1998 ABCA 333
Alberta Court of Appeal

Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.

1998 CarswellAlta 940, 1998 ABCA 333, [1998] A.J. No. 1120, [1999] 5 W.W.R. 726, 183 W.A.C. 180, 223 A.R. 180, 67 Alta. L.R. (3d) 104, 83 A.C.W.S. (3d) 386

# The Paddon Hughes Development Co. Ltd., Appellant (Plaintiff) and Pancontinental Oil Ltd., Inverness Resources Inc. and Inverness Energy Ltd., Respondents (Defendants)

Côté, O'Leary, Russell JJ.A.

Heard: January 16, 1998
Judgment: October 20, 1998
Docket: Calgary Appeal 96-16379

Proceedings: affirming (1995), 33 Alta. L.R.(3d) 7 (Alta. Q.B.)

Counsel: *J. Ballem, Q.C.*, *H. Locke*, *R.F. Smith*, and *P. Edwards*, for the Appellants.
*J.W. Rose, Q.C.* and *T.J. Coates*, for the Respondents.

Subject: Civil Practice and Procedure; Contracts; Natural Resources; Property

**Related Abridgment Classifications**

**Civil practice and procedure**

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**Contracts**

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**Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness**

Lessor of natural gas lease commenced action for declaration that lease was terminated by lessee's failure to pay drilling delay rental fee on time — Action was dismissed and lessor appealed — Appeal dismissed — Trial judge's interpretation of lease that payment could be made by mail and that payment occurred on date of mailing was reasonable.

**Contracts --- Performance or breach — Time of performance — General**

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**Oil and gas --- Oil and gas lease — Nature of lease — General**

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**Practice --- Practice on appeal — Powers and duties of appellate court — Reversing findings of fact — General**

Lessor of natural gas lease commenced action for declaration that lease was terminated by lessee's failure to pay drilling delay rental fee on time — Action was dismissed and lessor appealed — Appeal dismissed — Trial judge's finding that payments were made on time was supported by evidence and was not based on palpable and overriding error.

The plaintiff was the lessor of two natural gas leases. Both contained clauses which required the lessees to pay drilling delay rental payments on the respective anniversary dates of the leases. B lease specified that payment was to be made by mailing or delivering the required sum, with the payment deemed to have been made on the date of mailing. T lease also initially contained an identical clause, but the lessee had struck the clause out and replaced it with one which simply required that payment was to be made to a specified address in San Francisco. The plaintiff commenced an action against the lessees for a declaration that the rental payments under both leases had not been paid on time, thereby rendering the leases void. The trial judge dismissed the action on ground that the evidence supported a finding that the payments had been made on time. With respect to the T lease, the trial judge specifically held that the lease could be interpreted as allowing for payment by mail, and with payment being deemed to have been received when it was placed in the mail. The plaintiff appealed.

**Held:** The appeal was dismissed.

Per O'Leary J.A. (Russell J.A. concurring): The trial judge did not make any palpable or overriding error in concluding that the payments had been made on time. This decision was supported by the evidence. Case law established that an appellate court could not interfere with a lower level decision in the absence of such error even if it took a different view of the evidence.

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With respect to the T lease, the clause as to payment was not so vague as to be considered ambiguous and justify the introduction of parole evidence to assist in its interpretation. Rather, it was to be interpreted in the context of commercial reality and with a businesslike intention being attributed to the parties. Commercial reality and attributing a businesslike intention to the parties allowed for the clause to be interpreted as allowing for payment to be made by mail. Such an interpretation is not inconsistent with a clause in the lease stating that the written document constituted the entire agreement, in that it did not involve adding a new term to the contract, but simply interpreting an existing one.

With respect to time of payment, case law has established that where payment by mail is permitted, payment is made when posted.

Per Côté J.A. (dissenting): Case law does not allow for payment to be deemed to have been made upon its mailing. Accordingly, while payment had been made on time under the B lease, it had not been made on time under the T lease.

