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COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., CATZMAN J.A. AND GILLESE J. (*ad hoc*)

B E T W E E N :

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THE PUBLIC SERVICE
ALLIANCE OF CANADA

) John C. Murray and Jay Shore, for
) the appellant/respondent by cross-
) appeal

Applicant)
(Respondent in)

appeal)

)

- and -

)

)

NAV CANADA

) David Yazbeck, for the
) respondent/appellant by cross-
appeal

Respondent)
(Appellant))
)

) Heard: March 4, 2002

On appeal from the judgment of the Divisional Court (Justices James Southey, Jeffrey Flinn and Lawrence Kozak JJ.) dated February 8, 2001 and reported at [2001] O.J. No. 692.

CATZMAN J.A.:

The appeal

[1] A labour arbitrator hearing a union grievance granted the employer's request for rectification of the collective agreement to correct certain scheduled hourly wage rates for the calculation of retroactive pay. He dismissed the grievance.

[2] The union applied for judicial review. The Divisional Court set aside the award on the ground that the arbitrator exceeded his jurisdiction in rectifying the collective agreement. It made that determination on the basis of the decision of this court in *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al.*, [1972] 2 O.R. 793.

[3] The employer was granted leave to appeal to this court from the decision of the Divisional Court. The union cross-appealed, arguing that, even if the arbitrator had jurisdiction to rectify the collective agreement, he erred in doing so.

[4] For the reasons that follow, I would allow the appeal, dismiss the cross-appeal and restore the award of the arbitrator.

The facts

[5] NAV Canada (“the employer”) and the Public Service Alliance of Canada (“the union”) began negotiating a collective agreement in 1997. They reached an agreement in 1998, and the collective agreement was ratified and signed in 1999.

[6] The collective agreement covered various occupational groups and replaced a number of group-specific agreements that expired on different dates. Among the groups covered by the 1999 collective agreement were the General Labour and Trades (“GLT”) employees and the General Services employees (“GS”), whose prior agreements had expired in 1997.

[7] A Memorandum of Settlement in September 1998 recorded the parties’ negotiated agreement on wages. All employees in the bargaining unit were to receive a wage increase of 5% on the day after the expiration of the applicable group-specific collective agreements and a second 5% wage increase effective July 1, 1998. The parties also agreed to a lump sum payment of \$250 payable to all regular employees on July 1, 1999.

[8] Certain terms applying to the GS and GLT occupational groups were also agreed. The weekly hours of work of GS and GLT employees were to be reduced from 40 to 37.5 from the date of signing of the collective agreement. The parties agreed that this reduction in work hours would not adversely affect the employees’ overall level of compensation, and there was to be an increase in these employees’ hourly rates of pay to offset the reduction in weekly work hours. The parties did not come to any explicit agreement on the specific formula by which these terms would be implemented.

[9] The Memorandum of Settlement specified that the agreement comprised the three-part wage increase and “all other terms agreed to during negotiations”, including the terms applying to the GS and GLT occupational groups.

[10] The Memorandum of Settlement was subject to ratification by the union membership. The employer prepared a draft collective agreement that was presented to the union membership for ratification. Appendix A of the draft agreement laid out the pay scales for all employees, including the GS and GLT groups. The pay scales were specified in dollar amounts with no indication of the manner in which they had been calculated. While the collective agreement went through various changes and drafts before it was ultimately ratified and signed, the pay scales for GS and GLT employees in Appendix A remained unchanged.

[11] Upon the signing of the collective agreement, the employer was required to implement the wage increases and to make retroactive payments to its employees. In the process of calculating these retroactive payments, the employer discovered and corrected an error in the pay scales for the GS and GLT occupational groups.

[12] When the employer made retroactive payments to the employees on the basis of the corrected pay scales, the union grieved, arguing that the retroactive payments to the GS and GLT employees should have been made on the basis of the pay scales scheduled in the collective agreement. The employer responded by asking the arbitrator to rectify the collective agreement by replacing the scheduled GS and GLT pay scales with the revised pay scales it had used to calculate the payments.

