *supra*, at para. 343), but, again, the objective is 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.

43 It was formerly held that it was not sufficient if the evidence merely comes from the party seeking rectification. In *"M. F. Whalen" (The), supra*, Duff J. (as he then was) said, at p. 127, "[s]uch parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties." Modern practice has moved away from insistence on documentary corroboration (Waddams, *supra*, at para. 337, Fridman, *supra*, at p. 879). In some situations, documentary corroboration is simply not available, but if the parol evidence is corroborated by the conduct of the parties or other proof, rectification may, in the discretion of the Court, be available.

44 It is convenient at this point to deal with the trial judge's findings in relation to these traditional requirements. I will then turn to the appellants' proposed fifth precondition - due diligence on the part of the plaintiff.

(1) The Existence and Content of the Prior Oral Agreement

45 The appellants' principal argument against rectification is that the alleged prior oral agreement is void for uncertainty. Reliance is placed on *I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72 (B.C. C.A.), where rectification of an agreement to purchase a recreational vehicle park was refused because, *per* Finch J.A. (now C.J.B.C.), at para. 7, the parties never agreed on "the precise location of the eastern boundary," and *Gordeyko v. Edmonton (City)* (1986), 45 Alta. L.R. (2d) 201 (Alta. Q.B.), where Stratton J. (as he then was) found the evidence uncertain about a notice period envisaged by the prior oral agreement. See also *Kerr v. Cunard* (1914), 16 D.L.R. 662 (N.B. S.C.). Appellants' counsel quotes Lord Denning's "pithy" observation that: "[a] mistake made by one party to the knowledge of the other is a ground for avoiding a contract, but not for making one" (*Byrnlea Property Investments Ltd. v. Ramsay*, [1969] 2 Q.B. 253 (Eng. C.A.), at p. 265).

46 I agree with the appellants that on this point the trial judge's reasons are somewhat unsatisfactory, but this appears to be because the "uncertainty" argument now made against rectification was not before him. The issue of uncertainty of subject matter was raised neither in the pleadings nor at trial. The trial judge directed his reasons to the points that he believed were in controversy. As to the appellants' new arguments, one may echo the words of James V.C. in *Rumble v. Heygate* (1870), 18 W.R. 749 (Eng. Ch.), who said, at p. 750, that the objections to the agreement in that case on the basis of uncertainty of quantity of land and of its site "are mere shadows which vanish when examined by the light of common sense."

47 The Court should attempt to uphold the parties' bargain where the terms can be ascertained with a reasonable level of comfort, i.e., convincing proof. Here the trial judge predicated his award of compensatory damages on the finding that the optioned land could accommodate 58 single family houses located along the 480 yard length of the 18th fairway. There is no argument about the 480 yards. O'Connor himself plucked the 480 figure from the length of play listed on the Sylvan Lake Golf Club score card. O'Connor's number for the width of the development (110) may also be accepted. The issue is whether the number was intended to express yards or feet. The trial judge appears to have concluded that the dispute about the depth of

the residential development (which is all that divided the parties) came down to a simple choice between Bell's version (Plan A) and O'Connor's version (Plan B). Both plans were predicated on the length of the 18th fairway, namely, 480 yards. Plan B, which O'Connor had described in the document, contemplated a single row of houses on a development plan 110 *feet* deep. Bell's Plan A was based on two rows of housing separated by a road allowance, in a configuration similar to that shown in the aerial photo of the Bayview development discussed by Bell and O'Connor at their December 16-17 meeting. Plan A called for a depth of about 110 *yards*. If Plan B's 110-*foot* depth is tripled to 110 *yards*, the acreage under option would be roughly tripled from about 3.6 acres (Plan B) to about 10.8 acres (Plan A), which accommodates the 58 lots plus the standard municipal road allowance. The problem in *I.C.R.V. Holdings Ltd.*, *supra*, was that the parties never agreed on the boundary. Here the trial judge concluded that there *was* agreement even though the parties did not express themselves to each other in lawyerly language. This not infrequently happens: *Bloom v. Averbach*, [1927] S.C.R. 615 (S.C.C.), per Lamont J., at p. 621:

> It is suggested that had the letters been handed to a lawyer to prepare a formal contract therefrom, he would not have been able to determine what assets were to be included in the term "building, machinery and fixtures," or what were to be covered by "stock, etc." It may be that he would not, but that is not the test. *The test is, did the parties themselves clearly understand what was comprised in each. In other words were their minds* ad idem *as to these expressions*? [Emphasis added.]

48 The trial judge thus found that the parties had made a verbal agreement with reference to a residential development along the 18th hole. It was more than an agreement to agree. He concluded that there was a definite project in a definite location to which O'Connor and Bell had given their definite assent.

49 Although the parties did not discuss a metes and bounds description, they were working on a defined development proposal. O'Connor cannot complain if the numbers he inserted in clause 18 (110 x 480) are accepted and confirmed. The issue, then, is the error created by his apparently duplicitous substitution of feet for yards in one dimension. We know the 480 must be yards because it measures the 18th fairway. If the 110 is converted from feet to yards, symmetry is achieved, certainty is preserved and Bell's position is vindicated.

(2) Fraud or Conduct Equivalent to Fraud

50 The notion of "*equivalent* to fraud," as distinguished from fraud itself, is often utilized where "the court is unwilling to go so far as to find actual knowledge on the side of the party seeking enforcement" (Waddams, *supra*, at para. 342). The trial judge had no such hesitation in this case. He characterized O'Connor's actions as "fraudulent, dishonest and deceitful" (para. 114).

51 The trial judge was persuaded not only of the terms of the prior oral agreement and of Bell's mistake but "beyond any reasonable doubt" of O'Connor's knowledge of that mistake. He states (at para. 79):

> This court is satisfied beyond any reasonable doubt that O'Connor knew of Bell's mistake and he chose to permit Bell to sign it in the mistaken belief that it represented the verbal agreement. He did so with the full intention that he would in the future rely on the terms of the Agreement to thwart or reduce any plan by Bell to develop an increased area of the golf course for residential development.

52 O'Connor thus fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. He knew that Bell would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing as specified in the prior oral contract. O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 feet for 110 yards. O'Connor knowingly snapped at Bell's mistake "to thwart or reduce any plan by Bell to develop an increased area of the golf course for residential development." Bell's loss would be O'Connor's gain, as O'Connor (Performance) would come into sole ownership of the optioned land as of December 31, 1994.

53 Although on occasion the trial judge describes O'Connor's conduct as "equivalent to fraud," and elsewhere he describes it as actual fraud, his reasons taken as a whole can only be characterized as a finding of actual fraud.

(3) Precise Terms of Rectification

54 It follows from the foregoing that "the precise form" in which the written document can be made to conform to the oral agreement would be simply to change the word "feet" in the phrase "one hundred and ten (110) *feet* in width" to "yards."

(4) Existence of "Convincing Proof"

55 The trial judge made his key findings in respect of the prior oral agreement, Bell's unilateral mistake and O'Connor's knowledge of that mistake to a standard of "beyond any reasonable doubt."

56 He also found that Bell's version of the verbal agreement was sufficiently corroborated on significant points by other witnesses (including his wife, his former partner, his lawyer and, subsequently, the development consultants), and documents (including his lawyer's notes and the plan of the Bayview Golf Course development discussed in mid-December 1989).

D. Bell's Lack of Due Diligence

57 The appellants seek, in effect, to add a fifth hurdle (or condition precedent) to the availability of rectification. A plaintiff, they say, should be denied such a remedy unless the error in the written document could not have been discovered with due diligence.

58 O'Connor says that Bell's failure to read clause 18 and note the mixture of yards and feet should be fatal to his claim because the Court ought not to assist businesspersons who are negligent in protecting their own interests. Alternatively, the effective cause of Bell's loss is not the fraudulent document but Bell's failure to detect the fraud when he had an opportunity to do so.

59 I agree that Bell, an experienced businessman, ought to have examined the text of clause 18 before signing the document. The terms of clause 18 were clear on their face (even though many readers might have misread a description of land that mixed units of measurement as clause 18 did here). He had time to review the document with his lawyer. He did so. Changes were requested. He did not catch the substitution of 110 feet for 110 yards; indeed, he says he did not read clause 18 at all.

60 The trial judge, at para. 76, accepted the evidence of Bell's lawyer, who admitted that he had not directed his mind to the limitations of the size of the development parcel found in clause 18, nor had he made any note of bringing those to Bell's attention, which would have been his normal practice.

> He could offer no explanation for why he had not done so other than the fact that his focus on receipt of the Agreement signed by Bell was to ensure the completion and registration of documentation to facilitate the closing of [the purchase] on or before December 31, 1989. This court accepts the evidence offered by Mr. Hancock and that of Bell that they at no time discussed the description of property contained in clause 18.

61 It is undoubtedly true that courts ought to hold commercial entities to a reasonable level of due diligence in documenting their transactions. Otherwise, written agreements will lose their utility and commercial life will suffer. Rectification should not become a belated substitute for due diligence.

62 On the other hand, most cases of unilateral mistake involve a degree of carelessness on the part of the plaintiff. A diligent reading of the written document would generally have disclosed the error that the plaintiff, after the fact, seeks to have corrected. The mistaken party will often have failed to read the document entirely, or may have read it too hastily or without parsing each word. As the American *Restatement of the Law, Second: Contracts (2d)* (St. Paul, Minn.: American Law Institute Publishers, 1981), points out in its commentary under s. 157 ("Effect of Fault of Party Seeking Relief"), "since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence." Comment B discusses "failure to read writing." "Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms." But this proposition is qualified by that Comment's further statement that the "exceptional rule" in s. 157 (which permits rectification or "reformation" of the contract) applies only where there has been an agreement that preceded the writing. "In such a case, a party's negligence in failing to read the writing does not preclude reformation if the writing does not correctly express the prior agreement."

63 One reason why the defence of contributory negligence or want of due diligence is not persuasive in a rectification case is because the plaintiff seeks no more than enforcement of the prior oral agreement to which the defendant has already bound itself.

64 The commentary in the American *Restatement* is consistent with the Canadian case law. For example, in *Beverley Motel (1972) Ltd. v. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757 (B.C. S.C.), the vendor signed documents, already signed by the purchaser, in the office of the purchaser's solicitor that conveyed two lots, the single lot (with a motel) that the vendor had offered for sale and the adjacent residentially zoned vacant lot. Of that group of individuals, only the purchaser noted the error (on the day of signing) and he was "pleased and surprised" another lot had been included. He snapped at the offer but he had played no role in inducing the mistake. Gould J. conceded (at pp. 758-759), "[i]t is quite true that if they [the three shareholders of the vendor] had read the legal description in the documents with any care, they would have caught the error. Obviously they did not so read the legal description, and that is understandable, although careless, because they were with their own solicitor, present in the purchaser's solicitor's office, and both solicitors were obviously giving the impression that the final documents were in order and ready for signature." Gould J. ordered that the second lot be conveyed back to the original vendor because it was "unfair, unjust or unconscionable" (p. 760) for the purchaser "to hold the legal advantage he ha[d] gained" (p. 759). Gould J. acknowledged that the presence of a solicitor can help explain why a party might not himself read the written document. In the present case, Bell left the documentation up to the lawyers without appreciating that he had given his lawyer insufficient information to check O'Connor's figures. He had, at that time, no reason to question O'Connor's integrity.

65 If want of due diligence had been a good defence to rectification, relief would likely have been refused in *Big Quill Resources Inc. v. Potash Corp. of Saskatchewan Inc.* (2001), 203 Sask. R. 298, 2001 SKCA 31 (Sask. C.A.), *Stepps Investments Ltd.*, *supra*, *per* Grange J., at p. 362, *Prince Albert Credit Union Ltd. v. Diehl*, [1987] 4 W.W.R. 419 (Sask. Q.B.), *Montreal Trust Co.*, *supra*, at p. 262, *Windjammer Homes Inc. v. Generation Enterprises* (1989), 43 B.L.R. 315 (B.C. S.C.).

E. Discretionary Relief

66 I conclude, therefore, that due diligence on the part of the plaintiff is not a condition precedent to rectification. However, it should be added at once that rectification is an equitable remedy and its award is in the discretion of the court. The conduct of the plaintiff is relevant to the exercise of that discretion. In a case where the court concludes that it would be unjust to impose on a defendant a liability that ought more properly to be attributed to the plaintiff's negligence, rectification may be denied. That was not the case here.

F. Fraud

67 There is, on the facts of this case, a more fundamental reason why the appellants' complaint about Bell's lack of due diligence provides no defence. O'Connor did more than "snap" at a business partner's mistake. O'Connor undertook as part of the verbal agreement to have a document prepared that set out its terms. According to the trial judge, he not only breached that term, it became part of his fraudulent scheme to have the document wrongly state the terms of the option, to fraudulently misrepresent to Bell that it did accurately set out their verbal agreement, to allow Bell to sign it when O'Connor knew Bell was mistaken in doing so, then to delay any response to Bell's development proposals (and thus bring the error to Bell's attention) until it was almost too late for the development to proceed. O'Connor admitted providing his lawyer with the erroneous metes and bounds description in clause 18. It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected.

68 "[F]raud 'unravels everything' ": *Farah v. Barki*, [1955] S.C.R. 107 (S.C.C.), at p. 115 (Kellock J. quoting Farwell J. in *May v. Platt*, [1900] 1 Ch. 616 (Eng. Ch. Div.), at p. 623).

69 The appellants' concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C., who said, "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution

because I relied implicitly upon your fairness and honesty' ": *Central Railway Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99 (U.K. H.L.), at pp. 120-121.

70 Lord Chelmsford's strictures were quoted and applied by Southin J. (as she then was) in *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322 (B.C. S.C.), where she observed that "[c]arelessness on the part of the victim has never been a defence to an action for fraud" (p. 335).

> Once the plaintiff knows of the fraud he must mitigate his loss but until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.
>
> And, in my opinion, a good thing, too. There may be greater damages to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault I fool you." Such a defence should not be countenanced from a rogue. (p. 336)

See also *Dalon v. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89 (B.C. S.C.). To the same effect is George Spencer Bower and Alexander Kingcome Turner, *The Law of Actionable Misrepresentation*, 3rd ed. (London: Butterworths, 1974), at p. 218:

> A man who has told even an innocent untruth, by which he has induced another to alter his position, - much more one who has fraudulently lied with that object and result, - has debarred himself from ever complaining in a court of justice, any more than he could in a court of morals, that the representee acted on the faith of his misstatement in the manner in which he, the representor, intended that he should. He can never be heard to resent the fact that another believed the lie that was told for the very purpose of inspiring that belief, or plead as an excuse that, if the representee had not been such a fool as to trust such a knave, no harm would have been done.

