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## **Rectification of Conservation Easement Agreements on the Basis of a Mistake in Integration: Underlying Principles**

**Written by: Evaristus Oshionebo**

**Case Commented on:** *Nature Conservancy of Canada v Waterton Land Trust Ltd*, [2014 ABQB 303](#)

This case raises a myriad of legal issues covering disparate areas of the law. For the purpose of this post, only those facts relevant to the issue of rectification of the conservation easement agreement will be discussed. Other aspects of the facts can be found in Jonnette Watson Hamilton's earlier post [here](#).

### **Facts**

The Nature Conservancy of Canada (NCC), a private non-profit corporation, owned the Penny Ranch located in the eastern slopes of the Rocky Mountain. The ranch is strategically important for the movement of wildlife in Alberta as it is within the migratory corridors of several species of wildlife. Thus the NCC was interested in preserving the ranch as a migratory corridor for wildlife.

Once it became apparent to the NCC that it might soon be selling the Penny Ranch, the NCC decided to register a conservation easement on its title to the land. A conservation easement is a written agreement between a registered owner of land and a conservation organization or government agency designed to facilitate the protection, conservation and enhancement of the environment. See *Alberta Land Stewardship Act*, SA 2009, c A-26.8, s. 29. The NCC intended that the terms of the conservation easement would later be revised to suit the purchaser of the ranch, provided that any such revision did not compromise the NCC's ability to conserve the ranch.

The NCC believed that, as owner of the Penny Ranch, it could not hold a conservation easement on the ranch in its own name. Thus, the NCC enlisted the assistance of the Alberta Conservation Association (ACA), a charitable organization dedicated to the conservation of nature. The ACA agreed to hold a placeholder conservation easement with regard to the Penny Ranch. On May 28, 2003, the NCC (as grantor) and the ACA (as grantee) entered into a conservation easement agreement regarding the Penny Ranch. The conservation easement agreement was duly registered on the NCC's title to the ranch. The NCC and the ACA understood that should the

NCC sell the ranch to a third party in the future, the ACA would transfer or assign their rights under the conservation easement agreement to the NCC.

The conservation easement agreement contained a number of restrictions on use of the Penny Ranch including restrictions on fencing of the ranch. The agreement provided in part that:

The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements (Facilities) located on the Property as of the date of this easement. The Facilities are to be maintained, replaced or repaired, each at its original size and in its same location. If any or all of such Facilities are removed or destroyed, the Grantor may replace them with similar structures of the same size in the same location.

In 2003, the NCC decided to sell the Penny Ranch subject to a conservation easement to ensure that the land is conserved in perpetuity. To this end, the NCC approached the Defendant, Thomas Olson, to purchase the ranch. Mr. Olson, an avid conservationist, operated bison ranches in Western Canada. Olson was interested in purchasing the Penny Ranch because he thought it would be suitable for his bison ranching business.

The NCC's Director of Land Conservation, Margaret Green, negotiated the sale of the Penny Ranch on behalf of the NCC. Green had the full authority of the NCC to negotiate and close the sale of the ranch. The negotiations between Olson and Green were amicable and constructive given that both the NCC and Olson were mutually interested in the conservation of nature. In the end, Green and Olson agreed orally on the terms of sale and purchase of the ranch. They also agreed orally to amend the conservation easement agreement previously registered on the NCC's title to the ranch. Olson testified that, in order to cater to his bison ranching business, the parties orally agreed on specific amendments to the conservation easement agreement including the fence height restrictions. This oral agreement is referred to by the court as the "Agreed Fence Height Restriction".

Olson then instructed his solicitor to prepare a formal offer to purchase the property in accordance with the terms of his oral agreement with Green. Olson's solicitor prepared and sent the Offer to Purchase to the NCC. Attached to and forming part of the Offer to Purchase was a document purportedly containing the amendments which Green and Olson had agreed to make to the conservation easement agreement. However, due to an error on the part of Olson's solicitor, this document (referred to by the court as the 'Conservation Easement Amending Agreement') did not correctly reflect the amendments orally agreed to between Olson and Green. Rather, the document included the fencing restrictions (particularly fence height restriction) in the initial conservation easement agreement. More specifically, the document contained the following provisions:

Property Management Principles

8. Section 1.01 of Schedule B of the Agreement is hereby deleted and replaced with the following:

.....

