Canadian Institute of Resources Law
Institut canadien du droit des ressources

Surrounding Circumstances and Custom: Extrinsic Evidence in the Interpretation of Oil and Gas Industry Agreements in Alberta

by
David E. Hardy
Ballem, McGill, MacInnes and Eden
Calgary

Discussion Paper

1989

Faculty of Law, The University of Calgary, Calgary, Alberta, Canada T2N 1N4. Tel: (403) 220-3200 Fax: (403) 282-6182

CANADIAN INSTITUTE OF RESOURCES LAW

The Canadian Institute of Resources Law was incorporated in 1979 with a mandate to examine the legal aspects of both renewable and non-renewable resources. Its work falls into three interrelated areas: research, education, and publication.

The Institute has engaged in a wide variety of research projects, including studies on oil and gas, mining, forestry, water, electricity, the environment, aboriginal rights, surface rights, and the trade of Canada's natural resources.

The education function of the Institute is pursued by sponsoring conferences and short courses on particular topical aspects of resources law, and through teaching in the Faculty of Law at The University of Calgary.

The major publication of the Institute is its ongoing looseleaf service, the *Canada Energy Law Service*, published in association with Carswell. The results of other Institute research are published as books and discussion papers. Manuscripts submitted by outside authors are considered. The Institute publishes a quarterly newsletter, *Resources*.

The Institute is supported by the Alberta Law Foundation, the Government of Canada, and the private sector. The members of the Board of Directors are appointed by the Faculty of Law at The University of Calgary, the President of The University of Calgary, the Benchers of the Law Society of Alberta, the President of the Canadian Petroleum Law Foundation, and the Dean of Law at The University of Alberta. Additional members of the Board are elected by the appointed Directors.

All enquiries should be addressed to:

The Executive Director
Canadian Institute of Resources Law
Room 3330, Professional Faculties Building,
Block "B" (PF-B 3330)
Faculty of Law
The University of Calgary
Calgary, Alberta, Canada
T2N 1N4

Telephone: (403) 220-3200
Facsimile: (403) 282-6182
Internet: cirl@acs.ucalgary.ca

INSTITUT CANADIEN DU DROIT DES RESSOURCES

L'institut canadien du droit des ressources a été constitué en 1979 et a reçu pour mission d'étudier les aspects juridiques des ressources renouvelables et non renouvelables. Son travail porte sur trois domaines étroitement reliés entre eux, soit la recherche, l'enseignement et les publications.

L'institut a entrepris une vaste gamme de projets de recherche, notamment des études portant sur le pétrole et le gaz, l'exploitation des mines, l'exploitation forestière, les eaux, l'électricité, l'environnement, les droits des autochtones, les droits de surface et le commerce des ressources naturelles du Canada.

L'institut remplit ses fonctions éducatives en commanditant des conférences et des cours de courte durée sur des sujets d'actualité particuliers en droit des ressources et par le truchement de l'enseignement à la Faculté de droit de l'Université de Calgary.

La plus importante publication de l'institut est son service de publication continue à feuilles mobiles intitulé le *Canada Energy Law Service*, publié conjointement avec Carswell. L'institut publie également les résultats d'autres recherches sous forme de livres et de documents d'étude. Les manuscrits soumis par des auteurs de l'extérieur sont également considérés. L'institut publié un bulletin trimestriel intitulé *Resources*.

L'institut reçoit des subventions de la Alberta Law Foundation, du gouvernement du Canada et du secteur privé. Les membres du conseil d'administration sont nommés par la Faculté de droit de l'Université de Calgary, le recteur de l'Université de Calgary, les conseillers de la Law Society of Alberta, le président de la Canadian Petroleum Law Foundation et le doyen de la Faculté de droit de l'Université d'Alberta. D'autres membres sont élus par les membres du conseil nommés.

Toute demande de renseignement doit être adressée au:

Directeur exécutif
Institut canadien du droit des ressources
Room 3330, Professional Faculties Building,
Block "B" (PF-B 3330)
Faculty of Law
The University of Calgary
Calgary, Alberta, Canada
T2N 1N4

Téléphone: (403) 220-3200
Facsimilé: (403) 282-6182
Internet: cirl@acs.ucalgary.ca

FOREWORD

This paper was selected as the 1988 winner of the Institute's annual Essay Prize. The Prize, established in 1983, is awarded to the best student essay in Canadian natural resources law submitted to the Institute. The winning entry was selected from among 10 submissions by this year's selection committee, consisting of Ann Broughton of the Alberta Energy Resources Conservation Board (Chairperson); P. Donald Kennedy, Q.C., a lawyer with the firm Reed Donahue & Company; and Professor Nick Rafferty, Associate Dean of The University of Calgary Faculty of Law. The contribution of the Selection Committee is gratefully acknowledged.

Mr. Hardy was a 1988 graduate of The University of Calgary's Faculty of Law; past prize winners have included studies from the Universities of Toronto and Alberta.

This is only the second time that the winning essay, or a work based upon it, has been published by the Institute. In 1988, the Institute published *Maritime Boundaries and Resource Development: Options for the Beaufort Sea* by Donald Rothwell, which was based on his winning submission to the 1986 competition.

This paper is a thorough, well-researched piece of work that contributes to the existing literature and will be of great interest to practitioners of oil and gas law; the law is stated as it was available to the author on 30 March 1988. Future entrants to the essay competition may aspire to meet the standard of excellence that has been set by Mr. Hardy.

AVANT-PROPOS

La présente étude a gagné en 1988 le prix de dissertation décerné chaque année par l'institut. Ce prix, offert depuis 1983, est attribué à l'étudiant en droit canadien ayant présenté à l'institut la meilleure dissertation en droit des ressources naturelles. La dissertation gagnante a été choisie parmi dix soumissions par le comité de sélection, composé cette année de Ann Broughton, de la Commission chargée de l'économie des ressources énergétiques (Alberta Energy Resources Conservation Board) (présidente), P. Donald Kennedy, c.r., du cabinet d'avocats Reed Donahue & Company et du professeur Nick Rafferty, vice-doyen de la Faculté de droit de l'université de Calgary. Nous remercions sincèrement le comité de sélection pour sa contribution.

M. Hardy a obtenu son diplôme de la Faculté de droit de l'université de Calgary en 1988. Le prix de dissertation a déjà été décerné à des étudiants des universités de Toronto et de l'Alberta.

C'est la deuxième fois seulement que l'institut publie la dissertation gagnante, ou un travail réalisé à partir de cette dissertation. L'institut a publié en 1988 une étude intitulée *Maritime Boundaries and Resources Development: Options for the Beaufort Sea*, par Donald Rothwell, qui était basée sur le document qui lui avait valu le premier prix lors du concours de 1986.

La présente étude est un travail approfondi, bien documenté, qui contribue à la littérature existante et intéressera beaucoup les spécialistes du droit du pétrole et du gaz; la légisation citée est celle dont disposait l'auteur le 30 mars 1988. Les futurs candidats au concours de dissertation peuvent aspirer à égaler le niveau d'excellence établi par M. Hardy.

TABLE OF CONTENTS

I Introduction

The oil and gas industry is built on agreements: lease agreements, support agreements, farmout agreements, operating agreements, unit agreements, processing agreements, sales agreements, and seemingly endless combinations of these agreements. When the inevitable disputes arise as to the rights and obligations of the parties under these agreements, the courts are often called upon to construe the agreements. During such litigation, an issue which often arises is the extent to which evidence outside the agreement can be used as an aid to interpretation. The courts use the parol evidence rule to determine this issue. The essence of the parol evidence rule is that extrinsic evidence "cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract".[1]

Around the turn of the century, Wigmore wrote that "the so-called parol evidence rule is attended with a confusion and an obscurity which make it the most discouraging subject in the whole field of Evidence".[2] Eighty years later Laycraft J.A. (as he then was), in the course of his judgment in a case in which the application of the rule had been a hotly contested issue, stated:[3]

> We must also note that the argument before us, the trial judgment and the 1,100 pages of transcript fairly bristle with references to the parol evidence rule and to objections by counsel based upon it. Some of them are even apt and accurate statements of the rule.

The statements of Wigmore and Laycraft J.A. illustrate that there has long been and continues to be a general confusion about the rule. In reality, this confusion arises not in knowing what the rule is -- the rule itself, as we have seen, can be stated quite simply. Rather, the confusion lies in applying the rule during the interpretation process. This is because a number of exceptions to the parol evidence rule have developed and so the rule will not always apply to exclude extrinsic evidence.[4]

The purpose of this paper is not to criticize the parol evidence rule; there have already been a number of writers who have fulfilled that purpose.[5] Instead, we intend to consider two exceptions to the rule -- the exceptions for surrounding circumstances and custom -- which are argued frequently in oil and gas industry litigation as grounds for the admission of extrinsic evidence to aid in the interpretation of written agreements. While the issue of whether or not evidence is admissible under one or both of these exceptions is rarely the central issue in a case, it often plays a significant role in how a court construes a written agreement. The purpose of this paper, then, is to explain the basis for these two exceptions, discover the principles which have developed regarding their application in

Alberta courts, and describe some of the difficulties which may be encountered in their application.

II Surrounding Circumstances

A. Basis for the Exception

The history of the law of interpretation of written instruments has been described as a "progress from a stiff and superstitious formalism to a flexible rationalism".[6] At least a summary appreciation of this history is needed to understand the exception for surrounding circumstances and the difficulties and confusion which accompany its application.

Until the beginning of the 18th century, a purely literal approach was taken to the interpretation of written instruments. Under this approach, the document "spoke", and if it did not, one could not look to anything else to speak for it.[7] The words of a legal document were thought to possess, inherently, a "fixed and unalterable meaning" which was prescribed by law. Parties who used words intending them to have a meaning other than that prescribed by "law" did so at their peril.[8] No extrinsic evidence was admissible to aid in construction, except in the case of an "equivocation", which existed only when a word was capable of applying to two or more persons or objects.[9]

During the 18th century it became generally accepted that resort to extrinsic evidence could be made not only for an equivocation, but for any real "ambiguity". Finally, during the 19th century, we see more and more judgments expressing the realization that the meaning of words is always governed by their connection to extrinsic things and, therefore, that to find the "true meaning" of the words used in an agreement we must always look to the circumstances surrounding that agreement. We see, then, a shift from the principle that there should be interpretation of words only when it is needed to the principle that words must always be interpreted in light of the circumstances surrounding their use. This shift in the approach is the basis for the "surrounding circumstances" exception to the parol evidence rule.[10]

B. Application of the Exception

A very good description of this less formalistic approach to interpretation is found in the following statement of Ewing J.A., in *Structure Oil and Gas Co. v. Royalite Oil Co.*:[11]

> In *Toronto R. Co. v. Toronto* (1906), 37 S.C.R. 430 at p. 434, Sedgewick J., said: "In construing an instrument in writing, the court is to consider what the facts were in respect to which the instrument was framed, and the object as appearing from the instrument, and taking all these

> together it is to see what is the intention appearing from the language when used with reference to such facts and with such an object, and the function of the court is limited to construing the words employed."
>
> It therefore becomes necessary to examine the facts and circumstances to which the agreement here was intended to apply as well as the object as appearing from the instrument and the intention appearing from the language when used with reference to such facts.

This quotation illustrates the point that the use of surrounding circumstances adds a subjective element to interpretation in the sense that, in order to interpret the agreement, the court tries to place itself in the same factual context that the parties found themselves in when making the agreement. That, however, is as far as the subjective element intrudes into the process, for it is also clear from this quotation that the object of the agreement and the intention of the parties is to be objectively discovered in the words of the agreement construed in light of the surrounding circumstances.

The extent to which some courts adhere to the necessity of construing an agreement in light of the surrounding circumstances is demonstrated by *Re Ulster Petroleums Ltd. and Pan-Alberta Gas Ltd.*[12] In *Re Ulster*, the parties sought to have the court interpret a contractual provision under Rule 410(e) of the Alberta Rules of Court. Rule 410(e) provides a summary procedure for determining an issue where there are no material facts in dispute and the parties' rights depend upon the construction of a written instrument. At issue in the case was whether the applicant was entitled to terminate an agreement for the sale of natural gas to the respondent. This turned on whether or not the respondent had fulfilled an obligation to obtain all necessary permits and approvals by August 26, 1974, "to make feasible" the November 1, 1974, purchase of gas.