71 The appellants having failed to establish that due diligence on the part of the plaintiff is a precondition to rectification, or to shake the trial judge's findings with respect to the traditional preconditions discussed above, their appeal on the rectification issues must be rejected.

G. Damages in Lieu of Rectification

72 The trial judge awarded $620,100 in compensatory damages representing the loss of profit on a fully built residential development on the 18th fairway. The appellants argue that damages should be limited to the difference between the market value of the land and the option price of $400,000. They say compensatory damages should not include the "reasonably expected profit" from a 58-lot housing development.

73 The finding of fact is, however, that the parties specifically contemplated (even on O'Connor's evidence) that the optioned land would be put to the use of residential housing. Damages for breach of the contract, as rectified, therefore must include losses flowing from the special circumstances known to the parties at the time they made their contract: *Brown & Root Ltd. v. Chimo Shipping Ltd.*, [1967] S.C.R. 642 (S.C.C.), at p. 648, *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670 (S.C.C.), *Australian Newsprint Mills Ltd. v. Canadian Union Line Ltd.*, [1954] S.C.R. 307 (S.C.C.), *Corbin v. Thompson* (1907), 39 S.C.R. 575 (S.C.C.), *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.), at p. 655. In *New Horizon Investments Ltd. v. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268 (B.C. S.C.), Nemetz C.J.B.C. observed, at pp. 272-273:

> [T]he plaintiff's damages should be assessed by reference to the profits which both parties contemplated the plaintiff would make but for the breach. It is not necessary that this contemplation include a precise pre-estimate or calculation of these losses, only a " . . . contemplation of circumstances which embrace the head or type of damage in question".

74 The appellants then contend that even if the trial judge selected the correct measure of damages, he ought to have applied a higher discount for contingencies, particularly the contingencies that (1) Sylvan (Bell) lacked the financial resources to exercise the option and fund the project, and (2) the project could not, in any event, have been completed by the end of 1994, as required.

In essence, they argue that in assessing damages, the Court must discount the value of the chance of profit by the improbability of its occurrence, and call in aid the observation of Crocket J. in *Hyman v. Kinkel*, [1939] S.C.R. 364 (S.C.C.), at p. 383:

> For my part, I can find no authority . . . justifying any court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value.

75 It is at this point, I think, that the appellants' argument runs afoul of the rule against raising new fact-based issues on appeal. The trial judge has found as a fact that the respondent contracted for the opportunity to build a residential development on about 10.9 acres of prime land. It was wrongfully deprived of that opportunity. The trial judge set out to assess the value of that lost opportunity (which was, of course, potentially worth considerably less than a certainty). The appellants' trial counsel took little issue with the damages claim as advanced by Sylvan, and did not adduce much of an evidentiary record to the contrary, whether by calling his own witnesses, or through cross-examination of the respondent's witnesses, to challenge significantly the expert evidence of Trouth and others. Trouth may have been overly optimistic and his figures generous, but his evidence was uncontradicted.

76 The Alberta Court of Appeal characterized the compensatory award as "substantial and generous" (para. 29) but concluded that: "Despite our reservations, we are not prepared to interfere with the award of damages in this case" (para. 27). In the absence of an error of principle, or a factual record that supports the appellants' criticisms, this Court ought not to interfere with the concurrent findings in the Alberta courts on the amount of compensatory damages.

H. Should the award of punitive damages be restored?

77 The respondent in its cross-appeal seeks restoration of the $200,000 award of punitive damages disallowed by the Alberta Court of Appeal. Principles concerning the award and assessment of punitive damages were canvassed at the hearing of this appeal, heard the same day as *Whiten*, *supra*, reasons in which are released concurrently.

78 It is sufficient to apply the principles developed in *Whiten* without repeating the underlying analysis.

79 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency." The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour: *Whiten*, *supra*, at para. 36, and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 196.

80 The misconduct found against O'Connor was his contemptuous disregard for Bell's rights under the verbal agreement of December 1989, together with his subsequent use of the written document (which he knew misstated their verbal agreement) leading up to and including court proceedings filed January 4, 1995, to obtain possession of the golf course property and thereby to destroy the value of Bell's option to develop the agreed-upon residential project.

81 Torts such as deceit or fraud already incorporate a type of misconduct that to some extent "offends the court's sense of decency" and which "represents a marked departure from ordinary standards of decent behaviour," yet not all fraud cases lead to an award of punitive damages.

82 O'Connor's fraud was a condition precedent to Bell's successful claim to rectification, for which his company will now receive compensatory damages of $620,100. Payment of $620,100 hurts. The question is whether *more* punishment is rationally required by way of retribution, deterrence or denunciation (*Whiten*, *supra*, at para. 43).

83 *Whiten* emphasizes that defendants should have "advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it" (*Whiten*, *supra*, at para. 86). Here, punitive damages in the sum of $1,020,100 were expressly sought in the Amended Amended Statement of Claim and the basis for the claim was "disgorgement of the profits the Defendants will enjoy as a result of the [Plaintiff's] unilateral mistake." The trial judge, as stated, awarded $200,000 in punitive damages.

84 The applicable standard of appellate review for "rationality" was articulated by Cory J. in *Hill*, *supra*, at para. 197:

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

85 *Whiten* affirms that "[t]he 'rationality' test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum" (para. 101).

86 I agree with the Alberta Court of Appeal that the award of punitive damages in this case does not serve a rational purpose.

87 O'Connor's fraud was, of course, reprehensible. Indeed, fraud is generally reprehensible, but only in exceptional cases does it attract punitive damages. In this case, the trial judge, at para. 109, thought punishment above and beyond the payment of generous compensatory damages was required for two reasons, namely that O'Connor's actions (1) "demand an award which will stand as an example to others" and (2) "at the same time assure that O'Connor does not unduly profit from his conduct." These are both legitimate objectives for the award of punitive damages (*Whiten*, *supra*, at paras. 43, 111). However, it must be kept in mind that an award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation.

88 This was a commercial relationship between two businessmen. One tried to pull a fast one on the other. There was no abuse of a dominant position. O'Connor's misconduct was planned and deliberate and he persisted in it over a period of four and a half years, but, in the end, the courts did their work and Bell obtained full compensation plus costs on a solicitor-client basis, all of which undoubtedly had a punitive effect on O'Connor. In addition, O'Connor is stigmatized with a judicial finding (now upheld by two appellate courts) that he acted in a way that was "fraudulent, dishonest and deceitful." His conduct has been soundly denounced and he has been required personally to pay a large amount of money in compensation. The respondent is unable to identify any aggravating circumstances that would not be present in almost any case of business fraud except that O'Connor was found to have behaved abominably in the conduct of the litigation. However, as stated, the trial judge excluded this consideration from the award of punitive damages because he identified it as the basis for his award of solicitor-client costs.

89 The trial judge's second reason for punitive damages was to ensure that O'Connor "[did] not unduly profit from his conduct" (para. 109). But in fact O'Connor did not profit at all from his misconduct. The source of his development profits was the prior oral contract. Whatever Performance (O'Connor) made after paying $620,100 compensatory damages to the respondent rightfully belonged to them under the terms of the (rectified) agreement. As discussed earlier, the verbal agreement of December 1989 contemplated that after five years, O'Connor's company, Performance, would acquire the golf club lands (minus the optioned lands if the option had been exercised) to develop as it wished for its own account. While on the whole O'Connor's conduct in this matter was found to be reprehensible, his behaviour also had some redeeming qualities. Early on in the project, for example, O'Connor picked up Bell's share of mortgage interest when Bell was not able to afford to contribute the amount that he had agreed to pay. The conflict between Bell and O'Connor should not be caricatured as a battle between good and evil.

90 It may be true, as the trial judge found, that O'Connor's profits on the balance of lands *not* subject to the option will "recover all or more of the amount of damage for loss of profit awarded against him in favour of Bell" (para. 109), but, with respect, that is not a rational reason to punish O'Connor further. Those profits are not the fruit of misconduct directed at Bell.

91 Finally, the assessment of $200,000 coincides with the payment that Sylvan (Bell) was obliged to pay in order to exercise the option, and which the trial judge properly took into account in his assessment of compensatory damages. This figure has no rational relationship to the appellants' potential development profits on the balance of the golf course land, on which there was no evidence. Moreover, it is a payment that the appellants, under the rectified agreement, were entitled to keep.

92 As pointed out in *Whiten*, *supra*, at paras. 98 and 100, and *Hill*, *supra*, at para. 197, punitive damages are not "at large," and both the award and the assessment of quantum must meet the test of rationality. In this case, with respect, neither the punitive damages award nor the $200,000 assessment survives that test.

IV. Conclusion

93 I would therefore dismiss the appeal and cross-appeal both with costs on a party and party basis.

LeBel J.:

94 Subject to my comments on punitive damages in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (S.C.C.), I agree with Binnie J.'s reasons. I would dispose of the appeal and cross-appeal as he suggests. Rectification of the contract was properly ordered, but punitive damages would fulfil no rational purpose in this case.

Appeal dismissed; cross-appeal dismissed.

Pourvoi rejeté; pourvoi incident rejeté.

Footnotes

* Corrigendum to para. 70: the D.L.R. cite was replaced with the B.C.L.R. cite, with the consequent changes to page references being made in the quotation.

† Davies Ward Phillips & Vineberg, LLP

2

2004 CarswellOnt 936
Ontario Court of Appeal

Wasauksing First Nation v. Wasausink Lands Inc.

2004 CarswellOnt 936, [2004] 2 C.N.L.R. 355, [2004] O.J. No. 810, 129 A.C.W.S. (3d) 2, 184 O.A.C. 84, 43 B.L.R. (3d) 244

Council of the Wasauksing First Nation a.k.a. Council of Ojibways of Parry Island Band, and John Beaucage and Terry Pegahmagabow, on their own behalf and on behalf of the registered members of the Wasauksing First Nation a.k.a. Ojibways of Parry Island Band, Applicants (Appellants) and Wasausink Lands Inc., Joyce Tabobondung, Wilfred King, Dora Tabobondung, Leslie Tabobondung, and Florence Tabobondung, Respondents (Respondents)

Laskin, Cronk, Armstrong JJ.A.

Heard: April 2-3, 2003
Judgment: March 4, 2004
Docket: CA C37772

Proceedings: affirming *Wasauksing First Nation v. Wasausink Lands Inc.* (2002), 2002 CarswellOnt 107, [2002] 3 C.N.L.R. 287 (Ont. S.C.J.)

Counsel: Yehuda Levinson, Eugene Meehan, David Stone for Applicants / Appellants
Charles Campbell, Renée Lang for Respondents / Respondents

Subject: Corporate and Commercial; Public; Contracts; Constitutional

Headnote

Business associations --- Creation and organization of business associations — Corporations — Incorporation — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s

records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Aboriginal law --- Bands and band government — Band councils — Powers and jurisdiction — General principles

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Business associations --- Specific corporate organization matters — Directors and officers — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Business associations --- Creation and organization of business associations — Corporations — Corporate constitution — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by

previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Aboriginal law --- Constitutional issues — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Table of Authorities

Cases considered:

Canadian Pacific Ltd. v. Matsqui Indian Band (1995), 26 Admin. L.R. (2d) 1, (sub nom. *Matsqui Indian Band v. Canadian Pacific Ltd.)* [1995] 2 C.N.L.R. 92, 122 D.L.R. (4th) 129, 85 F.T.R. 79 (note), [1995] 1 S.C.R. 3, 177 N.R. 325, 1995 CarswellNat 264, 1995 CarswellNat 700 (S.C.C.) — considered

Casimel v. Insurance Corp. of British Columbia (1993), 82 B.C.L.R. (2d) 387, 30 B.C.A.C. 279, 49 W.A.C. 279, 106 D.L.R. (4th) 720, 18 C.C.L.I. (2d) 161, [1994] 2 C.N.L.R. 22, 1993 CarswellBC 231 (B.C. C.A.) — distinguished

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

Equity Waste Management of Canada Corp. v. Halton Hills (Town) (1997), 1997 CarswellOnt 3270, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324, 35 O.R. (3d) 321 (Ont. C.A.) — referred to

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160, 1992 CarswellNat 649, 1992 CarswellNat 1313 (S.C.C.) — referred to

Harelkin v. University of Regina (1979), [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 26 N.R. 364, 96 D.L.R. (3d) 14, 1979 CarswellSask 79, 1979 CarswellSask 162 (S.C.C.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

John Austin & Sons Ltd. v. Smith (1982), 35 O.R. (2d) 272, 132 D.L.R. (3d) 311, 1982 CarswellOnt 1342 (Ont. C.A.) — considered

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

K's Adoption Petition, Re (1961), 38 W.W.R. 100, (sub nom. *Katie, Re)* 32 D.L.R. (2d) 686, 1961 CarswellNWT 3 (N.W.T. Terr. Ct.) — distinguished

Lakeside Colony of Hutterian Brethren v. Hofer (1992), [1993] 1 W.W.R. 113, [1992] 3 S.C.R. 165, 142 N.R. 241, 81 Man. R. (2d) 1, 30 W.A.C. 1, 1992 CarswellMan 138, 97 D.L.R. (4th) 17, 1992 CarswellMan 221 (S.C.C.) — referred to

Mitchell v. Minister of National Revenue (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.)* 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.)* 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.)* [2001] 3 C.N.L.R. 122, (sub nom. *Mitchell v. M.N.R.)* [2001] 1 S.C.R. 911, 206 F.T.R. 160 (note), [2002] 3 C.T.C. 359 (S.C.C.) — referred to

Mitchell v. Sandy Bay Indian Band (1990), (sub nom. *Mitchell v. Peguis Indian Band)* [1990] 5 W.W.R. 97, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, 3 T.C.T. 5219, 67 Man. R. (2d) 81, 110 N.R. 241, [1990] 3 C.N.L.R. 46, 1990 CarswellMan 209, 1990 CarswellMan 380 (S.C.C.) — considered

Nowegijick v. R. (1983), (sub nom. *Nowegijick v. Canada)* [1983] 1 S.C.R. 29, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 1983 CarswellNat 123, 1983 CarswellNat 520 (S.C.C.) — considered

P.S.A.C. v. NAV Canada (2002), 2002 CarswellOnt 1063, 212 D.L.R. (4th) 68, 17 C.C.E.L. (3d) 26, (sub nom. *Public Service Alliance of Canada v. NAV Canada)* 158 O.A.C. 276, (sub nom. *Public Service Alliance of Canada v. NAV Canada)* 2002 C.L.L.C. 220-033, (sub nom. *Public Service Alliance of Canada v. NAV Canada)* 59 O.R. (3d) 284 (Ont. C.A.) — referred to