1.1 The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements located on the Property as of the date of this easement. The fences and roads are to be maintained, replaced or repaired, each at its original size and in its same location. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the

existing 5 acre home site. Any building construction shall require the prior notice to the Grantee.

(Emphasis added by the court)

The ‘Conservation Easement Amending Agreement’ was to be entered into between the NCC, as owner of the Penny Ranch and grantor of the initial conservation easement, and the ACA as grantee of the initial conservation easement. However, the terms of the ‘Conservation Easement Amending Agreement’ were determined by the NCC and Olson as part of the sale and purchase of the Penny Ranch.

The Offer to Purchase, along with the documents attached to it, was accepted by the NCC and the sale of the Penny Ranch to Olson was closed on the basis of the terms of the Offer to Purchase. Subsequently, the NCC and the ACA executed the ‘Conservation Easement Amending Agreement’.

Soon after purchasing the Penny Ranch, Olson decided to replace the fencing on the perimeter of the ranch with a new fence. In September 2004, Olson commenced construction of a new fence which he believed would be more effective in restraining and keeping his bison. The NCC received several phone calls from neighbouring landowners complaining about the new fence. As a result the NCC asked Olson to change the fence. The NCC took the view that the height of the new fence breached the terms of the Conservation Easement Amending Agreement which, the NCC alleged, is the document attached to Olson’s Offer to Purchase the ranch. The NCC also believed that the new fence would hinder wildlife migration.

The NCC brought this action against Olson seeking enforcement of the terms of the Conservation Easement Amending Agreement. The NCC sought an order compelling Olson to modify his new fence. Olson counter-claimed against the NCC for an order rectifying the Conservation Easement Amending Agreement so that it accords with the oral agreement reached by Olson and the NCC. Olson contended that, in the course of drafting the Offer to Purchase, there was a mistake in integrating the terms of the Conservation Easement Amending Agreement.

In September 2005, the NCC and the ACA signed an assignment agreement under which the ACA transferred their rights under conservation easement agreement to the NCC, as originally contemplated by the parties.

## **The Decision**

### ***Terms of the Oral Agreement***

The Court of Queen’s Bench (Justice P.R. Jeffrey) accepted Olson’s testimony regarding the oral agreement he reached with the NCC, finding in the process that “Olson’s recollection and testimony on these negotiations was both clear and credible” (para 109). The court held that Olson and the NCC orally agreed on the sort of fencing that was necessary for the adequate containment of bison on the Penny Ranch. In the words of the court,

[114] I find that the NCC regarded Olson’s proposed changes to the Initial ACA CE in respect of fencing acceptable. I find that Green on behalf of the NCC readily agreed with Olson that his desired changes to the Initial Fence Height Restriction would get included

in the amendment to the Initial ACA CE and, thereby, become a part of the final NCC conservation easement.

The court concluded (at paras 126 & 327) that the parties had an oral agreement (characterized by the court as the “Agreed Fence Height Restriction”) as follows:

The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements located on the Property. If doing so with fences or roads, they are to be maintained, replaced or repaired at or near the existing ones. The Grantor may not build fences or roads in areas where none exists without the Grantee’s permission. The building of wildlife-proof fences is not permitted, except in localized areas as needed to control or prevent wildlife damage to haystacks, stored forage or domestic gardens. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the existing 5 acre home site. Any building construction shall require the prior notice to the Grantee.

The court held further that this oral agreement, that is, the “Agreed Fence Height Restriction”, did not preclude Olson from constructing the new fence.