The parties submitted documentary and affidavit evidence on the contract. This included the agreement between the parties, the subsequent amendments to the agreement, a description of the respondent's contract to sell the gas it acquired from the applicant to a Quebec distributor, and the regulatory process the respondent had gone through in order to get the permits necessary to remove the gas from Alberta and transport it to eastern Canada. The learned trial judge held that the applicant was entitled to terminate the agreement because, although the last permit required had been issued by the National Energy Board on August 23, 1974, the permit had not come into force until September 11, 1974, when the final condition under which the permit had been issued was fulfilled.

On appeal of the decision, Sinclair J.A., for the court, was of the opinion that the trial judge had not considered the question which was important to the determination of the issue: whether by August 26, 1974, the respondent had the permits and approvals necessary "to make feasible" the gas purchase. He stated:[13]

> Such a determination cannot be carried out abstractly; it has to be made in the light of the circumstances existing at August 26, 1974. In that connection, I would respectfully adopt the words of Lord Wilberforce in *Prenn v. Simmonds*, [1971] 3 All E.R. 237, a unanimous decision of the House of Lords. He said this at pp. 239-40:
>
> > In order for the agreement of 6th July 1960 to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Comrs v. Adamson* [(1877) 2 App. Cas. 743] provides ample warrant for a liberal approach. We must, as he said, enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.
>
> The material before us in this appeal simply does not enable the Court to determine whether, viewed from a business point of view in the light of the surrounding circumstances, the permits and approvals in existence by August 26, 1974, made "feasible" the November 1, 1974, purchase of gas by Pan-Alberta.

Mr. Justice Sinclair concluded that for a proceeding under Rule 410(e) there could be no material facts in dispute, that this case went further in that a material fact did not even appear on the record, and that, therefore, the case could not be decided under Rule 410(e). The rationale for the decision is clearly that, without knowing more about the circumstances surrounding the agreement (the business of selling and purchasing natural gas and the regulatory process), the Court was not prepared to decide whether or not the fact that a permit had been issued subject to conditions made "feasible" the sale of gas to the respondent.

The Scope of Surrounding Circumstances

If the courts are to consider "surrounding circumstances", then it is necessary to determine the scope of the term. The following statement of Lord Wilberforce, in *Reardon Smith Line Ltd. v. Hansen-Tangen*, has been quoted and approved by the courts in Alberta:[14]

> The nature of what is [sic] legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

With this explanation in mind, we will examine a number of cases which illustrate the scope of surrounding circumstances.

One of the cases in which we find surrounding circumstances used in interpretation is *Borys v. C.P.R.*[15] At issue in this case was whether a reservation of "petroleum" to the defendants included the layer of natural gas that existed on top of the layer of oil in the formation and the natural gas in solution in the oil. At all levels the courts recognized that the meaning of "petroleum" might vary according to the circumstances in which it was used. While a technical, chemical, or scientific definition of petroleum would include natural gas because their chemical structures are the same, this was not the meaning adopted by the courts. The courts considered that it was necessary to construe the word in the context that the parties using it were non-scientific persons, and held that to the landowners, business men, and engineers who were in this category at the time the reservation was made, "petroleum" and "natural gas" were two different substances. The layer of natural gas above the oil was therefore not included in the reservation of "petroleum".

The Privy Council decided, however, that the natural gas in solution in the oil while in the formation was "petroleum".[16] This result was grounded in two circumstances. First, the reservation was of "petroleum" *in situ* and it was difficult to believe that ordinary people would have differentiated between the oil and the gas when the gas was dissolved in the oil (while still in the formation); second, the reservation, if it did not include the gas in solution, would be useless to the defendants because, to extract their "petroleum", they would have to interfere with the plaintiff's rights to the gas.[17]

Structure Oil and Gas,[18] which we quoted from at the beginning of this section of the paper, is a case which illustrates both the scope of surrounding circumstances and how the exception affects interpretation. In this case the plaintiff, Structure, sought a declaration that the defendant, Royalite, was obligated to pay for its gas which Royalite sold or used in the future and an accounting for its gas that Royalite had already sold or used. The dispute arose out of a contract between the parties whereby Royalite processed Structure's gas.

Ewing J.A., for the majority, began by stating the principle that to properly interpret an agreement one must first examine the facts and circumstances which formed the background to the agreement and the object and intention disclosed in the words having reference to that background. His Lordship then turned to survey the factual background to the agreement in dispute.

Royalite had for a number of years been selling gas from the Turner Valley field to Canadian Western Natural Gas Light, Heat & Power Co. Ltd. (CWNG). In 1933, Royalite decided to build an absorption plant so that naphtha could be extracted from the gas before it was sold to CWNG. The absorption plant was built with a capacity much in

excess of that which Royalite required to process its own gas and Royalite entered into agreements with the owners of other wells in the field, including Structure, to also process their gas.

The evidence established that at all material times Royalite produced sufficient gas from its own wells to meet its sales commitments with CWNG. As well, the evidence disclosed that the primary purpose of entering into the processing agreements with other well owners was to recover naphtha from the gas and not to get additional gas for sale to CWNG. This was shown by the fact that the agreement gave Structure the right to take all the residue gas which resulted from the processing of its raw gas. This right had never been exercised by Structure. In return for the naphtha extracted from the raw gas, Royalite had to pay Structure a royalty in the amount of 20% of the value of the total naphtha extracted.

The court then turned to the circumstance which, because it was not mentioned in the agreement, was the cause of the dispute: the gas processed in the plant, no matter who owned the well the gas came from, was gathered in one system and entered the plant through a common pipe. The evidence showed that it would be impossible to operate the large plant with the gas from just one well at a time and that it was apparent to everyone whose gas was processed in the plant that the gas must therefore be mixed. This was not denied by Structure, but it claimed that as its gas was mixed with Royalite's gas, a portion of its gas had been sold to CWNG and therefore it was entitled to be paid for that gas.

After reviewing all of the evidence, Ewing J.A. considered that portion of the agreement dealing with the payment for gas. One clause of the agreement, which Ewing J.A. designated as clause "A", stated that Royalite had the right to sell any of Structure's residue gas and, should it do so, would pay Structure two cents per thousand cubic feet for the gas so sold.[19] The next clause in the agreement, which Ewing J.A. designated as clause "B", stated, in part: "It is understood that [Royalite] will continue to first sell its own natural gas and/or residue gas for distribution purposes...."[20]

Interpreting these clauses against the factual background and object of the agreement, Ewing J.A. held that Structure's assertion that Royalite must pay for any of its gas that was sold in the "mixed" gas could not be correct for two reasons. First, if this assertion were correct, then the "right" given in clause "A" to sell Structure's gas ceased to be a right and became a necessity. Second, clause "B" stated that Royalite could "continue to first sell" its own gas and this was an important indicator of the parties' intention: no one suggested that it was possible to separate the mixed gas after it was processed, and Royalite had for a long period sold its own gas to CWNG without exhausting its supply.

Therefore, for clause "B" to have any meaning, the parties must have intended that as long as Royalite had gas in excess of the amount required for CWNG, any gas it sold to CWNG should be deemed to be its gas, notwithstanding that, in reality, it contained a small portion of Structure's gas.

Harvey C.J.A., dissenting, did not agree with this interpretation of clause "B". He said: "It certainly does not say that and to give it a meaning different from the natural meaning, would be violating all proper rules of construction."[21]

Further, in His Lordship's opinion, the surrounding circumstances did not show that it was certain that the parties had intended the clause to have the meaning attributed to it by the majority. The agreement provided that Royalite would pay for only twenty per cent of the naphtha extracted from the gas provided by Structure. This meant that Royalite was obtaining four-fifths of the naphtha extracted from the gas in return for processing the gas. It was therefore not unreasonable that Royalite, who was deriving a substantial income from handling Structure's gas, would be willing to pay Structure for its two to five per cent of the total gas that was sold. Harvey C.J.A. concluded that Royalite operated the plant and that if it chose to mingle and sell the plaintiff's gas with its own, then it was liable to pay for that gas.

The dissent in *Structure Oil and Gas* illustrates a more literal approach to interpretation, which is still preferred by some judges. The fact that one may encounter judicial attitudes which vary from the very liberal to the very literal leads to uncertainty in predicting how a court will interpret a particular clause.[22] We will touch on this issue again when discussing the difficulties in applying the surrounding circumstances exception.

Evidence that is not Surrounding Circumstances

The *Borys* and the *Structure Oil and Gas* cases help to define the scope of surrounding circumstances by illustrating what the courts consider to be within the exception. Cases in which evidence is excluded can also help to define the scope of surrounding circumstances. These cases, however, may promote confusion about the surrounding circumstances exception because they sometimes contain broad statements that "extrinsic evidence" is only admissible as an aid to interpretation when an ambiguity exists in the language to be interpreted.

The difficulty in this area appears to stem from the courts' use of the broad label "extrinsic evidence" to describe this inadmissible evidence. After all, evidence of surrounding circumstances is extrinsic evidence. Yet, as we have seen, such evidence is clearly admissible to aid in interpretation. Therefore, the "extrinsic evidence" which is not

admissible unless an ambiguity exists cannot be evidence of surrounding circumstances. An analysis of the case law reveals that the "extrinsic evidence" the courts are referring to in this context generally falls into three categories: direct evidence of the intention of a party to the agreement, evidence of negotiations leading up to the agreement, and evidence of informal agreements which have been replaced by formal agreements at a later time.

Direct Evidence of Intention

The courts make a distinction between evidence given to create a "factual matrix" from which the court may determine the intention or object of the parties and direct evidence regarding that intention or object.[23] As Lord Wilberforce stated in the *Reardon Smith* case:[24]

> When one speaks of the intention of the parties to the contract, one is speaking objectively -- the parties cannot themselves give direct evidence of what their intention was -- and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

The prohibition against direct evidence of intention also appears to extend to direct evidence of the intention of those individuals who enter into contracts similar to the one being litigated. This is illustrated in *Guaranty Trust Company of Canada v. Hetherington.*[25]

The main issue in *Guaranty Trust* was the nature of the interest created under a royalty trust agreement. As part of its evidence, the plaintiff called three witnesses who had some firsthand knowledge of royalty trust agreements. The first witness was a partner in a company whose agent had induced the defendant landowners' predecessors in title to enter into the royalty trust agreement with the plaintiff. The company had also purchased royalty certificates from the landowners. A part of this witness' evidence was as follows:[26]

> Q. What did you think you were buying? A. Well, it is something that was certainly good forever....
> Q. What significance did the certificate have as far as trading was concerned? A. Well, they were like $100 bills or better. Nobody doubted that they weren't exactly what they said they were.
> Q. Which was what? A. An interest, a gross royalty interest, which is better than the rest of the -- like the 87 1/2 percent that is left. It was an interest in the mineral title itself....
> Q. Well, specifically what did you think you were buying when you got the [royalty trust] certificates? A. Well, if we stopped to think about it, why, we were getting 4 percent of his mineral title.

The second witness was a landowner who had entered into a royalty trust agreement exactly the same as the one in issue and had traded some of his certificates for certificates relating to other lands. He testified:[27]

> Q. Yes. Did you review Schedule "A" of the agreement and the certificate and did you reach any understanding about what role or what place the certificate would have overall in this scheme? A. Yes. I understood the certificate to be a permanent record of ownership of a portion of the petroleum and natural gas production that may accrue on those particular lands.

The third witness, also a landowner who had entered into an identical royalty trust agreement, gave the following evidence:[28]

> Q. At the time that you received or set up the agreement, sir, what did you understand the certificates that you received to represent? A. They represented a portion of their title.
> Q. What title? A. The mineral title....
> Q. Well, were the certificates or the length of time that they were to run limited or restricted in any way? A. They would run forever.

O'Leary J. held that none of this evidence was admissible as evidence of surrounding circumstances. The evidence was not factual in nature, but only expressions of opinion as to the understanding that the witnesses had of the agreements they were involved in.[29]

Like direct evidence of the general intention of parties, direct evidence of what meaning the parties intended a specific word to have is inadmissible. The general rule is that:[30]

> all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected.

An application of this can be seen in the *Borys* case, referred to earlier in this paper, in which the meaning of the word "petroleum" was in issue.[31] The Privy Council makes it clear that in making their decision they did not consider the "view or belief" as to the meaning held by the parties either at the time of the grant or subsequent to that time. It is, as their Lordships say, "the vernacular meaning of the word 'petroleum' and not what opinion was held by the parties to the grant" that is important in making this determination.[32]

Evidence of Negotiations

The second general category of extrinsic evidence which does not fall within the surrounding circumstances exception is evidence of the negotiations between the parties leading up to the written agreement.[33] The general rule here is that:[34]

> verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract....

