Many Questions (and a Few Possible Answers) About the Application of Rectification in Tax Law

Joel Nitikman*

The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice bless'd;
It blesseth him that gives and him that takes.

Shakespeare, *The Merchant of Venice*

PRÉCIS

Bien que la doctrine de la rectification soit assez ancienne, elle n'a émergé que récemment dans le droit fiscal canadien. C'est l'arrêt *Juliar* de la Cour d'appel de l'Ontario qui l'a portée à l'attention de la plupart des fiscalistes. Dans cet article, l'auteur explore les limites de la doctrine de la rectification dans son application au droit fiscal canadien. En particulier, il tente de déterminer si la rectification est confinée aux situations « classiques » dans lesquelles les parties se sont entendues sur un mot en particulier mais en ont écrit un autre, ou si elle ne pourrait pas s'étendre aux situations dans lesquelles les parties se sont entendues pour utiliser le mot écrit mais se sont méprises quant à ses effets ou conséquences juridiques. Il examine aussi les situations où un document donné a été utilisé délibérément mais que, compte tenu des conséquences fiscales défavorables, il est par la suite devenu apparent qu'un document différent aurait du être utilisé. Les deux dernières situations remettent en question la thèse selon laquelle la rectification permet de corriger un acte mais non un contrat ainsi que la notion générale selon laquelle la planification fiscale rétroactive n'est pas reconnue en droit fiscal canadien. À la lumière de ces idées, l'auteur passe en revue la jurisprudence canadienne antérieure et postérieure à l'arrêt *Juliar* ainsi que l'arrêt *Juliar* lui-même, et les compare à la jurisprudence du Royaume-Uni. Il conclut qu'il n'existe pas de limites précises à la doctrine de la rectification, mais qu'il semble y avoir une tendance légèrement plus marquée au Canada qu'au Royaume-Uni d'utiliser la rectification dans sa forme plus moderne pour réparer une erreur fiscale. L'auteur examine diverses questions de procédure entourant la rectification, comme le fardeau et la norme de preuve, et celle de savoir si l'Agence du revenu du Canada doit être informée d'une demande de rectification.

* Of Fraser Milner Casgrain LLP, Vancouver.

ABSTRACT

Although the equitable doctrine of rectification is quite old, it has only recently come to the fore in Canadian tax law. The case that brought it to the attention of most tax professionals was the Ontario Court of Appeal's decision in *Juliar*. In this article, the author explores the limits of the doctrine of rectification as it applies to Canadian tax law. In particular, he attempts to determine whether rectification is confined to "classical" situations in which the parties agreed on a particular word but wrote down another, or whether it extends to situations in which the parties agreed to use the very word that was written down but were mistaken as to its legal effect or consequences. He also considers situations in which a particular document was deliberately used but, owing to adverse tax consequences, it later became apparent that a different document should have been used. The last two situations challenge the notion that rectification corrects instruments but not contracts, as well as the general concept that retroactive tax planning is not permitted in Canadian tax law. In looking at these ideas, the author reviews Canadian cases decided before and after *Juliar*, as well as *Juliar* itself, and compares them with a rich body of case law from the United Kingdom. He concludes that there are no clear limits to the doctrine of rectification, but that there appears to be a slightly stronger tendency in Canada than in the United Kingdom toward allowing rectification in its more modern form as a means of remedying tax mistakes. The author reviews various procedural issues surrounding rectification, such as the onus and standard of proof and whether one must notify the Canada Revenue Agency of a rectification application.

KEYWORDS: RECTIFICATION ■ EQUITY ■ CONTRACTS ■ ONUS ■ STANDARDS ■ PROOF

CONTENTS

INTRODUCTION

In a number of recent Canadian tax cases, the courts have held that absent a specific provision to the contrary in the relevant legislation, tax cases are to be decided on the basis of the actual legal relationships between the parties rather than on the "economics" of the deal. The Supreme Court has stated:

> This Court has repeatedly held that courts must be sensitive to the economic realities of a particular transaction, rather than being bound to what first appears to be its legal form: *Bronfman Trust*, *supra*, at pp. 52-53, *per* Dickson C.J.; *Tennant*, *supra*, at para. 26, *per* Iacobucci J. But there are at least two caveats to this rule. First, this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's *bona fide* legal relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases.[1]

Even when a provision of the relevant legislation or the context of a case directs the court to discern the "substance" of the transaction, regard must be had to the true legal nature of the relationship between the parties. As Williams J put it,

> In order to determine whether the contract was in substance a loan of money, the substance or real nature of the transaction must be determined by ascertaining the legal effect of the bargain which the parties had entered into.[2]

How does one know what the legal reality is? The only possible answer is that one must begin by looking at the contracts and other transactional documents executed by the parties. Those documents may not be the end of the inquiry, however. One must apply the rules of contracts, deeds, promissory notes, and so on

---

1 *Shell Canada Limited v. The Queen et al.*, 99 DTC 5669, at paragraph 39 (SCC). In *Canada Trustco Mortgage Co. v. Canada* (2005 SCC 54), especially at paragraphs 10, 11, 55, and 75, the court engaged in an extensive discussion of the principles of statutory interpretation as they apply to tax matters. A full discussion of the case is beyond the scope of this article.

2 In *Metropolitan Discounts & Investment Co. Ltd. v. Bowra Radio & Electrical Co. Ltd. (In Liquidation)* (1944), 18 ALJR 88, at 92 (HC), cited with approval in *American Express International Inc. v. Commissioner of State Revenue*, [2004] VSCA 193 (online: http://bar.austlii.edu.au/). See also *Telewest Communications Plc v. Customs and Excise*, [2005] EWCA Civ 102, at paragraph 86 (online: http://www.bailii.org/), where the court said, "This line of authority is, in my judgment, inconsistent with the argument which the Commissioners seek to run. The mere fact that the court seeks to find the commercial reality of a transaction does not mean that it would seek to apply the economic reality of the transaction. The economic reality of the transaction may have nothing to do with either the essential features of what the parties agreed or the legal structure of their transaction." See also *Commissioners of Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (1951), 33 TC 57, at 63 (Scot. Ct. Sess.), per Cooper P: "As was demonstrated in the *Duke of Westminster*, [1936] A.C. 1, it is not legitimate to look behind the form and strict legal effect of a transaction to its so-called 'substance' in order to impose upon a taxpayer a liability not otherwise enforceable against him."

to discern the final legal nature and effect of the transactional documents. This is simply an example of the wider principle, enunciated in *Will-Kare Paving & Contracting Limited v. The Queen*, that the Income Tax Act[3] "is not a commercial code in addition to a taxation statute."[4]

One doctrine that, in an appropriate case, may be invoked to determine the final legal nature of a transaction is rectification.[5]

A DEFINITION

What is rectification? Originally, it was a method of correcting transcription errors in instruments that recorded contracts; it was not a method of changing the actual contract. In one example of a "classic" case of rectification,[6] the parties to a mortgage agreed that the amount advanced was $139,550.89; through inadvertence, the actual deed recorded the amount as $131,629.89. In an action by the lender to enforce the mortgage, the borrower argued that the deed was an invalid bill of exchange because it failed to state a sum certain. But the court rectified the deed to state the correct sum, thereby allowing the mortgage to be enforced.

Snell's Equity 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.

---

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

4 2000 DTC 6467, at paragraph 31 (SCC), followed in *Mattel Canada Inc. v. The Queen*, [2001] 2 SCR 100, and *Rezek et al. v. The Queen*, 2005 FCA 227, at paragraph 48.

5 I speak here of the equitable doctrine of rectification; I do not discuss statutory remedies that might lead to the same result. See, for example, *Prospera Credit Union, Re* (2002), 32 BLR (3d) 145 (BCSC), where the court used section 107 of the Credit Union Incorporation Act, RSBC 1996, c. 82, to rectify certain documents which, if not rectified, could have led to adverse tax consequences under the Act. For comments on these statutory remedies, see Joel Nitikman, "Undoing the Past," *Beyond Numbers*, no. 389 (Vancouver: Institute of Chartered Accountants of British Columbia, December 1999), 16. Rectification is not the only way to avoid a contract: the Variation of Trusts Act or doctrines of common mistake, mutual mistake, or non est factum may still apply even if rectification is not available. Note that common mistake goes to the terms of the contract, whereas rectification is a different type of common mistake—that is, a transcription error in the instrument recording the contract. For an example of a case in which a court set aside a deed for unilateral mistake as to the legal effect of the deed, even though rectification was not available, see *Gibbon v. Mitchell*, [1990] 3 ALL ER 338 (Ch. D.). Furthermore, it is possible to add words to or delete words from a contract or other instrument as a matter of construction rather than rectification. See *Holding & Barnes Plc v. Hill House Hammond Ltd.*, [2001] EWCA Civ. 1334, where it was held that this "principle applies where a reader with sufficient experience of the sort of document in issue would inevitably say to himself, 'Of course X is a mistake for Y.'"

6 *Sniderman (Trust) v. Gibbs*, 2004 CanLII 34233 (Ont. SC).

> 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.[7]

The Supreme Court of Canada has considered the doctrine of rectification. Unlike most of the recent Canadian cases, *Performance Industries*[8] dealt with rectification in a situation of alleged unilateral, rather than common, mistake. Nonetheless, the following observations by Binnie J, writing for the majority, 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.[9]

The central "classic" principle of rectification may be summarized by saying that "courts rectify instruments, not contracts,"[10] or, similarly, that "courts of equity do not rectify contracts; they may and do rectify instruments."[11] Put simply, under the classic concept of rectification a court will not rewrite the actual bargain between the parties. It may and will, however, recast the written instrument by which the agreement is recorded so as to ensure that the written instrument accurately reflects the actual bargain between the parties. I discuss below whether today's "modern" concept of rectification is broader than the classic concept.