The award of the arbitrator

[13] The arbitrator granted the employer's request for rectification and dismissed the union's grievance: *Nav Canada and P.S.A.C. (Retroactive Pay) (Re)* (2000), 88 L.A.C. (4th) 334. He reviewed a number of authorities on rectification in the arbitration context and at common law. He acknowledged this court's decision in *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al.* ("Metro Police") but concluded, following a review of case law, arbitral authority and academic commentary, that the "better view" was that an arbitrator has jurisdiction to rectify a collective agreement.

[14] He then turned his attention to the agreement reached in the negotiations between the union and the employer, and made a number of findings, which are set out in the following paragraphs.

[15] He found that the employer and the union agreed to a reduction in hours from 40 to 37.5 for the GL and GS groups on the express condition that this change would not cause any loss of income. He found that to be the extent of the agreement put into words during negotiations in relation to the matters in dispute.

[16] He found that this explicit understanding carried with it certain implicit terms which formed part of the agreement reached at the bargaining table, even though they were not discussed. He found that there was a clear implication that hourly rates of pay would be increased to offset the loss of income which would otherwise result from the reduction in hours, and that there were specific implications for both the amount and timing of the resulting hourly increase. As to amount, each hourly rate of pay would have to be multiplied by 40 over 37.5. Any lesser increase would not achieve the mutual objective of preventing a loss of income. Any greater increase would result in employees having a higher weekly income when working 37.5 hours than they had when working 40 hours.

Such an outcome would be inconsistent with the explicit understanding reached at the table. He found that, although no one said so, both parties must have understood that the reduction in hours would not produce extra income. He found that the agreement also implied that the increase in the hourly rate would take effect at the same time as employees began working 37.5 hours per week. A later effective date would result in a loss of income. An earlier effective date would yield extra income, as employees would continue to work 40 hours weekly while receiving an hourly rate increased by a factor of 40 over 37.5. He found that such a result would be inconsistent with the express agreement, which was not intended to generate additional income.

[17] He summarized his conclusion in these words, at pp. 344-345:

In short, the deal reached at the bargaining table was comprised of explicit and implicit components. The overall bargain struck was that hourly rates would be increased by a factor of 40 over 37.5 effective on the date when employees began working 37.5 hours per week. These agreed terms are not accurately reflected in the “B” and “C” hourly rates contained in the document executed on June 30, 1999. The most reasonable explanation for this discrepancy is that the rates were calculated in error by the employer ... I conclude this is what happened.

and, at pp. 346-347:

In the instant case, the employer made a unilateral mistake at the stage of preparing the formal document. Such a mistake is not a bar to rectification. At the point of signing, the employer wrongly believed the formal document reflected the agreement reached in negotiations. The union either held the same mistaken belief, in which case there was a mutual mistake, or the mistake was unilateral on the part of the employer with the union being aware of the discrepancy. In either scenario, rectification would be appropriate.

[18] On the basis of these findings, the arbitrator granted the employer's request for rectification.

[19] In fairness to the arbitrator, it should be noted that, following *Metro Police*, arbitrators' decisions diverged along two competing paths, one asserting, the other disclaiming, an arbitrator's power to rectify. The arbitrator's expression of the "better view" (see para. 13, above) is taken from Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed. (looseleaf), at para. 2:1440:

More recently, however, arbitrators have expressed the view that there are two divergent and irreconcilable lines of authority in this area, and that in circumstances where a party can show that the rectification will reflect the parties' true intentions, the better view is that the arbitrator should have jurisdiction to rectify.

The decision of the Divisional Court

[20] The union applied to the Divisional Court for judicial review of the arbitrator's award. The decision of that court was written by Southey J.: [2001] O.J. No. 692 (Q.L.). He said, at para. 12:

In my respectful opinion, the arbitrator arrived at a result which may have been preferable from a labour relations standpoint, but which is contrary to the law of this Province. I can see no legitimate ground for distinguishing this case from the decision of the Court of Appeal in the *Metro Police* case, in which it was held that an arbitrator had no jurisdiction to apply the doctrine of rectification.

and concluded, at para. 21:

[21] If the law as declared by Arnup J.A in the *Metro Police* case is to be changed, the change must be brought about by statute or by the decision of a court higher than the Divisional Court.

[21] In the result, the Divisional Court set aside the award and referred the grievance back to the arbitrator with a direction that it be sustained.