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

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.) — referred to

Peter Pan Drive-In Ltd. v. Flambro Realty Ltd. (1980), 32 N.R. 538, [1980] 1 S.C.R. xi (S.C.C.) — referred to

R. v. Sparrow (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — referred to

R. v. Vanderpeet (1996), 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet)* 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet)* 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet)* 200 N.R. 1, (sub nom. *R. v. Van der Peet)* 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet)* [1996] 2 S.C.R. 507, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, (sub nom. *R. v. Van der Peet)* [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet)* 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — considered

Reza v. Canada (1994), 24 Imm. L.R. (2d) 117, 21 C.R.R. (2d) 236, 116 D.L.R. (4th) 61, (sub nom. *Reza v. Canada (Minister of Employment & Immigration))* 72 O.A.C. 348, 22 Admin. L.R. (2d) 79, [1994] 2 S.C.R. 394, (sub nom. *Reza v. Canada (Minister of Employment & Immigration))* 167 N.R. 282, 18 O.R. (3d) 640 (note), 1994 CarswellOnt 675, 1994 CarswellOnt 1158 (S.C.C.) — referred to

Robert McAlpine Ltd. v. Woodbine Place Inc. (2001), 2001 CarswellOnt 317, (sub nom. *McAlpine (Robert) Ltd. v. Byrne Glass Enterprises Ltd.)* 141 O.A.C. 167, 7 C.L.R. (3d) 155 (Ont. C.A.) — referred to

Soulos v. Korkontzilas (1997), 212 N.R. 1, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241, 17 E.T.R. (2d) 89, [1997] 2 S.C.R. 217, 1997 CarswellOnt 1490 (S.C.C.) — 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 (S.C.C.) — distinguished

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35(1) — referred to

Corporations Act, R.S.O. 1990, c. C.38
Generally — referred to

s. 124(1) — referred to

s. 124(2) — referred to

s. 127 — referred to

s. 284(1) — referred to

s. 287(1) — referred to

s. 287(2) — referred to

s. 287(4) — referred to

s. 309(1) — considered

s. 309(2) — referred to

s. 309(5) — referred to

Income Tax Act, S.C. 1970-71-72, c. 63
Generally — referred to

Indian Act, R.S.C. 1970, c. I-6
s. 87 — referred to

Indian Act, R.S.C. 1985, c. I-5
Generally — referred to

s. 88 — considered

APPEAL by Indian chief and band council from judgment reported at *Wasauksing First Nation v. Wasausink Lands Inc.* (2002), 2002 CarswellOnt 107, [2002] 3 C.N.L.R. 287 (Ont. S.C.J.) dismissing application for control of land management company.

***Per curiam*:**

I. Overview

1 Wasauksing First Nation (the "WFN") is a native community on an island in Lake Huron. Back in the 1960s, to gain revenues for its members, the WFN decided to lease part of its land as cottage lots. Because the *Indian Act*, R.S.C. 1985, c. I-5 prohibits Indian Bands from alienating land (except to the Crown), in 1971 the respondent, Wasausink Lands Inc. ("WLI") was incorporated to lease the lots, and collect and manage the rents.

2 Between 1971 and 1994 the chief and band council of the WFN controlled WLI. In 1994 and 1995 the chief and council at the time - now individual respondents - reorganized WLI, formally separating its governance from that of the WFN. The individual respondents remain the directors of WLI. Since 1997, however, the WFN has elected a new chief and band council - the appellants - who object to the respondents' management of WLI.

3 At its core, this litigation is about who controls WLI. The appellants contend that the members of the WFN are members of WLI and that the chief and council of the WFN are the rightful directors of WLI. They rely on the practice that existed between 1971 and 1994. The respondents, on the other hand, contend that control of WLI, its members and directors, must be determined by the corporation's letters patent and by-laws, and by the provisions of the *Corporations Act*, R.S.O. 1990, c. 38 (the Act).

4 The appellants sought relief from the requirements of the Act and put forward a number of arguments in support of that relief. After a long trial, Blair R.S.J., in lengthy and thorough reasons, dismissed their application. The appellants now appeal to this court on three grounds:

(i) the trial judge erred in failing to give effect to their claim by rectifying the corporate registers of WLI under s. 309(1) of the Act;

(ii) in the alternative, this court should impose in their favour a constructive trust on the current directors and officers of WLI; and

(iii) in the further alternative, the trial judge erred in failing to grant them a constitutional exemption from the requirements of the Act by recognizing an aboriginal right under s. 35(1) of the *Constitution Act, 1982*.

II. Facts

5 The facts in this case were exhaustively reviewed in the reasons for judgment of the trial judge, reported at [2002] O.J. No. 164 (Ont. S.C.J.). It is therefore unnecessary to engage in a further detailed review of the evidence. For the purpose of these reasons, it will suffice to provide a general outline of the facts in order to put our analysis and conclusions in context. What follows, therefore, is a summary of the facts based upon the review of the trial judge.

6 The WFN peoples were originally Ojibways. Approximately 400 members of the WFN live on a reserve located on Parry Island in Georgian Bay adjacent to the Town of Parry Sound. An additional 600 or so members of the WFN live off the reserve.

7 Sometime in the 1950s, the WFN conceived the idea of renting some of their reserve lands on Parry Island for cottage lots as a means of generating income for the various needs of the reserve. However, the *Indian Act*, *supra*, prevented the transfer of an interest in real property by aboriginals, except to the Crown.

8 In order to comply with the *Indian Act*, 244 lots to be rented for cottage use were surrendered to the Crown in the early 1960s. The federal crown agreed to hold the rents received in trust for the benefit of the WFN. However, it was not long before the band council of the WFN began to look for ways to exercise more control over this enterprise and, in particular, the funds derived from it. As a result of discussions with representatives of Indian and Northern Affairs Canada (INAC), the federal government agreed to the incorporation of a company which would enter into a head lease with the Crown for the 244 cottage lots. WLI entered into the head lease and then sublet the lots to the cottagers.

9 The letters patent of WLI provide that the corporation is "to foster and advance the interests of the Ojibways of Parry Island Band (now the Wasauksing First Nation)" and "to do all things as are incidental or conducive to the obtainment of those objects".

10 WLI was established in 1971 as the economic development agency of the WFN. In addition to managing the cottage lots and collecting the rents, it operated or managed various other properties, businesses and projects.

11 The original applicants for incorporation of WLI were Flora Tabobondung (then the chief of the WFN), Hubert Tabobondung, Matilda Tabobondung, Leslie E. Tabobondung and Ernest Partridge (the Original Incorporators). All of these persons, except for Leslie Tabobondung, were members of the WFN band council at the time of WLI's incorporation. Leslie Tabobondung became a member of the band council in 1972. The Original Incorporators were also the first directors of WLI.

12 Until the 1990s, WLI appeared to operate as an integral part of the activities of the band council. The trial judge summarized the situation as follows:

> It is clear on the evidence that in practical terms, between 1971 and Fall 1993, the Chief and Council in office from time to time acted as *de facto* directors of WLI and were accepted as such by the members of the [WFN] and by the Federal Government and all concerned parties dealing with WLI. I find that this was so. However, there is no evidence of any meetings of WLI members having ever been held to elect these persons as directors. It seemed to follow from their election as Chief and Council that they were expected to fill the role.

Band council general meetings were usually followed by WLI meetings. Both meetings were open to all members of the WFN.

13 In February 1993, Joyce Tabobondung was elected chief of a new WFN band council. The new chief and her council reviewed the affairs of the WFN and WLI and concluded that there were serious financial and organizational issues that needed to be addressed. The WFN was indebted to the bank in the amount of $630,000. WLI's overdraft at the bank was $70,000. The new band council concluded that the affairs of WLI needed to be separated from the affairs of the WFN. In order to proceed with a new organization plan, they retained the services of three consultants: one to review the financial affairs; one to review the cottage leasing operation; and one to review the organizational structure of the WFN and WLI.

14 The review by the financial consultant revealed that the funding, provided by the federal government through INAC, was insufficient to cover the expenses of the WFN. For several years, WLI had been making payments to the WFN to cover the shortfall.

15 In 1994 and 1995, the new band council, under Joyce Tabobondung, initiated the reorganization of WLI as a separate entity from the WFN (the 1994 Reorganization). This involved the admission of some new members of the corporation and changes to the board of directors of WLI, all of which is detailed in the reasons for judgment of the trial judge.

16 The new band council and WLI negotiated an operating agreement, which was intended to provide a protocol to govern the relationship between the two organizations. The agreement was signed in the spring of 1995. The operating agreement was described by the trial judge as follows:

> The provisions for the management of WLI are central to the *raison d'être* behind the Operating Agreement. The Agreement recognized that the WLI directors were responsible for the day-to-day operations of the corporation and that they were to develop and carry out various development and business plans in that regard. However, to ensure that the general direction of WLI's activities was consistent with the policies of the [WFN] as they were established from time to time, the WLI directors were restricted in various ways in what they could do without WFN approval. In particular, the Operating Agreement stipulated that WLI:
>
> - would only accept as members of the corporation individuals who had been approved by the [WFN] from a short list proposed by WLI;
> - would limit the compensation payable to directors;
> - would obtain the [WFN's] prior written approval,
>   - of the auditor of WLI
>   - of any proposed by-law or application for supplementary letters patent of WLI
>   - for spending more than 50% of WLI's annual operating revenues on operating expenses in any one year, or more than 25% of annual operating revenues on capital investments in any one financial year, or to incur cumulative debt in excess of 75% of annual operating revenues in any financial year; and finally,
> - was not to proceed with any activities unless they had been outlined in a business plan approved by the [WFN].
>
> The Operating Agreement also required WLI to forward financial statements, provide a review of operations, and submit business plans and an outline of requirements to the [WFN]. Any individual authorized by WFN was to be entitled to access to the books and records of WLI on 48 hours written notice. In addition, under Article 3 WLI was to pay certain sums to WFN, including 25% of its net annual income.

17 The reorganization of WLI and the execution of the operating agreement unfortunately did not result in an improvement in the financial affairs of the WFN. During the tenure of Joyce Tabobondung and her council, the financial situation continued to deteriorate. As a result, INAC appointed a third party manager to manage and administer the funds provided by the federal government to the WFN.

18 Not long after the appointment of the third party manager, a crisis developed over the provision of schooling for the children of the WFN. In August 1996, the parents of school-aged children were informed by the Parry Sound Board of Education that their children could not attend the local schools in September due to a failure of the band council to pay the required tuition fees.

19 The upshot of this crisis and other contentious issues that arose at the time was that Joyce Tabobondung and her fellow councillors were defeated in an election held in February 1997. John Beaucage replaced Joyce Tabobondung as the chief.

20 Although the third party manager eventually paid the outstanding tuition fees, the education crisis placed John Beaucage and his new council in a series of confrontations with the members and directors of WLI led by Joyce Tabobondung.

21 When Mr. Beaucage and his councillors were elected, they began to attempt to roll back many of the changes brought about as a result of the organization of WLI under the Joyce Tabobondung council. Mr. Beaucage and his new council refused to communicate with WLI directors in regard to WLI business plans. As well, they repudiated the operating agreement and

declined to proceed with the implementation of other arrangements and agreements that had been made between the Joyce Tabobondung council and WLI before the election of February 1997.

22 At the centre of the dispute between John Beaucage and his followers and Joyce Tabobondung and her followers is the issue of whether or not all members of the WFN are members of WLI. Beaucage and his fellow councillors asserted that all members of the WFN are indeed members of WLI.

23 Finally, in December 1997, the band council, John Beaucage and others began this litigation against WLI, Joyce Tabobondung and others. In their application, the appellants sought a range of remedies. As relevant to this appeal, they sought a declaration that all members of the WFN are members of WLI, a declaration that the duly elected chief and council of the WFN are the directors of WLI, and an order rectifying the company's registers of members and of directors as necessary. The trial judge declined to grant this declaratory relief and dismissed the appellants' rectification claim.

24 The appellants also sought an order declaring that the WFN's custom and practice of the band council governing and managing its affairs on behalf of its members is constitutionally exempt from the application of the Act. The trial judge declined to grant this relief.

25 In addition, the appellants sought an order declaring that the operating agreement of September 12, 1995 is invalid or, alternatively, unenforceable against the WFN. In that connection, during the proceedings before the trial judge, the respondents initially supported the operating agreement as a valid and legally-binding document. However, at the conclusion of the trial, they elected to accept the appellants' repudiation of the operating agreement. Consequently, the trial judge had no alternative but to declare that the operating agreement had been terminated and that it is no longer of any force and effect.

26 The trial judge refused to grant any of the other relief sought by the appellants.

III. Analysis

(1) Rectification Claim

27 The appellants argue that from the time of WLI's incorporation in 1971, the WFN community understood that all members of the WFN were to be members of WLI and that the persons elected from time to time as the WFN's chief and as councillors of the WFN band council were to be the directors of WLI (collectively, the WFN Understanding).

28 The appellants also maintain, as detailed in their factum filed on this appeal, that WLI was created "to ensure that the entire [WFN] community could control its assets and resources for the benefit of the community". They submit that the formal constating records of WLI mistakenly fail to give effect to this fundamental objective and to the underlying "open, inclusive, representative and consensus-based" decision-making customs, practices and traditions of the WFN. Thus, the appellants contend, WLI's corporate records fail to give effect to the "very reason why the corporation was set up".

29 The appellants submit that this deficiency constitutes a substantive error in the corporate records of WLI that is susceptible to rectification under s. 309(1) of the Act. In that regard, they maintain that s. 309(1) should receive a broad and liberal construction to give effect to the customs, practices and traditions of the WFN, a unique aboriginal and cultural community.

30 Sections 309(1), (2) and (5) of the Act provide:

> s. 309(1) If the name of a person is, without sufficient cause, entered in or omitted from the minutes of proceedings mentioned in section 299 or from the documents or registers mentioned in sections 41 and 300, or if default is made or unnecessary delay takes place in entering therein the fact of any person having ceased to be a shareholder or member of the corporation, the person or shareholder or member aggriev-ed, or any shareholder or member of the corporation, or the corporation itself, may apply to the court for an order that the minutes, documents or registers be rectified, and the court may dismiss such application or make an order for the rectification of the minutes, documents or registers, and may direct the corporation to compensate the party aggrieved for any damage the party has sustained.

> (2) The court may, in any proceeding under this section, decide any question relating to the entitlement of a person who is a party to such proceeding to have the person's name entered in or omitted from such minutes, documents or registers, whether such question arises between two or more shareholders or members or alleged shareholders or members, or between any shareholder or member or alleged shareholder or member and the corporation.
>
> . . . . .
>
> (5) This section does not deprive any court of any jurisdiction it otherwise has.