Although there is no documentary evidence indicating the precise terms of the oral agreement that the parties reached on fencing of the Penny Ranch, there is strong circumstantial evidence indicating that the parties did reach an oral agreement on fencing of the property. Circumstantial evidence also points to the fact that the parties agreed that the fence height restriction in the initial conservation easement agreement would not govern Olson’s purchase and use of the ranch. For example, the NCC was aware in the course of negotiations that Olson intended to use the property for his bison ranching business. They were also aware that the fence height restriction in the initial conservation easement agreement was a potential deal breaker for Olson because the restriction would render the Penny Ranch unsuitable for bison ranching (paras 111-113). As the court held (at para 111),

... (1) absent certainty on the ability to install adequate fencing for bison ranching on the Property, Olson would not have proceeded with the purchase of the Penny Ranch; and (2) if the NCC had any concerns with Olson’s wishes on perimeter fencing, Green would have raised them and remembered at trial any ensuing discussions, because of their criticality to Olson’s purpose for acquiring the Property. They would have been every bit as, if not more, memorable as their discussions on additional buildings.

Further circumstantial evidence is the fact that Olson’s solicitor, pursuant to Olson’s instructions, sent a revised and modified version of the conservation easement agreement to the NCC, wherein Olson’s solicitor deleted the phrase “each at its original size and in its same location” (para 125). This phrase formed an integral part of the initial conservation easement agreement between the NCC and the ACA. Olson’s solicitor apparently deleted the phrase from the agreement in order to ensure that it accorded with the parties’ prior oral agreement on fencing.

Moreover, the NCC’s conduct prior to and after the sale of the ranch to Olson shows that the height of the fence was not a matter of particular concern to the NCC at the time of sale of the ranch to Olson. For example, the NCC did not include the phrase “at its original size and in its same location” in either the Grazing Lease Agreements it signed with other parties prior to the sale to Olson or its grazing lease with Olson. In addition, the NCC’s Grazing Plan for the Penny

Ranch was silent on fencing, while the Penny Ranch Baseline Report prepared by an independent expert on behalf of the NCC did not address the matter.

In the face of these documents, it “is simply too implausible” that the parties would have intended the fence height restriction in the initial conservation easement agreement to govern the sale of the property to Olson. According to the court (at para 330), “[t]he approaches to fencing in these contemporaneous documents are also further evidence that fence size was not on the NCC’s radar screen” at the time the property was sold to Olson.

Unfortunately, the oral agreement did not get correctly reflected in the Conservation Easement Amending Agreement that the parties signed (para 120).

### ***Should the Conservation Easement Amending Agreement be Rectified?***

Having found that the parties’ oral agreement was not correctly reflected in the written Conservation Easement Amending Agreement, the court then proceeded to determine whether the written agreement should be rectified to accord with the prior oral agreement. A mistake in integration of contract may be rectified by the court for the sole purpose of restoring the parties to their original agreement (*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 SCR 678 at para 31). However, not all types of mistakes can support rectification of a contract. Rectification is granted only in instances involving mutual mistake and unilateral mistake.

Even then, a party seeking rectification of a contract on the basis of mutual mistake or unilateral mistake must provide “convincing proof” of their case (*Performance Industries* at para 41). The requirement of ‘convincing proof’ imposes a burden of proof higher than the burden required in civil cases which is proof on balance of probabilities. While the ‘convincing proof’ standard falls short of the criminal standard (that is, proof beyond a reasonable doubt), it “goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil ‘more probable than not’ standard” (*Performance Industries* at para 41).

### ***Mutual Mistake***

On the issue of mutual mistake, the court held (at para 345) that “there was a mutual mistake between the parties on the fencing provision”. A mutual mistake occurs where both parties share a mistaken assumption regarding some important matter underlying their contract. In such instances, “the parties reach agreement on the terms of their contract but share an error with respect to some important contextual circumstance that has motivated one or both of the parties to enter the agreement” (John D. McCamus, *The Law of Contracts*, 2<sup>nd</sup> ed (Irwin Law, 2012) at 556).