THE COMMON LAW VERSUS EQUITY

Rectification evolved as an equitable, as opposed to a common-law, doctrine.[12] Why was this necessary? At common law, it is not possible to correct transcription errors in an instrument once it is executed. But equity follows the common law—that is, equity may do that which the common law cannot do. Therefore, equity was needed to correct the error:

---

7 John McGhee, *Snell's Equity*, 30th ed. (London: Sweet & Maxwell, 2000), 693. Cited with approval in *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 43 BLR (3d) 244, at paragraph 76 (Ont. CA).

8 *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 SCR 678, followed on a very similar fact situation in *Il Caminetto di Umberto Restaurant (1982) Ltd. v. Mountainside Lodge Ltd.*, 2005 BCSC 876.

9 *Performance Industries*, supra note 8, at paragraph 31.

10 *Williamson v. Williamson* (2004), 240 DLR (4th) 456, at paragraph 31 (Sask. CA).

11 *Bank of Montreal, etc.* (1987), 15 BCLR (2d) 34, at 36 (CA), quoting *Mackenzie v. Coulson* (1869), LR 8 Eq. 368, at 375.

12 Quebec law seems to allow for "nullification" but not for rectification: see *BEA Holdings Inc. c. Trafsys Inc.*, [2004] JQ no. 646 (Que. CA), referred to in question 2 of the CRA round table held at the 2004 conference of the Association de planification fiscale et financière, CRA document no. 2004-0086691C6, October 8, 2004.

> To the common law, a contract either existed or it did not; if there was fundamental mistake there was no contract and any purported agreement was void, a nullity. In equity, however, it would seem that, even where a mistake would not invalidate a contract *ab initio*, under common-law rules, if it would be inequitable or unconscientious for a party to be permitted to take advantage of another's mistake, even if not induced by him, then equity would come to the rescue of the mistaken party, at least to the extent of providing an equitable remedy, for example, rescission or rectification, or allowing an equitable defense to an equitable remedy, such as specific performance, which the non-erring party was attempting to invoke.[13]

Rectification, like all equitable doctrines, should not be applied too narrowly but as the circumstances truly require. Spry says,

> [Rectification] has been shown to be salutary in preventing unconscionable reliance upon documents executed or continuing in existence in an objectionable form. In particular, especially since it often operates more moderately than rescission and like remedies, it should not be circumscribed by anomalous or artificial rules, but should be applied where appropriate in order to give better effect to equitable doctrines.[14]

Juliar[15] and *Snow White*,[16] discussed below, are perhaps examples of this principle.

On the other hand, a court always retains the discretion to disallow a claim for rectification in appropriate circumstances, even if the evidence indicates that rectification would otherwise be allowed. For example, in one case[17] a credit union unilaterally altered certain loan documents. In an action by the credit union for rectification of the documents, the court held that no rectification should be allowed because the credit union did not come to court with clean hands, regardless of the fact that, on the evidence, the alteration requested probably accorded with the actual agreement between the parties.

Because classic rectification is concerned with a correction of the instrument that records the contract rather than with the contract itself, there is no rule prohibiting the introduction of parol evidence in a rectification case.[18] Indeed, given the nature of rectification, it is only by evidence external to the instrument itself that rectification can be proved.

---

13 *Park Fuels Ltd. v. Fundy Solid Surfacing Inc.* (2004), 34 CLR (3d) 95, at paragraph 28 (NBQB), quoting *Draper v. Sisson* (1991), 50 CPC (2d) 171, at paragraph 9 (Ont. SC).

14 I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 6th ed. (Prymont, NSW: LBC Information Services, 2001), 608.

15 Infra note 43.

16 Infra note 77.

17 *Collins v. Melfort Credit Union Ltd.* (1995), 133 Sask. R. 166 (QB); aff'd. (1996), 144 Sask. R. 67 (CA).

18 *Norman Estate v. Norman* (1990), 43 BCLR (2d) 193 (SC); *Performance Industries*, supra note 8, at paragraph 43; and *Jemi Holdings Ltd. v. 528428 British Columbia Ltd.*, 1997 CanLII 2161, at paragraph 56 (BCSC).

IS RECTIFICATION RETROACTIVE?

If an instrument is executed on day 1 of year 1 but is not rectified until day 1 of year 2, and if the taxpayer relies on the rectified document to determine his tax payable in year 1, can the Canada Revenue Agency (CRA) complain that the taxpayer is engaging in retroactive tax planning? In my view, the answer is no.[19] Because rectification simply makes the written instrument accord with the agreement previously reached, and because rectification, by definition, always takes place after (perhaps many years after) the instrument is executed, rectification is always "retroactive" in a sense—but not in the sense that a backdated document is retroactive. It is, as the Supreme Court said in *Performance Industries*,[20] restorative rather than retroactive.[21] If an instrument is rectified, it is simply corrected to make it reflect the terms that the parties originally agreed to but wrote down incorrectly. This is so even if the application for rectification is made for tax purposes. For example, in one case[22] the parties executed and acted on a distribution agreement in a way which they believed led to a certain favourable tax result for GST purposes. The CRA assessed on the basis that the agreement did not lead to the results sought. The parties appealed the assessment to the Tax Court of Canada and, while that appeal was pending, brought an application to the Ontario Superior Court to rectify the agreement. The lawyer who drafted the agreement deposed in an affidavit that she had attempted to give effect to what was then, and still was, the intention of all of the parties to the agreement and, if she failed to achieve that result and caused the CRA to interpret the agreement incorrectly, it was essentially a matter of form rather than substance. On this evidence, the court granted the application for rectification, even though in essence the sole purpose of the application was to win the GST appeal:

> [T]he applicant wishes, and should be entitled, to put before the Tax Court a version of the Agreement which reflects what the parties to it had agreed to and had intended to execute and on the basis of which they proceeded to carry out the transactions that subsequently flowed from it. The Tax Court still has full jurisdiction to consider the significance of everything that has occurred, including the possible error in the original form of the Agreement and its rectification pursuant to the judgment of this court, and to dispose of the appeal in accordance with the law.[23]

---

19 But see Bowman J's decision to the contrary in *Sussex Square Apartments*, infra note 100, discussed below.

20 Supra note 8.

21 In *Martin v. Nicholson*, [2004] EWHC 2135 (Ch. D.) (Lexis), the court referred to rectification as retrospective rather than retroactive but even that, in my view, is wrong. Interestingly, in that case the revenue authorities took the position that rectification was not binding on them, but the court said that was plainly wrong.

22 *CI Fees Trust v. CI Mutual Funds Inc.*, 2004 CanLII 42943 (Ont. SC).

23 Ibid., at paragraph 10.

Therefore, cases or textbooks that refer to rectification as being retroactive should be understood to mean no more than that the application is being brought after the document was executed.

WHAT IS THE TEST FOR RECTIFICATION?

A person applying for rectification must prove three essential elements:

> (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.[24]

It is important to note that an application for rectification is not defeated merely because one party to the instrument denies that there is a mistake in the instrument. This would be the situation in so-called unilateral, rather than mutual, rectification. In unilateral rectification the application is somewhat akin to an action in fraud, in that the petitioner is alleging that the respondent is trying to take deliberate advantage of a known error in the instrument that does not accord with the parties' actual agreement.[25] In *Performance Industries*, the parties negotiated the development of a housing project on a golf course. The width of the project was agreed to be 110 yards, but was written down as 110 feet. The narrower boundary would have completely changed the profitability of the deal, because fewer houses could have been built and sold on 110 feet than on 110 yards. The owner of the golf course tried to enforce the contract as written. The trial judge found as a fact that the owner knew that the word "feet" should have been "yards" and furthermore that the owner knew that the petitioner would not have agreed to "feet" instead of "yards." The owner was attempting to enforce the contract notwithstanding this knowledge. The trial judge allowed the application for rectification. On appeal to the Supreme Court the ruling was upheld.

The court observed that the commercial world must be able to rely on contracts as written and not have to worry about them being reformulated long after the fact:

> When reasonably sophisticated businesspeople 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.[26]

---

24 *Wasauksing First Nation*, supra note 7, at paragraph 81.

25 However, it is clear that fraud or constructive fraud need not be proved to ground an application for unilateral rectification. See *Saanich, etc.* (1983), 43 BCLR 132, at 137 (CA), and *Anderson v. Brouwer Claims Canada & Co.*, [2002] BCJ no. 1756, at paragraph 72 (SC).

26 Supra note 8, at paragraph 29.

Nevertheless, the court held that if certain strict guidelines (which, it must be emphasized, were set out in a case dealing with unilateral, not mutual, rectification) are met, even contracts written and reviewed by lawyers may be rectified:

> 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."[27]

In an action for mutual rectification, the court's job is somewhat easier in that the parties agree that the written instrument does not accord with their actual bargain and no element of fraud enters the picture. Nevertheless, the remedy remains discretionary; the mere fact that the parties agree that rectification is appropriate does not mean that the court must agree. The court may not believe their evidence, or it may find that there is some other reason why its discretion should not be exercised in the particular case.

It must be stressed that what is relevant is "the intention of the parties at the time when the deed was executed," 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.[28] 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.[29]

MUST THERE HAVE BEEN A BINDING CONTRACT?