31 The trial judge concluded that the members of WLI are the Original Incorporators of WLI, as modified during the 1994 Reorganization and thereafter, and that the current directors of WLI are the respondents Dora, Leslie and Florence Tabobondung rather than the current elected chief and members of the WFN band council. He also made the following key findings of fact:

> (i) WLI was not incorporated with the intention that all members of the WFN would be members of the corporation, nor with the intention that the WFN itself would be a member of WLI;
>
> (ii) WLI was established as a limited, rather than as a universal, membership corporation; and
>
> (iii) the original directors of WLI were still in place when the 1994 Reorganization of WLI was undertaken. In addition, the 1994 Reorganization was itself properly carried out and was initiated by a validly elected chief and band council of the WFN.

32 The trial judge rejected the appellants' claim for rectification on two grounds. First, he held that the requisite factual underpinning for the rectification claim had not been established at trial. Second, he held that the rectification remedy under s. 309(1) of the Act does not extend to the type of relief sought by the appellants concerning WLI.

33 We conclude that the trial judge was correct to hold that the rectification remedy under s. 309(1) is not available to the appellants in the circumstances of this case. We reach this conclusion for the reasons that follow.

(i) Factual Underpinning for the Rectification Claim

34 In considering the trial judge's findings regarding the factual underpinning for the appellants' rectification claim, it is useful to consider the provisions of WLI's constating records first.

(a) Constating Records of WLI - Membership

35 It is common ground that WLI's letters patent and by-laws do not support the alleged WFN Understanding, either with respect to membership in WLI or concerning the composition of its board of directors. The appellants seek rectification of WLI's corporate records for that reason.

36 The letters patent of WLI provide that a charter is issued to the Original Incorporators of WLI "constituting them and any others who become members of the Corporation hereby created a corporation without share capital under the name of [WLI]" for specific objects.

37 This language in the letters patent is significant. By stipulating that persons other than the Original Incorporators can "become" members of WLI, the letters patent provide for a limited membership of five persons in WLI - the Original Incorporators - subject to expansion of the membership over time. During the 1994 Reorganization of WLI, certain of the Original Incorporators ceased to be members of WLI and new members were added in their stead. The membership of WLI was not then expanded, however, as it might have been, to include all members of the WFN. Indeed, the letters patent of WLI have never expressly provided for universal membership in WLI. To the contrary, as the trial judge held, the language used in the letters patent suggests that there was no intention at the time of WLI's creation that it be established as a universal membership corporation.

38 The appellants argue that universal membership applies to WLI because members of the WFN community were treated and admitted as members of WLI by successive band councils of the WFN. They emphasize that universal membership is a foundational concept within the WFN community, requiring that WFN community assets be managed and controlled in an "open, inclusive, representative and consensus-based manner". Sections 124(1) and (2) of the Act, however, provide that the admission of a person or an unincorporated association as a member of a not-for-profit corporation must be effected by resolution of the board of directors of the corporation unless the letters patent, supplementary letters patent or by-laws of the corporation provide for the admission of members by virtue of their office. WLI's letters patent do not invoke this exception by providing for the admission of members to WLI by virtue of their offices in the WFN. In addition, there is no suggestion that any resolutions of WLI's board of directors were passed prior to the 1994 Reorganization of WLI to alter or add to WLI's membership.

39 Moreover, no amendment of WLI's letters patent has ever been sought or obtained to amend the membership of WLI for the purpose of giving effect to the WFN Understanding regarding membership in WLI.

40 Prior to the 1994 Reorganization, no formal by-laws were passed by the directors of WLI. An unsigned by-law, which the trial judge accepted was at one time appended to WLI's letters patent in its formal minute books, provided that membership in WLI "shall consist of the [Original Incorporators] and such other persons as are admitted as members by the board of directors". The trial judge held that this draft by-law "was probably never enacted and in force". Nonetheless, its provisions regarding membership are instructive. Like the letters patent, it contemplated a limited membership in WLI that might be expanded prospectively by WLI's board of directors. As the trial judge remarked, this draft by-law "is at least some indication of the incorporators' intentions at the time".

41 A general by-law regulating the affairs of the corporation was approved on September 10, 1994 as part of the 1994 Reorganization of WLI ("By-law No. 1"). By-law No. 1 also provides for limited, rather than universal, membership in WLI, subject to prospective enlargement of the membership by WLI's board of directors. Accordingly, the only by-law of WLI that appears to have been formally enacted and that addresses membership in WLI, is inconsistent with the universal membership concept advanced by the appellants.

42 Thus, none of WLI's constating records provide for universal membership in WLI in accordance with the WFN Understanding. Consequently, WLI's other corporate records, including its register of members, make no provision for the membership in WLI of all members of the WFN.

(b) Constating Records of WLI - Board of Directors

43 Similarly, WLI's letters patent make no provision for persons becoming directors of WLI by virtue of their offices or positions with the WFN, as is permissible under s. 127 of the Act, and no amendment to the letters patent was ever sought or obtained in that regard. The letters patent provide that the Original Incorporators are the first directors of WLI, that they are to hold office for two years, and that the election of directors is to take place every two years.

44 WLI's By-law No. 1 regularized the procedures for the election of directors. It provides that the members of WLI, by resolution passed by at least two-thirds of the votes cast at a general meeting of members, may remove any director before the expiration of his term of office and, by a majority of the votes cast at that meeting, may elect any person in his stead for the remainder of his term.

45 Section 287(2) of the Act requires the election of directors of a corporation on a yearly basis unless the by-laws of the corporation otherwise provide. Section 287(1) provides that directors are to be elected by the shareholders or members of the corporation in general meeting. Prior to the 1994 Reorganization, no formal general meetings of the original members of WLI were held for the election of directors.

46 Section 284(1) of the Act provides that the persons named as first directors in the instrument creating a corporation are the directors of the corporation until replaced. Section 287(4) of the Act states that if an election of directors is not held at the time required by the Act, the directors continue in office until their successors are elected. The effect of these provisions, in

the absence of an election of directors at a properly constituted meeting of the members of WLI, was to continue the original directors of WLI - the Original Incorporators - as the directors of WLI.

(c) WFN Understanding

47 Nonetheless, the appellants claimed at trial and submit before us that the WFN Understanding has governed the composition of the membership and of the board of directors of WLI from 1971 to date. The basis of this claim was succinctly described by the trial judge:

> How, then, do the Applicants say "others" - i.e. all members of the First Nation, including newborns - have "become" members? Essentially, they say this is so because everyone *believed* themselves to be members, and were treated as such. More elegantly, perhaps, they submit:
>
> a) that from 1971 until at least 1993, the community members of the [WFN] understood and believed that they were all members (or "shareholders") of WLI, and that they were treated as such by the acting WLI directors who were the successively elected Chiefs and Band Council members of the [WFN];
>
> b) that the members of the [WFN] elected their Chiefs and Band Council members from time to time, and that those elections were considered to be elections for the board of directors of WLI as well, because the same individuals performed both functions; and,
>
> c) that successive Chiefs and Band Councillors acted at all times as the *de facto* directors of WLI, and were accepted by the members of the [WFN] as such
>
> [emphasis in original].

48 The core issue at trial regarding the appellants' contention that all members of the WFN were intended, and understood to be, members of WLI, concerned the meaning of the term "member of WLI". In respect of those who felt that "membership" in the WFN was co-extensive with membership in WLI, the trial judge was required to determine whether "membership" meant membership as that term is used under the Act, that is, in the context of the regulation of corporations, or whether "membership" meant something else. The trial judge framed this central question in this way:

> Did they mean "member" in the corporate-law sense, as contemplated by the Letters Patent and governing legislation? Or did they mean "member" in a more general way, i.e., as reflective of a sense of belonging and of recognition that the proceeds from the leased lots were for the benefit of the [WFN] and were to be used in [its] best interests?

49 The trial judge held that "the latter meaning...more closely reflects the views held by members of the [WFN]". He elaborated:

> I am not able to find a factual basis for concluding that all members of WFN are - or were intended at the time of incorporation to be - the corporate "members" of WLI. Nor am I able to conclude that the reorganization of WLI from a *de facto* situation where the members of Chief and Council as elected from time to time acted as the directors of WLI during their term [of] office, to a board of directors properly elected by the members of the Corporation in accordance with the provisions of the Letters Patent, the new By-law, and the governing corporate law legislation, was improperly carried out.

50 The trial judge accepted that at least some members of the WFN "understood and believed that they and all members of the [WFN] were members of WLI and that the community members were treated as such by successive Band Councils". However, after a detailed review of the evidence regarding the beliefs and perceptions of WFN members concerning membership in WLI, the trial judge made the following critical findings:

> After reviewing all of the evidence, including the foregoing excerpts and documentation, I am prepared to accept that there was a widespread feeling amongst members of the [WFN] that they were a part of WLI - or, perhaps more accurately, that *it* was a part of them as the [WFN] - and that this sense of belonging was perceived in some loose sense as "membership".

> However, I am not prepared to find that there was a general understanding or belief amongst all, or even a majority of the members of the [WFN], that all members of the [WFN] were "members" of WLI - in corporate law terms - simply by virtue of the fact that they were members of the [WFN]. Some members of the [WFN] may have had that understanding and belief. Others, however, did not. Most, I conclude, simply believed that the members of the [WFN] were "members" of WLI in the sense that WLI *belonged* to the members of the [WFN] and was obligated to act, and to use its resources, for the general benefit of the Wasauksing community
>
> [emphasis in original].

51 In connection with the composition of WLI's board of directors, as we have said, the trial judge accepted that although no formal election of directors was carried out by the members of WLI prior to 1994, as a practical matter, the persons elected from time to time as the chief and the councillors of the band council of the WFN served as the *de facto* directors of WLI between December 1971 and the Fall of 1993. Thereafter, the 1994 Reorganization was undertaken by the elected chief and band council of the WFN. The trial judge's assessment of the significance of these facts was expressed in the following terms:

> [T]he original directors of the Corporation were technically still in place at the time Chief Joyce Tabobondung and her Council initiated the reorganization - in their capacity as *de facto* directors - in 1994.
>
> The fact that it was the *de facto* board of directors of WLI who initiated the reorganization is a significant consideration. Even if it could be argued that the foregoing...could be overcome by the long-standing practice of the [WFN] to accept newly elected Chiefs and Council members as the acting directors of WLI, the reality is that it was just such a board of directors who instituted the change.
>
> . . . . .
>
> It is not as if the original members and directors of WLI rose suddenly like a phoenix from the ashes to wrest control of WLI from the Chief and Council. The reorganization was initiated by a validly elected Chief and Council, who were acting at the same time - as the Applicants submit they should have been - as the *de facto* board of directors, in order to regularize a long-standing hiatus in the proper corporate administration and structuring of WLI
>
> [emphasis in original].

52 In our view, the trial judge's factual findings concerning the membership and the directors of WLI pose an insurmountable barrier to the appellants' rectification claim under s. 309(1) of the Act.

53 An appellate court will not interfere with a trial judge's findings of fact absent a palpable and overriding error in the trial judge's appreciation of the evidence: see *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.); *Robert McAlpine Ltd. v. Woodbine Place Inc.* (2001), 141 O.A.C. 167 (Ont. C.A.); and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.).

54 The appellants do not challenge the trial judge's factual findings concerning the intentions of the parties who incorporated WLI. Nor do they directly attack his conclusions regarding the composition of WLI's membership or of its board of directors. Rather, in effect, they submit that the trial judge misapprehended the evidence concerning the WFN Understanding and erred by applying "black letter" corporate law principles to his consideration of the issues concerning the membership and the directors of WLI. We would not give effect to these submissions.

55 Various members of the WFN testified at trial concerning their beliefs and perceptions regarding membership in WLI. These witnesses included several former chiefs and members of the band council of WFN, some of the Original Incorporators, and various WFN members who previously worked with or for WLI. The testimony of these witnesses, as a whole, indicates that from and after the incorporation of WLI in 1971 members of the WFN held no uniform or consistent belief or understanding regarding the corporate structure of WLI and the basis for entitlement to membership in WLI.

56 For example, the trial testimony of some WFN members suggested that member-ship in WLI arose as a matter of birthright, that is, members of the WFN automatically became members of WLI because they were "born into it". Other members of the WFN testified that they believed that every person who was registered on the WFN band membership list was automatically considered to be a member of WLI. Many members of the WFN testified that all WFN members had an "interest" in WLI, or in the lands controlled by WLI, because they had given up part of their land or because WLI was created for their benefit. In that context, some of the Original Incorporators of WLI testified that they did not believe that members of the WFN were members of WLI but, rather, that they had an interest in the lands managed by WLI.

57 This evidence indicates that the level of understanding by members of the WFN concerning the corporate framework of WLI and the concept of legal membership in the corporation was uneven. Moreover, the testimony at trial concerning the beliefs and perceptions of members of the WFN regarding membership in WLI was inconsistent. In many instances, it was also conflicting and unclear.

58 Thus, it was open to the trial judge on the record before him to find, as he effectively did, that there was no "general understanding or belief amongst all, or even a majority of the members of the [WFN] that all members of the [WFN] were "members" of WLI - in corporate law terms - simply by virtue of the fact that they were members of the [WFN]".

59 We note in this regard that the appellants themselves state in their factum filed on this appeal that prior to the 1994 Reorganization of WLI, "most" members of the WFN regarded themselves as members of WLI and considered the councillors on the WFN's band council to be the directors of WLI. This statement is inconsistent with the universal membership concept for WLI that is otherwise urged by the appellants.

60 Other evidence at trial also supports the trial judge's finding regarding the membership of WLI. In particular, this finding is supported by the evidence concerning the way in which decisions were made regarding the affairs of WLI and the reasons for the original membership structure of WLI.

61 The historical approach to decision-making concerning WLI is especially telling in this connection.

62 As we have previously indicated, meetings of WLI were usually held after WFN band council meetings and were generally open to all members of the WFN. The trial judge found as a fact that although members of the WFN attended and participated in WLI meetings, they did not vote on issues relating to the affairs of WLI or on any resolutions concerning WLI.

63 The appellants do not dispute this finding. However, they assert that it is of no moment because, in accordance with the customs, practices and traditions of the WFN, members of the WFN only vote on issues when no consensus can otherwise be reached. They also argue that WFN members did not vote on matters concerning WLI because the meetings in question were meetings of WLI's directors, rather than of its members. We would not give effect to these submissions.