In the instant case, it appears that both parties had a mistaken assumption that the Conservation Easement Amending Agreement correctly reflected their prior oral agreement. As the court observed (at para 352), “The mistake here was not in the bargain struck between the parties on fencing but in the failure to include correctly in the written agreement that bargain they reached”. The court articulated (at para 334) the requirements for rectification of a contract on the basis of mutual mistake as follows:

The party seeking rectification must establish on a standard of convincing proof:

(i) the existence and nature of a common intention by the parties prior to the making of the document or instrument alleged to be deficient; (ii) that this common intention remained unchanged at the date that the document or instrument was made; and (iii) that the challenged document or instrument, by mistake, does not conform to the parties' prior common intention.

The court held (at para 346) that Olson “established the necessary elements to a standard of ‘convincing proof’ for rectification of the contract in a case of mutual mistake.” More specifically, the court held (at para 336) that the parties had a common intention that “the Agreed Fence Height Restriction be the fencing provision due to Olson’s requirements for containing bison on the Property”; that this common intention was unchanged at the date the agreement was executed; and that the challenged document, that is, the Conservation Easement Amending Agreement “contains a mistake and does not conform to the parties’ intentions and prior oral agreement that the applicable fencing provision be the Agreed Fence Height Restriction” (paras 338-339).

The subsequent conduct of the parties corroborates and supports the conclusion that all three elements required to rectify a contract on the basis of mutual mistake are established in this case. Such conduct includes the fact that subsequent leases did not contain fence height restrictions, as well as the fact that, soon after purchasing the property and prior to discovering the mistake in integration of the oral agreement, Olson began the construction of a new fence “as permitted by the Agreed Fence Height Restriction”, that is, the oral agreement (at para 342).

Moreover, the parties had a common understanding of Olson’s purpose for acquiring the ranch (para 345). As the court observed (at para 340), Olson would never have agreed to the inclusion of the fence height restriction in the Conservation Easement Amending Agreement because “it would have precluded their running wild bison on the Property.” Thus the fence height restriction urged by the NCC is not only “contrary to the evidence”, but it also “defies logic for a wild bison ranch”.

Ultimately, the court granted an order rectifying the Conservation Easement Amending Agreement on the basis of mutual mistake.

### ***Unilateral Mistake***

In the alternative, the court considered whether the agreement should be rectified on the basis of unilateral mistake. A unilateral mistake occurs where one party is mistaken as to a fundamental matter underlying a contract and the non-mistaken party is aware of the mistake made by the mistaken party. (See, for example, *Glasner v. Royal Lepage Real Estate Services Ltd.*, 1992 CanLII 975 (BCSC)).

Numerous “high hurdles” stand in the way of a party seeking rectification of a contract on the basis of unilateral mistake (*Performance Industries* at paras 35-41). A contract induced by unilateral mistake may be rectified by the court if the party seeking rectification proves:

1. the existence of a prior oral agreement with definite and ascertainable terms;
2. that the written document does not correspond with the prior oral agreement (that is, that the terms agreed to orally were not written down properly);
3. that at the time of execution of the contract the defendant either knew or ought to have known of the mistake in reducing the oral terms to writing and the plaintiff did not. That

is, that the defendant's attempt to rely on the erroneous written document amounts to "fraud or the equivalent of fraud";

4. their case on the basis of 'convincing proof'

(*Performance Industries* at paras 31, 35-41).

Flowing from these 'high hurdles', a party seeking rectification of a contract on the basis of unilateral mistake bears the obligation to show the 'precise form' in which the written agreement can be made to conform to the parties' prior oral agreement (*Performance Industries* at para 40). Applying these principles to the facts, the court held (at para 349) that Olson convincingly established "the existence and content of a prior oral agreement between the parties on the Agreed Fence Height Restriction, which is inconsistent with the Replacement Fence Height Restriction actually contained in the written agreement". Furthermore, the court held (at para 354) that the NCC either knew or ought to have known of the mistake in reducing the oral terms to writing. This is so because the NCC knew that Olson's intended uses for the Property "depended on his ability to contain wild bison within its boundaries" (para 354). Thus, had the NCC reviewed the Conservation Easement Amending Agreement they "would have recognized the mistake in it" (para 354). Finally, the court held (at para 355) that, the NCC's attempt to rely on the erroneous written document amounts to 'fraud or the equivalent of fraud'. Thus, while this transaction fell short of deceit, "it would be unconscionable for the NCC to avail itself of the advantage obtained" through the erroneous Conservation Easement Amending Agreement. In the end, the court held that the Conservation Easement Amending Agreement should be rectified on the basis of unilateral mistake.