In *Performance Industries*, the court referred to a "prior oral contract." Must the parties have gone so far as to have entered into an oral, binding, concluded contract before rectification of the written instrument will be allowed, or will something

27 Ibid., at paragraph 31.

28 But query whether this is the true rule: see the discussion below under the heading "Juliar."

29 *Snell's Equity*, supra note 7, at 696, quoted in *Wasauksing First Nation*, supra note 7, at paragraph 80.

less suffice? This issue has not been directly addressed in Canada. The courts here have seemingly been satisfied with the idea that the parties must have "agreed" on a certain term prior to the execution of the instrument. The issue has been more extensively discussed in the United Kingdom, where it has been held that "it is not necessary to have a concluded and binding contract antecedent to the agreement which it is sought to rectify"; rather, it is merely necessary to show that the parties had a "continuing common intention" as to the use of a particular word that was afterwards written down incorrectly, provided that there is some outward manifestation of this common intention.[30] In other words, it seems that there is no requirement that there be an antecedent entire, oral, concluded contract before rectification of one particular word will be allowed;[31] it is sufficient that there was a continuing common intention as to the use of a word down to the moment the written instrument was executed, even if, at the instant before the execution, neither party could have successfully brought an action to enforce an oral contract.[32]

It has been said that it is not enough that the parties had a continuing common intention; there must have been some "outward manifestation" of that common intention.[33] But this requirement has been said—correctly, in my view—to be of "dubious validity."[34] Although the lack of outward manifestation will often make proof difficult, it should not be a separate requirement. So long as the court is convinced, to the applicable standard of proof, of the existence of the continuing common intention, there is no reason to require as a separate criterion that the intention must have been manifested in some way. Otherwise, a party could admit that an instrument does not conform to the common intention of the parties but still argue that it should not be rectified because that intention was not outwardly manifested before the instrument was signed. This makes no sense.

Another critical point is that while rectification is usually thought of as a remedy to be applied when the parties agreed on one word or figure but wrote down another, it may not be confined to that situation; rectification may (although, as will be seen below, this point is not certain) also be permitted when the parties agreed on the

30 *Amp (UK) Plc & Anor. v. Barker & Ors.*, [2000] EWHC Ch 42, at paragraph 60 (online: http://www.bailli.org/); and *The City of London Real Property Company Ltd v. CGU International Insurance plc* (December 21, 2000), at paragraph 55 (Ch. D.) (available on Lexis in the Commonwealth database).

31 See *Amalgamation of Aylwards (1975) Ltd., Re* (2001), 16 BLR (3d) 34, at paragraph 42 (NL. SCTD).

32 Nevertheless, there cannot be a complete absence of any basis for a contract. See, for example, *Re Sharp-Rite Technologies Ltd.*, [2000] BCJ no. 477, at paragraphs 37-38 (SC), and *978011 Ontario Ltd. v. Cornell Engineering Co.* (2001), 198 DLR (4th) 615, at paragraph 54 (Ont. CA).

33 It appears (although the matter is not without doubt) that this means it is not enough that the two parties mentally had the same intention at the same time; the two parties must have demonstrated this common intention through some objectively demonstrable outward manifestation.

34 *AG Hodgson v. International Harvester Credit Corporation of Australia Limited*, 1987 Vic Lexis 69 (Victoria SC). See, to the same effect, *NSW Medical Defence Union Ltd. v. Transport Industries Insurance Co Ltd.*, 1986 NSW Lexis 6709 (NSW SC), and *Gallaher*, infra note 55, at paragraphs 116-17.

exact term that was written down but "it has in law or as a matter of true construction an effect or meaning different from that which was intended."[35] The exact meaning and limits of this rule are examined below in conjunction with the discussion of *Juliar*.[36]

THE ONUS AND STANDARD OF PROOF IN AN APPLICATION FOR RECTIFICATION

Who bears the onus to prove that the essential elements of rectification have been made out? Generally, as with most civil cases, the onus is on the person claiming rectification.[37]

The more interesting question is the standard of proof for rectification. The terminology used by various courts over the years to describe the standard has varied. The common theme is that the evidence must "really" convince the court that rectification is justified, but it is difficult to say with certainty how high the standard is. Some cases have gone so far as to say that there must be proof beyond a reasonable doubt, but it seems doubtful that the criminal standard of proof could be required in any civil case. Other cases have used "clear and convincing" evidence or similar phrases to describe the applicable standard. Some commentators have argued for proof on a bare balance of probabilities, but that argument has been rejected.[38] It seems that the current rule is that the evidence justifying rectification must be "convincing":

---

35 *City of London Real Property Company*, supra note 30, at paragraph 56.

36 Infra note 43.

37 *Bank of Montreal*, supra note 11, and *Snow White*, infra note 77.

38 *Performance Industries*, supra note 8, at paragraph 42, rejecting an argument made by Stephen M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999), paragraph 343, on the ground that "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." A slightly different reason for demanding a "convincing" standard of proof was accepted in *Racal Group Services v. Ashmore*, [1995] STC 1151, at 1154-55 (CA), where the court said:

> One aspect of that caution is the court's insistence that the applicant for rectification should establish his case by clear evidence. Foremost in what must be shown is the true intention to which effect has not been given in the instrument. The evidential standard which the court requires has from time to time been expressed in different ways, but the judge, correctly in my view, directed himself by reference to the guidance given by Brightman LJ in *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.* [1981] 1 WLR 505 at 521:
>
> > The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent

> In passing, I observe that some of the cases have suggested that the onus [sic] of proof on a party seeking rectification is "proof beyond a reasonable doubt" although others have placed the onus at an apparently lower level with the use of such language as "convincing proof" or "irrefragable." It does not appear to be wise to import from the criminal law a phrase such as "beyond all reasonable doubt." I prefer the phrase "convincing proof" as used in the *Joscelyne* case, for it imports the notion that the evidentiary standard is high in keeping with the seriousness associated with a claim for rectification.[39]

Another interesting issue is whether the standard of proof is the same in unilateral rectification as it is in mutual rectification, or whether a higher standard is in keeping with the fraud-like connotation of an action for unilateral rectification.[40] The general standard in a civil action for fraud is proof on a balance of probabilities, but within that standard there may be varying degrees of proof; a court will require proof commensurate with the seriousness of the allegation.[41] However, notwithstanding the fraud connotation, the Supreme Court does not appear to have differentiated between unilateral rectification and mutual rectification in describing the applicable standard of proof;[42] until that court comments further on the issue, it seems that it may be taken that the standard is the same in both types of rectification actions.

JULIAR[43]

Hard cases make bad law. Is *Juliar* an example of that maxim, or is it merely an application of the classic rule of rectification to a somewhat unusual fact situation? Or does it reflect a more modern doctrine of rectification than the classic doctrine discussed above?

For the purposes of this discussion, the facts may be simplified as follows. Juliar sold certain shares of one corporation (Opco) to another corporation (Holdco) for

---

> probability that the written instrument truly represents the parties' intention because it is a document signed by the parties.
>
> In *Amp*, supra note 30, at paragraph 59, the court accepted that both policies—the need to uphold concluded contracts and the fact that a concluded contract normally provides the best evidence of what the parties agreed—were behind the need to require convincing proof.

39 *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 93 DLR (3d) 221, at 226-27 (Ont. HCJ); aff'd. (1980), 106 DLR (3d) 576 (Ont. CA). See also *Bank of Montreal*, supra note 11; *Spetifore Estate v. S. Spetifore and Sons Ltd.*, [1998] BCJ no. 1470 (SC); aff'd. [1999] BCJ no. 776 (CA); and *Performance Industries*, supra note 8, at paragraphs 41-42.

40 An issue raised but not decided in *Wilson Walker LLP v. Royal Bank of Canada*, [2004] OJ no. 1934 (SC).

41 *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] SCR 154, at 160-61, citing *Bater v. Bater*, [1950] 2 All ER 458, at 459 (CA).

42 *Performance Industries*, supra note 8, at paragraphs 41-42.

43 *Juliar et al. v. AG of Canada et al.*, 99 DTC 5743 (Ont. SCJ); aff'd. 2000 DTC 6589 (Ont. CA); leave to appeal denied [2000] SCCA no. 621.

a promissory note from Holdco. The Holdco note was intended to equal what the parties believed to be the adjusted cost base (ACB) of the Opco shares. Under these conditions Juliar would have had a tax-free disposition. Accordingly, no section 85 rollover election form T2057 was filed. It was part of the agreed statement of facts that Juliar did not anticipate any tax consequences from the sale of the Opco shares.

As it turned out, Holdco was related to Juliar, and the Holdco note exceeded Juliar's actual ACB of his Opco shares. The minister of national revenue reassessed Juliar under section 84.1 for a deemed dividend equal to the note less the greater of the paid-up capital and the actual ACB of the Opco shares. Juliar appealed the reassessment to the Tax Court of Canada. While that appeal was pending, Juliar applied to the Ontario Superior Court to rectify the transaction to substitute Holdco shares for the Holdco note, the purpose of the application being to avoid section 84.1 and create a section 85 rollover.

The lower court allowed the application for rectification. In affirming the lower court's decision, the Court of Appeal applied the following principle from an earlier UK decision:[44]

> The true principles governing these matters I conceive to be as follows. (1) The court has a discretion to rectify where it is satisfied that the document does not carry out the intention of the parties. This is the basic principle. (2) Parties are entitled to enter into any transaction which is legal, and, in particular, are entitled to arrange their affairs to avoid payment of tax if they legitimately can. The Finance Acts 1969 and 1975 tell them explicitly how they can do so in the case of estate duty and capital transfer tax. (3) If a mistake is made in a document legitimately designed to avoid the payment of tax, there is no reason why it should not be corrected. The Crown is in no privileged position *qua* such a document. It would not be a correct exercise of the discretion in such circumstances to refuse rectification merely because the Crown would thereby be deprived of an accidental and unexpected windfall. (4) As counsel for the trustees submitted, neither *Whiteside v. Whiteside* [[1949] 2 All E.R. 913] nor any other case contains anything which compels the court to the conclusion that rectification of a document should be refused where the sole purpose of seeking it is to enable the parties to obtain a legitimate fiscal advantage which it was their common intention to obtain at the time of the execution of the document.[45]

Was this a valid application of the rule that courts do not rectify contracts, only instruments? Could the minister legitimately complain that this was true retroactive tax planning rather than rectification? In my view, the answer depends on what one thinks of as the "real" agreement. If the "real" agreement was "shares for debt," then the case was wrongly decided. If the "real" agreement was "a transfer of shares in a tax-free manner, regardless of how that was to be accomplished," then the case was correctly decided. The Court of Appeal evidently viewed the real agreement as the latter, not the former:

---

44 *Re Slocock's Will Trusts*, [1979] 1 All ER 358, at 363 (Ch. D.).