Lord Wilberforce, in *Prenn v. Simmonds*,[35] tells us that the reason for excluding evidence of negotiations is simply that such evidence would be unhelpful. The rationale appears to be that a position strongly taken at one point in negotiations may be weakened at a later stage to gain ground in another area. Likewise, a concession offered at one stage may be withdrawn later in response to the perceived intransigence of the other party. This rationale is, in effect, simply a restatement of the rationale underlying the parol evidence rule itself, that is, it is the written document which records the consensus of the parties and, therefore, it is that document and not the prior negotiations from which we must construe the parties' intention.

This rule was applied in *Imperial Oil v. Whissell Enterprises*.[36] In that case, the plaintiff applied for summary judgment on an action in debt. The plaintiff's claim was based upon an agreement for the purchase and sale of fuel products. In opposition to the application, the defendant sought admission of an affidavit by its managing director which was intended to "clarify and explain" the terms of the agreement by giving evidence of the negotiations between the parties. The court, following the general rule, held that evidence of negotiations was inadmissible because there was no ambiguity in the language of the agreement.

It is interesting to note that *Imperial Oil*, as a result of the imprecise language used by the court to exclude evidence, is one of those cases which promotes confusion about the surrounding circumstances exception. As a matter of fact, it is potentially more confusing than most, because the court uses the term "surrounding circumstances" instead of the more generic "extrinsic evidence" when making the following statement: "Parol evidence of the surrounding circumstances attending the execution of a contract is admissible to enable the court to interpret the language used when there is an ambiguity...."[37]

Taken literally, this statement implies that evidence of surrounding circumstances is only admissible when an ambiguity exists. As authority, the court cites *Northwestern Mechanical Installations Ltd. v. Yukon Construction Co. Ltd.*[38] The court, in *Northwestern Mechanical*, however, makes it clear that evidence is being excluded because

it is *not* evidence of surrounding circumstances.[39] It is clear from the judgment in *Imperial Oil*, as well, that the evidence in that case is being excluded because it is evidence of negotiations and not because it is evidence of surrounding circumstances (as that term has been authoritatively defined). It is unfortunate, then, that the court in *Imperial Oil* carelessly used the term "surrounding circumstances" when it was really speaking of extrinsic evidence of another type.

Superseded Letter Agreements

The third category of evidence which does not fall within the surrounding circumstances exception is evidence of informal agreements which have been replaced by more formal agreements.[40] In oil and gas industry litigation, the question of the admissibility of this type of evidence usually arises when one of the parties seeks to admit a letter agreement to aid in the interpretation of a more complex, formal agreement which the parties later executed. The case which is accepted as authoritatively setting out the the principles to be applied in such cases is *Home Oil Company Ltd. v. Page Petroleums Ltd.*[41]

At issue in the *Home Oil* case was the interpretation of a royalty provision in a farmout agreement. The parties had entered into a letter agreement which contained a royalty provision and also stated that the letter agreement was to be followed by a "more formal agreement". The parties subsequently did enter into a more formal agreement which contained a royalty provision in different language than the letter agreement. When a dispute arose as to the amount of the royalty to be paid, the plaintiff sought to have the court use the letter agreement as an aid to interpretation of the formal agreement.

Laycraft J. stated that it was a common feature of commercial life for the essential terms of an agreement to be incorporated into a more detailed and formal agreement at a later time. Where this was done, the parol evidence rule applied to exclude the letter agreement and the rights of the parties were entirely governed by the later document.[42] He concluded:[43]

> As evidence extrinsic to [the formal agreement], the letter agreement cannot, however, be considered unless [the formal agreement] is on its face ambiguous or it is needed to ascertain the circumstances in which the agreement was made or the subject matter to which it applied. Moreover, dispute about interpretation or difficulty in determining which interpretation is the correct one does not necessarily mean that the agreement is ambiguous.

The Ambiguity Threshold

When looking at the direct evidence of intention, evidence of negotiations and superseded letter agreement categories of extrinsic evidence, we saw that the threshold for admissibility of these types of evidence is ambiguity in the written document. As the last line of the above quotation from *Home Oil* suggests, the courts have held that there is a distinction between "difficulty" in interpretation and "ambiguity". In Alberta, the threshold of ambiguity has traditionally been set relatively high. In the *St. Lawrence* case, for example, the Appellate Division stated:[44]

> The language used in clause 10 (b), which is the clause that is said to be ambiguous, is plain enough. What the effect of these words is upon the other clauses of the agreement and what rights are thereby conferred upon the appellants, present difficulties, but these are difficulties of interpretation only and as this court has pointed out, difficulty of interpretation is not synonymous with ambiguity. [citations omitted]

Litigants seeking to admit one of these ordinarily inadmissible forms of extrinsic evidence naturally attempt to lower the threshold of "ambiguity". These attempts seem to have borne fruit in some jurisdictions. Sopinka and Lederman, for example, state:[45]

> Although a document may be clear on its face, uncertainties may arise with respect to its interpretation when it is considered in the light of surrounding circumstances, and in such cases explanation by way of extrinsic evidence may be given. Gale C.J.O. in *Leitch Gold Mines Ltd. v. Texas Gulf Sulfur Co.* [(1969), 3 D.L.R. (3d) 161 at 216 (Ont. C.A.)] while finding no material latent ambiguities in applying the language of the agreement in that case, did state the legal principle as follows:
>
> ...
>
> > where the language is equivocal, or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied generally to all cases of doubtful meaning or application....

While the Ontario Court of Appeal may now be willing to equate a difficulty in interpretation with ambiguity, the Alberta Court of Appeal has expressly rejected such a course. In the *Northwestern Mechanical* case,[46] Harradance J.A., for the court, considered the statement, quoted above, from the *Leitch Gold Mines* case. As well, His Lordship considered a statement by the British Columbia Court of Appeal, that "ambiguity means no more than doubt or uncertainty....,"[47] and a judgment of Locke J. of the Supreme Court of Canada,[48] that arguably equated "doubt" with "ambiguity". Harradance J.A. held,"[w]ith deference to those who hold a contrary view, I am of the opinion that difficulty in interpretation is not synonymous with ambiguity."[49]

To support his conclusion, Harradance J.A. cited the *St. Lawrence* decision, which the Appellate Division had made twenty years earlier, and its affirmation by the Supreme

Court of Canada. So, while there seems to be a move to a lower threshold for ambiguity in other jurisdictions, in Alberta the higher threshold for ambiguity still applies.[50]

C. Difficulties in Application

In the preceding section we saw how the courts approach, define, and apply the surrounding circumstances exception to the parol evidence rule. We will now discuss two areas of difficulty encountered in the application of the exception. The first area involves the question of when evidence of surrounding circumstances will lead the court to give words a meaning other than their "plain meaning". The second area involves the more basic problem of deciding whether or not evidence should be characterized as falling within the surrounding circumstances exception.

Departing from the "Plain Meaning"

In *Structure Oil and Gas,*[51] we saw that there are differing judicial attitudes on the role to be played by surrounding circumstances in interpretation. Harvey C.J.A., dissenting in that case, was not prepared to depart from what he described as the "natural meaning" of the words used by the parties, unless the surrounding circumstances showed with certainty that this was not the meaning intended by the parties. The threshold which must be reached before one can depart from the "plain" or "natural" meaning of the words in an agreement is one of the difficulties which is sometimes found in cases dealing with the application of this exception.

The case of *Canadian Delhi Oil Ltd. v. Alminex Ltd.*[52] illustrates just how high this threshold may be set. In *Canadian Delhi,* the plaintiff was one of 30 participants in a unitization agreement. Under that agreement, production from the unit was distributed to the various participants on the basis of the "tract participation" percentage attributed to each participant's producing tracts (or properties) within the unit. The tract participation percentage was in turn a product, in part, of the "producibility factor" of the participant's well. The following clause set out how the producibility factor was to be determined:[53]

> 103. (b) *Determination of producibility factor.* The producibility factor shall be determined by dividing the daily average test rate by sixty-six (66), provided that the producibility factor shall never exceed the whole number one (1).

The plaintiff drilled a well which had a daily average test rate of 66 barrels per day; this was the maximum production allowed in the area of the unit by the Oil and Gas Conservation Board (Board). The plaintiff sought, on the basis of clause 103(b), admittance of the new tract to the unit with a producibility factor of 1. The Board,

however, had reduced the allowable production from the plaintiff's well by one-half (to 33 barrels per day) to penalize the plaintiff for drilling the well outside the "target area" for that spacing unit. As a result, the defendants (the other participants in the agreement) took the position that the plaintiff's tract should only be allowed into the unit with a producibility factor of 0.5. This would mean that the plaintiff's share of production would be cut in half.

The defendants were successful at trial and the plaintiff appealed. On appeal, the defendants argued that the situation required that the "golden rule of interpretation" be applied and therefore the trial court's decision should be affirmed.[54] The basis of this argument was that if the plaintiff's tract was admitted with a producibility factor of 1, premised on a production level of 66 barrels per day, and by virtue of the Board's order the tract could only produce 33 barrels per day, then the result would be a commercial absurdity whereby the plaintiff would receive a share of production from the unit which was much greater than the production contributed by the plaintiff's tract to total unit production.

Smith C.J.A., for the court, was of the opinion that the defendants had not established that such would be the result if the plaintiff's producibility factor was set at 1. In any event, he said, it was unnecessary to establish whether the argument was sound as, "[t]he issue is not what a fair share for the appellant of the distributions of the unit would be, but what the appellant is entitled to under the terms of the unitization agreement."[55]

According to His Lordship, the principle which determined whether one was to depart from the "plain meaning" of the words had been properly stated in *Shore v. Wilson*:[56]

> where language is used in a deed which in its primary meaning is unambiguous, and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken, conclusively, to be that in which the writer used it; ... by "sensible with reference to the extrinsic circumstances" is not meant that the extrinsic circumstances make it more or less reasonable or probable is [sic] what the writer should have intended; it is enough if those circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning.

The primary meaning of the clause in the agreement, in the view of Smith C.J.A., was that the plaintiff was entitled to be admitted with a producibility factor of 1. There was no way to agree on a unit agreement which was exactly accurate in awarding the participants a share in relation to the amount of oil which was in place in their tract. Besides, the parties may have considered the relevant facts about off-target wells and

decided that the formulae in the agreement sufficiently took care of all contingencies. Therefore, Smith C.J.A. concluded that the language of the agreement was not ambiguous in its primary meaning and the circumstances did not "deprive the words of all reasonable application according to such primary meaning".[57]

The judgment in *Canadian Delhi* illustrates the conflict between the "plain meaning" and the "golden" rules of interpretation. The conflict, however, does not lie in whether surrounding circumstances are open for consideration when interpreting an agreement -- it may be considered under either rule. This is clearly shown in the quotation from *Shore v. Wilson*; for how can one determine whether the primary meaning is "sensible with reference to the extrinsic circumstances", as suggested by the quotation, if one does not consider the extrinsic (that is to say, surrounding) circumstances. The court, in *Canadian Delhi*, certainly looked to the surrounding circumstances when interpreting the unit agreement -- it simply concluded that the surrounding circumstances did not warrant the interpretation argued for by the defendants.

The difficulty with the *Canadian Delhi* judgment lies in the very high threshold test which the court accepts for determining whether the plain meaning is to be departed from, that is, that the circumstances must "deprive the words of all reasonable application". As has been stated:[58]

> neither "the intention of the parties" nor "the meaning of words" affords a practical and conclusive answer to the problem. On the one hand, it is not what the parties intended to write that matters but what they have in fact written; on the other hand, words possess no meaning in their own right but only when placed in a particular setting and read against all the relevant circumstances. To this setting and to those circumstances different minds will react in different ways. In most cases a court may choose between a literal and a liberal interpretation and the choice will be largely a question of judicial temperament.

The "judicial temperament" displayed by the court in *Canadian Delhi* is obviously one leaning towards a very literal approach to interpretation. This, however, has not been the dominant approach in the last ten to fifteen years. The courts in the more recent cases, following the approach in *Prenn v. Simmonds*, appear, like the majority in *Structure Oil and Gas,* less concerned with such strict adherence to a plain meaning of the language used by the parties and more concerned with the meaning of the language in the particular circumstances of the parties to the specific agreement. This is not to say that the courts do, or should, ignore the ordinary meaning of words and concentrate solely on the presumed intention of the parties; as the above quotation indicates, there is a balance to be maintained between the literal and liberal approaches.