An arbitrator's power to rectify

a. Metro Police

[22] As noted, this court addressed the power of an arbitrator to rectify a collective agreement in *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al.*, [1972] 2 O.R. 793. In that case, a number of police inspectors gave notice of their resignation from the Police Association. The employer then refused to deduct Association dues from the pay of these inspectors and to forward the deducted dues to the Association. The Association grieved. On a literal reading of the collective agreement, inspectors were excluded from the dues deduction requirement in the collective agreement. The arbitrator allowed the grievance on three alternative bases, one of which was rectification.

[23] The Association's appeal to this court from an order quashing the arbitrator's award was dismissed. Arnup J.A., who delivered the judgment of the court, said, at p. 801:

In "applying the doctrine of rectification" the arbitrator made two separate and distinct errors:

(i) As a consensual arbitrator he had no power whatever to rectify the collective agreement. If the collective agreement did not represent the true bargain between the parties, the party asserting this to be so could bring an action for rectification, but as Judson, J., said in *Port Arthur Shipbuilding Co. v. Arthurs et al.*, [1969] S.C.R. 85 at p. 96, 70 D.L.R. (2d) 693 at p. 702, the arbitrator "[had] no inherent powers to amend, modify or ignore the collective agreement".

(ii) He ignored an express term of the agreement itself, cl. 17 of which reads:

An Arbitrator appointed under Step 5 of the Grievance Procedure shall not have power to add to, subtract from, alter, modify or amend any part of this Agreement or otherwise make any decision inconsistent with this Agreement.

[24] *Metro Police* was affirmed on other grounds by the Supreme Court of Canada: [1975] 1 S.C.R. 630. Spence J., who dissented, was the only member of that court to consider the issue of rectification. He agreed with this court that rectification was beyond the jurisdiction of the arbitrator. He said, at p. 662:

The arbitrator also purported to rely on a power which he imagined he possessed to rectify the agreement. I agree with the Court of Appeal for Ontario that such exercise of a purported right to rectify is straight in the face of clause 17 of the collective agreement. Had the result which the arbitrator reached been dependent on any rectification of the collective agreement, I would have been of the strong view that the award was beyond the jurisdiction of the arbitrator and therefore a nullity.

[25] *Metro Police* is substantially similar to the present case. Both that case and this involve a grievance arbitrator appointed under a collective agreement. In both, the arbitrator purported to rectify the written terms of the collective agreement to conform to the negotiated agreement between the parties. In both, the collective agreement contained no express power on the arbitrator to rectify it. Indeed, both collective agreements contained language prohibiting the arbitrator from altering, modifying or amending its provisions. Article 16.10 of the collective agreement in the present case provides, in part:

... in no event shall the Arbitrator/Board of Arbitration have the power to change the Collective Agreement or to alter, modify or amend any of its provisions.

[26] Normally, *Metro Police* would govern the disposition of this appeal on the basis of *stare decisis*. But while that principle requires that this court generally follow its own previous decisions, there are a number of well-recognized exceptions. One such exception applies where there have been developments in the jurisprudence that undermine the view taken in the earlier decision; where, by reason of developments in the jurisprudence, the

holding of a case has been “attenuated” by subsequent decisions: *R. v. Bernard*, [1988] 2 S.C.R. 833 at p. 855, *per* Dickson C.J.C. [\[1\]](#) In my view, that exception applies, in the disposition of this appeal, to the decision of this court in *Metro Police*.

b. movement of the law since Metro Police

[27] The three decades that have passed since *Metro Police* was decided have seen a major shift in labour relations law. In a number of cases, the Supreme Court of Canada has expanded the remedial powers of the arbitrator and has recognized the arbitrator’s exclusive jurisdiction to resolve disputes arising out of collective agreements. I turn to a review of these cases.

[28] The starting point in this analysis is *Port Arthur Shipbuilding Co. v. Arthurs et al.*, [1969] S.C.R. 85, on which *Metro Police* relied in its assessment of an arbitrator’s remedial powers. *Port Arthur Shipbuilding* involved three employees who were fired for taking time off work under false pretences for the purpose of engaging in temporary employment elsewhere. The employees grieved their dismissals. The management rights clause of the collective agreement recognized management’s right to “demote, suspend and discharge for proper cause”. The board of arbitration found that there was proper cause to discipline the employees but concluded that the facts did not justify dismissal and substituted a suspension. The Supreme Court held that the board did not have the power to do so. On behalf of the court, Judson J. said, at p. 89, that “[o]nce the board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration”.