45 *Juliar*, supra note 43, at paragraph 33 (Ont. CA).

> The trial judge effectively found that the true agreement between the parties here was the acquisition of the half interest in the Gold's tobacco business by transfer of shares in 867 to Juliar Holdings in a manner that would not attract immediate liability for income tax. In these circumstances, that had to be, not a transaction pursuant to s. 84.1 of the *Income Tax Act*, but a shares for shares transaction. Hence, it was appropriate for the trial judge to permit rectification to reflect that transaction.[46]

What are the implications of this case for future transactions? Taxpayers and their advisers may feel that so long as there is a clear initial intent not to have an adverse tax result, any transaction can be rectified without attracting an accusation that the rectification amounts to retroactive tax planning. While in *Juliar* there was an intent to have a tax-free transaction, that overarching intent was imputed to the taxpayer only because the taxpayer's new accountant made a mistake as to the ACB of the shares. If rectification is permitted in those circumstances, then any error leading to a transaction that results in adverse tax consequences should similarly be a candidate for rectification. Indeed, even errors of law may result in rectification.[47] Why carry any professional liability insurance? Tax professionals and solicitors will take great comfort from subsequent cases, which have certainly interpreted *Juliar* as expanding the traditional doctrine of rectification to novel situations in which the mistake was not in transcribing the agreement but in choosing the wrong mechanism for effecting it. In one case, for example, the court said:

> The decision of the Ontario Court of Appeal in *Juliar v. Canada (Attorney General)*, . . . permitting rectification of a corporate transaction so as to accord with an original intent to avoid income tax liability, illustrates that the doctrine of rectification may, in appropriate cases, be employed *in novel situations* in the corporate sphere to ensure that instruments evidencing corporate transactions comport with the real intentions of their creators. . . .
>
> In the context of the current case, what is significant about *Juliar* is that the court was prepared to allow rectification *where the mechanism chosen to reach an intended result was mistakenly used*. The parties were allowed effectively to restructure the transaction by using a *different mechanism*, provided of course that the result obtained by the use of the new mechanism was in accordance with the original common intention of the parties. In achieving rectification, the parties were permitted, retroactively, to create new, or modify existing, instruments to achieve their original purpose where the original instruments could not do so as a result of a common mistake, and this was so even though the parties may not have adverted to the appropriateness of the use of the specific mechanism that had originally been mistakenly chosen to effectuate their original intention.[48]

---

46 Ibid., at paragraph 25.

47 *Bailey and Ors. v. Manos Breeder Farms Pty Ltd. and Ors.*, [1991] SASC 2799 (online: http://bar.austlii.edu.au/), and *In re Butlin's Settlement*, [1976] 1 Ch. 251 (Ch. D.).

48 *Aylwards*, supra note 31, at paragraphs 38 and 41 (emphasis added). See also the discussion of *GT Group Telecom Inc.*, infra note 89, under the heading "The Department of Justice's and the CRA's Positions on Rectification" below.

THE UK CASE LAW: THE SAME AS JULIAR, OR DIFFERENT?

I suggested above that in the United Kingdom, at least, a rule has been developed that "[r]ectification may be available if the document contains the very wording that the parties intended it to contain, but it has in law or as a matter of true construction an effect or meaning different from that which was intended."[49] Is *Juliar* an example of this kind of case and therefore not an expansion of the doctrine of rectification? To determine the meaning and limits of the rule, I will discuss several UK cases. The first is *Racal Group Services v. Ashmore*.[50] *Racal* is perhaps the strongest case against the broader application of rectification in *Juliar*, and it certainly would have been interesting to see how the Court of Appeal in *Juliar* would have dealt with *Racal* had it been referred to.[51]

In *Racal*, the taxpayer wanted to make a donation to a charity. Under the relevant UK legislation, such a donation would be tax-deductible only if the donation were one of a series of donations spread out over at least a three-year period. The deed of donation that was executed spread out a series of three donations over 33 months rather than three years. The taxpayer applied to rectify the deed, but the court refused the application.

Two main points arise from the case, one of which is discussed below under the heading "What If the Parties Help Themselves?" For present purposes, the second main point is that the court in *Racal* felt unable to find the evidence of clear intention necessary to ground rectification, even though it was clear, and accepted by the court, that the taxpayer intended to deduct the donation:

> [T]he court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective. The specific intention of the grantor *as to how the*

49 *City of London Real Property Company*, supra note 30.

50 Supra note 38.

51 A case similar to *Racal* is *Tankel v. Tankel*, [1999] 1 FLR 679, at paragraph 11 (Ch. D.), where the court said,

> It is clear that rectification is capable of being ordered in relation to the terms of the settlement. It is also clear that in such a case, in determining whether the document, as executed, fails by reason of a mistake to give effect to the true intentions of the parties, the intentions which matter are those of the settlor (see *Re Butlin's Settlement Trusts*; *Butlin v. Butlin* [1976] Ch 251). Equally, however, rectification "must be cautiously watched and jealously guarded" (*Whiteside v. Whiteside* [1950] Ch 65, 71). I can only order it if I am satisfied that the document which was executed differed by reason of some mistake from that which the settlor intended should be executed. It is not enough for me to consider, as I do, that it would have been better if the settlor had executed a document which was from the outset in the form to which I am now requested to change it. Nor is it enough for me to conclude that if the settlor's intention had been drawn to the actual terms of the document which was executed, and he had been asked whether he would rather have them changed, he would have said that he would.

objective was to be achieved must be shown if the court is to order rectification. Thus in *Van der Linde v. Van der Linde* [1947] Ch 306 at 312 Evershed J said—

> ". . . I find it impossible to reach a clear view as to what was [the grantor's] real intention, and if it be no more precise than this, namely that he intended, by whatever formulation of words was appropriate or possible, to achieve the result that he could deduct in his surtax return the amount of the bounty that he paid to his sister, in so far as the document fails by proper formulation to achieve that result, I certainly do not feel disposed to exercise in the particular form suggested the remedy of rectification in this case."[52]

One cannot help but be struck by how different this reasoning is from the reasoning in *Juliar* as it was subsequently interpreted in *Aylwards*.[53] In *Juliar*, the court accepted that no one had specifically considered the tax consequences of issuing the promissory note; yet the court imputed to the taxpayer the intention to have a tax-free transaction or none at all. It seems that in that case there was nothing more than an intention, "by whatever formulation of words was appropriate or possible," to have a tax-free rollover; yet that was sufficient to allow rectification. If the quotation from *Racal* set out above were the law,[54] one would have to suggest that *Juliar* was wrongly decided.

The next case is *Amp*.[55] The facts were complicated; briefly, the trustees of a pension plan passed a resolution that would result in an unexpectedly large cost to the pension plan. The trustees applied to rectify the resolution, and the application was allowed. The court discussed extensively the concept that rectification may be allowed even if the written instrument contains exactly the terms the parties intended it to contain, but those terms do not have the intended effect.

For convenience I will set out again the extract from *Snell's Equity* quoted in *Wasauksing*:

> 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.[56] Rectification ensures that the instrument contains the provisions which the parties

52 *Racal Group Services*, supra note 38, at 1158 (emphasis added).

53 *Aylwards*, supra note 31.

54 See, to the same effect (although *Racal* was not cited), *Baird v. BCE Holdings P/L* (1996), 40 NSWLR 374 (SC Eq.); and *Oates Properties Pty Ltd. & Ors v. Commissioner of State Revenue*, [2003] NSWSC 596 (online: http://bar.austlii.edu.au/).

55 Supra note 30. See also *Gallaher Ltd. v. Gallaher Pensions Ltd. & Ors.*, [2005] EWHC 42 (Ch.) (online: http://www.bailii.org/), a case decided on very similar facts and reasoning.

56 But query whether this is the true rule: see the discussion below under the heading "Juliar."

actually intended it to contain, and *not those which it would have contained had they been better informed.*[57]

Now compare that extract with the following passage from *Amp*:

> The next question is whether the right to rectification is affected by the fact that the Trustees and the Board sub-committee intended to pass, or consent to, the very wording in the Resolution. It is plain that it is not so affected. *Re Butlin's Settlement* illustrates another general proposition in the law of rectification, which is that rectification may be available even if the parties have quite deliberately used the wording in the instrument. Brightman J said (at 261-2):
>
> > ". . . rectification is available not only in a case where particular words have been added, omitted or wrongly written as a result of careless copying or the like. It is also available where the words of the document are purposely used *but it was mistakenly considered that they bore a different meaning as a matter of true construction*. In such a case . . . the court will rectify the wording so that it expresses the true intention . . ."
>
> Consequently rectification may be available if the document contains the very wording that it was intended to contain, but it has in law or as a matter of true construction an effect or meaning different from that which was intended.[58]

In my view, the passage quoted in *Wasauksing* is completely contrary to the passage from *Amp*. The former essentially confines rectification to cases where the instrument contains a word not actually agreed on; the latter permits rectification in cases where the instrument contains the exact words agreed on but the parties have made a mistake as to the legal effect of that word and would have used a different word had they been better informed. In my view, the former rule is not definitively the law in Canada; *Juliar*, *Snow White*,[59] and *Aylwards* make that clear. On the other hand, the latter rule has not, in express terms, been adopted as the law in Canada either.