64 While we accept that the traditional decision-making process of the WFN is characterized by the search for consensus rather than by formal vote-taking, we agree with the trial judge that the fact that WFN members did not vote on matters concerning WLI is significant. The trial judge found as a fact that meetings of the members of WLI were held from at least the time of the 1994 Reorganization. Members of the WFN did not vote, or seek to vote, at those meetings concerning the affairs of WLI. By now seeking to rectify the corporate records of WLI to confer membership status *under the Act* on all members of the WFN, thereby obtaining the legal right to vote on the affairs of WLI, the appellants essentially seek the right to a form of participation in the decision-making of WLI that they have not exercised to date.

65 In rejecting the alleged WFN Understanding, the trial judge also had regard to the original membership structure of WLI.

66 The trial judge noted that the structure of WLI at the time of its incorporation, which contemplated only five original members and directors, was designed to ensure that WLI obtained and maintained status as a non-taxable, not-for-profit corporation under the Act. He correctly observed that not-for-profit corporations are restricted at law in the payments and distributions that they may make to their members. The trial judge stated:

> Universal...membership in WLI might well jeopardize the use of the corporation's resources for purposes benefiting [WFN] members, through programs such as loans to individual [WFN] members and the land share distributions which have occurred. In short, there were very cogent reasons for WLI having been incorporated with only a few members to operate it and carry out its objects to advance the overall interests of the [WFN], as opposed to having been incorporated with a universal membership.

67 Although the appellants dispute this finding, there was evidence before the trial judge to support his conclusion that the original limited membership structure of WLI was deliberate, not accidental, and driven, at least in part, by tax exemption considerations. Those factors negate the assertion of a common understanding by the members of the WFN that they were all members of WLI.

68 In the end, the trial judge correctly observed that: "An individual does not become a member or shareholder of a corporation through belief or understanding, no matter how genuinely that belief and understanding may be held." The correctness of that proposition is not contested by the appellants.

69 Accordingly, there was evidence adduced at trial upon which a trier of fact, acting judicially, could conclude that membership in the WFN is not synonymous with membership in WLI. In addition, in our view, the evidence established that there was no legal basis upon which to conclude that the persons who served as the WFN's elected chief and members of band council also automatically enjoyed status as directors of WLI.

70 The factual foundation for the appellants' claim for rectification of WLI's corporate records is predicated on acceptance of the alleged WFN Understanding. The burden of establishing the WFN Understanding at trial rested on the appellants. We do not agree with the appellants' contention that the trial judge misapprehended the evidence concerning the WFN Understanding. Rather, as he was entitled to do on the record before him, he simply concluded that the appellants had not discharged their evidential burden to establish the existence of the WFN Understanding and, hence, the factual underpinning for their rectification claim.

71 We also do not accept the appellants' submission that the trial judge erred by applying "black letter" corporate law principles to his assessment of the issues concerning the membership and the board of directors of WLI. The Act is an enactment of general application. Section 88 of the *Indian Act*, *supra*, provides:

> Subject to the terms of any treaty and any other Act of Parliament, *all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act* or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act
>
> [emphasis added].

72 By its stipulation that provincial laws of general application "are applicable to and in respect of Indians in the province", s. 88 of the *Indian Act* renders the Act applicable to the issues of the composition of the membership and of the board of directors of WLI. Accordingly, unless membership in and the governance of WLI are constitutionally exempt from the application of the Act - an argument that we address later in these reasons - the trial judge did not err in applying the provisions of the Act to his analysis of these issues.

73 The trial judge's finding that the appellants had failed to establish the factual underpinning for their rectification claim is itself dispositive of this claim. It is therefore technically unnecessary to address the conclusions of the trial judge concerning the scope of the rectification remedy under s. 309(1) of the Act. However, as considerable time was spent on this issue by the parties in their oral and written submissions to this court, we will comment on it briefly.

(ii) Rectification Under Section 309(1) of the Act

74 Sections 309(1), (2) and (5) of the Act, in combination, afford discretion to a court to rectify specific corporate records, to award compensation to an aggrieved party for damages occasioned by a proven corporate records deficiency, and to determine the entitlement of any person who is a party to a rectification application to have their name entered in or omitted from the corporate records in question. In this case, the appellants seek rectification of the registers of members and of directors of WLI for the purpose of recognizing and giving effect to the WFN Understanding.

75 Section 309(1) does not expressly delineate the scope of the rectification remedy established thereunder; nor does it set out the circumstances under which the remedy may be granted. Moreover, there is no developed jurisprudence concerning the rectification remedy under s. 309(1) of the Act. What, then, is the scope of the remedy contemplated by s. 309(1) and what pre-conditions, if any, must be satisfied in order to obtain the remedy?

76 In *Snell's Equity*, 30th ed. (London: Sweet & Maxwell Ltd., 2000) at 693, J. McGhee describes the equitable remedy of rectification in these terms:

> If by mistake a written instrument does not accord with the true agreement between the parties, equity has power to reform, or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing. Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of the contract [footnotes omitted].

See also J.E. Martin, *Modern Equity*, 16th ed. (London: Sweet & Maxwell Ltd., 2001) at 866-67.

77 The pre-conditions to the granting of rectification were considered by the English Court of Appeal in *Joscelyne v. Nissen* (1969), [1970] 2 Q.B. 86 (Eng. C.A.), at 98. The court held in that case that an applicant seeking rectification of a written agreement must demonstrate, on "convincing proof", that the parties had a common intention, antecedent to the formal document in question and evidenced by some outward expression of accord, that continued unchanged until the time that the formal document was executed by the parties and that the formal document mistakenly did not conform to the prior common intention. 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.), leave to appeal to S.C.C. refused [1980] 1 S.C.R. xi (S.C.C.) and *John Austin & Sons Ltd. v. Smith* (1982), 35 O.R. (2d) 272 (Ont. C.A.), this court accepted the *Joscelyne* formulation as a correct statement of the modern rule concerning the pre-conditions to rectification. See also *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (Nfld. C.A.) and *P.S.A.C. v. NAV Canada* (2002), 59 O.R. (3d) 284 (Ont. C.A.) at paras. 44-45.

78 Recently, in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678 (S.C.C.), the Supreme Court of Canada considered the equitable remedy of rectification. Unlike this case, the central issue in *Sylvan Lake Golf & Tennis Club Ltd.* concerned the conditions precedent to rectification in cases of alleged unilateral, rather than mutual, mistake. Nonetheless, the following observations at para. 31 by Binnie J., writing for the majority of the Supreme Court, are instructive:

> Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent...The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other.

79 Later in his reasons, in considering the standard of proof applicable in rectification cases, Binnie J. stated at paras. 41-42:

> The modern approach, I think, is captured by the expression "convincing proof", i.e., 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.

80 It is also important to emphasize that rectification is available only in cases of genuine mistake. It does not apply in instances of ambiguity or mistaken assumption. McGhee in *Snell's Equity*, *supra*, makes this point at 696:

> Further, *what is relevant is "the intention of the parties at the time when the deed was executed, and not what would have been their intent if, when they executed it, the result of what they did had been present to their minds." There can thus be no rectification if the omission of a term was deliberate, even if this was due to an erroneous belief that the term was unnecessary* or that it was sufficiently dealt with in the antecedent oral agreement, or that the term was illegal, or a breach of covenant, and similarly if the instrument intentionally contains a provision which in fact means something different from what the parties thought it meant. *Rectification ensures that the instrument contains the provisions which the parties actually intended it to contain, and not those which it would have contained had they been better informed*
>
> [footnotes omitted and emphasis added].

See also S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book Inc., 1999) at 239-40.

81 As relevant to the appellants' rectification claim, the following principles concerning equitable rectification emerge from the foregoing authorities. Rectification is available in the exercise of the court's discretion. Such discretion is not to be exercised lightly but, rather, only where it is demonstrated that, by mistake, a written document or instrument does not accord with or accurately reflect the agreement or arrangements intended by the parties. Rectification is not used to vary the intentions of the parties, or to speculate on the substance of those intentions; rather, it is designed to correct a mistake in carrying out the settled intentions of the parties as established by the evidence. As well, and importantly, rectification is not available to correct erroneous assumptions or beliefs as to what was intended; the remedy seeks to effect the actual intentions of the parties which, by mistake, were not accurately recorded. Finally, a heavy burden rests on the party seeking rectification to establish on convincing proof: (i) the existence and nature of a common intention by the parties prior to the making of the document or instrument alleged to be deficient; (ii) that this common intention remained unchanged at the date that the document or instrument was made; and (iii) that the challenged document or instrument, by mistake, does not conform to the parties' prior common intention.

82 In this case, the trial judge denied the appellants' rectification claim in the exercise of his discretion under s. 309(1) of the Act. The jurisdiction of an appellate court to review the exercise of judicial discretion is strictly constrained. We are not in a position to interfere with the trial judge's decision to deny rectification unless it is clearly demonstrated that he wrongfully exercised his discretion by giving no weight, or insufficient weight, to relevant considerations: see *Reza v. Canada*, [1994] 2 S.C.R. 394 (S.C.C.), at 404-05: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at 76-77; and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at 588. We conclude that this exacting standard of review is not met in this case, for four reasons.

83 First, all of the necessary pre-conditions to the granting of rectification are not satisfied here.

84 The appellants were obliged to demonstrate on convincing evidence that there was a common intention among the members of the WFN community that the membership and governance of WLI be structured and maintained in accordance with the alleged WFN Understanding. This required proof of a common intention that WLI be structured and operated as a universal membership corporation, that is, that all members of the WFN would also be members of WLI.

85 The defining moment in the search for a common intention is the time antecedent to when the challenged document or instrument, in respect of which rectification is sought, was made. Here, the relevant time is prior to the incorporation of WLI in 1971. The trial judge held that the evidence of what happened at the time of the incorporation of WLI, and of what the WFN was then told and understood, was neither extensive nor clear. He also rejected the appellants' claim that the WFN Understanding existed after the creation of WLI. Accordingly, a critical pre-condition to the granting of rectification - proof of an existing common intention among the members of the WFN concerning the membership and governance of WLI - has not been satisfied on convincing evidence.

86 Second, we agree with the trial judge's conclusion that no error exists in the corporate records of WLI that requires rectification. The trial judge found as a fact that WLI was created as a limited membership corporation. Since there was no convincing demonstration at trial of a common intention that universal membership apply to WLI, there is no "mistake" in the corporate records of WLI to be rectified.

87 Third, we do not agree that the trial judge interpreted s. 309(1) of the Act too narrowly, or that he misconstrued the purpose of the rectification remedy established under that provision.

88 The trial judge stated in connection with the nature and scope of the rectification remedy under s. 309(1):

> In my opinion, s. 309 is designed to permit the *rectification* of clerical errors or mistakes in completing corporate records and registers. Its purpose is not to permit the *restructuring or reorganization* by judicial fiat of a corporation's shareholding structure or membership, or the crafting of new by-laws for the corporation, which is in effect what the [appellants] seek in these proceedings. "Rectification", according to *The Shorter Oxford English Dictionary*, means "the correction of error; a setting straight or right". Section 309 is a rectification provision, not a restructuring or reorganization provision
>
> [emphasis in original].

89 The change to WLI's membership register sought by the appellants would fundamentally alter the composition of the membership of WLI notwithstanding that the requested change has not been authorized in accordance with the provisions of the Act that regulate the membership of not-for-profit corporations. In addition, the changes sought by the appellants to WLI's registers of members and directors, in combination, would effectively re-write the provisions of By-law No. 1 and effect a significant realignment of the structure of WLI and a re-distribution of control over it.

90 We agree with the trial judge that the rectification remedy under s. 309(1) is not designed to facilitate such far-reaching corporate changes. Rather, its purpose is to permit the correction of unintended or inadvertent clerical errors or mistakes in the completion of corporate records and registers. It is not intended as a tool to resolve complex corporate disputes by facilitating, through the exercise of judicial discretion, fundamental changes that intrude on established internal corporate affairs. It is also not intended as a device to secure an exemption from substantive requirements of the Act concerning the regulation of a corporation's structure or affairs.

91 Finally, we do not accept the appellants' argument that an expansive interpretation of s. 309(1) of the Act is required in this case because its invocation is sought in an aboriginal context.

92 The appellants rely on *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), a case which concerned the issue of whether income earned by a registered Indian living on a reserve was exempt from taxation under the *Income Tax Act*, 1970-71-72 (Can.), c. 63 by virtue of s. 87 of the *Indian Act*, R.S.C. 1970, c. I-6. In considering this issue, the Supreme Court of Canada stated at 36:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. *It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians*...In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that *Indian treaties "must...be construed*, not according to the technical meaning of [their] words...but *in the sense in which they would naturally be understood by the Indians*
>
> [emphasis added].

As appears from this passage, the principle of statutory construction referenced by the Supreme Court applies to "treaties and statutes relating to Indians". See also, in the tax exemption rights context, *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) at paras. 13-15 and, in the context of band taxation tribunal by-laws, *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.), at 67.

93 None of the *Nowegijick*, *Mitchell* or *Matsqui Indian Band* cases suggests that this interpretive principle applies to the construction of statutory provisions of general application, like s. 309(1) of the Act.

94 As well, we do not understand the interpretive principle formulated in *Nowegijick* to mandate the expansive interpretation of laws of general application where such a reading is not otherwise warranted. Were it otherwise, as the trial judge observed, laws of general application concerning corporations could be interpreted so as to create one form of statutory regime for aboriginals and another form of statutory regime, concerned with the same subject matter, for non-aboriginals. *Nowegijick*, *Mitchell* and *Matsqui Indian Band* do not dictate or support such an outcome. To the contrary, as observed by the Supreme Court in *Nowegijick* at p. 36: "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens."

95 The appellants also argue that an expansive interpretation of a statutory provision is warranted in the aboriginal context if it is demonstrated that an established aboriginal practice conflicts with the applicable statutory provision. Support for this proposition may be found in *K's Adoption Petition, Re* (1961), 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.) and *Casimel v. Insurance Corp. of British Columbia* (1993), 82 B.C.L.R. (2d) 387 (B.C. C.A.). See also, in the context of membership in an unincorporated association, *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 (S.C.C.).

96 This argument rests on proof of an established aboriginal practice or custom that is at odds with the requirements of the enactment in question. It is unsustainable on the facts here.

97 The trial judge held, in connection with the appellants' argument that the WFN's custom and practice of governing and managing its affairs through band council is constitutionally exempt from the application of the Act, that there is no established aboriginal practice to operate or manage a corporation. We discuss the appellants' constitutional exemption argument later in these reasons. For the purpose of the interpretation of s. 309(1) of the Act, however, we agree with the respondents' submission that the alleged WFN Understanding, even if it had been established at trial, does not itself constitute an aboriginal practice or custom merely because the community at issue is aboriginal. Stated somewhat differently, aboriginal peoples engage in many activities, and may hold many beliefs, that do not attract the status of aboriginal practices and customs.