**Table of Authorities**

**Cases considered by *O'Leary J.A.* (*Russell J.A.* concurring):**

*A. & J. Inglis v. John Buttery & Co.* (1878), 3 App. Cas. 552 (U.K. H.L.) — considered

*Air Transit Ltd. v. Innotech Aviation of Nfld. Ltd.* (1989), 78 Nfld. & P.E.I.R. 24, 244 A.P.R. 24 (Nfld. T.D.) — referred to

*Bank of British Columbia v. Turbo Resources Ltd.* (1983), 27 Alta. L.R. (2d) 17, 46 A.R. 22, 23 B.L.R. 152, 148 D.L.R. (3d) 598 (Alta. C.A.) — considered

*Calvan Consolidated Oil & Gas Co. v. Manning* (1958), 25 W.W.R. 641, 16 D.L.R. (2d) 27 (Alta. C.A.) — considered

*Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253, 17 D.L.R. (2d) 1 (S.C.C.) — referred to

*Canadian Fina Oil Ltd. v. Paschke* (1957), 21 W.W.R. 260, 7 D.L.R. (2d) 473 (Alta. C.A.) — distinguished

*Canadian Superior Oil of California Ltd. v. Kanstrup* (1964), [1965] S.C.R. 92, 47 D.L.R. (2d) 1, 49 W.W.R. 257 (S.C.C.) — referred to

*East Crest Oil Co. v. Strohschein*, 4 W.W.R. (N.S.) 553, [1952] 2 D.L.R. 432 (Alta. C.A.) — referred to

*Gloyd v. Midwest Refining Co.* (1933), 62 F.2d 483 (U.S. N.M. Ct. App. 10th Cir.) — considered

*Hayward v. Mellick* (1984), 45 O.R. (2d) 110, 5 D.L.R. (4th) 740, 36 R.P.R. 106, 26 B.L.R. 156, 2 O.A.C. 161 (Ont. C.A.) — considered

*Home Oil Co. v. Page Petroleum Ltd.*, [1976] 4 W.W.R. 598 (Alta. S.C.) — considered

*Indian Molybdenum Ltd. v. R.*, [1951] 3 D.L.R. 497 (S.C.C.) — considered

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*Ivany v. Lancaster Investment Inc.* (1994), 119 Nfld. & P.E.I.R. 51, 370 A.P.R. 51 (Nfld. T.D.) — referred to

*Knight Sugar Co. v. Webster*, [1930] S.C.R. 518, [1930] 4 D.L.R. 343 (S.C.C.) — considered

*Mitsui Construction Ltd. v. Attorney General of Hong Kong* (1986), 71 N.R. 285 (Hong Kong P.C.) — considered

*Northwestern Mechanical Installations Ltd. v. Yukon Construction Co.*, 20 Alta. L.R. (2d) 156, 37 A.R. 132, [1982] 5 W.W.R. 40, 136 D.L.R. (3d) 685 (Alta. C.A.) — considered

*Nova, an Alberta Corp. v. Guelph Engineering Co.* (1989), 70 Alta. L.R. (2d) 97, 100 A.R. 241 (Alta. C.A.) — applied

*Paramount Petroleum & Mineral Corp. v. Imperial Oil Ltd.* (1970), 73 W.W.R. 417 (Sask. Q.B.) — applied

*Reardon Smith Line v. Hansen-Tangen*, [1976] 1 W.L.R. 989, [1976] 3 All E.R. 570 (U.K. H.L.) — considered

*Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1994), 23 Alta. L.R. (3d) 193, 157 A.R. 65, 77 W.A.C. 65, [1995] 1 W.W.R. 316 (Alta. C.A.) — considered

*St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.* (1962), 41 W.W.R. 210, 35 D.L.R. (2d) 574 (Alta. C.A.) — considered

*St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.*, [1963] S.C.R. 482, 45 W.W.R. 26, 41 D.L.R. (2d) 316 (S.C.C.) — referred to

*Texas Gulf Sulphur Co. v. Ballem* (1970), 72 W.W.R. 273, 17 D.L.R. (3d) 572 (Alta. C.A.) — considered

*Texas Gulf Sulphur Co. v. Ballem* (1970), (sub nom. *Ballem v. Texas Gulf Sulphur Co.)* [1971] 1 W.W.R. 560, 17 D.L.R. (3d) 640 (S.C.C.) — referred to

*Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 2 W.W.R. 609, 87 B.C.L.R. (2d) 1, 18 C.C.L.T. (2d) 209, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, (sub nom. *Toneguzzo-Norvell v. Savein)* 162 N.R. 161, (sub nom. *Toneguzzo-Norvell v. Savein)* 38 B.C.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein)* 62 W.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein)* [1994] R.R.A. 1 (S.C.C.) — applied

*Turner v. Visscher Holdings Inc.* (1996), 23 B.C.L.R. (3d) 303, 77 B.C.A.C. 48, 126 W.A.C. 48 (B.C. C.A.) — considered

*32262 B.C. Ltd. v. 271617 B.C. Ltd.* (1996), 24 B.C.L.R. (3d) 21 (B.C. C.A.) — referred to

**Cases considered by *Côté J.A.* (dissenting):**

*Bordo v. 403512 Ontario Inc.* (1983), 41 O.R. (2d) 68, 145 D.L.R. (3d) 235 (Ont. H.C.) — considered

*Canadian Fina Oil Ltd. v. Paschke* (1957), 21 W.W.R. 260, 7 D.L.R. (2d) 473 (Alta. C.A.) — considered

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*Canadian National Railway v. Volker Stevin Contracting Ltd.* (1991), 48 C.L.R. 134, 120 A.R. 39, 8 W.A.C. 39, 1 Alta. L.R. (3d) 167 (Alta. C.A.) — considered

*Gloyd v. Midwest Refining Co.* (1933), 62 F.2d 483 (U.S. N.M. Ct. App. 10th Cir.) — considered

*Henthorn v. Fraser*, [1892] 2 Ch. 27 (Eng. Ch. Div.) — considered

*Paramount Petroleum & Mineral Corp. v. Imperial Oil Ltd.* (1970), 73 W.W.R. 417 (Sask. Q.B.) — considered

*Plummer Enterprises (1983) Ltd. v. R.*, (sub nom. *Great Bear Lake Lodge Ltd. v. Canada)* [1997] G.S.T.C. 35, 5 G.T.C. 1091 (T.C.C.) — considered

*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. 1-2895, 127 A.R. 43, 20 W.A.C. 43 (Alta. C.A.) — considered

*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 7 W.W.R. 37, 20 Alta. L.R. (3d) 296, 168 N.R. 381, (sub nom. *Maritime Life Assurance Co. v. Saskatchewan River Bungalows Ltd.)* [1994] I.L.R. 2913, 155 A.R. 321, 73 W.A.C. 321, 115 D.L.R. (4th) 478, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490 (S.C.C.) — considered

*Tankexpress v. Compagnie Financiere Belge des Petroles* (1948), [1949] A.C. 76 (U.K. H.L.) — referred to

*Texas Gulf Sulphur Co. v. Ballem* (1970), 72 W.W.R. 273, 17 D.L.R. (3d) 572 (Alta. C.A.) — applied

*Texas Gulf Sulphur Co. v. Ballem* (1970), (sub nom. *Ballem v. Texas Gulf Sulphur Co.)* [1971] 1 W.W.R. 560, 17 D.L.R. (3d) 640 (S.C.C.) — referred to

APPEAL by plaintiff from judgment reported at (1995), 33 Alta. L.R. (3d) 7 (Alta. Q.B.) which dismissed its action for declaration that two natural gas leases had terminated.

***O'Leary J.A.* (*Russell J.A.* concurring):**

1 The issue in this appeal is whether the delay rental payments on two freehold petroleum and natural gas leases were made in time to preserve the leases beyond their respective first anniversary dates. If either lease is found to have terminated for late payment, both of them, as well as a third lease of an interest in the same lands, will fall. The appellant, who is successor in title to the lessors, claims the trial judge erred in finding that the delay rental payments were made within the times prescribed by the leases: (1995), 173 A.R. 254 (Alta. Q.B.); (1995), 33 Alta. L.R. (3d) 7, [1995] 10 W.W.R. 656 (Alta. Q.B.).