Is there a limit to the latter rule? In *Amp*, the court tried to establish one:

> It is sometimes said that equitable relief against mistake is not available if the mistake relates only to the consequences of the transaction or the advantages to be gained by entering into it: *cf Whiteside v. Whiteside* [1950] Ch 65, 74; *Gibbon v. Mitchell* [1990] 1 WLR 1304, 1309. This distinction seems to have been derived in the former case from the 1929 edition of Kerr on Fraud and Mistake. *If anything, it is simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them*. The cases certainly establish

57 *Snell's Equity*, supra note 7, at 696, quoted in *Wasauksing First Nation*, ibid., at paragraph 80 (emphasis added).

58 *Amp*, supra note 30, at paragraphs 69-70 (emphasis added).

59 Infra note 77.

> that relief may be available if there is a mistake as to law or the legal consequences of an agreement or settlement, and in the present case Mr. Simmonds QC ultimately accepted that, if there was a mistake, it was a mistake as to legal effect and not merely as to consequences.[60]

The court began by saying that even a mistake as to law or legal consequences can ground an application for rectification, but it finished by trying to draw a distinction (relied on in *Racal*) between the "legal effect" of a document and its "consequences." This is a very difficult line to draw.

The next UK case is *The City of London Real Property Company Ltd.*[61] The parties entered into a lease that provided for a rent review, but only upward, not downward. It was contended on an application for rectification that a downward review clause should have been contained in the lease. The court allowed the application and in the process discussed the difference, if any, between an error in the legal effect of a document, which justifies rectification, and an error in the consequences of a document, which does not. The court said, "Rectification may be available if the document contains the very wording that the parties intended it to contain, but it has in law or as a matter of true construction an effect or meaning different from that which was intended."[62]

The court went on to say that "rectification is not available to save a party from the consequences of a mistake or from an improvident bargain."[63] The court tried to distinguish these situations by saying that when the parties have turned their minds to a matter and have agreed on it, rectification will be permitted if the instrument has consequences that they did not intend, even if the exact words necessary to achieve the correct consequence had not been agreed on, and even if the instrument by which they tried to achieve that consequence contained the exact terms they did agree on. The rule was expressed as follows:

> [R]ectification is available where the parties believe that certain wording will give effect to their bargain but mistakenly overlook some other aspect of their arrangements, with the result that this wording will in fact not do so. To grant rectification in such cases is not to mend the parties' bargain but to give effect to it.[64]

The final UK case that I will discuss is *Farmer v. Sloan*.[65] Two spouses drafted mutual wills. The husband died and left certain real estate to his wife. When the wife died, the property was to go to her daughter. The wife was living with the daughter;

60 *Amp*, supra note 30, at paragraph 70 (emphasis added).

61 Supra note 30.

62 Ibid., at 56.

63 Ibid., at 57.

64 Ibid., at 59.

65 [2004] EWHC 606 (Ch. D.) (QL).

to save inheritance tax, and on the advice of her accountant, the wife executed a deed which, by a reservation of rights, in effect gave her a life interest in the property with the remainder to the daughter. Her accountant sent the deed to Her Majesty's Revenue and Customs (formerly Inland Revenue), which pointed out to the accountant that the deed would result in inheritance tax being levied on the property. The accountant did not immediately raise this matter with the wife, who died a month later. The accountant, who was also her executor, then applied to rectify the deed.

The judge in *Farmer* first quoted *Racal*: "[T]he court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective."[66] The judge noted that he must be satisfied that the deed did not give effect to the true agreement between the parties, not merely that it failed to achieve its objective of saving tax. On the surface that seemed to be an impossible task, given that the deed contained the exact words that the lawyer who drafted it intended it to have and that the wife had never discussed the effect of the offending reservation in the deed. In fact, the court found that the wife had read the clause and understood it. The court accepted that if the wife had been given the choice between reserving a life interest and saving tax she would have chosen the latter; however, that by itself was not sufficient to permit rectification because the parties had never turned their minds to that choice. As the court said, "There is therefore no doubt that the clause was entered into by mistake, but it does not follow that it is contrary to the intention of the parties so as to entitle the court to rectify the deed."[67] This statement is reminiscent of the Crown's argument in *Juliar*.

Nevertheless, and possibly to the surprise of anyone reading the case, the court allowed rectification. The court found that although there was no express discussion about inheritance tax with the lawyer who drafted the deed, the lawyer knew that the objective of the deed was to save inheritance tax and that the lawyer did not know that the addition of the reservation to the deed meant that tax would be owed rather than saved. The court further found that the wife shared this mistake in executing a deed "containing words which she understood but whose legal consequences[68] she did not intend."[69] On this basis the court granted rectification.

If one steps back from the reasons in *Farmer* and looks just at the facts and the result, one sees a case in which a person, hoping to achieve a certain tax result, executed a document on the advice of her lawyer and accountant without understanding the fiscal consequences or how the fiscal result would be achieved. Her intention was to sign a deed, and she read and understood exactly the words the document contained; the court allowed the document to be rectified because it had adverse tax consequences. These circumstances are essentially congruent with *Juliar* but contrary to *Racal*.

---

66 *Racal Group Services*, supra note 38, at 1158.

67 *Farmer*, supra note 65, at 18.

68 Note that the court does not say "legal effect."

69 *Farmer*, supra note 65, at 25.

It is still too soon to draw a conclusion from these UK cases without discussing the Canadian decision in *Bramco*,[70] but at this point one may say that the distinction, if there is one, between the reasoning in *Racal* on the one hand and the reasoning in *Juliar* and *Farmer* on the other is exceedingly fine.

BACK TO THE CANADIAN CASES: COMPARING JULIAR WITH BRAMCO

An example of the fine, if not invisible, distinction which the UK cases have raised, and which the Court of Appeal in *Juliar* apparently accepted, can be seen by comparing *Juliar* with *Bramco*,[71] an earlier Ontario Court of Appeal case that it distinguished. The taxpayer in *Bramco* owned two corporations, one of which was not an Ontario corporation. The non-Ontario corporation took title to some land in Ontario; the title could just as easily have been taken by the Ontario corporation. A much higher land transfer tax was payable as a result of the error. The application for rectification was denied. The trial judge held that rectification did not apply because the matter of land transfer tax was not the purpose of the transaction, but rather merely a consequence of it. The Court of Appeal agreed. In *Juliar*, the Court of Appeal distinguished *Bramco* on the ground that the taxpayer in *Bramco* never had an intention to save tax and therefore the courts would not rewrite the agreement.

One has to ask whether this is a logically attractive basis on which to distinguish *Bramco*. In *Juliar*, the court accepted that no one had expressly discussed the tax consequences of the shares-for-debt deal, yet held that as a matter of common sense the parties would have intended to transfer the shares with as little tax as possible: "The plain and obvious fact, however, is that the proposed division had to be carried out on a no immediate tax basis or not at all."[72] Can the same not be said about the taxpayer in *Bramco*? Surely she wanted to acquire the land with as little tax as possible. Is there really a difference[73] between applying for rectification to ensure that one obtains the tax advantages one set out to obtain (in which case the remedy is available) and applying to avoid an unexpected tax disadvantage (in which case it is not)? And if there is a difference, on which side do *Juliar* and *Bramco* fall?

Only two cases of which I am aware (apart from *Juliar* itself) have considered both *Juliar* and *Bramco*. The first is *Snow White*,[74] which is discussed below. The other is *Transport North American Express v. New Solutions Financial Corp.*,[75] in which

70 Infra note 71.

71 *771225 Ontario Inc. v. Bramco Holdings Co.* (1994), 17 OR (3d) 571 (Gen. Div.); aff'd. (1995), 21 OR (3d) 739 (CA); leave to appeal refused (1995), 48 RPR (2d) 320 (SCC).

72 *Juliar*, supra note 43, at paragraph 27 (Ont. CA).

73 As the court in *Snow White*, infra note 77, seems to think there was.

74 Infra note 77.

75 (2001), 200 DLR (4th) 560 (Ont. SCJ); rev'd. on a different point (2002), 214 DLR (4th) 44 (Ont. CA); aff'd. on a different point (2004), 235 DLR (4th) 385 (SCC).

the court refused to rectify an agreement to create a debt that provided for usurious interest rates into an agreement to create an equity interest, on the basis that "ignorance of the legal consequences" does not permit rectification:

> As, on the evidence, I find that the parties intended, and agreed, to create a relationship that, in law, was that of debtor and creditor with respect to the royalty payments, the respondent's request to have the agreement rectified to convert the payments to a 30 per cent equity interest in the applicant cannot be accepted. There was not, as in *Attorney General of Canada v. Juliar*, 2000 D.T.C. 6589 (Ont. C.A.), a mistake in reducing the terms of an agreement to writing. The agreement between the parties with respect to the royalties was accurately reflected in the commitment letter. The only mistake was that none of the participants in the transaction—or their lawyers—appears to have adverted to the possible effect of s. 347 of the *Criminal Code*. By itself, *ignorance of the legal consequences of an agreement between the parties does not provide a basis for rectification*. This case falls on the side of the line represented by the decision in *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739 (C.A.) (leave to appeal to the S.C.C. refused (1995), 48 R.P.R. (2d) 320)) rather than that of the decision in *Attorney General of Canada v. Juliar*.[76]

Query whether this is correct, given that in *Juliar* there was arguably nothing more than a mistake as to the legal consequences of issuing debt instead of shares, and given that the basis for the decision in *Bramco* was that the parties had not turned their minds to the issue of the tax consequences of the deal.

IS JULIAR CONSISTENT WITH CAN-DIVE? THE DECISION IN SNOW WHITE[77]

The facts in *Sniderman*[78] differ significantly from those in *Juliar*. *Sniderman* is what I call a "classic" case of rectification: the parties agreed on one figure but wrote down another. In *Juliar*, the parties intended to issue a promissory note as consideration for the shares but were mistaken as to the legal effect of their doing so.[79]

In *Can-Dive*,[80] the defendant owner, Pacific Coast Energy Corporation, contracted with Morrison-Knudsen, a general contractor, to construct a pipeline. Morrison-Knudsen subcontracted with Can-Dive to lay the underwater pipe. Can-Dive encountered problems in laying the pipe supports as a result of the sloped seabed. It claimed for extra payments relating to the increased cost of laying the

---

76 Ibid., at paragraph 24 (Ont. SCJ) (emphasis added).

77 *Snow White Productions Inc. v. PMP Entertainment, Inc. et al.*, 2005 DTC 5150 (BCSC).