It is submitted, for example, that although one might disagree with the "threshold" test employed by the court in *Canadian Delhi,* the result was warranted. The parties in *Canadian Delhi* had included in their agreement a specific clause which explicitly set out how a participant's producibility factor was to be calculated. There was no uncertainty or dispute as to the effect of this clause as expressed in the agreement. In reality, the defendants were asking the court to imply a term into the agreement to the effect that where the Board reduced a party's allowable production below the production level indicated by the flow test, the Board's order and not the test would be used to determine the producibility factor. The court was correct in concluding that where sophisticated parties had included an express provision for determining the producibility factor by using the test rate of the well, it would be rewriting the contract to hold that the Board's order could be used instead.[59] *Canadian Delhi*, then, presents a different situation than the one faced by the court in *Structure Oil and Gas.*[60] In the latter case there was no clause in the parties' agreement which dealt expressly with the fact that the parties' gas was mixed when processed. This meant the court could determine the meaning of the clauses having regard to the surrounding circumstances without having to imply a term inconsistent with an express term in the agreement.

Characterizing the Evidence

A difficulty, more basic than the question of when one may use surrounding circumstances to depart from the plain meaning of the language, is the problem of determining whether evidence is within the scope of the term "surrounding circumstances". We have already discussed the fact that any definition of this term is necessarily imprecise[61] and the *St. Lawrence*[62] case demonstrates that different courts may characterize the same evidence differently.

In *St. Lawrence,* at issue was the legal nature of what is commonly described as a "net profits interest". Specifically, this involved the interpretation of clause 10(b) of the agreement which granted the plaintiffs such an interest. In his judgment at trial, Milvain J. states that the plaintiffs submitted a great deal of "extrinsic evidence", but this evidence was not admissible because there was no ambiguity in the meaning of clause 10(b) or in the agreement as a whole.[63] After deciding the issue without reference to the excluded evidence, Milvain J. also considered the issue in light of that evidence. It is in this way that we learn just what evidence Milvain J. considered to be inadmissible.[64] With regard to the plaintiff, St. Lawrence, the evidence showed that it had entered into similar agreements on two other occasions and on neither occasion did the agreements contain a provision like the

disputed clause 10(b). Regarding the other plaintiffs, the Bennetts, the evidence showed that the first contact with the defendants had been in the United States where the defendants had explained their oil development program and had produced an agreement which did not contain a clause like clause 10(b). As Americans, the Bennetts were concerned about their tax position under the sample agreement. After lengthy correspondence between the lawyers for both parties, the agreement which included clause 10(b) was drafted.

The Appellate Division, in its judgment in *St. Lawrence*, appears to agree with the trial judge's decision on the admissibility of this evidence when it states:[65]

> A great deal of evidence was given subject to the objection of respondents' counsel. This was mainly directed to show what interest in the oil and gas the parties intended to confer. This was tendered upon the appellants' assumption that clause 10 (b) was ambiguous and that this parol evidence could be looked at in aid of interpretation.
>
> ...
>
> We are agreed that the appeal should be dismissed for the reasons stated by the learned trial judge. We are also agreed that parol evidence, in so far as it was led to explain the meaning of the agreement, should not have been admitted. The language used in clause 10 (b), which is the clause that is said to be ambiguous, is plain enough.

However, there is a suggestion, in the qualification contained in the second to last sentence of this quotation, that perhaps the Appellate Division is limiting the trial decision somewhat. A careful review of the Appellate Division's statement of the facts in this case confirms the suggestion. Although there is no mention of the evidence relating to the St. Lawrence plaintiff, there is a paragraph which sets out most of the evidence relating to the Bennett plaintiffs which was excluded by the trial judge. Here we are told that Bennett, an American citizen, was concerned with his tax position under the agreement as originally submitted to him and that clause 10(b) was inserted as a result of correspondence between the parties' solicitors.[66]

The Appellate Division gives no reason for including this evidence in its statement of facts, and therefore it is difficult to state with any degree of certainty why the difference of opinion exists between the two levels of courts. From the statement made by the Appellate Division, however, one gets the impression that the court was saying that it agreed that direct evidence of a party's intention was not admissible but that it characterized this evidence as surrounding circumstances rather than evidence of intention.[67]

It is difficult to evaluate the characterization of the evidence by either court in the *St. Lawrence* case because we are given only the courts' summaries of that evidence and not the evidence itself. We are not faced with the same problem in *Amerada Minerals Corp. of Canada Ltd. v. Mesa Petroleum (N.A.) Co.*[68]

In *Amerada*, which we will also discuss when considering the custom exception to the parol evidence rule, one of the issues confronting the court was the meaning of the term "plant outlet" contained in a royalty provision. The learned trial judge held that "plant outlet" as used in the agreement meant "marketability".[69] This finding was based mainly upon the evidence of a Mr. Murray, one of the plaintiff's witnesses.[70] Mr. Murray, a lawyer, was the plaintiff's chief landman. He had negotiated the agreement for Amerada and had drafted it. The evidence of Mr. Murray which led to the trial judge's holding is set out in the Court of Appeal's decision. The first part of this evidence deals with a number of different uncertainties which the oil and gas industry in general faced at the time the agreement was drafted. Then the following evidence is given:[71]

> [1] Q. And it was against that backdrop of uncertainty that you negotiated the June 10th, 1966 agreement on behalf of Amerada. A. I don't know if it was uncertainty that we negotiated it. It was certainly something that had to be in the back of Amerada minds but probably more to our negotiating the agreement was to get somebody to continue an exploration program on the lands, notwithstanding what you've defined as the uncertainties.
> [2] Q. Right, but you have acknowledged that those uncertainties were present at the time of June 10th, 1966 and what you as Amerada was doing to protect yourself against those uncertainties in part was to put a provision in the agreement that protected you against processing charges of some kind. A. I think that's fair, yes.
> [3] Q. And those were processing charges necessary for the purpose of making the product marketable. A. Yes. We had to get the product -- if it were not already sold in a specification [sic] manner that it could be accepted by pipeline companies if that were the case.
> [4] Q. But you gave the acceptance of a pipeline company as an example of one kind of "marketability". A. Yes. If the product -- if the gas had say a high sulfur content in it, it had to be removed before it would meet pipeline specifications. That is an example, yes.
> [5] Q. But only an example? A. That is correct, yes.
> [6] Q. At no time did you put your mind ahead to exotic enhancement facilities for the raw gas stream? A. I would say we did not, no.
> [7] Q. Your focus was on one thing and one thing alone and that was a free ride to marketability. A. Getting a well drilled, evaluation of the property and a free ride I think is right, yes.
>
> [Numbering of the questions is added.]

As mentioned above, this evidence was quoted and recognized as being the main ground for the decision at trial by the Court of Appeal. In affirming the trial decision, Lieberman J.A., for the court, stated: "In my view the learned trial judge's findings of fact are amply supported by the evidence and his application of the principles of interpretation are sound."[72]

In the preceding section of this paper we discussed the rules which have been laid down by the courts regarding the scope of the surrounding circumstances exception. With

these rules in mind, one wonders that both the trial court and the Court of Appeal in *Amerada* accept that this evidence can be used to interpret the term "plant outlet". Virtually all of this evidence, it is submitted, is evidence which is excluded by the above-mentioned rules of interpretation.

The substance of this evidence is: Amerada negotiated and signed the agreement in order to develop the property (question 1). The royalty provision was intended to protect them from processing charges (question 2). The processing charges Amerada intended to protect itself against were those charges necessary to make the gas marketable (question 3). Having the gas meet pipeline specifications is an example of what Amerada meant by "marketability" (question 4). Finally, a "summary" of Amerada's intention is provided (question 7). It is never stated expressly that "Amerada intended...." or "Amerada's object was....", but nonetheless this evidence is direct evidence of the intent or object of one of the parties when the agreement was being negotiated and when it was signed. The admission of such evidence clearly contravenes the statements of principle made by Ewing J.A., in *Structure Oil and Gas*, and Lord Wilberforce, in *Reardon Smith*.[73] The rule is that direct evidence of the intention or object of the parties is not admissible. Rather, the intention and objects of the parties are conclusions of law to be drawn by the court based upon what the intention and objects of reasonable people placed in the same circumstances would be.[74]

How is it then that both courts in *Amerada* admitted and made use of this evidence? It cannot be that they were unaware of this prohibition -- both courts cite and quote extracts from *Bank of B.C. v. Turbo Resources Ltd.*,[75] a case in which Laycraft J.A. considers and approves of the *Reardon Smith* case and gives the following warning: "Consideration of the commercial setting in which a contract is made is not, of course, to be confused with parole [sic] evidence of the intention of the parties. That is not admissible."[76]

Given that both courts profess to approve of this statement, they must have characterized this evidence as evidence of the "commercial setting" (*i.e.*, surrounding circumstances) rather than as direct evidence of intention. With respect, based on the the above analysis of the evidence, this was an improper characterization.[77]

III Custom

A. Basis for the Exception

The custom exception to the parol evidence rule did not meet the same resistance from the courts as was faced by the surrounding circumstances exception. The custom exception was making strong headway by the end of the 18th century and was firmly

established by the middle of the 19th century.[78] There are really two different ways in which the custom exception may be used. First, custom may be admitted to prove that the words in an agreement have not been used in the sense which they are ordinarily used, but that they have been used in a particular or special sense. Used in this way, custom acts as a "dictionary", providing a meaning for the words used in the contract. Second, custom may be admitted to annex a term to an agreement. When used in this way, the court implies a term into the agreement which the parties have omitted, but which they both understood was applicable to the agreement because the inclusion of such a term was customary in the context of the particular trade or locality in which the agreement was made.[79]

The rationale for the first application of custom is that it is presumed that the parties intended that the word used should be understood in the sense which was customary in their trade or locality and therefore to give the word its ordinary meaning would defeat that intention. The rationale for the second application of custom is that it is presumed that the parties did not set down on paper all of the terms of their agreement, but rather left unexpressed those terms which it was understood were customarily included in such agreements.[80] In both situations, then, an exception is made and evidence of custom admitted in order to give effect to the presumed intention of the parties.[81]

B. Application of the Exception

Proving Custom

Evidence going to prove custom, like evidence submitted as surrounding circumstances, will always be heard by the court; the question is whether the evidence will be found admissible to aid in the construction of the written agreement. The accepted threshold requirement for the admissibility of a practice as custom is found in Duff J.'s statement in *Georgia Construction Co. v. Pacific Great Eastern Railway Co.*: "[the practice] must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract. [citation omitted]"[82]

The party asserting that custom forms a part of the contract generally carries the burden of proving the custom. However, once the custom is proven to exist, the party asserting that the parties contracted with the intention of excluding the custom has the burden of establishing such was the case, and this must be shown from the contract itself, as no parol evidence will be admitted for this purpose.[83]

The definition of the requirement for establishing custom is obviously imprecise and therefore leaves a certain amount of discretion in the court as to whether the threshold has been met. *Great Northern Petroleums & Mines Ltd. v. Merland Explorations*

Ltd.[84] provides an illustration of this. In *Great Northern,* the plaintiffs and defendants were joint owners of various petroleum and natural gas properties and related surface facilities. An "area of mutual interest" [AMI] clause was included in the agreement governing the relationship between the parties. The defendants acquired properties on their own behalf and the plaintiffs brought an action to establish that they owned a beneficial interest in those properties. The plaintiffs alleged, *inter alia*, that even if the lands in question were not within the AMI zone, the custom in the oil and gas industry was such that the defendant was obligated to share its acquisition with the plaintiffs.

After quoting Duff J.'s statement of the threshold requirement for establishing custom, Shannon J. held:[85]

> While the evidence indicates that, in all of the circumstances of this case, the usual practice in the industry is that the defendants would notify the plaintiffs of their intention to attempt to acquire an interest in the lands in question or to actually offer the plaintiffs the opportunity to participate in the acquisition. I am not satisfied by the evidence that such a practice is so certain and notorious that a requirement to conform with the practice could be held to be a term of the contract between the parties.

A practice, then, may be "the usual practice" in the industry, without being "so certain and notorious" that it is found to be a term of the contract. Unfortunately, the judgment does not disclose the evidence given on the subject, so it is difficult to evaluate how the court draws the line between a "usual" and a "notorious" practice.