2 In my opinion, the appeal must be dismissed. My reasons follow.

**I. Background**

3 In 1984, the respondent, Pancontinental Oil Ltd. ("Pancontinental"), leased an undivided one-third interest in the mines and minerals in the SE $^{1}/_{4}$ of 25 - 43 - 2, W4M in the Province of Alberta ("the leased lands") from each of Edward and Audrey Bishop, Harriman Thatcher, and Margaret Stevens. The timely payment of delay rental in respect of the Bishop and Thatcher leases is in issue. The Bishop lease was effective August 17, 1984 and the Thatcher lease August 20, 1984. In 1991 Pancontinental was amalgamated into the respondent Inverness Resources Inc. and the latter was amalgamated into the respondent Inverness Energy Ltd. in 1992.

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4 The leases are in the same printed form. Each is for a primary term of five years from its date

> ...and so long thereafter as the leased substances ... are produced from the said lands, subject to the sooner termination of the said term as hereinafter provided.
>
> . . . . .
>
> PROVIDED that if operations for the drilling of a well are not commenced on the said lands within one (1) year from the date hereof, this Lease shall terminate and be at an end on the first anniversary date, unless the Lessee shall have paid or tendered to the Lessor on or before said anniversary date the sum of *fifty three and* $^{34}/_{100}$ (*$53.34*) Dollars (hereinafter called the "delay rental"), which payment shall confer the privilege of deferring the commencement of drilling operations for a period of one (1) year from said anniversary date, and that, in like manner and upon like payments or tenders, the commencement of drilling operations and the termination of this Lease shall be further deferred for like periods successively.
>
> [handwritten words in italics]

5 Under this form of lease, Pancontinental was bound to either commence drilling operations on the leased lands or pay the agreed delay rental on or before the first anniversary date of the lease. If it did neither, the lease automatically terminated: *East Crest Oil Co. v. Strohschein*, [1952] 2 D.L.R. 432 (Alta. C.A.); *Canadian Superior Oil of California Ltd. v. Kanstrup* (1964), [1965] S.C.R. 92 (S.C.C.).

6 Clause 21 of the Bishop lease sets out the manner in which delay rental payments were to be made:

> **21. Manner of Payment:-**
>
> All payments to the Lessor provided for in this Lease shall, at the Lessee's option, **be paid or tendered** either to the Lessor or to the depository named in or pursuant to this clause, and all such payments or tenders may be made by cheque or draft of the Lessee **either mailed or delivered to the Lessor** or to said depository, which cheque or draft shall be payable in Canadian funds at par in the bank on which it is drawn. **In the case of payments which are mailed, such payments shall be deemed to be received by the Lessor as of the date of mailing**...
>
> [emphasis added]

7 In its printed form, Clause 21 of the Thatcher lease was worded the same as Clause 21 of the Bishop lease. However, before the parties executed the lease, Thatcher requested that a large part of Clause 21 be deleted and other words added. This was done by striking out the unwanted portions and inserting the additions in handwriting. The changes were initialled by the parties. As amended, the clause is as follows:

> **21. Manner of Payment:-**
>
> All payments to the Lessor provided for in this Lease shall be paid to the Lessor *at the address specified in Paragraph 24*.
>
> [handwritten words in italics]

8 The parties deleted the part of Clause 21 that permitted payment by cheque or draft, payable in Canadian funds, mailed to Thatcher, and that deemed payment made in that manner to have been received by Thatcher on the date of mailing. They substituted an agreement that delay rental and other payments were to be paid to Thatcher at the address specified in Clause 24 of the lease.

9 The relevant parts of Clause 24 of the Thatcher lease are as follows:

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**24. Notices:-**

All notices to be given hereunder may be given by registered letter addressed to ... the Lessor at San Francisco, California, U.S.A. *94110 507 Peralta Avenue*. or such other address as the Lessor ... may ... from time to time appoint in writing, and any such notice shall be deemed to be given to and received by the addressee seven (7) days after the mailing thereof, postage prepaid.

[handwritten words in italics]

10 In 1988, the appellant, Paddon Hughes Development Co. Ltd. ("Paddon Hughes"), acquired the interests of Stevens, the Bishops and Thatcher under the leases. In 1989, Pancontinental commenced drilling operations at a location in the North West $^{1}/_{4}$ of Section 25 (not on the leased lands) resulting in a natural gas well capable of commercial production. Later in 1989, Pancontinental gave formal notice to Paddon Hughes that it had pooled the leased lands with the other lands in Section 25 in order to make up a one-section natural gas spacing unit. The notice was given pursuant to Clause 8 of the leases which gave Pancontinental the right to pool the leased lands with other lands to create a one-section natural gas spacing unit. Production from any part of the pooled lands continued the leases as if the production were from the leased lands.