78 Supra note 6.

79 The Crown would say—although this was not accepted by the court, and in my view it would have been irrelevant even if it had been accepted by the court—that the parties were mistaken merely as to the consequences of doing so.

80 *Can-Dive Services Ltd. v. Pacific Coast Energy* (2000), 74 BCLR (3d) 30 (BCCA); leave to appeal denied [2000] SCCA no. 166.

pipe. The owner's position was that the work was included in the contract with Morrison-Knudsen. The trial judge held that the owner did not have any obligation to Morrison-Knudsen but that there had been a mutual mistake between Morrison-Knudsen and Can-Dive, and that the work constituted extra work which made rectification of the subcontract appropriate. Both parties appealed; the appeal was allowed and the cross-appeal dismissed. The Court of Appeal held that the trial judge had incorrectly rectified the bargain between the parties, not the instrument executed by them. There was no clerical error. The subcontract constituted the entire agreement between the parties. Morrison-Knudsen did not bargain to pay Can-Dive more than it was entitled to receive from the owner under the main contract. Both Morrison-Knudsen and Can-Dive agreed to be bound by the main contract.

Can-Dive is a "classic" application (or, on the facts, non-application) of rectification. Is *Juliar*, which arguably represents a broader doctrine of rectification, consistent with *Can-Dive*? The court in *Snow White* certainly seemed to think so. In *Snow White*, the parties entered into a production services agreement in the course of trying to qualify for film production tax credits under section 125.5 of the Act. The agreement incorrectly referred to a particular person as the owner of the copyright in the film; ownership by that person would have disentitled Snow White to the tax credits. The errors contained in the agreement became apparent when the CRA's Vancouver Film Services Unit reviewed and rejected Snow White's film tax credit application. Snow White applied to rectify the agreement so that it referred to the correct person as the owner of the copyright. The court allowed the application. It was satisfied that the case—like *Juliar*, but unlike *Bramco*—was one in which the parties had turned their minds to the tax consequences, had intended to achieve them, but had made a mistake in the contract. Note that the rectification substituted one party for another into a contract. It could hardly be said that the new party had had a continuing common intention to be a party to the contract, or else it would surely have been a party. Yet the court rectified the transaction as a whole because it accepted that the entire group had the requisite intention to achieve a particular tax result.

One might say that the parties had not made any mistake—they had deliberately entered into a contract with the very person with whom they intended to contract.[81] Only when the parties discovered that that person did not hold the copyright did they realize that they should have contracted with another person. Yet the court held that because of the underlying—or perhaps one might say overarching—intention to obtain the tax credits, rectification was permitted. But what of *Can-Dive*, a case which, unlike *Juliar*, was directly on point from a court whose decisions were binding on the trial court in *Snow White*?

Juliar was applied and *Can-Dive* distinguished on the basis that "none of the parties to the Agreement [in *Snow White*] oppose rectification":

81 A similar situation with a similar conclusion arose in *Thistle v. Thistle (No. 2)* (1981), 129 DLR (3d) 314 (NSSC).

> In the case at bar, none of the parties to the Agreement oppose rectification. Because that is the case, I am satisfied that the decision of the Court in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (2000), 74 B.C.L.R. (3d) 30 (B.C.C.A.), leave to appeal denied, can be distinguished. In *Can-Dive*, Southin, J.A. was satisfied that the learned trial judge had attempted to rectify the bargain between the parties rather than attempting to rectify an instrument which did not reflect the true intention of the parties.[82]

Presumably the court in *Snow White* meant that all parties agreed that the written instrument did not accurately reflect the actual agreement. But what of it? There is no specific requirement that the parties agree to a rectification application: in the "$139,550.89 versus $131,629.89" situation in *Sniderman*, the court ordered rectification even though one party denied a continuing agreement on the larger amount.[83] Again, if one looks only at the facts and the result in *Snow White*, the case appears to be an example of the broader doctrine of rectification discussed in cases such as *Farmer* (or, if one likes, an example of the broader way of viewing the terms of the original agreement). As the court said, echoing *Juliar*,

> [I]t was always the common intention of the parties to obtain the legitimate fiscal advantage of the benefits under the *Income Tax Act* (Canada) and the *Income Tax Act* (British Columbia) which accrue to an "eligible production corporation" in a position to receive an "accredited film or video production certificate."[84]

Although the exact boundaries of this more modern principle of rectification are not yet known, it seems clear that they are not confined to the classic cases of rectification as exemplified by *Sniderman* and *Can-Dive*: they may include situations where no transcription error appears in the contract, yet the transaction as a whole does not achieve the legal (including the tax) effect that the parties intended to achieve.

ANY CONCLUSIONS?

I will try to draw some conclusions from this lengthy discussion, but with considerable doubt that the cases can all be logically reconciled.

Rectification is permitted in the "classic" case where the parties agree on one word but accidentally write down another. In the doctrine's more modern form, any time the parties intend to achieve a particular tax result and actually consider that tax result, rectification of the transaction as a whole will be permitted even if the executed documents contain the words they were intended to contain and even if the mechanism chosen to obtain the tax result turns out to be the wrong mechanism. There is no true distinction between a mistake as to legal consequences and a mistake as to legal effect: the court that hears the application must simply be vigilant and ensure that the parties are not merely changing their minds to escape what has turned out to be a plan that they would rather not carry out for commercial reasons.

---

82 *Snow White*, supra note 77, at paragraph 25.

83 *Performance Industries*, supra note 8, was a contested case of rectification.

84 *Snow White*, supra note 77, at paragraph 24.

Furthermore, it is necessary to show that there was an actual agreement or at least a continuing common intention to achieve a particular tax result[85] but, under Canadian law (as opposed to what is possibly the law in the United Kingdom), not specifically how that tax result was to be achieved.[86]

If, however, I am wrong and the parties must show a continuing common intention with respect to the actual mechanism to be used to achieve the intended tax result,[87] then that intention may be found or imputed to the parties when the particular tax result can be achieved in only one way and the evidence shows that the parties would have carried out the transaction only if it achieved that tax result. As *Juliar* says, if the transaction had to be carried out in a particular manner or not at all, then the actual transaction will be rectified to make it accord with the way it must have been carried out, because the parties must have intended to carry it out that way. In that case, on the facts, a transfer of the shares to the related corporation could only have been done tax-free on a "shares-for-shares" basis. The Court of Appeal found that it had to be done that way or not at all:

> The appellant quarrels with the finding of fact that "it was the intention of the Juliars that the transactions would not trigger an immediate obligation to pay income tax." The appellant argues that this finding "was based more on an inference than on clear, direct, and admissible evidence."
>
> This latter is a fair comment. It is possible, even probable, that no one mentioned income tax throughout the nine or ten months in issue. The plain and obvious fact, however, is that the proposed division had to be carried out on a no immediate tax basis or not at all.[88]

In these circumstances, a denial of rectification would have resulted in an unintended windfall for the minister.[89] The rectification did not allow the taxpayer to redo the transaction in any manner he chose that happened to be more tax-effective than the actual transaction that was undertaken; it simply allowed him to

---

85 But not an outward manifestation of same.

86 Even in the United Kingdom there is strong authority for this proposition. See *Swainland Builders Ltd. v. Freehold Properties Ltd.*, [2002] EWCA Civ 560, at paragraph 44 (online: http://www.bailii.org/), where the court said: "I see no reason in principle why equity should be prevented from giving relief merely because the parties had not agreed on the mechanics by which effect should be given to a clear and simple common intention."

87 While it may be that the parties did not have to have a common intention as to the exact way in which the tax result was to be achieved, they must be able to tell the court exactly how they now intend to achieve it. In *Il Caminetto*, supra note 8, the court said that the party seeking rectification must show "the precise form" in which the written instrument can be made to express the prior intention. 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.

88 Supra note 43, at paragraphs 26-27 (Ont. CA).

89 The court used the word "windfall" in granting rectification in *GT Group Telecom Inc., Re* (2004), 5 CBR (5th) 230, at paragraph 3 (Ont. SCJ).

do what he always intended to do and what, absent the error, he clearly would have done in the first place. In that sense it was restorative rather than retroactive, in keeping with the general principle of rectification.

SOME PROCEDURAL ISSUES

Which courts have jurisdiction in an application for rectification? Clearly the provincial superior courts, which are established under section 96 of the Constitution Act, 1867, and which have inherent equitable jurisdiction, have jurisdiction to rectify an instrument.[90] It is beyond doubt that such courts will rectify an instrument even if the applicant's only purpose in applying for the remedy is to avoid an adverse tax consequence.[91] It is also clear that one may apply to these courts for rectification even if an appeal is pending in the Tax Court.[92]

Can the Tax Court rectify an instrument? Not in the usual sense: the Tax Court is not a court of equity,[93] and in general only one of the parties to the contract will be a party before the Tax Court; the other party to the contract will not have been assessed and will not be seeking rectification. In my view, however, the Tax Court can decide a case as if the instrument had been rectified: the Tax Court has the implied jurisdiction to decide provincial legal matters in the course of exercising its exclusive jurisdiction to decide tax cases.[94] The Tax Court often applies equitable principles in the course of deciding a tax matter.[95] In *GLP NT*,[96] it was suggested that the Tax Court has no power to rectify a document. In my view, that statement is technically right, but it is wrong if it is meant to suggest that the Tax Court could not treat an instrument as having been rectified.[97] The true rule, in my view, is expressed as follows:

---

90 See section 9 of the British Columbia Supreme Court Act, RSBC 1996, c. 443, as amended, and sections 5 and 44 of the British Columbia Law and Equity Act, RSBC 1996, c. 253, as amended.