## Commentary

The order of rectification granted by the court would appear generous but it is supportable on the facts. There is no doubt that the parties agreed orally to amend or modify the fence height restriction in the initial conservation easement agreement. This conclusion is supported by the subsequent conduct of the parties, particularly the post-sale grazing lease which did not contain fence height restrictions. Moreover, Olson would not have purchased the property if the NCC had insisted on the terms of the initial conservation easement agreement as the basis for the sale and purchase of the property.

The problem, however, is that the court's description of the precise terms of the oral agreement appears to be more elaborate than the terms urged by Olson at trial. Olson argued in his closing brief that the parties agreed orally on fencing as follows:

[124] The Grantor may maintain, replace and repair the fences, roads, buildings and other improvements located on the Property as of the date of this easement. The fences and roads are to be maintained, replaced or repaired.

Yet the court found the oral agreement to be more elaborate than Olson urged in his pleading (paras 126 & 327). By making a determination which apparently goes beyond Olson's specific pleading, the court opens itself to the criticism that it drafted the terms of the 'Agreed Fence Height Restriction' for the parties. It also makes the court susceptible to a charge of overreaching

its jurisdiction. As the Supreme Court of Canada noted in *Performance Industries* (at para 40), the court’s equitable jurisdiction to rectify a contract “is limited to putting into words that – and only that – which the parties had already orally agreed to.”

It should also be said that the court gave very little consideration to the issue of negligence in this case. In fact, the court alluded fleetingly to the issue of negligence by observing (at para 361) that “Rectification here is not a belated substitute for due diligence; it would not unjustly impose liability on the NCC that ought more properly to be attributed to Olson’s negligence.” Although “due diligence on the part of the plaintiff is not a condition precedent to rectification”, negligence is a factor to be considered by the court in determining whether to rectify a contract (*Performance Industries* at para 66). In the instant case, the court ought to have considered whether Olson’s negligence was of such a nature as to deny him the equitable remedy of rectification.

That being said, Olson’s negligence appears to be extenuated by several factors including the peculiar circumstances surrounding his execution of the purchase agreement. First, Olson’s mistaken assumption was directly attributable to his solicitor to whom he had given clear instructions to ensure that the written agreement accords with the prior oral agreement he reached with the NCC. Second, Olson signed the purchase documents in hurried circumstances primarily because the NCC wanted the documents “right away to convenience its internal needs” (para 121). As the court found,

[121] On August 28, 2003, Olson was departing with his family on vacation, but delayed his departure to get his offer in on the Property to accommodate the NCC. The NCC wanted it right away to convenience its internal needs. Olson came into his office to sign the [Offer to Purchase], with his large family waiting outside in their vehicle. Although the [Offer to Purchase] did not yet accurately reflect the agreement Olson reached with Green on the various remaining amendments they negotiated to the Initial ACA CE, he entrusted the remaining corrections to be made by passing on his comments to his commercial lawyer, .... Olson signed the [Offer to Purchase] in blank and rejoined his family.

In these circumstances, it would be harsh to deny Olson the equitable remedy of rectification simply because Olson and his solicitor were negligent. Moreover, as the court observed (at para 361), despite Olson’s negligence, an order of rectification “would not unjustly impose liability on the NCC”.

Finally, it should be observed that the court also dealt with the question of whether the title to the Penny Ranch should be rectified pursuant to section 190(1) of the *Land Titles Act* (paras 405-431). However, this aspect of the decision is not the focus of this post.

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