[29] *Port Arthur Shipbuilding* exemplifies a narrow approach to an arbitrator’s remedial powers. That narrow approach found expression in

the final paragraph of Judson J.'s reasons in these words, at pp. 95-96:

An arbitration board of the type under consideration has no inherent powers of review similar to those of the Courts. Its only powers are those conferred upon it by the collective agreement and these are usually defined in some detail. It has no inherent powers to amend, modify or ignore the collective agreement. But this is exactly what this board did in this case and it was clearly in error in so doing, and its award should be quashed.

[30] The Supreme Court's approach to the powers of an arbitrator began to shift in *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768. The circumstances in *Heustis* were similar to those in *Port Arthur Shipbuilding*. *Heustis* involved two employees who had been dismissed for assaulting a co-worker. As in *Port Arthur Shipbuilding*, the adjudicator found that the employer had cause to discipline the employees but that dismissal was an overly harsh sanction. Given the similarities between the cases, the adjudicator in *Heustis* felt bound by the decision in *Port Arthur Shipbuilding* and dismissed the employees' grievance on the basis that he had no power to substitute another form of discipline for dismissal. The New Brunswick Supreme Court, Queen's Bench Division, granted an application by the employees to quash the adjudicator's decision. On appeal by the employer, the Appeal Division of that court – applying *Port Arthur Shipbuilding* – reversed and set aside the order quashing the adjudicator's decision.

[31] A further appeal to the Supreme Court of Canada was allowed and the order quashing the decision of the adjudicator was restored. In its reasons, the court signalled a broader approach to the remedial powers of an arbitrator. Dickson J., writing for the court, held that the adjudicator had the power to substitute a lesser penalty for dismissal. He distinguished *Port Arthur Shipbuilding* on the grounds that, in that case, the disciplinary powers of the employer were contained solely in the management rights clause of the agreement and that neither the applicable labour relations

legislation nor the collective agreement indicated that management's authority to discipline would be subject to full review on arbitration. The collective agreement in *Heustis*, by contrast, contained a separate clause providing that "[d]iscipline, suspension, demotion or discharge of any employee shall be for just and sufficient cause".

[32] *Heustis* effectively confined *Port Arthur Shipbuilding* to its own facts and presaged a policy of recognizing broad remedial powers in the arbitration context. Dickson J. said, at p. 781:

There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained. (emphasis added)

[33] In subsequent cases, the Supreme Court continued to recognize expanded powers of labour arbitrators. *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, held that courts have no jurisdiction to entertain damage claims for breach of rights under collective agreements and that such jurisdiction resides exclusively with the arbitrator. Writing for the court, Estey J. recognized that Canadian labour law had moved toward recognizing broad arbitral powers and that "[w]hat is left is an attitude of judicial deference to the arbitration process" (p. 721).

[34] *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 and a companion case, *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, built on this approach. They established that where a dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement, exclusive jurisdiction to deal with that dispute lies with the arbitrator. Regarding the broad powers of the arbitrator to deal

with such disputes, McLachlin J., speaking for the majority in *Weber*, said, at para. 56:

The appellant *Weber* also argues that arbitrators may lack the legal power to consider the issues before them. This concern is answered by the power and duty of arbitrators to apply the law of the land to the disputes before them. To this end, arbitrators may refer to both the common law and statutes: *St. Anne Nackawic; McLeod v. Egan*, [1975] 1 S.C.R. 517. As Denning L.J. put it, “[t]here is not one law for arbitrators and another for the court, but one law for all”: *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.), at p. 847. This also applies to the *Charter: Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 597.

[35] The Supreme Court has reaffirmed the *Weber* principle of exclusivity and finality of arbitration awards in two recent cases: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, at paras. 22-25, and *Noël v. Société d’énergie de la Baie James* (2001), 202 D.L.R. (4th) 1, at para. 62.