91 *Juliar*, supra 43; *Snow White*, supra note 77; *CI Fees Trust*, supra note 22; and *Sir Peter Anthony Thompson v. Dattenfeld Ltd.*, [1996] HK CFI 416 (online: http://www.hklii.org/). A distinction has been drawn between cases where a provincial superior court is asked to issue a declaration as to certain legal issues solely for tax purposes and cases where the application for rectification is purely for tax purposes. See *CI Fees Trust*, distinguishing *GLP NT Corporation v. AG of Canada*, 2003 DTC 5654 (Ont. SCJ) and, presumably, the case that *GLP NT* followed, *Felsen Foundation v. Jabs Construction Ltd. et al.*, 98 DTC 6454 (BCSC). This distinction, if justified at all, can be said to rest on the fact that rectification is a kind of in rem remedy in that it actually affects the legal rights of the parties, while a declaration does not.

92 *Juliar*, supra note 43, and *CI Fees Trust*, supra note 22.

93 See section 12 of the Tax Court of Canada Act, RSC 1985, c. T-2, as amended.

94 *ITO Ltd. v. Miida Electronics Inc.* (1986), 28 DLR (4th) 641, at 662 (SCC).

95 See, for example, *Datacalc Research Corporation v. The Queen*, 2002 DTC 1479, at paragraph 58 (TCC).

96 Supra note 91.

97 See *St. Ives Resources Ltd. v. MNR*, [1990] 1 CTC 2539 (TCC); aff'd. on other grounds 92 DTC 6223 (FCTD), where the court was prepared to treat a contract as if it had been rectified.

> This leads to a subsidiary question. If a transaction is incomplete or defective by reason of a failure to comply with the bylaws of the company or the relevant *Companies Act* is it open to this court to find in an income tax appeal against an assessment that the transaction is defective, or must the court decline to make such a finding until a provincial court of competent jurisdiction either sets the transaction aside, as in *Beechwood*, declares the transaction to be ineffective, or rectifies a completed transaction as in *A.G. Canada v. Juliar et al.*, 2000 DTC 6589?
>
> Obviously this court cannot make declarations that bind the parties to a transaction, or set aside or rectify transactions as between parties. That is a matter for the courts of the provinces or territories. Nonetheless, this does not mean that this court must, where the validity of a transaction is relevant to the determination of a tax dispute between a taxpayer and the Government of Canada, stand impotently by and decline to make a determination that is essential to the exercise of its jurisdiction. *Clearly our court must decide the validity or legal effect of a transaction between subjects in the context of a determination of its tax consequences*.[98]

However, while it seems that the Tax Court may (and perhaps should) decide whether to treat a document as having been rectified in the course of deciding a tax case, the Tax Court has expressed the preference that taxpayers apply first to the provincial superior court for rectification.[99]

WHAT IF THE PARTIES HELP THEMSELVES?

Why apply to a court for rectification? After all, if rectification is the correction of an error in a document that does not reflect what the parties agreed, who better than the parties themselves to simply amend the document so that it does say exactly what they agreed? Why involve the courts at all?

In *Sussex Square Apartments Ltd. v. The Queen*,[100] the parties needed to rectify 129 assignments of certain leases to make them subleases in order to achieve a certain tax result. Seventeen leases were not rectified at all. Of the remaining 112, 63 were rectified on an application to the British Columbia Supreme Court. For reasons not explained in the case, 49 were rectified after the court order merely by agreement of the parties, perhaps because the parties assumed that they were simply following the court order. Bowman J (as he then was) in the Tax Court held that for tax purposes the 63 leases should be given effect as rectified but that the 49 should not. This aspect of the case was not appealed by the taxpayer, so we do not know whether the Court of Appeal would have agreed with it.

In refusing to give effect to the remaining 49 assignments as rectified by the parties, Bowman J stated:

---

98 *Lloyd v. The Queen*, 2002 DTC 1493, at paragraphs 18-19 (TCC) (emphasis added).

99 *Kovarik v. The Queen*, [2001] 2 CTC 2503 (TCC), cited on this point in *Stern v. The Queen*, 2004 DTC 3260, at paragraph 30 (TCC).

100 99 DTC 443 (TCC); aff'd. 2000 DTC 6548 (FCA).

> So far as the remaining 49 transactions are concerned, I should have thought that it was impossible by agreement alone to rewrite fiscal history, on the authority of Rowlatt, J. in *Waddington v. O'Callaghan* (1931), 16 T.C. 187 at pages 197-198 he said:
>
> > I do not think I need trouble you, Mr. Hills. I think this is a plain case. There is no sort of doubt at all about the legal position as I understand it. When people enter into a deed of partnership and say that they are to be partners as from some date which is prior to the date of the deed, that does not have the effect that they were partners from the beginning of the deed. *You cannot alter the past in that way*. What it means is that they begin to be partners at the date of the deed, but then they are to take the accounts back to the date that they mention as from which the deed provides that they shall be partners. There is no sort of doubt at all that that is the only effect, which such a deed can have. *No deed can alter the past*, but of course, it is quite possible that before the deed was executed the partners may in point of fact have been carrying on business in partnership which would give rise to partnership accounts and which would give rise to partnership liabilities and so on; and when the deed is executed and said to relate back to an earlier period, that means that the provisions of the deed as to the partnership rights and partnership accounts shall supersede the rights which have accrued under the partnership which *de facto* had existed before the date of the deed. All that is perfectly clear and perfectly simple.
>
> Although a number of the statements in *Dale* quoted above might arguably support the proposition that this court is entitled and indeed obliged to take into account the modification agreements which had the intended effect of making the assignments subleases *ab initio*, I think that the better view is that it would be pushing the *Dale* principle too far if I applied it to contractually agreed fiscal revisionism without the benefit of a court order.[101]

With due respect, I disagree with this reasoning. It indicates a misunderstanding of rectification. Rectification, as explained above, is not retroactive: it is restorative. The assignments not covered by the court order were rectified by the parties to make the instruments (not the agreements) conform to what the parties had actually agreed before they executed the assignments. On what basis could one say that that was rewriting fiscal history?

In the United Kingdom, it has been held that if the parties themselves have rectified the document the court will not grant rectification, on the ground that there is no longer any issue to be decided.[102] But there has been no discussion of the question whether a self-rectified document is effective for tax purposes. In my view, the answer is obviously yes. This issue remains to be decided by a future court.

---

101 Ibid., at paragraphs 41-42 (TCC) (emphasis added by Bowman J).

102 *Toronto-Dominion Bank v. Oberoi*, [2004] STC 1197, at paragraph 37 (Ch. D.), applying *Racal*, supra note 34.

NOTIFYING THE CROWN OF AN APPLICATION FOR RECTIFICATION[103]

Should the Crown be concerned about applications for rectification? It was not a party to the original agreement; therefore, there is no reason that it should be a party to the application to rectify a written instrument to make it conform to the original agreement. Even in the more modern form of rectification one can rightly say that the Crown was not a party to the original transaction; there is no reason that it should have an interest in an application to rectify that transaction to make it achieve the parties' intentions. There is no rule that the Crown's interest in a transaction somehow crystallizes at the moment the documents are executed.

That said, in some cases taxpayers have notified the Crown of the application to rectify. In *Snow White*, the applicant notified the Crown because counsel for Snow White had previously agreed with the Crown to do so. The court allowed the Crown, through its counsel, to be present in court and, without being a party, to make representations as to whether the court had all the relevant facts necessary to decide the case. The court said that notification was "appropriate"; it did not say that it was mandatory. The court's statement in *Snow White* may be contrasted with that in *CI Fees Trust*,[104] where the court said that notice had been served on the Crown as a matter of courtesy. In that case, the court allowed the Crown to make submissions on the court's jurisdiction to hear the case but not on the merits of the rectification application. In *Juliar*, the Crown was actually made a party to the application; I understand that this was done to ensure that the decision was binding on the Crown for tax purposes.

In *Prospera*, the court accepted the applicant's argument that no notice was required:

> The petition is brought without notice. I have been told there are no parties who will be adversely affected by the order sought. I have been told Canada Customs and Revenue Agency is not currently a creditor of the petitioner. I am told that Canada Customs and Revenue Agency's interest will not be affected other than losing an unexpected windfall by the orders sought; nor will Canada Customs and Revenue Agency become a creditor if the petition is denied.[105] I am told that this court need

103 Both the minister of national revenue and the attorney general for Canada represent the Crown. Because of the wording of the provincial rules of court, it is usually the attorney general for Canada who is named as a formal respondent. However, when the applicant simply wants to notify the CRA of the application without joining the Crown as a formal party, usually he will notify the Department of Justice as counsel for the minister. I will refer to the Crown in general to encompass both the minister and the attorney general.

104 Supra note 22.

105 Apparently this means that even if the petition was denied, Prospera would not owe any tax for the particular year in issue; therefore, the minister was not interested in the petition. However, the point of the petition was to achieve rectification so as to reduce tax payable in future years by $6 million. In my view, therefore, the case is authority for saying that notice does not have to be given to the minister even when tax may be saved as a result of the application.

not be concerned with the interests of Canada Customs and Revenue Agency on the hearing of this petition.[106]

There are two issues here: one is procedural and one is tactical. The procedural issue is really one of standing: Does the Crown have automatic standing at an application for rectification that is undertaken for tax purposes? In my view, it does not. The Crown has no vested interest in the tax that may arise from the unrectified instrument.[107] For tax purposes, the agreement is relevant; the instrument by which that agreement is recorded is not. The tax courts have held that notice to the Crown is not required for a provincial court's rectification order to be applied for tax purposes.[108]

For tactical purposes, however, one may want to invite the Crown to the rectification application, as the applicant in *Snow White* did. If the Crown appears, whether or not as a formal party, it would seem that it will be bound by the decision as a matter of res judicata.[109] For another, notice may permit the Crown to decide in advance that rectification is warranted in the circumstances, virtually ensuring that no appeal to the Tax Court will be required to decide the tax issue and that the provincial court will grant rectification.