Experts are usually called to give evidence of custom,[86] but there is no requirement that those giving such evidence be experts. The basic issue, as usual, is the credibility of the witnesses called by the parties, and so it is more than a matter of how many witnesses are called by each side to a dispute. In *Guaranty Trust v. Hetherington,*[87] for example, the plaintiff called three witnesses to give evidence as to the nature of the interest conveyed by royalty trust certificates. We have already discussed the evidence given by these witnesses when considering the scope and application of the surrounding circumstances exception.[88] It will be remembered that one witness was active in promoting royalty trust agreements, while the other two witnesses were landowners who had entered into identical agreements. Besides looking at the admissibility of the evidence given by these three witnesses as evidence of the circumstances surrounding the agreement, the court also considered its admissibility as evidence of custom. The court held that it was inadmissible as custom, stating:[89]

> It does not qualify as evidence of custom or usage, since the evidence of three individuals out of hundreds, or perhaps thousands, who entered into similar agreements or acquired royalty certificates during the same period of time as to what they understood the royalty trust certificates to mean falls far

> short of establishing a generally accepted custom in the locality or in the oil and gas industry. The evidence cannot, in my view, be used to attribute a meaning to the words and phrases used in the agreements nor as a basis for implying terms which are not expressed in the agreements.

The court was, however, prepared to accept that the evidence of one of the defendant's witnesses -- Dr. A. Thompson, described by the court as "a well-known oil and gas lawyer" -- clearly established that there was no generally accepted understanding in the industry as to the effect of the various forms of royalty trust agreements then in use.[90]

Inadmissible Custom

If evidence meets the threshold requirement of proving custom, the only way that this evidence can then be held inadmissible is if the custom established is "repugnant to or inconsistent with the tenor of the written instrument".[91] The rationale behind the exclusion of evidence of custom under these circumstances is clear enough: evidence of custom is admissible on the basis that it was the presumed intention of the parties that the custom be incorporated into the contract. If, therefore, the express language of the contract discloses an intention contrary or inconsistent with that custom, it is supposed that the parties chose to depart from and exclude the custom.[92]

An example of this type of situation is the *Great Northern Petroleums* case.[93] In that case, it will be remembered, the plaintiff sought to establish a beneficial interest in properties acquired by the defendant. An alternative finding of the court was that, even if the evidence had established a custom in the industry to the effect that the defendant had been obliged to notify the plaintiffs of the acquisition or give the plaintiffs an opportunity to participate in the acquisition, the evidence would not have been admissible. This conclusion was based on the finding that the property in question was outside the area covered by the AMI clause and, therefore, an implied term requiring such conduct by the defendant would be inconsistent with the express terms of the AMI clause.

A Case Study

As was mentioned when discussing the basis for the custom exception, there are really two ways in which custom can be used in construing an agreement: to define the words used in the agreement and to imply a term into the agreement. The *Amerada Minerals v. Mesa Petroleum* case[94] illustrates both of these applications of custom. In *Amerada*, the plaintiff was entitled to a royalty on petroleum and natural gas produced from certain lands under the terms of a written farmout agreement. Two of the issues in dispute in the case concerned this royalty. The first of these issues was whether the royalty for gas

was to be calculated "free of" or "net of" processing charges. The second issue was whether the royalty on gas was to be calculated "including" or "net of" fuel gas used in the operations.

Much of the difficulty in determining these issues came as a result of the changes in the processing facilities between the time the agreement was signed in 1966 and the time of the litigation in 1985. It is, therefore, necessary to describe these changes.[95] The standard processing facilities in use in the industry at the time the agreement was signed, and used by the defendant from 1967 to mid-September 1974, consisted of a separator and a storage tank at every wellsite. The petroleum substances coming out of the wellhead were "processed" through the separator with the gas being flared and the oil being stored in the storage tank for collection and sale. These facilities were termed "Phase I" facilities.

The "Phase II" facilities, in operation from mid-September 1974 to June 1, 1975, were temporary facilities installed in anticipation of an Alberta Energy Conservation Board order which required that gas produced from the field either be sold or injected back into the formation. Phase II facilities processed gas to the point where it could be sold to the Alberta and Southern Gas Company pipeline. Phase II consisted of separation, compression, dehydration, dew point control, and crude oil storage facilities.

The "Phase III" facilities, in use at the time of the litigation, had begun operation in June 1975. These facilities consisted of a staged separation system with vapor recovery, compression, dehydration, and deep cut liquid product storage. The purpose of these facilities was to recover natural gas liquids from the raw natural gas, so that the liquids could be sold. The effect was to enhance the value of the raw gas.

From the time processing had begun in the field, the defendant had routinely deducted processing charges from the value of the raw gas which it sold before calculating Amerada's royalty. This was the origin of the first issue addressed by the court. The determination of this issue depended on the interpretation to be given to clause 9(b)(i) of the farmout agreement which stated:[96]

> (b) on all petroleum substances that are produced, saved and marketed from the intermediate depth of the joint lands:
> (i) [the defendant] shall pay to Amerada, free and clear of any deductions whatsoever, a gross overriding royalty in cash of ten percent (10%) of the current market value at the time and place of production of all petroleum substances produced in liquid form, saved and marketed from the intermediate depth of the joint lands. For petroleum substances other than those produced in liquid form, the overriding royalty is to be computed at the plant outlet free and clear of all processing charges.

It can be seen that, in order to decide this issue, the court first had to establish where production took place, for it is at the point of production that petroleum substances

are to be categorized for the purpose of determining whether or not processing charges are to be deducted. The plaintiff called four expert witnesses whose testimony the trial judge summarized as indicating that:[97]

> gross separation of crude oil and raw gas is necessary in order to obtain "production" and that the word "produced" means at the state where the product can be measured, its value tested and where it can be effectively stored and used.

One of the experts, a former chairman of the Energy Resources Conservation Board, also testified that for Board purposes the point of measurement and calculation of royalties was the downstream side of the separator (which is located at the wellhead). While the defendants argued that production occurred as soon as the petroleum substances left the wellhead and therefore before the substances entered the separator, even one of their experts testified that production took place when the product came out of the ground and went through the separator.[98] Not surprisingly, the court held that production occurred at the downstream side of the separator.[99]

The next step for the court was to determine the meaning of the term "plant outlet". When looking at the *Amerada* case, in the surrounding circumstances section of the paper, we saw that, based on what the court regarded as evidence of surrounding circumstances, it held the term "plant outlet" to mean the point of "marketability" of the product.[100] This finding, in turn, necessitated a decision on whether marketability should be determined with respect to the processing of products in the Phase I, Phase II, or Phase III facilities. The defendants argued that there was a distinction to be made between marketability and enhancement. Further to this, they argued that processing for the purpose of enhancing the value of the raw gas, which occurred when the natural gas liquids were removed from the gas in the Phase III facility, was not the free processing contemplated by the royalty clause.

Once again custom was used by the court to help interpret the royalty clause. One of the plaintiff's witnesses testified that the plaintiff was fully aware, at the time of the agreement, of a custom in the industry that the processing costs necessary to make gas a saleable product were to be deducted before the calculation of a royalty. Moshansky J. stated:[101]

> In my view the phraseology utilized in cl. 9(b)(i) ought to be interpreted in a manner consistent with the prevailing custom in the industry which is established by the evidence; that is to say, that those who benefit by the enhancement of a product pay for their proportionate share of the cost of such enhancement.

With this in mind, the court held that the free processing contemplated by the royalty clause was limited to that processing required to make the gas itself marketable and

did not include any processing (or, in other words, enhancement) of the gas after that point. Only the residue gas from the Phase III plant was acceptable to the market in general,[102] and therefore the point of marketability was found to be within this facility. The free processing, however, could not include the "enhancement" of the gas, and so the court had to determine what percentage of the processing costs in the Phase III plant were attributable to enhancement. Based on expert evidence, the court found this percentage to be 79% and, therefore, the court held that the defendant was entitled to deduct 79% of the Phase III processing charges before calculating Amerada's royalty.[103]

The court then considered the second issue, which was resolved by using custom to imply a term into the agreement. In essence this issue was whether or not Amerada was entitled to a royalty on the gas used as fuel in the processing operations. The agreement was silent on the subject. Virtually all witnesses, including the defendant's witnesses, agreed that in the industry no royalty was payable on gas used for fuel. It was therefore easy for Moshansky J. to conclude that:

> It is safe to say that the evidence here establishes beyond argument that the custom of not paying royalties on fuel gas is so notorious and widely acquiesced in so as to readily meet the criteria of the Supreme Court in *Georgia Const. Co....*[104]

C. Difficulties in Application

As can be seen when considering the application of the custom exception, there are relatively few areas where one can run into problems in application. Three come to mind: first, the problem in establishing that the evidence submitted has met the threshold requirement to establish the existence of a custom; second, the problem that a court might admit otherwise inadmissible evidence under the guise that such evidence was custom; and finally, the problem that evidence of custom might be admitted when it was repugnant or inconsistent with the terms of the written agreement in issue.

We discussed the first type of problem in the preceding section of the paper when we discussed the *Great Northern Petroleums* case.[105] In that case we saw that a court might find that although a practice was "usual" in the industry, it was not so "certain and notorious" as to amount to a custom. There is little more that can be said on the uncertainty of the threshold requirement of custom and, therefore, we will turn to the second and third types of problems one might encounter.

Admitting Evidence Under the Guise of Custom

Great Plains Development Co. of Canada Ltd. v. Hidrogas Ltd.[106] illustrates the second type of problem. In this case, the plaintiff and defendant were parties to agreements for purchase and sale whereby the plaintiff purchased butane and propane from the defendant. Either party was entitled to terminate the agreements upon 60 days written notice prior to the anniversary date of the agreements. Prices for these products were going up in the market place and the plaintiff was concerned that the defendant would find another buyer for its product and would terminate the contract. In hopes of securing its supply, the plaintiff wrote a letter to the defendant on September 7, 1973, stating that it would be prepared to pay more for the products immediately on the "understanding that we will be able to re-negotiate a new contract for the contract year beginning April 1, 1974, based on economic value at that time".[107] The defendant never responded to this letter, but charged the higher price; four months later it gave notice of termination as it was entitled to do under the agreement. After some negotiations, the plaintiff agreed to match the offers which the defendant had received from other prospective buyers and five new contracts were signed.

The parties operated under the new contracts during 1974 and the first three months of 1975. On April 1, 1975, the plaintiff stopped dealing in propane and did not pay the defendant for the propane it had received during January, February, and March 1975. In July 1976, the plaintiff issued a statement of claim alleging, *inter alia*, that the defendant had breached the contract formed when the defendant had accepted the offer contained in the letter of September 7, 1973. It was the plaintiff's position that the defendants had not re-negotiated the new contracts "based on economic value at that time".

At trial, the court concluded that no binding contract had come into existence, because the offer to re-negotiate "based on economic value at that time" meant different things to the plaintiff and the defendant.[108] This conclusion was based on evidence given by the president of the plaintiff company that, when used in the propane and butane industry, the words "based on economic value" referred to a "net back" pricing arrangement, and evidence of the former vice-president of the defendant company that "economic value" meant the value negotiated between two parties at arms length which in the industry was a "fixed price" arrangement.

The court pointed out that no independent or expert evidence was adduced by either party on the meaning of the term "economic value" and it appears the court had an idea that it might be criticized for admitting and using this evidence. As a justification the court stated:[109]

> While the evidence of [the two witnesses] may be said to be subjective and therefore not to be taken into account when determining whether or not a mutual mistake occurred, the evidence of these witnesses was directed more to what the meaning of the term was when used in the industry, and so, in that sense, it may be said to be objective.

In the decision of the Court of Appeal, Moir J.A. reviewed the testimony given by the plaintiff's president.[110] Plaintiff's counsel had asked this witness what the plaintiff company's "understanding" of the term "economic value" was. It was in answer to this question that the witness had given his evidence as to what the term meant in the industry. Moir J.A. held that this evidence was direct evidence of intention of one of the parties and, therefore, was inadmissible because there was no ambiguity in the document.[111] He went on to state: "It may be argued that 'economic value' was a term that had a peculiar and unusual meaning in the oil and gas industry. It would be necessary, then, to prove that fact before the evidence could be admissible."[112]

The evidence given by the plaintiff's president was not sufficient to prove custom and therefore the evidence was inadmissible under that exception. Moir J.A. ultimately held that the phrase in issue meant that the contract would be re-negotiated at the price the products could fetch in the market place at that time, that the plaintiff had admitted this in cross-examination, and that therefore there was a contract.