[36] Since 1995, our court has applied *Weber* in a number of cases that confirm the exclusive jurisdiction of arbitrators in various workplace contexts, including claims for

- disability benefits: *Pilon v. International Minerals & Chemical Corp.* (1996), 31 O.R. (3d) 210; *Ruscetta v. Graham* (1998), 36 C.C.E.L. (2d) 177;
- constructive dismissal: *Chapman v. 3M Canada Inc.* (1997), 30 C.C.E.L. (2d) 102;
- defamation: *Giorno v. Pappas* (1999), 42 O.R. (3d) 626; *Bhaduria v. Toronto Board of Education* (1999), 173 D.L.R. (4th) 382; *Sloan v. York Region District School Board*, [2000] O.J. No. 2754; and

- interference with contractual relations, intimidation and conspiracy: *Jadwani v. Canada (Attorney General)* (2001), 52 O.R. (3d) 660.

c. the “no alteration” provision in the collective agreement

[37] In *Metro Police*, Arnup J.A. said that the arbitrator had erred when he “ignored an express term of the agreement”, which provided:

An Arbitrator appointed under Step 5 of the Grievance Procedure shall not have power to add to, subtract from, alter, modify or amend any part of this Agreement or otherwise make any decision inconsistent with this Agreement.

The collective agreement in the present case contained, in Art. 16.10, a similar clause, denying to the arbitrator “the power to change the collective agreement or to alter, modify or amend any of its provisions”.

[38] Before us, the union argued that to rectify the written document is to change the collective agreement and to alter its provisions in violation of this clause.

[39] I respectfully disagree. In my view, concomitant with the recognition of the expanded scope of an arbitrator’s jurisdiction is the proposition that, when an arbitrator called upon to adjudicate a dispute arising out of a collective agreement concludes that the proper disposition of the dispute can be addressed only through rectification, a “no alteration” clause will not stand in the way. Rectification operates not to alter the terms of an agreement, but rather to correct a contract which has been mistakenly drawn so as to carry out the common intention of the parties and have the contract reflect their true agreement: *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 28 O.R. (3d) 327, at p. 336.

[40] In this connection, I adopt the comments of Arbitrator Arthurs in *Re Alcan Canada Products Ltd. and Metal Foil Workers' Union, Local 1663* (1982), 5 L.A.C. (3d) 1, at p. 11:

I turn first to the contractual language relied upon by both Hughes J. and Arnup J.A. [in *Metro Police*]. This language corresponds to art. 9.01 of the instant agreement which forbids the arbitrator to “alter, modify or amend or supplement this agreement”. But this does not automatically dispose of the matter. No arbitrator, operating under a conventional mandate, would presume to do any of these things, whether the agreement contains such a prohibition or not. What any arbitrator does – what I must do – is to discover what is indeed “this Agreement”, and then to give effect to it according to its terms.

...

If it [the agreement] is all of the words appearing on the face of the document together with additional language which the parties intended should appear there, but omitted in error, then I would be giving effect to “the agreement” and not “altering, modifying, amending or supplementing” it.

[41] The arbitrator in the present case did not contravene Article 16.10 when he rectified the erroneous pay scales in the scheduled appendix to the collective agreement.

d. summary and conclusion

[42] In my respectful opinion, the authority of *Metro Police* has been attenuated by the Supreme Court’s subsequent pronouncements on the scope of the powers of arbitrators. *Metro Police* was premised upon the restrictive approach to an arbitrator’s remedial powers appearing in *Port Arthur Shipbuilding*, which was confined to its facts by *Heustis*. More recent decisions of that court have concluded that arbitrators have exclusive jurisdiction to resolve disputes arising under a collective agreement and that, in resolving those disputes, arbitrators have the power and duty to

apply “the law of the land”, both jurisprudential and statutory. One of the elements of the law of the land is the power to grant the remedy of rectification, and, in my view, the jurisprudence has now advanced to the point where arbitrators have the power to grant that remedy in adjudicating disputes arising out of a collective agreement. I would allow the appeal.

Rectification in the present case

[43] By way of cross-appeal, the union argued that even if an arbitrator has jurisdiction to grant the remedy of rectification, this was not an appropriate case in which to do so. In its submission, the evidence was insufficient to warrant rectification of the collective agreement.