98 We also agree with the trial judge's conclusion that the *K's Adoption Petition, Re* and *Casimel* decisions do not assist the appellants. In those cases, unlike the case at bar, the asserted aboriginal practice or custom was established to the satisfaction of the court and the relevant provincial legislation was interpreted and applied in light of the proven aboriginal practice or custom. In this case, the asserted practice or custom, which involves the membership and governance of a not-for-profit corporation, was not established at trial. There is no suggestion that the WFN community had a settled practice or custom concerning the corporate records of WLI, or regarding the application of the Act to WLI.

99 For all of these reasons, we conclude that the trial judge did not err in rejecting the appellants' claim for rectification under s. 309(1) of the Act.

(2) Trust Claim

100 As an alternative to the relief sought under s. 309(1) of the Act, the appellants submit that this court should impose a constructive trust on the directors and officers of WLI. In oral argument they framed their trust submission in one of two ways: either that WLI, its officers and directors, hold legal title to the corporation for the benefit of the WFN and its members, or that the directors and officers of WLI must vote at meetings of the corporation as directed by the band council. In advancing this submission the appellants rely on the four conditions for imposing a constructive trust set out by the Supreme Court of Canada in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.).

101 The appellants did not ask for a declaration of a constructive trust at trial. They sought this relief for the first time on appeal. On that ground alone we decline to give effect to their submission.

102 The ordinary rule is that a party cannot raise a new issue on appeal. An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so.

103 The appellants do not meet these requirements for departing from the court's ordinary practice. *Soulos* was decided in 1997. Thus, its four conditions for imposing a constructive trust were known more than three years before this trial began. These four conditions are as follows:

> (i) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (ii) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (iii) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personally or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (iv) there must be no factors which would render imposition of a constructive trust unjust in all circumstances of the case.

104 Because the question of a constructive trust was not raised at trial, neither side led evidence on these conditions, and the trial judge made no findings on them. We do not have a proper record to make findings on these conditions. Moreover, doing so would be unfair to the respondents. For example, the second condition requires the court to consider whether the respondents were guilty of wrongdoing. A party facing an allegation of wrongdoing ought to be given an opportunity to lead evidence to meet the allegation. The respondents were denied this opportunity. The third and fourth conditions require the court to engage in a broad inquiry into the justness of a constructive trust. In this case, that inquiry would have to be conducted in the absence of a proper evidentiary basis to make such a determination.

105 For these reasons, we are not persuaded that it is in the interests of justice to entertain the constructive trust argument on its merits. We therefore decline to give effect to this submission.

(3) Constitutional Exemption Claim

106 Finally, the appellants sought a constitutional exemption from the requirements of the Act. The WFN asked the court to recognize that WFN members have an aboriginal right under s. 35(1) of the *Constitution Act* to control and manage the assets of the community in a way that respects their traditional practices and customs. That traditional practice or custom, according to the appellants, is marked by "open, inclusive, representative and consensus-based decision-making". To give effect to this traditional practice or custom, the WFN wanted this court to ignore the corporate structure and organization of WLI, and instead permit the band council to manage the corporation. We found no merit in this submission and did not call on the respondents to answer it.

107 The trial judge correctly applied the framework set out by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.) and *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911 (S.C.C.) for establishing an aboriginal right protected by s. 35(1). As well, he accurately characterized (at para. 285 of his reasons) the right the appellants asserted.

108 As the trial judge pointed out, in *Vanderpeet* Lamer C.J.C. emphasized at para. 46 that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right". Yet on the record before him, the trial judge found that the appellants did not meet this requirement. In his words, they "have failed to establish an evidentiary foundation sufficient to form the basis for a finding that the traditional pre-European contact practices and the aboriginal right they seek to establish existed and continued to exist". The trial judge's finding is entitled to deference on appeal. We are not persuaded that it was tainted by any palpable and overriding error. On that ground alone the constitutional exemption claim must fail.

109 Moreover, we also agree with the trial judge's conclusion that even if the appellants had established the aboriginal right they assert, the Act does not infringe that right. The appellants could have structured WLI in a way that gave effect to the open, inclusive and consensus-based decision-making they espouse. But they did not do so. Now they seek to invoke a constitutional

exemption to circumvent the corporate structure they established in 1971 and modified in 1994. This they cannot do. For these reasons we do not give effect to their request for a constitutional exemption.

IV. Conclusion

110 We agree with the trial judge that the appellants are not entitled to relief under s. 309(1) of the Act or to a constitutional exemption from the requirements of the Act. We decline to deal with the appellants' trust claim. This argument was not raised at trial and we do not have either a proper evidentiary record or findings of fact to consider it on appeal. The appeal is therefore dismissed. The respondents are entitled to their costs of the appeal on a partial indemnity basis, which we fix in the amount of $35,000 inclusive of disbursements and Goods and Services Tax.

Appeal dismissed.

3

2009 CarswellOnt 7006
Ontario Superior Court of Justice

AIM Funds Management Inc. v. AIM Trimark Corporate Class Inc.

2009 CarswellOnt 7006, 2010 G.T.C. 1002, [2009] G.S.T.C. 170, [2009] O.J. No. 4798, 183 A.C.W.S. (3d) 433, 2010 G.T.C. 1002 (Eng.), 64 B.L.R. (4th) 261

AIM Funds Management Inc. (Applicant) and AIM Trimark Corporate Class Inc., AIM Trimark Canada Fund Inc., and AIM Funds Management Inc. (Respondents)

Perell J.

Heard: November 6, 2009
Judgment: November 10, 2009 *
Docket: 07-CV-346058PD3

Counsel: David Chernos, Stuart Svonkin, for Applicant
Alexandra Humphrey, Marie Thérèse Boris, for Intervenor, Attorney General of Canada

Subject: Goods and Services Tax (GST); Contracts

Headnote

Tax --- Goods and Services Tax — Special rules — Agents

Mutual fund manager signed numerous contracts with mutual funds between 1981 and 2007 — CRA reassessed manager for GST, on basis that monies received under contracts were payment for services to mutual fund rather than reimbursement for payments made on behalf of investors — Manager filed notices of objection — Manager applied for order rectifying contracts, and CRA intervened to oppose application — Application granted — Under "deferred sales charge" option for investors, manager paid sales charge to broker upfront and then was reimbursed wholly or in part from monies withdrawn from fund on redemption of investment — No GST was paid with respect to deferred sales charge on basis that, like upfront payment by investors to brokers, it constituted exempt financial service under Excise Tax Act — Contracts stated that payments were as consideration for services, but parties asserted they were reimbursement for deferred sales charge — Evidence, including manager's and mutual funds' books and income tax returns, was sufficient to establish that parties consistently intended that manager would pay deferred sales charge and would be reimbursed when investor withdrew investment from fund — Contracts misstated parties' pre-existing intent — Manager satisfied test for rectification — After GST was introduced, manager did not form intention to structure transaction to avoid GST, since it believed that GST was not factor at all in transaction in which manager was making reimbursable (tax-exempt) payment on behalf of investor — Manager did not seek to rewrite contract to rewrite contractual history, but to rewrite contract that did not correctly record contractual history — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 123(1)"financial service"(q), 178, 306.

Tax --- Goods and Services Tax — Exempt supplies — Financial services

Mutual fund manager signed numerous contracts with mutual funds between 1981 and 2007 — CRA reassessed manager for GST, on basis that monies received under contracts were payment for services to mutual fund rather than reimbursement for payments made on behalf of investors — Manager filed notices of objection — Manager applied for order rectifying contracts, and CRA intervened to oppose application — Application granted — Under "deferred sales charge" option for investors, manager paid sales charge to broker upfront and then was reimbursed wholly or in part from monies withdrawn from fund on redemption of investment — No GST was paid with respect to deferred sales charge on basis that, like upfront payment by investors to brokers, it constituted exempt financial service under Excise Tax Act — Contracts stated that payments were as consideration for services, but parties asserted they were reimbursement for deferred sales charge

— Evidence, including manager's and mutual funds' books and income tax returns, was sufficient to establish that parties consistently intended that manager would pay deferred sales charge and would be reimbursed when investor withdrew investment from fund — Contracts misstated parties' pre-existing intent — Manager satisfied test for rectification — After GST was introduced, manager did not form intention to structure transaction to avoid GST, since it believed that GST was not factor at all in transaction in which manager was making reimbursable (tax-exempt) payment on behalf of investor — Manager did not seek to rewrite contract to rewrite contractual history, but to rewrite contract that did not correctly record contractual history — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 123(1)"financial service"(q), 178, 306.

Tax — Goods and Services Tax — Contractual claims — Miscellaneous

Mutual fund manager signed numerous contracts with mutual funds between 1981 and 2007 — CRA reassessed manager for GST, on basis that monies received under contracts were payment for services to mutual fund rather than reimbursement for payments made on behalf of investors — Manager filed notices of objection — Manager applied for order rectifying contracts, and CRA intervened to oppose application — Application granted — Under "deferred sales charge" option for investors, manager paid sales charge to broker upfront and then was reimbursed wholly or in part from monies withdrawn from fund on redemption of investment — No GST was paid with respect to deferred sales charge on basis that, like upfront payment by investors to brokers, it constituted exempt financial service under Excise Tax Act — Contracts stated that payments were as consideration for services, but parties asserted they were reimbursement for deferred sales charge — Evidence, including manager's and mutual funds' books and income tax returns, was sufficient to establish that parties consistently intended that manager would pay deferred sales charge and would be reimbursed when investor withdrew investment from fund — Contracts misstated parties' pre-existing intent — Manager satisfied test for rectification — After GST was introduced, manager did not form intention to structure transaction to avoid GST, since it believed that GST was not factor at all in transaction in which manager was making reimbursable (tax-exempt) payment on behalf of investor — Manager did not seek to rewrite contract to rewrite contractual history, but to rewrite contract that did not correctly record contractual history — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 123(1)"financial service"(q), 178, 306.

Contracts — Rectification or reformation — Prerequisites — Mistake — Miscellaneous

Mutual fund manager signed numerous contracts with mutual funds between 1981 and 2007 — CRA reassessed manager for GST, on basis that monies received under contracts were payment for services to mutual fund rather than reimbursement for payments made on behalf of investors — Manager filed notices of objection — Manager applied for order rectifying contracts, and CRA intervened to oppose application — Application granted — Under "deferred sales charge" option for investors, manager paid sales charge to broker upfront and then was reimbursed wholly or in part from monies withdrawn from fund on redemption of investment — No GST was paid with respect to deferred sales charge on basis that, like upfront payment by investors to brokers, it constituted exempt financial service under Excise Tax Act — Contracts stated that payments were as consideration for services, but parties asserted they were reimbursement for deferred sales charge — Evidence, including manager's and mutual funds' books and income tax returns, was sufficient to establish that parties consistently intended that manager would pay deferred sales charge and would be reimbursed when investor withdrew investment from fund — Manager satisfied test for rectification — Manager did not seek to rewrite contract to rewrite contractual history, but to rewrite contract that did not correctly record contractual history.

Contracts — Rectification or reformation — Prerequisites — Mistake — Mutual

Mutual fund manager signed numerous management agreements, distribution agreements and declarations of trust with mutual funds between 1981 and 2007 — CRA reassessed manager for GST, on basis that monies received under contracts were payment for services to mutual fund rather than reimbursement for payments made on behalf of investors — Manager filed notices of objection — Manager applied for order rectifying contracts, and CRA intervened to oppose application — Application granted — Under "deferred sales charge" option for investors, manager paid sales charge to broker upfront and then was reimbursed wholly or in part from monies withdrawn from fund on redemption of investment — No GST was paid with respect to deferred sales charge on basis that, like upfront payment by investors to brokers, it constituted exempt financial service under Excise Tax Act — Contracts stated that payments were as consideration for services, but parties asserted they were reimbursement for deferred sales charge — Evidence was sufficient to establish that contracting parties

consistently intended that manager would pay commission that investor owed to broker and that it would be reimbursed in whole or in part upon redemption of investment — Contracts did not express that intention and misstated parties' pre-existing intent — Manager satisfied test for rectification — Manager did not seek to rewrite contract to rewrite contractual history, but to rewrite contract that did not correctly record contractual history.

Table of Authorities

Cases considered by *Perell J.*:

AIM Funds Management Inc. v. AIM Trimark Corporate Class Inc. (2009), 2009 CarswellOnt 3314, [2009] G.S.T.C. 169 (Ont. Master) — referred to

Amalgamation of Aylwards (1975) Ltd., Re (2001), 2001 CarswellNfld 193, 203 Nfld. & P.E.I.R. 181, 610 A.P.R. 181, 16 B.L.R. (3d) 34 (Nfld. T.D.) — referred to

Assaly v. Ontario (Minister of Revenue) (1986), 1986 CarswellOnt 688, 41 R.P.R. 309, 56 O.R. (2d) 30, 30 D.L.R. (4th) 291 (Ont. H.C.) — referred to

C.I. Fees Trust (Trust Administrator of) v. CI Mutual Funds Inc. (2004), 2004 CarswellOnt 4865, [2006] G.S.T.C. 132, 2004 O.T.C. 1046 (Ont. S.C.J.) — referred to

Di Battista v. 874687 Ontario Inc. (2005), 2005 CarswellOnt 8207, [2006] 5 C.T.C. 152, 80 O.R. (3d) 136 (Ont. S.C.J.) — referred to

Fraser Valley Refrigeration, Re (2009), 2009 BCSC 848, 2009 CarswellBC 1678, [2009] 6 C.T.C. 73 (B.C. S.C.) — referred to

GT Group Telecom Inc., Re (2004), 5 C.B.R. (5th) 230, 2004 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]) — referred to

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.) — referred to

H.F. Clarke Ltd. v. Thermidaire Corp. (1974), 1974 CarswellOnt 253F, [1976] 1 S.C.R. 319, [1975] 54 D.L.R. (3d) 385, 3 N.R. 133, 17 C.P.R. (2d) 1, 1974 CarswellOnt 253 (S.C.C.) — referred to

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

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, [2001] 4 C.T.C. 45, 136 O.A.C. 301 (Ont. C.A.) — referred to

Juliar v. Canada (Attorney General) (2001), 272 N.R. 196 (note), 2001 CarswellOnt 1805, 2001 CarswellOnt 1806, 153 O.A.C. 195 (note) (S.C.C.) — referred to

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.) — referred to

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.) — referred to

Peter Pan Drive-In Ltd. v. Flambro Realty Ltd. (1980), 32 N.R. 538, [1980] 1 S.C.R. xi (S.C.C.) — referred to

Prospera Credit Union, Re (2002), 32 B.L.R. (3d) 145, 2002 BCSC 1806, 2002 CarswellBC 3275 (B.C. S.C.) — referred to

QL Hotel Service Ltd. v. Ontario (Minister of Finance) (2008), 2008 CarswellOnt 2042, 90 O.R. (3d) 760 (Ont. S.C.J.) — referred to

Razzaq Holdings Ltd., Re (2000), 11 B.L.R. (3d) 157, 2000 CarswellBC 2610, 2000 BCSC 1829 (B.C. S.C. [In Chambers]) — referred to

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, 92 O.R. (3d) 779, 50 B.L.R. (4th) 161 (Ont. C.A.) — referred to

Snow White Productions Inc. v. PMP Entertainment Inc. (2004), 2004 BCSC 604, 2004 CarswellBC 1004, [2004] 3 C.T.C. 282, 46 B.L.R. (3d) 283, 2005 D.T.C. 5150 (Eng.) (B.C. S.C. [In Chambers]) — referred to

TCR Holding Corp. v. Ontario (2009), 2009 CarswellOnt 4816 (Ont. S.C.J. [Commercial List]) — referred to

Wasauksing First Nation v. Wasausink Lands Inc. (2002), 2002 CarswellOnt 107, [2002] 3 C.N.L.R. 287 (Ont. S.C.J.) — referred to

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

771225 Ontario Inc. v. Bramco Holdings Co. (1995), 1995 CarswellOnt 194, 43 R.P.R. (2d) 70, 21 O.R. (3d) 739, 77 O.A.C. 75 (Ont. C.A.) — referred to

Statutes considered:

Excise Tax Act, R.S.C. 1985, c. E-15
Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

s. 123(1)"financial service"(q) [en. 1990, c. 45, s. 12(1)] — referred to

APPLICATION by mutual fund manager for rectification of contracts with mutual funds.