The approach of the Court of Appeal towards the plaintiff's evidence is clearly in line with the rules developed for the application of the custom exception (and the surrounding circumstances exception, for that matter). The only evidence on the meaning given by the industry to the controversial term was that given by one witness for the plaintiff and one witness for the defendant. This evidence was really evidence of what each party intended the phrase in the letter to mean. As evidence of intention, then, it would only be admissible to resolve an ambiguity; no ambiguity was found to exist. The parties, however, had phrased their evidence so that it was presented in such a fashion that it referred to how the term was used in the industry. It was on this basis that the trial judge had held that the evidence was directed to "what the meaning of the term was when used in the industry", and therefore admissible. But if this was the basis of admissibility, then the custom had to be established, and it is difficult to see how one could find that a notorious and generally acquiesced in custom had been established on the conflicting evidence of these two witnesses. The important point, perhaps, is that the trial judge did not even attempt to do this, but merely admitted the evidence under the guise of admitting industry custom.

Admitting Inconsistent or Repugnant Custom

Turning to the third type of difficulty in the application of the custom exception, the case of *Resman Holdings Ltd. v. Huntex Ltd.* [113] provides a blatant example of the admission of custom to interpret an agreement when the custom is inconsistent with or repugnant to the tenor of that agreement. At issue in *Resman* was whether an overriding royalty on natural gas was to be calculated before or after deducting the transportation, gathering, and compression costs incurred in getting the natural gas from the well to the point of sale to the pipeline. Resman, the plaintiff, sought a declaration that its conduct in deducting such costs was proper and in accordance with the royalty provision. The provision was in the following terms:[114]

> 1. The Hunt Berisoff Royalty shall be two and one half (2 1/2%) per cent of the actual market value at the wellhead of all petroleum and associated substances on all production produced, and on natural gas two and one half (2 1/2%) per cent payable at the outlet valve to the pipeline, produced, saved and sold from the said lands....

In its decision, the court considered a range of authorities and evidence. The court first reviewed a case from the United States: *Freeland v. Sun Oil Co.*[115] The court quoted the following statement from that case, which describes how the market value of gas is determined at the wellhead:[116]

> in the analytical process of reconstructing a market value where none otherwise exists with sufficient definiteness, all increase in the ultimate sales value attributable to the expenses incurred in transporting and processing the commodity must be deducted. The royalty owner shares only in what is left over, whether stated in terms of cash or an end product. In this sense he bears his proportionate part of that cost, but not because the obligation (or expense) of production rests on him. *Rather, it is because that is the way in which Louisiana law arrives at the value of the gas at the moment it seeks to escape from the wellhead.* [emphasis added]

The court then quoted from an article,[117] published in the United States, which also expresses the view that the market value of gas at the wellhead is determined by taking the proceeds received by the lessee at the point of sale and deducting the transportation, processing, and compression costs incurred to get it from the wellhead to that point. The manual of the Alberta Energy and Natural Resources Mineral Division is then considered by the court. The manual sets out the "allowance" or "fee" allowed by the Crown for the costs of gathering, processing, and compressing its share of natural gas.

Finally, the court reviewed the evidence of two experts called by the plaintiff. Both of these witnesses described how royalties were calculated at the wellhead and how the costs of getting the product to market were borne by the royalty owner. Following is the court's summary of the evidence of one of these witnesses:[118]

> The sales point, with respect to the natural gas coming from the Sibbald area would be at the Nova sales meter. Between the well and the sales point, you have gas lines, compressing stations and the Suncor plant. The normal method of calculating is based on the wellhead values after deducting the transportation, gathering and compression costs. *In addition, he stated that the industry practice is that the royalty is computed at the wellhead and allows for the deductions such as compressing, gathering and transportation of gas, including the processing costs.* [emphasis added]

The court then concluded, without discussion, that the plaintiff's interpretation of the royalty clause was correct and therefore a declaration was given that the deductions made by the plaintiff before calculating the royalty had been properly made.

There is no doubt that the evidence considered by the court clearly establishes an industry custom that the royalty on natural gas is to be calculated at the wellhead. The evidence also clearly establishes that the customary method of determining the market value of the gas at the wellhead (upon which the royalty is calculated) is to take the price received for the gas at the point of sale and deduct the costs incurred in getting the gas from the wellhead to the point of sale. It is difficult to see, however, that this affects the interpretation of the royalty clause in issue.

The part of the royalty clause which must be interpreted states that the royalty on natural gas is to be "two and one half (2 1/2%) per cent payable at the outlet valve to the pipeline...." The focus, then, must be on where the "outlet valve to the pipeline" is located, for that is the point where the royalty is payable and therefore must be calculated free of any costs incurred prior to that point. If evidence of custom had been submitted to interpret that phrase, it would have been admissible. (As, for example, was the evidence of custom used in the *Amerada* case to help determine the meanings of the terms "production" and "plant outlet".[119]) However, that was not what was done here; no attempt was made to equate the term "outlet valve to the pipeline" with "the wellhead". Indeed, one would be hard pressed to reach such a conclusion when the parties have clearly set out two different royalties which are payable at different points in the production cycle: the first payable at the wellhead and the second, by contrast, to be paid at the outlet valve to the pipeline.

The fact of the matter is that the court made no attempt to analyze the royalty clause at all; it simply blindly applied the custom that the royalty on natural gas was to be paid at the wellhead and the custom for calculating such a royalty. This may have been permissible if the royalty clause had been silent on the question of how the royalty was to be calculated, but it was not silent. The custom admitted by the court to interpret the clause was inconsistent with and repugnant to the tenor of the express language agreed upon by the parties. It was therefore inadmissible because it contradicted or varied the written

agreement. In this case, the defendant had evidently negotiated for itself a royalty which was superior to that normally granted in the industry, and in doing so the parties had contracted to exclude custom, but the court used custom to make a new contract for the parties.

IV Conclusion

The surrounding circumstances and custom exceptions to the parol evidence rule are argued frequently in oil and gas litigation. This is because the oil and gas industry is built on written agreements and, in the course of litigation concerning these agreements, extrinsic evidence is often submitted to aid in interpretation. The courts have established certain principles for determining whether or not such extrinsic evidence will be admissible as falling within one of the exceptions. Difficulties, however, still arise in the application of the exceptions.

When applying the surrounding circumstances exception, the courts seek to discover the object and intention of the parties to a written agreement by construing the language of the agreement in light of all the circumstances surrounding its execution. It is difficult to define, in a precise way, what evidence can legitimately be admitted under the surrounding circumstances exception, but generally all factual information regarding the background to the agreement, including facts about the genesis of the transaction, the nature of the parties' business, the relationship between the parties, and the market in which the parties were operating, will be admissible. It is clear that direct evidence of the parties' intention or object when entering into the contract, evidence of the negotiations leading to the agreement, and evidence in the form of superseded letter agreements does not fall within the surrounding circumstances exception. These classes of evidence will not be admitted to aid in interpretation unless an "ambiguity" exists in the language of the written agreement. Different thresholds exist for finding that the language of an agreement is ambiguous, but in Alberta the present state of authority is that a difficulty or doubt in interpretation is not sufficient to give rise to a finding of ambiguity.

The courts apply the custom exception in two ways: first, to interpret the language of an agreement, and second, to add terms to the agreement. Before a practice can be admitted as custom it must meet the threshold requirement of being so certain, notorious, and generally acquiesced in that it can be presumed to form a part of the agreement. Even where a custom is proven to exist, however, it will be inadmissible as an aid to interpretation where it is inconsistent with or repugnant to the tenor of the written

agreement. This is because it is then presumed that the parties intended to exclude the operation of custom from their agreement.

As well as illustrating the principles governing the application of the surrounding circumstances and custom exceptions, the case authority surveyed in this paper illustrates two important facts about the application of these exceptions to the parol evidence rule. The first is that a court's decision on whether or not to admit evidence under one of these exceptions can have a significant impact on how that court construes an agreement and, therefore, on the outcome of a dispute. The second is that difficulties exist in the way in which some courts have applied the exceptions. Whether these difficulties take the form of the improper characterization of evidence as evidence of surrounding circumstances, the admission of evidence as custom when the custom has not been proven, or the admission of custom which is inconsistent with the parties' agreement, it is evident that the courts do not always apply the exceptions in a manner consistent with the established principles of admissibility.

Given the impact a decision on the admissibility of extrinsic evidence can have on the outcome of a case, it is disturbing to find the courts improperly applying the surrounding circumstances and custom exceptions. As we have seen, both of these exceptions are products of the desire to discover the "true" intention of the parties and the realization that, in order to accomplish that end, it is not enough to consider the language of the written agreement alone. Using these exceptions, a court is in a better position to construe, objectively, the intention of the parties through the admission of certain types of extrinsic evidence. When, however, a court improperly applies the principles which have been established as limits to admissibility under the exceptions, interpretation may be based on the subjective intention of just one of the parties or the intention of the parties may be totally frustrated. Clearly, such results are unfortunate and undesirable. The courts, therefore, must be careful not only to state the exceptions properly, but also to apply the exceptions within the established limits.

ENDNOTES

1. *Bank of Australasia v. Palmer*, [1897] A.C. 540, *per* Lord Morris, at 545. See generally, Sir Rupert Cross & C. Tapper, *Cross on Evidence*, 6th ed. (London: Butterworths, 1985); G.H. Treitel, *The Law of Contract*, 7th ed. (London: Stevens & Sons, 1987); John Sopinka & S.N. Lederman, *The Law of Evidence In Civil Cases* (Toronto: Butterworths, 1974). Note that while the word "parol" implies oral evidence, the parol evidence rule applies to any extrinsic evidence, including documentary evidence: see generally, David W. Scott, "The Parol Evidence Rule - A Litigator's Perspective: Will The Communings Of The Parties Be Received In Evidence?" (1984) L.S.U.C. Special Lectures 87 at 87.
2. John Henry Wigmore, *A Treatise On The System of Evidence In Trials At Common Law*, vol. 4 (Toronto: Canada Law Book, 1905) at para 2400.
3. *Great Northern Petroleums & Mines v. Merland Explorations Ltd.* (1985), 36 Alta. L.R. (2d) 97 at 100 (C.A.), aff'g (1983), 25 Alta. L.R. (2d) 67, 43 A.R. 128 (Q.B.).
4. For a list of these exceptions see Treitel, *supra*, note 1, at 151-164; Scott, *supra*, note 1, at 89-98.
5. See generally, K.W. Wederburn, "Collateral Contracts" [1959] C.L.J. 58; Arthur L. Corbin, "The Interpretation of Words and the Parol Evidence Rule" (1964-65) 50 Cornell L.Q. 161; and John Swan, Annotation on *Guaranty Trust Co. of Canada v. Hetherington* (1987) 44 R.P.R. 154.
6. Wigmore, *supra*, note 2, at para 2462.
7. *Id.*
8. *Id.*, at para 2470.
9. *Id.*; see Sopinka, *supra*, note 1, at 275, for an explanation of the term "equivocation".
10. Wigmore, *supra*, note 2, at 2470.
11. *Structure Oil & Gas Co. v. Royalite Oil Co.*, [1943] 3 D.L.R. 313 at 316 (Alta. S.C., A.D.).
12. *Re Ulster Petroleums Ltd. and Pan-Alberta Gas Ltd.* (1975), 53 D.L.R. (3d) 459 (Alta. S.C., A.D.), application for leave to appeal to S.C.C. dismissed 17 March 1975.
13. *Id.*, at 467-8.
14. *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 at 574, 1 W.L.R. 989 (H.L.). *See Bank of British Columbia v. Turbo Resources Ltd.* (1983), 27 Alta. L.R. (2d) 17 (C.A.); *Guaranty Trust Co. of Canada v. Hetherington* (1987), 44 R.P.R. 154, 50 Alta. L.R. (2d) 193 at 210 (Q.B.), currently on appeal.
15. *Borys v. C.P.R.*, [1953] 7 W.W.R. (N.S.) 546, 2 D.L.R. 65 (J.C.P.C.); aff'g (1952), 4 W.W.R. (N.S.) 481 (Alta. S.C., A.D.), which rev'd in part (1951), 2 W.W.R. (N.S.) 145 (Alta. S.C., T.D.).
16. *Id.*, D.L.R. at 72, for the Privy Council's views on the decisions of the Trial Court and the Appellate Division.
17. *Id.*, at 70-3. For an excellent article on the interpretation of reservations or exceptions of mineral rights, *see* N.J. Stewart, "The Reservation or Exception of Mines and Minerals" (1962) 40 Can Bar Rev. 329.
18. *Supra*, note 11.
19. *Id.*, at 320.
20. *Id.*
21. *Id.*, at 314.