11 If either of the Bishop or Thatcher leases is found to have terminated for late payment of delay rental in 1985, the pooling notice was ineffective to preserve the other leases beyond their primary terms.

12 Paddon Hughes commenced this action seeking a declaration that the delay rental payments in respect of the Bishop and Thatcher leases were not paid on or before their respective anniversary dates of August 17, 1985 and August 20, 1985, and that the leases therefore terminated on those dates by their own terms. If either lease is held to be terminated for that reason, Paddon Hughes asked for a further declaration that the other lease or leases expired since the leased lands were not effectively pooled and there were no drilling operations on or production from the leased lands prior to the end of the primary terms of any of the leases.

13 Paddon Hughes does not complain about the payment to Thatcher being made by cheque payable in Canadian funds although the Thatcher lease does not specifically authorize payment in that manner.

**II. Trial Judgment**

14 Pancontinental's position at trial and before us was that cheques for the delay rental payments were mailed at Calgary on August 9, 1985 by ordinary mail in accordance with the leases. The cheques and transmittal letters are dated August 9, 1985. The Bishop lease assumes payment to have been received on the date of mailing. Pancontinental argues that the Thatcher lease should be construed as permitting payment in Canadian funds by cheque mailed to Thatcher at his mailing address in San Francisco set out in the lease. Moreover, a payment made in that manner should, as a matter of construction, be found to have been made when posted. Alternatively, Pancontinental submits that the payment was mailed to Thatcher 11 days before the anniversary date of the lease and there is evidence from which it can reasonably be inferred that the envelope in fact arrived at Thatcher's residence before August 20, 1985.

15 The primary thrust of Paddon Hughes' evidence and its argument here and below was that the payments were not mailed on the date contended by Pancontinental, but, rather, not until some time after the anniversary dates of the two leases had passed. The envelopes in which the cheques were mailed have been lost or destroyed. The transmittal letters asked the addressees to confirm receipt. The Toronto Dominion Bank in Edmonton, the Bishop's designated depository, acknowledged receipt on August 26, 1985. Thatcher acknowledged receipt on September 4, 1985. Paddon Hughes points to these dates, evidence of the normal time lapse between posting and delivery, and other evidence as demonstrating that the payments were not mailed on August 9, 1985, but on a date after the respective anniversary dates of the leases.

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16 The trial judge found on the evidence that the payments were mailed on August 9, 1985, properly addressed in accordance with the manner of payment provisions of the leases. This was eight days before the anniversary of the Bishop lease and 11 days before the anniversary of the Thatcher lease.

17 The trial judge relied largely on documentary and oral evidence of Pancontinental's usual practice in requisitioning, signing, and mailing delay rental cheques. Pancontinental's cheque requisition forms and file copies of the transmittal letters were dated August 9, 1985. Thatcher died before the trial and there was no explanation for the period between the date of mailing and probable delivery and his acknowledgement of receipt. There was evidence of the internal procedures of the Toronto Dominion Bank that indicated the bank would have received the cheque on the day it acknowledged receipt or the previous day. A Canada Post official testified that the average time for a letter to travel from Calgary to Edmonton in August, 1985 was 2.5 to 3.1 days. There is no similar direct evidence about the average time between posting a letter in Calgary and its delivery in San Francisco, although there is evidence that other payments sent by Pancontinental to Thatcher by mail were delivered to his mailing address in less than 11 days.

18 Having found that the delay rental cheques were mailed on August 9, 1985, the trial judge concluded that the payment in respect of the Bishop lease had been made in a timely fashion. The Bishop lease provides for payment by mail and deems payment to have been received when mailed. Although the Thatcher lease does not specifically provide for payment by mail or in any other manner, the trial judge construed the Thatcher lease as contemplating and permitting payment by mail (Alta. L.R., p.37):