***Perell J.*:**

Introduction and Overview

1 This is an application for rectification of numerous contracts that were signed between 1981 and 2007 and that were frequently amended. The rectification is not opposed by the contracting parties, but the application is opposed by the Attorney General of Canada, who was granted standing as an intervenor by the order of Master Dash dated June 10, 2009. See *AIM Funds Management Inc. v. AIM Trimark Corporate Class Inc.*, [2009] G.S.T.C. 169, [2009] O.J. No. 2408 (Ont. Master).

2 The Applicant, Aim Funds Management Inc., a manager of mutual funds, seeks rectification of management agreements, distribution agreements, and declarations of trust that it and its predecessor, Trimark Investment Management Inc., signed with the Respondents Aim Trimark Corporate Class Inc., Aim Trimark Canada Fund Inc., and Aim Funds Management Inc.

3 The Respondents, which are the mutual funds, might as well have been co-Applicants since they and the Applicant and its predecessor are all members of the same family of companies. They all do not oppose rectification, and indeed, the Applicant and the Respondents have already signed an amending agreement that makes rectification superfluous.

4 The Applicant, nevertheless, seeks a court order (and the Respondents do not oppose the application) because Canada Revenue Agency has taken the position that under the various contracts, the Applicant and its predecessor must pay GST. Although not a contracting party, the Attorney General, who, in effect, is representing Canada Revenue Agency, opposes the granting of the order of rectification.

5 The Applicant submits that it is entitled to rectification because the numerous contracts contain a mistake because they do not express the intention of the contracting parties, which was that certain monies were received by the Applicant to reimburse it for a payment that it made on behalf of investors. The Applicant submits that the mistake is that the language of the contract bears the meaning that the receipt of the monies is a payment for services by the Applicant to the mutual fund, when, in truth, the receipt of monies was a reimbursement.

6 The Attorney General, however, submits that the Applicant is not seeking to correct a mistake in the expression of the agreement but rather rectification is being sought to correct a mistake in the agreement itself. If the Attorney General's argument is correct, then rectification would not be available. The Attorney General submits that the contracts attract GST tax liability and the Applicant is trying after the fact to avoid this liability by characterizing the contracts as being mistaken. The Attorney General also submits that as a matter of evidence the Applicant fails to meet the onus of proof for rectification.

7 The Applicant concedes that its request for rectification was motivated by the adverse GST tax consequences associated with the numerous contracts and by a series of tax assessments delivered by Canada Revenue Agency, but the Applicant submits that the motivation for the rectification of the contracts is not the reason or grounds for rectification. To rebut the Attorney General's argument, the Applicant says that the advantageous tax consequences of the rectified contracts would simply be an incident of the agreement it originally negotiated but that was incorrectly expressed in the written contracts.

8 The Applicant says that the case at bar is not a case, like some of the cases that I will mention below, where rectification was sought in circumstances where the contracting parties allegedly had intended to avoid adverse tax consequences but had expressed that intention mistakenly in their documents. The Applicant says that the case at bar is about how the contracts express the dynamics of their agreement with respect to what is a receipt of monies from the mutual funds that the Applicant (but not the Attorney General) says is a reimbursement for a payment made on behalf of the investors.

9 These are difficult arguments and they are made more difficult by the circumstance that the arguments about rectification are being made by a contracting party who is exposed to a significant tax liability and by a stranger to the contract that has an interest only because it may be able to extract tax revenues for the public purse depending upon the expression and the interpretation of a contract to which it is a stranger.

10 I was concerned about the motivations of both parties in making and in resisting this application for rectification when there are tax assessment objections by the Applicant that may make their way to the tax courts. Ultimately, I decided for the reasons that follow that the application for rectification was fairly brought and properly resisted and it will be for the tax courts to decide if GST is payable or not based on the rectified contracts.

11 In order to explain my reasons, after this introduction, first, I shall describe the evidentiary record for the Application. Second, I shall set out the general principles of the law about rectification. In this regard, there was no dispute between the Applicant and the Attorney General about the general principles. This application is rather about the factual problem of characterizing the intention of the contracting parties. Third, I will describe the factual background and the competing arguments

of the parties about the facts. Fourth, I will provide my analysis, but I foreshadow to say that the description of the factual background provides the best explanation for why rectification is appropriate in the case at bar and the analysis and discussion will be very brief. Fifth, I shall conclude and make an order for rectification.

The Evidentiary Record for the Application

12 The contracts to be rectified were signed in the 26 years between 1981 and 2007. Trimark Canadian Fund is the oldest fund at issue in this application. The initial Declaration of Trust is dated July 10, 1981.

13 The Applicant supported its application with affidavit evidence from three affiants: (1) David Warren; (2) Ann Hebert; and (3) Kathleen Young. The evidentiary record consisted of 24 thick volumes of documents, mainly contracts.

14 Mr. Warren is the Executive Vice President, Chief Financial Officer, and a corporate director of the Applicant and held those positions for the Applicant or its predecessor since 1994 when he began his work for the Applicant or its predecessor.

15 Ms. Hebert is an Assistant Vice-President of the Applicant since 2002 and has been employed by the Applicant and its predecessor since June 1994 holding various positions including controller, fund controller, and assistant vice-president, fund compliance and financial reporting.

16 Ms. Young, a chartered accountant, from January 1991 to her retirement in July 2001 was the Vice-President and Treasurer of Trimark Investment Management Inc. having assumed the office of Treasurer in 1988.

17 Copies of the declarations of trust, management agreements, and distribution agreements for which rectification is being sought were attached as exhibits to Mr. Warren's affidavit.

18 None of the Applicant's three affiants worked for the Applicant or its predecessors prior to 1988, and no letters, memos, e-mails or other correspondence contemporaneous with the parties reaching their initial agreements and executing the early fund documents have been included in the Application Record.

19 The Attorney General did not deliver any affidavit evidence but did cross-examine the affiants.

The General Principles of the Law on Rectification of Contracts

20 Equity's remedy of rectification is available when contracting parties make a mistake and do not correctly express their actual agreement in their written contract. Rectification is concerned with mistakes in recording an agreement in writing. It is not concerned about mistakes in the underlying agreement. The purpose of rectification is to ensure that the written contract accurately expresses what was the parties' agreement. See: *H.F. Clarke Ltd. v. Thermidaire Corp.*, [1973] 2 O.R. 57 (Ont. C.A.) at para. 25, rev'd on other grounds, (1974), [1976] 1 S.C.R. 319 (S.C.C.); *Royal Bank v. El-Bris Ltd.* (2008), 92 O.R. (3d) 779 (Ont. C.A.) at para. 13; *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] O.J. No. 810 (Ont. C.A.) at paras. 76-81, aff'g [2002] 3 C.N.L.R. 287 (Ont. S.C.J.); *Juliar v. Canada (Attorney General)* (2000), 50 O.R. (3d) 728 (Ont. C.A.) at para. 33, aff'g (2000), 46 O.R. (3d) 104 (Ont. S.C.J. [Commercial List]), leave to appeal to the S.C.C. ref'd (2001) (S.C.C.); G.H.L. Fridman, *The Law of Contract in Canada* (5th ed.) at pp. 825-29.

21 To obtain an order rectifying a contract, the applicant must prove: (1) a common intention held by the parties to the contract before the making of the written contract alleged to be deficient; (2) that this common intention remained unchanged at the date that the written contract was signed; and (3) that the written contract, by mistake, does not conform to the parties' prior common intention: *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (Ont. H.C.) at para. 13, aff'd (1980), 26 O.R. (2d) 746 (Ont. C.A.), leave to appeal to the S.C.C. ref'd., [1980] 1 S.C.R. xi (S.C.C.); *Amalgamation of Aylwards (1975) Ltd., Re* (2001), 16 B.L.R. (3d) 34 (Nfld. T.D.) at para. 42; G.R. Hall, *Canadian Contractual Interpretation Law* (1st ed.) (Markham: LexisNexis Butterworths Canada Inc.: 2007) at p. 142.

22 In *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] O.J. No. 810 (Ont. C.A.) at para. 77, the Court of Appeal stated: "[A]n applicant seeking rectification of a written agreement must demonstrate, on "convincing proof", that the parties had a common intention, antecedent to the formal document in question and evidenced by some outward expression of accord, that continued unchanged until the time that the formal document was executed by the parties and that the formal document mistakenly did not conform to the prior common intention."

23 Contracting parties are entitled to structure their contract to avoid payment of tax if this can legitimately be done, and if their written contract mistakenly expresses their intentions, the remedy of rectification may be available, and rectification is not to be refused merely because the revenue authorities will miss an incidental windfall: *Juliar v. Canada (Attorney General)* (2000), 50 O.R. (3d) 728 (Ont. C.A.) at para. 33, aff'g (2000), 46 O.R. (3d) 104 (Ont. S.C.J. [Commercial List]), leave to appeal to the S.C.C. ref'd (2001) (S.C.C.); *Di Battista v. 874687 Ontario Inc.* (2005), 80 O.R. (3d) 136 (Ont. S.C.J.); *TCR Holding Corp. v. Ontario*, [2009] O.J. No. 3430 (Ont. S.C.J. [Commercial List]); *GT Group Telecom Inc., Re* (2004), 5 C.B.R. (5th) 230 (Ont. S.C.J. [Commercial List]); *C.I. Fees Trust (Trust Administrator of) v. CI Mutual Funds Inc.*, [2004] O.J. No. 4789, [2006] G.S.T.C. 132 (Ont. S.C.J.); *QL Hotel Service Ltd. v. Ontario (Minister of Finance)* (2008), 90 O.R. (3d) 760 (Ont. S.C.J.); *Fraser Valley Refrigeration, Re*, 2009 BCSC 848 (B.C. S.C.); *Razzaq Holdings Ltd., Re*, 2000 BCSC 1829 (B.C. S.C. [In Chambers]); *Prospera Credit Union, Re* (2002), 32 B.L.R. (3d) 145 (B.C. S.C.); *Snow White Productions Inc. v. PMP Entertainment Inc.*, [2004] B.C.J. No. 904 (B.C. S.C. [In Chambers]).

24 A contracting party, however, cannot after the fact rectify his or her agreement in order to obtain a more favourable tax treatment. If a contracting party arranges his or her affairs in a manner that attracts tax, he or she cannot subsequently claim that he or she should be taxed in a more favourable manner based on a different manner of arranging his or her affairs. Courts do not look favourably upon attempts to rewrite history in order to obtain a more favourable tax treatment. See *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739 (Ont. C.A.); *Assaly v. Ontario (Minister of Revenue)* (1986), 56 O.R. (2d) 30 (Ont. H.C.) at p.40.

Factual Background and the Arguments of the Parties

25 The Applicant, Aim Funds Management Inc. (now Investco Trimark Ltd.), and a predecessor, Trimark Management Inc., were or are engaged in the business of promoting, distributing, managing, and administering mutual funds. The Applicant is also the trustee of the mutual trust funds at issue in this Application. Mutual trust fund managers provide distribution services, including the preparation of offering documents, marketing, sales support, and the distribution of fund units to investors.

26 As a result of a merger in August 2000, the Applicant and its predecessor amalgamated and continued as the Applicant. Before the amalgamation, the Applicant was responsible for AIM branded mutual funds and its predecessor was responsible for Trimark branded mutual funds.

27 Each trust fund was formed by a declaration of trust, as amended from time to time, and all are currently governed by a Master Declaration of Trust dated October 20, 2000, as amended and restated most recently as of August 10, 2007. All of the trust funds are subject to management agreements as amended from time to time. Some of the trust funds were previously subject to distribution agreements, as amended from time to time.

28 Ms. Young admitted that the structure upon which the mutual funds were based was "in place long before the GST regime ever came into place," and, therefore, the GST "was never a thought" when the funds were initially created. Ms. Young added that "once the GST came into place... we didn't see any need to change the structure based on the GST being in existence."

29 The structure to which Ms. Young referred reflects the custom of the industry. In the marketplace for mutual funds, an investor pays a commission or sales charge to his or her broker. The payment of brokers' commissions by an investor constitutes a "financial service" pursuant to subsection 123(1) of the *Excise Tax Act*. Under the Act, the payment to the broker is exempt from GST.

30 For the mutual funds that are the subject matter of the application now before the court (and in other mutual funds), an investor can elect what is known as a "deferred sales charge." Under this feature of the mutual fund investment, from the broker's perspective, the sales charge or commission is *not* deferred because the broker is paid by the manager or distributor of the mutual fund, but from the investor's perspective, the sales charge is deferred because the investor does not make any initial payment and payment from the investor is postponed. This deferment lasts until the investor redeems his or her investment in the mutual fund, at which time, the fund manager or fund distributor that originally paid the broker is reimbursed wholly or in part from the funds being withdrawn from the fund. Typically, the amount of the deferred sales charge that is deducted declines for each year that the investor maintains his or her investment. Thus, the reimbursement may be partial because the longer the investor keeps the money in the fund the smaller the amount deducted from the amount remitted to the investor.