22. For an article contrasting the literal and liberal approaches *see* Leon E. Trakman, "Interpreting Contracts: A Common Law Dilemma" (1981) 59 Can Bar Rev. 241.
23. Note that Scott, *supra,* note 1, at 98, appears to take the position that direct evidence of intention is not admissible to aid in interpretation even where an ambiguity exists. But *see Leitch Gold Mines Ltd. v. Texas Gulf Sulfur Co.* (1968), 3 D.L.R. (3d) 161 (Ont. H.C.), which Scott relies on as authoritative on other issues, where, at 215, the court states that direct evidence may be employed to aid in interpretation after all other methods of interpretation have been explored and failed.
24. *Reardon Smith, supra,* note 14, All E.R. at 574. Note the similarity in approach between this and the quote from *Structure Oil & Gas, supra,* note 11.
25. *Guaranty Trust, supra,* note 14.
26. *Id.,* at 206-7.
27. *Id.*, at 207.
28. *Id.*
29. *Id.* Note that the court also deals with the question of whether this evidence was admissible as custom, see *infra,* note 89.
30. *Grant v. Grant* (1870), L.R. 5 C.P. 727 at 728 (Ex. Ch.), as quoted in *Northwestern Mechanical Installations Ltd. v. Yukon Construction Co.* (1982), 20 Alta. L.R. (2d) 156 (C.A.), *per* Harradance J.A., at 162. Note that Harradance J.A., at 165, recognizes (like the court in *Guaranty Trust, supra,* note 14) that evidence of this nature can be admitted to prove a specific meaning if it establishes a customary meaning.
31. *Supra,* note 15.
32. *Id.,* at 74.
33. Other exceptions have arisen, however, outside the scope of surrounding circumstances, to cover statements or representations made during the negotiation process. See the judgment of Lambert J.A., in *Gallen v. Butterley* (1984), 53 B.C.L.R. 38 (C.A.), for an excellent analysis of the role and application of the parol evidence rule in this type of situation.
34. *Imperial Oil v. Whissell Enterprises* (1985), 62 A.R. 321 at 323 (M.C.), quoting *Goss v. Nugent (1833),* 110 E.R. 713 at 716 (K.B.) *per* Denman C.J.
35. *Prenn v. Simmonds*, [1971] 3 All E.R. 237, at 240-1 (H.L.).
36. *Supra,* note 34, at 323-6.
37. *Id.*, at 325.
38. *Northwestern Mechanical, supra,* note 30. The court, in *Imperial Oil,* also cites *Anderson v. Chaba* (1977), [1978] 1 W.W.R. 631, as authority for this proposition; indeed, the court in that case, at 635, does quote an extract from *Ogilvie v. Grant* (1906), 41 N.S.R. 1 (S.C.), to this effect. However, it is clear that the court in *Anderson* was citing the *Ogilvie* case as authority for the principle that direct evidence of the intention of the parties is inadmissible as an aid to interpretation, and was not approving of the statement that surrounding circumstances are only admissible as an aid to interpretation when an ambiguity is found to exist. The court in *Anderson*, in fact, does look to surrounding circumstances in the interpretation process.
39. *Northwestern Mechanical, supra,* note 30, at 162.
40. A bit of a reversal of this rule is demonstrated in *Alminex Ltd. v. Berkley Oil & Gas Ltd.*, [1971] 4 W.W.R. 401 (Alta. S.C., T.D.), aff'd [1972] 6 W.W.R. 412 (Alta. S.C., A.D.). In that case, evidence in the form of an unsigned draft formal agreement was held inadmissible to interpret the letter agreement that anticipated it. This of course makes sense, because the draft had not been agreed to by both parties and therefore could not be said to represent any consensus between the parties.

41. *Home Oil Co. Ltd. v. Page Petroleum Ltd.*, [1976] 4 W.W.R. 598 (Alta. T.D.). See *Resman Holdings Ltd. v. Huntex Ltd.* (1983), [1984] 1 W.W.R. 693 at 695-6, 28 Alta. L.R. (2d) 396 (Q.B.); *Monashee Petroleums Ltd. v. Pan Cana Resources Ltd.* (1986), 70 A.R. 277 at 290-1 (Q.B.).
42. *Home Oil*, *id.*, at 604.
43. *Id.*
44. *St. Lawrence Petroleums Ltd. v. Bailey Selburn Oil & Gas Ltd.* (1961), 36 W.W.R. (N.S.) 167 (Alta. S.C., T.D.), aff'd (1962), 41 W.W.R. 210, at 214 (Alta. S.C., A.D.), aff'd [1963] S.C.R. 482, 45 W.W.R. (N.S.) 26. The Supreme Court of Canada, at 488 of S.C.R., agreed with the Appellate Division that, although the clause presented difficulties of interpretation, it was not ambiguous, and therefore the evidence was inadmissible.
45. Sopinka, *supra,* note 1, at 273. See also Scott, *supra,* note 1, at 99-100, who portrays the relaxation of the requirement for finding an ambiguity in language before admitting extrinsic evidence as a "Canadian approach". The authorities Scott puts forward as establishing this approach are all dealt with by Harradance J.A. in *Northwestern Mechanical*: see text, *infra,* notes 46-50.
46. *Northwestern Mechanical*, *supra,* note 30, at 162-5.
47. The case is *Silver Standard Mines Ltd. v. Granby Mining Co.* (1971), 19 D.L.R. (3d) 578 at 584. (B.C.C.A.).
48. *Turvey and Mercer v. Lauder* (1956), 4 D.L.R. (2d) 225 (S.C.C.).
49. *Northwestern Mechanical*, *supra,* note 30, at 164.
50. This does not mean that different courts do not have different standards for finding ambiguity. Compare the clause in *Oriole Oil and Gas Ltd. v. American Eagle Petroleums Ltd.* (1983), 24 Alta. L.R. (2d) 121 at 123 (C.A.), which is found to be ambiguous, with the clause in *St. Lawrence*, *supra,* note 44, at 167-8 of the trial judgment, which is held to be unambiguous. The latter would appear to be a far more likely candidate for a finding of ambiguity.
51. *Supra,* note 11.
52. *Canadian Delhi Oil Ltd. v. Alminex Ltd.* (1967), 62 W.W.R. (N.S.) 513 (Alta. C.A.), aff'd [1968] S.C.R. 775, 65 W.W.R. 128.
53. *Id.,* 62 W.W.R. at 517.
54. *Id.,* 62 W.W.R. at 518-9. The explanation of the "golden rule" quoted in this case is as stated by Rigby L.J. in *Diederichsen v. Farquharson Bros.*, [1898] 1 Q.B. 150, at 159:

    > If the literal construction leads to an absurdity, repugnancy, or inconsistency which reasonable people cannot be supposed to have contemplated under the circumstances, it ought if possible to be modified so as to avoid such a result.

55. *Id.,* 62 W.W.R. at 518.
56. *Shore v. Wilson* (1842), 9 Cl. & Fin 355, 8 E.R. 450 at 517-8 (H.L.); quoted in *Canadian Delhi*, *supra,* note 52, 62 W.W.R. at 519.
57. *Supra,* note 52, 62 W.W.R. at 520-1.
58. G.C. Cheshire & C.H.S. Fifoot, *The Law of Contracts,* 4th ed. (London: Butterworth, 1956) at 120, as quoted in W.H. Hurlburt, "Judicial Approach To The Petroleum And Natural Gas Lease" (1966) 4 Alta. L. Rev. 196 at 207. See also Trakman, *supra,* note 22.
59. *Canadian Delhi*, *supra,* note 40, at 521-5. The court points out that at the time the parties entered into the agreement, the defendants were aware that, because a dry hole had already been drilled (on target) in the spacing unit, if the plaintiff was to drill a producing well, it would have to do so "off-target". As well, the court notes that the defendants must also have known of the conservation legislation in force at that time which would reduce the allowable production of such a well.
60. *Supra,* note 11.

61. *Supra,* note 14.
62. *St. Lawrence, supra,* note 44.
63. *Id.,* 36 W.W.R. at 168.
64. *Id.,* 36 W.W.R. at 173-4.
65. *Id.,* 41 W.W.R. at 213-4.
66. *Id.,* at 212.
67. Admittedly, this whole discussion on the difference of opinion between the courts is based solely on inferences drawn from the Appellate Division's decision. The S.C.C., on this point, agreed with the decisions of both the Trial Division and the Appellate Division that there was no ambiguity in the clause and therefore no extrinsic evidence was admissible; it did not make any mention of the facts which had been excluded by the trial judge but which were referred to on appeal in the Appellate Division's statement of the facts.
68. *Amerada Minerals Corp. of Canada Ltd. v. Mesa Petroleum (N.A.) Co.*, [1985] 4 W.W.R. 607, 37 Alta. L.R. (2d) 363 (Q.B.); aff'd (1986), 47 Alta. L.R. (2d) 289 (Alta. C.A.).
69. *Id.,* W.W.R. at 627-8.
70. *Id.,* 47 Alta. L.R. at 297.
71. *Id.,* 47 Alta. L.R. at 299.
72. *Id.,* 47 Alta. L.R. at 300.
73. *Supra,* notes 11 and 14, respectively.
74. *See Avco Delta Corporation Ltd. v. McKay*, [1977] 5 W.W.R. 4; 4 A.R. 565 (Alta. S.C., A.D.).
75. *Bank of B.C., supra,* note 14.
76. *Id.,* at 30; cited in *Amerada Minerals, supra,* note 68, W.W.R. at 620, 47 Alta. L.R. 296 omitting last sentence.
77. There is a suggestion, *supra,* note 68, W.W.R. at 625, that this was evidence was admitted as evidence of industry understanding (custom?) of the term "plant outlet". This, however, would not appear to be a proper categorization either: see text, *infra,* notes 106-111.
78. See generally, Wigmore, *supra,* note 2, at para 2462; and *Cheshire, Fifoot & Furmston's Law of Contract* (11th ed. 1986) at 126-7.
79. *Guaranty Trust, supra,* note 14; for early cases establishing the exception and setting out the rationale *see Brown v. Byrne* (1854), 118 E.R. 1304 (K.B.); *Humphrey v. Dale* (1857), 119 E.R. 1246 (K.B.).
80. Given this rationale, applying the term "exception" to this use of custom is recognized as being somewhat inaccurate; as the parties did not include these terms in the written agreement but did intend the terms to form part of their agreement, the prerequisite for application of the parol evidence rule (*i.e.,* that the parties intend all of the terms of their agreement to be contained in the written document) has not been met and the rule does not apply to exclude this evidence.
81. *Contra* Treitel, *supra,* note 1, at 164.
82. *Georgia Construction Co. v. Pacific Great Eastern Railway Co.*, [1929] 4 D.L.R. 161 at 163 (S.C.C.). Followed in Alberta in *Amerada Minerals, supra,* note 68, at W.W.R. 629; and *Great Northern, supra,* note 3, at 73-4 (Q.B.).
83. 7 C.E.D. (Western 3rd) para 514-5.
84. *Supra,* note 3.
85. *Id.,* 25 Alta. L.R. at 74.
86. See, for example, *Resman, supra,* note 41, and *Amerada Minerals, supra,* note 68.
87. *Supra*, note 14.
88. See text, *supra,* note 25-29.
89. *Guaranty Trust, supra,* note 14, at 207.
90. *Id.,* at 208.