> Was it the intention and in the contemplation of the parties in the present proceedings that the delay rental payment be sent by mail? Harriman Thatcher lived in San Francisco, California. Pancontinental's office was located in Calgary. The amount of the delay rental was $53.34. **Personal delivery, in the circumstances, made no business sense and was impractical**. Harriman Thatcher prior to August, 1985 received correspondence, which concerned the lease, by mail from Pioneer. **Harriman Thatcher, in Clause 24 of the lease, provided a mailing address at which he was to be paid. This mailing address included a zip code**. I am satisfied that it can fairly be inferred, and I find, that the parties contemplated and intended that delay rental payments and any other payments to which Harriman Thatcher became entitled to pursuant to the lease, would be paid through the mails.
>
> [emphasis added]

19 The trial judge then found that the parties intended that payment by mail be considered received when posted (Alta. L.R., p.37):

> The parties having contemplated and intended that the cheques in payment of the delay rentals be mailed, then the date of mailing is the relevant date and not the date of receipt.

20 The trial judge further held that the onus of proving, on a balance of probabilities, that the delay rental payments were not made on a timely and proper basis within the terms of the leases was on Paddon Hughes as successor in title to the lessors and the party asserting that proposition. He concluded that both the Bishop and Thatcher leases were preserved by payment of delay rentals before their anniversary dates.

**III. Analysis**

21 Paddon Hughes urges the Court to disagree with the trial judge's finding of fact that Pancontinental mailed the delay rental cheques on August 9, 1985 in envelopes properly addressed in accordance with the leases. I would not interfere with his conclusion. It is supported by the evidence and does not demonstrate a palpable and overriding error in the trial judge's assessment of the relevant evidence: *Nova, an Alberta Corp. v. Guelph Engineering Co.* (1989), 100 A.R. 241 (Alta. C.A.) at 245. McLachlin J. (for the Court), summarized the roles of trial judges and appellate courts in *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, [1994] 2 W.W.R. 609 (S.C.C.) at 613-14:

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> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it.... A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

22 A consideration of the validity of the Bishop and Thatcher leases must therefore be premised on the finding that the delay rental payments were mailed at Calgary by ordinary mail on August 9, 1985.

***A. The Bishop lease***

23 Clause 21 of the Bishop lease deems payment of the delay rental to have been received by the Bishops on the date of mailing, that is, August 9, 1985. Since the rental was paid before the anniversary date in the manner contemplated by the lease, the Bishop lease did not terminate for late payment.

***B. The Thatcher lease***

24 The Thatcher lease presents a problem of interpretation. Clause 21, as altered by the parties during negotiations, does not clearly specify *how* payment of delay rental is to be made, or *when* payment is considered to have been made. There are therefore two issues to be decided:

- Does the Thatcher lease permit payment of the delay rental by mail?

- If payment may be made by mail, what is the effective time of receipt of a payment made in that manner?

25 Before proceeding to consider these issues, it is useful to review some fundamental rules of construction that are relevant to this case.

*(1) Rules of Construction*

26 The purpose of construing a written agreement is to discover and give effect to the real intention of the parties. Contracting parties are presumed to have intended what they have said in their agreement: *Chitty on Contracts*, 27th ed., vol. 1 (London: Sweet & Maxwell, 1994), at paras. 12-039 and 12-040.

27 Where the parties have reduced their agreement to writing, the parol evidence rule excludes from the court's consideration extrinsic evidence of the parties' intentions, that is, direct evidence beyond what is contained within the four corners of the written agreement. The rule is that the court may not consider extrinsic evidence that adds to, subtracts from, or varies the meaning of the written document. The parties' intentions are to be found, if possible, in the document itself.

28 Clause 21 of the Thatcher lease simply says that the delay rental "shall be paid to the Lessor at the address specified in Paragraph 24". It was argued that the lease was ambiguous regarding payment of the delay rental. Notwithstanding the parol evidence rule, where the language of the agreement is ambiguous, it is well established that a court may resort to extrinsic evidence to assist in interpreting the ambiguity.

29 Difficulty of interpretation is not, however, synonymous with ambiguity: *Northwestern Mechanical Installations Ltd. v. Yukon Construction Co.*, [1982] 5 W.W.R. 40 (Alta. C.A.) at 48-49; *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.* (1962), 41 W.W.R. 210 (Alta. C.A.) at 214; aff'd, [1963] S.C.R. 482 (S.C.C.); *Calvan Consolidated Oil & Gas Co. v. Manning* (1958), 25 W.W.R. 641 (Alta. C.A.) at 658; aff'd, [1959] S.C.R. 253 (S.C.C.); *Home Oil Co. v. Page Petroleum Ltd.*, [1976] 4 W.W.R. 598 (Alta. S.C.) at 604-605.