But there are also reasons for not notifying the Crown. The most obvious situation is one in which the parties have found the tax error themselves. In this situation, one might want to rectify the instrument, not notify the Crown, and hope that the Crown never audits the taxpayer. If the Crown does audit, then the taxpayer has a ready-made answer to the audit. Or if the application for rectification

---

106 *Prospera*, supra note 5, at paragraph 2.

107 *Attorney General of Canada v. Gestion R.F. & Fils Inc.* (September 26, 2001), docket no. 500-05-061690-002 (Que. SC).

108 *Dale et al. v. The Queen*, 97 DTC 5252 (FCA); and *Sussex Square Apartments*, supra note 100. In both cases, rectification was obtained without notice to the minister and the rectification order was applied by the Federal Court of Appeal for tax purposes. In *Dunfield v. The Queen*, [2001] 4 CTC 2518, at paragraph 23 (TCC), the court said, "It is obvious from *Dale* and *Sussex Square Apartments v. R.*, 2000 D.T.C. 6548 (Fed. C.A.), that courts with jurisdiction in federal tax matters have given effect to such rectification orders made by provincial courts." There is no requirement in this passage that notice of the rectification application be given to the minister.

In *Dale*, it was held that the tax courts must apply a rectification order, even if it is obtained on an ex parte basis, because to do otherwise would be to allow the Crown to launch a collateral attack on an otherwise valid court order. The court relied on *Wilson v. The Queen*, [1983] 2 SCR 594. *Wilson* was cited with approval on this point in *Toronto (City) v. CUPE, Local 79*, [2003] 3 SCR 77, at paragraph 33.

109 See *Wakefield Corporation v. Cooke*, [1904] AC 31 (HL), cited in Hodge M. Malek, ed., *Phipson on Evidence*, 16th ed. (London: Sweet & Maxwell, 2005), and *Saskatoon Credit Union, etc.* (1988), 22 BCLR (2d) 89, at 97 (SC), where the court held that issue estoppel applies to persons who participated or *could have* participated in an earlier case. This rule is subject to an overriding rule that issue estoppel does not apply when there are "special circumstances" which make it unjust that it should apply: *Clayton v. Garrett (Guardian ad litem of)*, [1995] 7 WWR 109 (BCCA). However, there does not appear to be any special circumstances for the Crown if it is served with notice of the application and is allowed to be heard.

is not certain to succeed, one may not want the Crown in court arguing that rectification should not be granted.[110]

THE DEPARTMENT OF JUSTICE'S AND THE CRA'S POSITIONS ON RECTIFICATION

Following *Juliar*, a Department of Justice rectification committee was established. Rectification applications of which the committee is aware are discussed on a regular basis, and the committee decides whether to oppose the applications. I understand from a member of the committee that the committee does not keep statistics on the types of applications considered or the percentage of applications agreed to or opposed.

The procedures for using this committee are as follows:

1. A letter should be sent to the Director of the Tax Services Office advising rectification will be sought and asking to have the Notice of Objection, if one, held in abeyance. If no Notice of Objection, you should consider filing one.
2. The CRA officer handling this objection, if one, should be informed that rectification will be sought.
3. CRA should be named as a party in the Motion.
4. Justice on behalf of CRA should be served with the Notice of Motion.
5. Justice should be advised with whom at CRA you have been dealing.
6. Justice on behalf of CRA should be provided with the affidavits and materials upon which the Applicant is relying for the motion respecting the alleged error and the original intent of the parties.
7. Justice on behalf of CRA should be advised of the legal and factual basis for the motion. We may ask for more evidence to show the original intention of the parties.
8. If other parties will be affected by the motion and potential change of legal documents or relationships, we will want to know if these third parties are aware of the motion, aware of any effect it will have on their legal rights and whether they oppose the motion.
9. Justice has a monthly rectification teleconference call in which the pending rectification motions are discussed. We will ask that you delay the motion until we have had a chance to discuss it with the committee and give advice to CRA. We may seek more information from the Applicant after the first teleconference call which we will need to discuss with the committee the next month.
10. Judge Bowman decided that without a formal court ordered rectification after the fact changes to legal documents will not be accepted for tax purposes. *Sussex Square Apartments Limited v. The Queen*, 99 DTC 4431.
11. Justice will inform you if CRA intends to oppose the motion.[111]

---

110 As discussed in more detail below, in an ex parte application the applicant has a clear duty to the court to disclose all the arguments for and against the application. Nevertheless, arguments against the application may sound less compelling in the mouth of the applicant's counsel than they do in the minister's.

111 This is the text of a handout presented by two members of the committee from the Department of Justice to the Tax Section of the BC Branch of the Canadian Bar Association on January 19,

At the January 19, 2005 presentation, the Department of Justice stated that one of its primary concerns is set out in point 8 of the list—namely, that the parties applying for rectification may present to the court only those facts that directly affect them; they may not present facts that might affect persons who are one or two steps removed from the parties. For example, suppose that in *Juliar*, prior to the rectification application, the taxpayer had assigned the promissory note to some third party as consideration in a completely separate transaction or had put up the note as security for a loan from a third party. The Crown's concern is that a third party's interests will not be adequately represented at an ex parte application for rectification.

In my view, that concern does not adequately respect the applicant's legal and ethical duty on an ex parte application to make full, true, and plain disclosure of all relevant facts to the court:

> [T]he law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.[112]

Assuming that the applicant's counsel is alive to this duty and that the court is alive to the rules that rectification "must be cautiously watched and jealously exercised"[113] and proved by "convincing proof"—the onus being on the applicant—it seems to me that the department's concern is not as serious as it might

---

2005. For earlier comments from the Department of Justice, see Ian S. MacGregor, "Significant Fiscal Developments from a Justice Perspective," in *Report of Proceedings of the Fifty-Third Tax Conference*, 2001 Conference Report (Toronto: Canadian Tax Foundation, 2002), 6:1-15, at note 32 and accompanying text.

112 *United States of America v. Friedland*, [1996] OJ no. 4399, at paragraph 27 (Gen. Div.). Although this was an injunction case, the general rule applies to all ex parte motions: *McCarthy v. Canadian Red Cross Society* (2001), 8 CPC (5th) 349, at paragraph 19 (Ont. SCJ). See also the Ontario Rules of Civil Procedure, RRO 1990, reg. 194, as amended, section 39.01(6); the rules expressly provide that failure to make full and fair disclosure of "all material facts" is "in itself sufficient ground for setting aside any order" obtained without notice. Note, however, that *Friedland* qualified this duty somewhat: "The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. Ex parte applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the court." Presumably this qualification would not be applied in an applicant's favour as strongly in a rectification application where there was no urgency and the applicant had sufficient time to prepare his or her materials properly.

113 *Whiteside v. Whiteside*, [1950] 1 Ch. 65, at 71 (CA).

otherwise be. This does not mean that a case might not occur in which a third party's interest is not adequately represented at the hearing, but such cases are likely to be rare, and the possibility of their occurring does not seem to warrant a rule that Justice must be notified in every case to protect such possible interests.

The CRA's official policy on rectification is as follows:

> Our general policy is that where the amendments are integral to achieving the original intentions of the parties, the application for rectification likely will not be opposed. However, I would caution you that rectification should not be seen as a substitute for professional insurance. The threshold for obtaining a rectification order is quite high. The court will have to be persuaded that the documentation of the transaction in question does not reflect the true and primary intentions of the parties.[114]

Provided that nothing in this passage is intended to restrict rectification to what I have called "classic" cases and that it embraces situations such as those in *Juliar*, *Snow White*, and *Farmer*, where the instruments said exactly what they were supposed to say but did not have the legal or fiscal effects they were intended (or perhaps expected) to have, this seems to be an accurate summary of the law of rectification as it applies to tax matters.

The CRA's position is illustrated in the *GT Group Telecom* case.[115] The parties entered into a loss transaction deal, but the actual steps were out of sequence with the steps necessary to preserve and use the tax losses. On the application for rectification, the CRA sent a letter to the court stating that it did not oppose the application. The court noted that

> [t]he non-opposition of the CCRA would to my view demonstrate that it appreciates that it recognizes that it would be inappropriate for it to claim a windfall benefit which arose through the inadvertent mistake and the unintended sequencing. The CCRA and the Director have been very helpful in the resolution of this problem.[116]

The CRA's non-opposition and helpfulness is particularly interesting because the mistake was not in the reducing of a common intention to writing but in the mechanism that was used to effect the loss transfer. The court relied on *Juliar* to permit rectification in these circumstances by a mechanism different from that which was originally intended; the CRA's position, to my mind, indicates as clearly as anything could its acceptance of the expanded notion of rectification seen in *Juliar*.

---

114 *Income Tax Technical News* no. 22, January 11, 2002.

115 Supra note 89.

116 Ibid., at paragraph 3.

ADDENDUM

At the Canadian Tax Foundation's annual conference, held on September 25-27, 2005, Douglas S. Ewens and Paul Lynch presented a paper on rectification. Mr. Lynch is the director general of the Tax and Charities Appeals Directorate of the Appeals Branch of the CRA. Mr. Lynch's main point was that the CRA accepts rectification when it is "merely" a means of implementing the original tax plan gone awry, but not when it is designed to create retroactively a tax plan not contemplated at the time the transaction was implemented. He also indicated that the CRA felt that *Juliar* was in the former camp. While superficially this is a helpful line to draw, in my view it is a difficult distinction to implement in practice and is not in line with the case law as discussed in the body of this article.