91. *Humphrey v. Dale*, *supra,* note 79, at 1249; *Great Northern*, *supra,* note 3, Alta. L.R. at 74-5; *Guaranty Trust*, *supra,* note 14, at 212. See generally, John Huxley Buzzard, R. May & M.N. Howard, *Phipson On Evidence*, 13th ed. (London: Sweet & Maxwell, 1982) at para 38-13.
92. Cheshire, *supra,* note 78, at 127-8. Note that no parol evidence is admissible to disclose the contrary or inconsistent intention: see text, *supra,* note 83.
93. *Supra,* note 3. See text, *supra,* note 84-5.
94. *Amerada Minerals, supra,* note 68.
95. These are described in the agreed statement of facts submitted by the parties, which is quoted in *Amerada Minerals*, *supra,* note 68, W.W.R. at 612-5.
96. *Amerada Minerals*, *supra,* note 68, W.W.R. at 618-9.
97. *Id.,* W.W.R. at 623.
98. *Id.,* W.W.R. at 623-4. This is the evidence of Mr. Gulles.
99. *Id.,* W.W.R. at 625. Note that although the judgment states here that production occurs "downstream of the plant outlet", at the Court of Appeal level, 47 Alta. L.R. at 297, all parties and the Court agree that this reference should read "downstream of the separator outlet".
100. See text, *supra,* notes 68-77.
101. *Amerada Minerals*, *supra*, note 68, Alta. L.R. at 627.
102. One wonders why the requirement should be marketability "in general" (*i.e.,* marketability to anyone in industry) when it appears that the gas had always been sold to a pipeline company. Gas from the Phase II plant met pipeline specifications.
103. *Amerada Minerals*, *supra*, note 68, Alta. L.R. at 628-9.
104. *Id.,* at 629.
105. See text, *supra,* note 84.
106. *Great Plains Development Co. of Canada Ltd. v. Hidrogas Ltd.* (1982), 17 Alta. L.R. (2d) 17 (C.A.); rev'g [1978] 5 W.W.R. 22 (S.C., T.D.).
107. *Id.,* W.W.R. at 23.
108. *Id.,* W.W.R. at 25-6.
109. *Id.*
110. *Id.*, Alta. L.R. at 24-5.
111. It appears that the Court of Appeal was only concerned that the evidence of the plaintiff was improperly admitted. Theoretically, both the evidence of the plaintiff and the defendant should be inadmissible, because in both cases it was evidence as to the understanding of the meaning of the same term.
112. *Great Plains*, *supra,* note 106, at 26.
113. *Resman*, *supra,* note 41.
114. *Id.,* at 695.
115. *Freeland v. Sun Oil Co.,* 277 F. (2d) 154 (5th Cir. 1960).
116. *Resman*, *supra,* note 41, at 697.
117. *Id.,* at 697-8.
118. *Id.,* at 698.
119. *Supra,* notes 94-104.

CIRL Publications

Following is a complete list of CIRL publications currently available:

Agricultural Law in Canada 1867-1995: With particular reference to Saskatchewan, by Marjorie L. Benson. 1996. ISBN 0-919269-43-5. 192 p. $35.00

Forest Management in Canada, by Monique Ross. 1995. ISBN 0-919269-42-7. 388 p. $59.00

Comprehensive Land Claims Agreements of the Northwest Territories: Implications for Land and Water Management, by Magdalena A.K. Muir. 1994. ISBN 0-919269-44-3. 145 p. $30.00

Canadian Law of Mining, by Barry J. Barton. 1993. ISBN 0-919269-39-7. 522 p. $135.00

Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights, by Richard H. Bartlett. 1988. ISBN 0-919269-23-0. 237 p. $30.00

A Citizen's Guide to the Regulation of Alberta's Energy Utilities, by Janet Keeping. 1993. ISBN 0-919269-40-4. 75 p. $5.00

Environmental Protection: Its Implications for the Canadian Forest Sector, by Monique Ross and J. Owen Saunders. 1993. ISBN 0-919269-34-6. 173 p. $30.00

Energy Conservation Legislation for Building Design and Construction, by Adrian J. Bradbrook. 1992. ISBN 0-919269-36-2. 88 p. $12.00

Managing Interjurisdictional Waters in Canada: A Constitutional Analysis, by Steven A. Kennett. 1991. ISBN 0-919269-31-1. 238 p. $15.00

Security of Title in Canadian Water Rights, by Alastair R. Lucas. 1990. ISBN 0-919269-22-2. 102 p. $13.00

Toxic Water Pollution in Canada: Regulatory Principles for Reduction and Elimination with Emphasis on Canadian Federal and Ontario Law, by Paul Muldoon and Marcia Valiante. 1989. ISBN 0-919269-26-5. 120 p. $13.00

The Offshore Petroleum Regimes of Canada and Australia, by Constance D. Hunt. 1989. ISBN 0-919269-29-X. 169 p. $10.00

A Reference Guide to Mining Legislation in Canada (Second Edition), by Barry Barton, Barbara Roulston and Nancy Strantz. 1988. ISBN 0-919269-25-7. 123 p. $10.00

The Framework of Water Rights Legislation in Canada, by David R. Percy. 1988. ISBN 0-919269-21-4. 103 p. $12.00

Maritime Boundaries and Resource Development: Options for the Beaufort Sea, by Donald R. Rothwell. 1988. ISBN 0-919269-24-9. 61 p. $5.00

Crown Timber Rights in Alberta, by Nigel Bankes. 1986. ISBN 0-919269-17-6. 128 p. $10.00

Liability for Drilling- and Production-source Oil Pollution in the Canadian Offshore, by Christian G. Yoder. 1986. ISBN 0-919269-20-6. 84 p. $10.00

A Guide to Appearing Before the Surface Rights Board of Alberta (Second Edition), by Barry Barton and Barbara Roulston. 1986. ISBN 0-919269-19-2. 124 p. $10.00

The Canadian Regulation of Offshore Installations, by Christian G. Yoder. 1985. ISBN 0-919269-18-4. 116 p. $10.00

Oil and Gas Conservation on Canada Lands, by Owen L. Anderson. 1985. ISBN 0-919269-16-8. 122 p. $10.00

The Assignment and Registration of Crown Mineral Interests, by N.D. Bankes. 1985. ISBN 0-919269-11-7. 126 p. $10.00

The International Legal Context of Petroleum Operations in Canadian Arctic Waters, by Ian Townsend Gault. 1983. ISBN 0-919269-10-9. 76 p. $5.00

Canadian Electricity Exports: Legal and Regulatory Issues, by Alastair R. Lucas and J. Owen Saunders. 1983. ISBN 0-919269-09-5. 42 p. $5.00

Acid Precipitation in North America: The Case for Transboundary Cooperation, by Douglas M. Johnston and Peter Finkle. 1983. ISBN 0-919269-02-8. 75 p. $5.00

Resources: The Newsletter of the Canadian Institute of Resources Law. ISSN 0714-5918. Quarterly. Free

Annual Report. Free

CIRL OCCASIONAL PAPERS

Pipeline Jurisdiction in Canada: The Case of NOVA Gas Transmission Ltd., by Steven A. Kennett. 1996. CIRL Occasional Paper #1. 45 p. $15.00

DISCUSSION PAPERS

Alberta's Wetlands: Legal Incentives and Obstacles to Their Conservation, by Darcy M. Tkachuk. 1993. ISBN 0-919269-37-0. 38 p. $10.00

Instream Flow Protection and Alberta's Water Resources Act: Legal Constraints and Conservations for Reform, by Steven J. Ferner. 1992. ISBN 0-919269-38-9. 44 p. $10.00

Surrounding Circumstances and Custom: Extrinsic Evidence in the Interpretation of Oil and Gas Industry Agreements in Alberta, by David E. Hardy. 1989. 38 p. $10.00

Successor Liability for Environmental Damage, by Terry R. Davis. 1989. ISBN 0-919269-30-3 46 p. $10.00

Classifying Non-operating Interests in Oil and Gas, by Eugene Kuntz. 1988. 31 p. $10.00

Views on Surface Rights in Alberta, Papers and materials from the Workshop on Surface Rights, 20-31 April 1988. Barry Barton, ed. 1988. 77 p. $10.00

ESSAYS FROM CIRL'S CONFERENCES ON NATURAL RESOURCES LAW

Law and Process in Environmental Management, Essays from the Sixth CIRL Conference on Natural Resources Law, edited by Steven A. Kennett. ISBN 0-919269-41-9. 422 p. (hardcover) $80.00

Growing Demands on a Shrinking Heritage: Managing Resource-use Conflicts, Essays from the Fifth CIRL Conference on Natural Resources Law, edited by Monique Ross and J. Owen Saunders. ISBN 0-919269-35-4. 431 p. (hardcover) $80.00

Public Disposition of Natural Resources, Essays from the First CIRL Conference on Natural Resources Law, edited by Nigel Bankes and J. Owen Saunders. ISBN 0-919269-14-1. 366 p. (hardcover) $25.00

OTHER PUBLICATIONS

Available from Carswell

Canada Energy Law Services.
Canada Energy Law Service: Federal, 2 vols.
(ISBN 0-88820-409-4)
Canada Energy Law Service: Alberta, 1 vol.
(ISBN 0-88820-410-8)
Canada Energy Law Service: Federal and Alberta
(ISBN 0-20146)

Available from:Carswell
Thomson Professional Publishing
One Corporate Plaza, 2075 Kennedy Road
Scarborough, Ontario, Canada M1T 3V4

For more information, call Customer Service:
Toronto: (416) 609-3800
Canada & U.S.: 1-800-387-5164
Fax: (416) 298-5094

CIRL Order Information

All book order enquiries should be directed to:
Canadian Institute of Resources Law
PF-B 3330
The University of Calgary
Calgary, Alberta, Canada T2N 1N4
Telephone: (403) 220-3200
Facsimile: (403) 282-6182
Internet: cirl@acs.ucalgary.ca

Business Hours
0830 to 1630 (MST except MDT April-October)

Discount Policy for Bookstores and Book Wholesalers
20% on 1 to 4 books
40% on 5 or more books

GST
All Canadian orders are subject to the 7% Goods and Services Tax (GST). If GST exempt, please indicate in writing. *CIRL's GST Registration No. R118833508*

Payment Terms
Net 60 days.
- Payment or numbered, authorized purchase order must accompany all orders.
- Mastercard or Visa account number with expiry date will be accepted.
- **Outside Canada prices are in U.S. dollars.**

Shipping
Please allow four to five weeks for delivery.

Return Policy
(Applies ONLY to bookstores and book wholesalers.)
All books may be returned for credit within one year of the invoice date, provided that they are in a clean and resaleable condition. Please write for permission to return books and supply original invoice numbers and discounts. Returns must be shipped prepaid. Defective books are replaceable at no charge.

Please Note:
- All books are softcover unless otherwise noted
- All prices are subject to change without notice
- Make cheque or money order payable to *The University of Calgary*

CIRL Order Form

Quantity	Title	Price
_____	Pipeline Jurisdiction in Canada	$15.00
_____	Agricultural Law in Canada 1867-1995	35.00
_____	Forest Management in Canada	59.00
_____	Comprehensive Land Claims Agreements of the Northwest Territories	30.00
_____	Canadian Law of Mining	135.00
_____	Aboriginal Water Rights in Canada	30.00
_____	Law and Process in Environmental Management	80.00
_____	Citizen's Guide to the Regulation of Alberta's Energy Utilities	5.00
_____	Environmental Protection: Its Implications for the Canadian Forest Sector	30.00
_____	Alberta's Wetlands: Legal Incentives and Obstacles to Their Conservation	10.00
_____	Instream Flow Protection and Alberta's Water Resources Act	10.00
_____	Energy Conservation Legislation for Building Design	12.00
_____	Growing Demands on a Shrinking Heritage	80.00
_____	Managing Interjurisdictional Waters in Canada	15.00
_____	Security of Title in Canadian Water Rights	13.00
_____	Toxic Water Pollution in Canada	13.00
_____	Surrounding Circumstances and Custom	10.00
_____	Successor Liability for Environmental Damage	10.00
_____	Offshore Petroleum Regimes of Canada and Australia	10.00
_____	Interjurisdictional Issues in Canadian Water Management	13.00
_____	Classifying Non-Operating Interests in Oil and Gas	10.00
_____	Reference Guide to Mining Legislation in Canada	10.00
_____	Framework of Water Rights Legislation in Canada	12.00
_____	Views on Surface Rights in Alberta	10.00
_____	Maritime Boundaries and Resource Development	5.00
_____	Crown Timber Rights in Alberta	10.00
_____	Liability for Drilling- and Production-Source Oil Pollution	10.00
_____	Guide to Appearing Before the Surface Rights Board of Alberta	10.00
_____	Canadian Regulation of Offshore Installations	10.00
_____	Oil and Gas Conservation on Canada Lands	10.00
_____	Public Disposition of Natural Resources	25.00
_____	Assignment and Registration of Crown Mineral Interests	10.00
_____	International Legal Context of Petroleum Operations	5.00
_____	Canadian Electricity Exports: Legal and Regulatory Issues	5.00
_____	Acid Precipitation in North America	5.00

Sub-total	$ _____
Postage and Handling within Canada: $2.50 first book, $1.00 each additional book	_____
Postage and Handling outside Canada: $4.00 first book, $2.00 each additional book	_____
Sub-total	$ _____
Canadian orders, add 7% GST	_____
TOTAL	$ _____

Outside Canada prices are in U.S. dollars

July 1996