31 Two examples illustrate the choices of the investor and the deferred sales charge scheme:

- In the first example, an investor has $1,000 to invest in a mutual fund. If the investor pays his or broker (referred to in the industry as a "front-end load" option) a commission of $50, then $950 is invested in the mutual fund. Assuming that by the time of redemption, the fund grew by 10%, the investor would receive $*1,045* upon redemption.

- In the second example, the investor has $1,000 to invest in the fund and all of this sum is invested in the mutual fund with the fund manager paying the broker the $50 commission. Assuming that by the time of redemption, the fund grew by 10%, the investor would receive $*1,050*; visualize the investor would receive $1,100 from the fund less the $50 which would be reimbursed to the fund manager (referred to in the industry as a "back-end load" option") before the balance was remitted to the investor.

32 In the case at bar, this deferred sales charge scheme existed before the introduction of GST, and it was the scheme used by the Applicant and its predecessor from 1981 until 2007. Throughout this period, no GST was ever paid with respect to the deferred sales charge.

33 In November 2003, the Canada Revenue Agency reassessed the Applicant and its predecessor and sent the first of a series of notices of reassessment. For the reassessments, Canada Revenue Agency took the position that the deferred sales charge were being paid by the mutual fund (not by the investor) for services provided by the Applicant and its predecessor and GST was payable. The following chart provides details of the reassessments:

Date of Reassessment Notices	Period of Reassessment	Amount of Reassessment
November 19, 2003	April 1, 1999 to October 31, 1999	$1,640,505.79 plus interest plus penalties
July 10, 2007	November 1, 1999 to July 31, 2000—January 1, 2002 to December 31, 2002	$4,804,797.46 plus interest plus penalties
October 29, 2007	September 1, 2003 to December 31, 2003.	$513,990.00 plus interest and penalties
February 22, 2008	January 1, 2004 to December 31, 2004	$1,424,961.85 plus interest and penalties

34 The Applicant has filed notices of objection, which are still outstanding and which may eventually lead to a hearing before the tax court.

35 Canada Revenue Agency took its position that GST was payable relying on the appearance of funds being paid by the mutual fund to the Applicant and its predecessor and from the language of the mutual fund contracts, which I will describe below. It is fair to say that Canada Revenue Agency position is reasonable because the language of the contracts literally says that the mutual fund is paying the Applicant and its trustee for services and there is an exchange of monies from the mutual fund to the fund manager or distributor. In general terms, the mutual fund documents say one or the other of that:

• the distributor of the mutual funds is to receive a sales commission as consideration for the distribution services it has provided to the Fund;

• as consideration for distribution services provided to the fund, the fund distributor is to receive from the fund the deferred sales charge payable by investors;

• the manager of the mutual funds and the fund distributor will agree on what will be paid to the fund distributor as consideration for the distribution services it provides.

36 By way of specific illustrations of the expressions used in the trust fund documents to describe the receipt of deferred sales charges by the Applicant and its predecessors:

• The Distributorship Agreement, October 4, 1994, between G.T. Global Fund Inc. (the Fund) and G.T. Global Canada Inc. (the Distributor), states:

Remuneration and Expenses of Distributor -

In consideration of the services performed by the Distributor hereunder, the Distributor shall be entitled to receive from the Fund any sales charges payable by investors, whether on a deferred or front-end basis, in respect of any sale of Mutual Fund Shares as set out in the simplified prospectus from time to time, together with any other fees payable by investors which are set out in the simplified prospectus from time to time under which the Mutual Funds Shares were sold.

• The Distribution Agreement for Trimark Canadian Small Companies Fund, dated April 20, 1998 states:

Sales Charges -

The Distributor shall be entitled to receive sales charges and fees payable in respect of any Mutual Fund Units sold to investors during the period when it was distributor of the Mutual Fund Units. For greater certainty, the Distributor shall be entitled to any deferred sales charges that are paid to the Fund or to the manager or trustee of the Fund by a unitholder after the time the Distributor ceases to be the Distributor, provided that the unitholder acquired the Mutual Fund Units during the period when the Distributor acted as distributor.

Distribution of Units -

The Trustee shall have the power and authority to enter into agreements regarding the distribution and sale of Units, including arrangements relating to the right to charge fees of any nature or kind (including without limitation, sales commissions, redemption fees, distribution fees and transfer fees) in connection with the distribution or sale of Units. Any such fees may be deducted from the amount of a subscription, redemption proceeds or a distribution if not paid separately.

37 There is a reasonable debate between the Applicant and the Attorney General about how and whether the deferred sales charge scheme is reflected accurately or mistakenly in the mutual fund contracts. By way of illustration of the debating points, the Distributorship Agreement, October 4, 1994, between G.T. Global Fund Inc. and G.T. Global Canada Inc., set out above, states that "in consideration of the services performed by the Distributor hereunder, the Distributor shall be entitled to receive from the Fund any sales charges" suggests that the distributor is being paid by the fund for services performed. However, the debating counterpoint focuses on the next words that qualify the previous phrase and indicate that the sales charges are those "payable by the investors," which suggests that the distributor is not receiving consideration for services to the fund but rather receiving a reimbursement for a payment it made on behalf of the investors. The existence of these debating points explains why the Applicant seeks rectification and why the Attorney General opposes it.

38 The Applicant submits that it was the intention of it, its predecessor, and the Respondents that the investor and not the mutual fund that would pay the deferred sales charges. The Applicant submits that it was this intention that the investor should ultimately pay for the broker's remuneration and not any intention to avoid tax that is the relevant intent that underlies the claim for rectification. The Applicant expresses this point at para. 32 of its factum as follows:

> The [Applicant and the Respondents] intended throughout the relevant period that [the Applicant and its predecessor] would, upon an investor electing to purchase securities on a DSC [deferred sales charge] or back-end load basis, and upon [the Applicant or its predecessor] paying such investor's sales commission to the Broker in respect of that purchase, be entitled to recoup from the investor the DSC to which [the Applicant or its predecessor] would be entitled if the investor redeemed his/her securities within a specified period. The Parties further intended that this payment would be made by the investor at the time his or her securities were redeemed by having the DSC withheld from the proceeds of redemption and paid to the Fund Manager.

39 The Applicant submits that an aspect of its intention that the deferred service charge was an obligation of the investor was to ensure that the charge was one for which *no* GST was chargeable. The Applicant submits that it was the intention that the mutual fund transactions be conducted in a manner that was tax favourable to the funds and to the investors in those funds with regard to GST.

40 The Applicant states that it acted in accordance with that intention and believed that GST was not collectible because the deferred service charges related to exempt financial services.

41 The Applicant provided evidence that the Applicant, its predecessor, and the Respondents financial records, accounting treatment, books, records, tax filings were consistent with a structure in which DSC was an obligation of the investor, and the Applicant provided evidence that the payment by the Applicant and its predecessor to the investor's brokers and the subsequent interception of funds moving from the mutual fund to the investor was a reimbursement to the Applicant or its predecessor and not a payment made by the fund in consideration of services by the Applicant or its predecessor to the mutual fund.

42 The broker's sales commission was shown on the books of the Applicant or its predecessor as a deferred capital asset that was amortized over time. When an investor redeemed his or her units, the deferred sales charge was shown as revenue on the books of the Applicant or its predecessor and any unamortized balance with respect to the payment of the commission was written off as an expense.

43 It is to be noted that neither the sales commission paid at the time of the investment nor the deferred service charge remitted to the Applicant or its predecessor are reflected on the books of the mutual fund. The mutual funds did not account for the deferred service charges as income or as expenses or deductions from fund income.

44 During the period at issue, the Applicant, its predecessor, and the Respondents filed their income tax returns on the basis that the investors in the funds paid the deferred service charges.

45 The confirmation slips issued to investors when they redeemed their units in the mutual fund show that the investor and not the mutual fund was charged the deferred sales charge out of the amounts remitted to the investor from the mutual fund on redemption.

46 During the period at issue, the simplified prospectuses of the funds indicated that the obligation to pay the deferred service charges, if any, were an obligation owed by the investor to the fund manager in respect of the commission paid to the broker by the Applicant or its predecessor at the time the investment was made.

47 The Applicant's affiants, each of whom had many years of experience in the mutual fund industry testified that they were not aware of any mutual fund that treated deferred sales charges as an obligation of the mutual fund or for which GST was collected from the fund.

48 As of December 21, 2007, the Applicant, as the trustee of the trust funds, executed a Master Amendment to the Declarations of Trust that amended on a retroactive basis the declarations of trust to eliminate any meaning other than that the deferred sales charges were an obligation of the investor.

49 Also as of December 21, 2007, the Applicant in its capacity as manager or distributor during the relevant period and with the intention of binding its predecessor entered into a Management/Distribution/Distribution Master Amending Agreement to amend on a retroactive basis the management agreements and distribution agreements to eliminate any meaning other than that the deferred sales charges were an obligation of the investor with the Respondents.

50 The above circumstances are the basis for the claim for rectification, and in seeking rectification, the Applicant seeks to add the following language to the Declarations of Trust Master Amendment:

> **5.1 Distribution of Units**
>
> Notwithstanding any other provisions hereof, but subject to any other provision in the declaration of trust dealing with the issue price of units, the Trustee may, from time to time, at its discretion, determine the terms upon which Units of a Fund will be offered for sale to the public and the nature and amount of any fees or charges to be paid by investors in that Fund, whether at the time of purchase or on such other basis as the Trustee shall determine. Such terms, fees or charges as may be so determined shall be described in the relevant disclosure documents of the Fund or in a notice that is given to unitholders in accordance with the provisions of the declaration of trust in order for them to be binding upon the investors in the Fund. Any change in such terms, fees or charges will not affect any unitholder in respect of any unit of the Fund acquired prior to the effective date of such change or in respect of any unit acquired after the effective date of such change where the fee or charge on such unit is contingent upon the ownership of a unit acquired prior to the effective date of such change. The person to whom any such fee or charge shall be payable shall be determined by or under the authority of the Trustee from time to time.
>
> **Charges on Redemption** (New Article to be added)
>
> The Trustee may consent to the manager or distributor (or other person appointed pursuant to the declaration of trust) (the "Redemption Charge Payee") from time to time providing that a redemption charge or other fee may be charged to unitholders with respect to the redemption of any units of a Fund, the amount of the redemption charge or fee and the terms of the application thereof to be fixed by the Redemption Charge Payee. Notice of any such redemption charge or fee that is so fixed and the terms of its application shall be given to unitholders of the Fund either as provided in the declaration of trust or by stating the same in the disclosure documents of the Fund. The Redemption Charge Payee may from time to time alter any such redemption charge or fee and the terms of its application. Any such change in the redemption charge or fee or the terms of its application shall not affect any unitholder in respect of a unit of the Fund held on the effective date of such change or in respect of any unit acquired after the effective date of such change where the redemption charge or in respect of fee payable on the redemption of such unit is contingent upon the ownership of a unit acquired prior to the effective date of such change. Any applicable redemption charge or fee shall be withheld, by the trustee as agent for the Redemption Charge Payee, from the redemption amount otherwise payable on the redemption of such units. The person to whom any such redemption charge or fee is payable shall be determined by or under the authority of the Manager and, in the absence of such determination, such amounts shall be retained by the Manager.

51 Before beginning the analysis of the merits of the claim for rectification, there is one additional factual matter to mention.

52 In March 2002, changes were made to the fund documents for certain funds to allow the parties to conclude agreements with third-parties to finance the payment of brokers' commissions. At the same time, one of the Applicant or the Respondents entered into such an agreement with Citigroup. The applicant refused to produce the Third-Party Financing Agreement and took the position that it was not relevant to the rectification application because the dispute with the Canada Revenue Agency does not involve investments subject to the Third-Party Financing Agreement.

53 The Attorney General submits that the failure to disclose the Third-Party Financing Agreement means that the court cannot determine what the intent of the contracting parties was after 2002 and whether there is a discord between the intention of the parties and the language of the contracts they signed after 2002.

54 Put simply, on this last point, I agree with the Applicant and not with the Respondents and, in my opinion, the evidentiary record is satisfactory to make a determination of whether rectification of the contracts should be granted in the case at bar.

Discussion and Analysis

55 Also put simply, I am satisfied that the evidence described in the factual background is sufficient to establish that the contracting parties to the mutual fund documents consistently intended that the fund manager or the fund distributor would pay the commission that the investor owed to its broker and that the contracting parties intended that the fund manager or fund distributor would be reimbursed in whole or in part when the investor withdrew his or her investment from the fund.

56 I am also satisfied that the contractual documents do not express the above intention and as such the contracts mis-state the contracting parties' pre-existing contractual intent. Thus, the Applicant has satisfied the test for rectification.

57 As I see the facts of this case, after GST was introduced, the Applicant did not form an intention to structure a transaction to avoid the incidence of GST. It did not have this intention because it believed that GST was not a factor at all in a transaction in which the fund administrator or fund manager would be making a reimbursable (tax-exempt) payment on behalf of the investor. The written agreements, however, do not accurately reflect the intention to make a payment on behalf of the investor to be recouped from the remittal of the investment in the mutual fund, and, therefore, rectification is appropriate in the circumstances of this case.

58 In my opinion, in the case at bar, the Applicant does not seek to rewrite a contract to rewrite contractual history; rather, the Applicant is seeking to rewrite a contract that does not correctly write the contractual history.

Conclusions

59 Accordingly, I order rectification of the contracts in the form requested by the Applicant.

60 If the parties cannot agree with respect to the matter of costs, they may make submissions in writing beginning with the Applicant within 20 days of the Release of these Reasons for Decision to be followed by the Attorney General within a further 20 days.

61 Order accordingly.

Application granted.

Footnotes

* A corrigendum issued by the Court on November 30, 2009 has been incorporated herein.

End of Document

3

CALLIDUS CAPITAL CORPORATION
Applicant

-and-

XCHANGE TECHNOLOGY GROUP LLC et al
Respondents

Court File No. CV-13-10310-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES

DICKINSON WRIGHT LLP
Barristers & Solicitors
199 Bay Street, Suite 2200
P.O. Box 447 Commerce Court Postal Station
Toronto, Ontario M5L 1G4
Fax: (416) 865-1398

JOHN D. LESLIE
LSUC Registration No. 29956P
Email: jleslie@dickinsonwright.com
Tel: (416) 646-3801

MICHAEL J. BRZEZINSKI
LSUC Registration No. 63573R
Email: mbrzezinski@dickinsonwright.com
Tel: (416) 777-2394

Lawyers for 239314 Ontario Inc.