[44] The Supreme Court of Canada has recently had occasion to consider the equitable remedy of rectification in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] S.C.J. No. 20 (“*Performance Industries*”). The majority judgment was delivered by Binnie J., who observed that the remedy is available not only for mutual mistake but also for unilateral mistake, where certain defined requirements are satisfied. He said, at para. 31:

Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct “equivalent to fraud”. The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met.

[45] The preconditions for rectification are not easy to meet. They are designed to ensure that the remedy does not become an escape route for contracting parties seeking to get out of improvident bargains. Thus, *Performance Industries* lays down four “high hurdles” that must be overcome. The party seeking rectification must:

- show the existence and content of the inconsistent prior oral agreement

(para. 37);

- show that the written document does not correspond with the prior oral agreement and that permitting the other party to take advantage of the mistake in the written document would be fraud or equivalent to fraud. Equity acts on the conscience of a party who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed (paras. 38 and 39);
- show the precise form in which the written instrument can be made to express the prior intention. The equitable jurisdiction to rectify does not permit speculation about the parties' unexpressed intentions but is limited to putting into words that, and only that, which the parties had already agreed to (para. 40); and
- establish all of these requirements on a standard of convincing proof (para. 41).

[46] In the present case, the arbitrator made all the factual findings necessary to fulfill these conditions.

[47] With respect to the first requirement, he found that the parties reached an oral agreement at the bargaining table before the written agreement was drafted. That agreement was that hourly rates would be increased by a factor of 40 over 37.5 effective on the date when employees began working 37.5 hours per week.

[48] With respect to the second requirement, the arbitrator found that the pay scales as written in the collective agreement mistakenly made a pay increase intended to offset a reduction in work hours retroactive over a period when the reduced work hours were not in effect. In this respect, the written document is clearly inconsistent with the oral agreement as stated by the arbitrator. The union seeks to benefit from a mechanical mistake that went undetected until after the signing of the collective agreement. It would be unfair to permit the union to take advantage of the mistake in this way.

[49] With respect to the third requirement, the arbitrator determined the precise form in which the written agreement could be made to express the parties' prior oral agreement. He did so by adopting the revised pay scales put forward by the employer. Much was made in argument of the fact that neither these pay scales nor the set of formulae upon which they were based were presented to the union during negotiations. That fact does not assist the union because, as the arbitrator found, the parties had reached an oral agreement in their negotiations and the revised pay scales merely convert that agreement into numerical terms. In so finding, the arbitrator was not giving effect to "unexpressed intentions" but, on the contrary, was giving effect to the prior agreement that he found as a fact to exist.

[50] I turn to the fourth requirement. The arbitrator's findings establish that the parties had a prior oral agreement and the content of that oral agreement; they demonstrate that the prior agreement was inconsistent with the written document; they show that permitting the union to take advantage of the mistake in the written agreement would fall within the broad category of equitable fraud or constructive fraud; and they establish precisely how the document should be rectified to reflect that prior agreement. His reasoning was clear and supported by the evidence. Although he did not advert to the standard of proof he was applying, his findings are couched in terms that meet the standard of convincing proof described in *Performance Industries*.

[51] The arbitrator did not err in granting the remedy of rectification to the circumstances of this case as he found them and as he was, on the evidence, entitled to find them. I would dismiss the cross-appeal.

Disposition

[52] I would allow the appeal, dismiss the cross-appeal, set aside the order of the Divisional Court and reinstate the award of the arbitrator. The

appellant is entitled to its costs in the Divisional Court and in this court. I invite counsel to make brief written submissions with respect to the amount of such costs.

Released: APR 19 2002

RRM

Signed: "M.A. Catzman J.A."

"I agree R.R. McMurtry
C.J.O."

"I agree E.E. Gillese
J.A."

[\[1\]](#) While Dickson C.J.C. was writing in dissent, the proposition referred to has subsequently been cited with approval by the Supreme Court of Canada in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353 and *R. v. Hynes*, 2001 SCC 82, at para. 22, and by this court in *R. v. Jenkins* (1996), 29 O.R. (3d) 30, at p. 47.