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30 In my view, while the Thatcher lease presents a difficulty of interpretation, it is not so unclear as to be ambiguous. Therefore, I do not find it necessary to resort to extrinsic evidence. The intention of the parties may be found in the language they used in the context of the lease as a whole.

31 It was argued that the words deleted from the printed form of Clause 21 clearly show what the parties intended. The deleted portion of Clause 21 specifically permitted payment by mail and deemed payment made by mail to be received by the lessor on the date of mailing.

32 The effect of striking words from a printed form of agreement was at issue in *Knight Sugar Co. v. Webster*, [1930] 4 D.L.R. 343 (S.C.C.). Newcombe J. (for the majority) referred with approval at p. 351 to the statement of Lord Hatherley in *A. & J. Inglis v. John Buttery & Co.* (1878), 3 App. Cas. 552 (U.K. H.L.) at 558:

> Nor can I think, and I believe your Lordships will concur with me in this opinion, that it is legitimate to look at those words which appear upon the face of the agreement with a line drawn through them, and which are expressly, by the intention of all the parties to the agreement, deleted, that is to say, done away with, and wholly abolished. **It is not legitimate to read them and to use them as bearing upon the meaning of that which has become the real contract between the parties, namely, the final arrangement of the document which we must now proceed to construe.**
>
> [emphasis added]

33 This proposition was echoed in *Indian Molybdenum Ltd. v. R.*, [1951] 3 D.L.R. 497 (S.C.C.) at 503, where Estey J. stated that "words deleted by the drawing of a line through them, and this deletion initialled by the parties, cannot be looked at."

34 Where, as here, there is no ambiguity justifying the admission of extrinsic evidence in aid of interpretation, it is not proper to refer to the deleted words in construing the meaning of the words actually used by the parties to express their agreement. The words deleted from the Thatcher lease are to be ignored and treated as if they never existed.

*(2) Does the Thatcher lease permit payment of the delay rental by mail?*

35 Clause 21 simply says that payments "shall be paid to the Lessor at the address specified" in Clause 24. The address set out in Clause 24 is a municipal street address with a "zip code". It is clearly a *mailing* address. That is the language from which the Court must ascertain the parties' intentions with respect to the manner of payment of the delay rental. The trial judge construed Clause 21 to mean that the parties contemplated and intended that delay rental payments could be made by mail. His conclusion was based on the fact that the lease provided a *postal* address at which Thatcher was to be paid, and on the commercial reality that a small sum of money was to be paid to an individual living hundreds of miles from the party obligated to pay.

36 The trial judge construed the language of the Thatcher lease in the context of commercial reality. He made no error in doing so. Although extrinsic evidence of the parties' intentions is not admissible, it is perfectly acceptable (and perhaps necessary in this case) to look at the commercial setting of the agreement to help ascertain the intention of the parties. No contracts are made in a vacuum; there is always a setting in which they have to be placed: *Reardon Smith Line v. Hansen-Tangen*, [1976] 1 W.L.R. 989 (U.K. H.L.) at 995 (*per* Lord Wilberforce). In *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 148 D.L.R. (3d) 598 (Alta. C.A.) at 608, Laycraft J.A. (for the Court) stated:

> Consideration of the commercial setting in which a contract is made is not, of course, to be confused with parol evidence of the intention of the parties. That is not admissible. But the commercial setting of the contract assists in ascertaining the intention of the parties from the language they have used.

37 The trial judge observed that Thatcher resided in San Francisco, California, while Pancontinental's office is located in Calgary. He noted that the amount of the annual delay rental was only $53.34. In these circumstances, he concluded that personal delivery made no business sense. I agree. To borrow a phrase from Laycraft J.A. in *Turbo Resources*, the

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"commercial reality" is that the parties must have contemplated and intended that payment of a $53.34 delay rental between Calgary and San Francisco would be by mail. When considered with the actual words used by the parties, this "reality" leads one to conclude that the parties contemplated and intended that payments could be made by mail.

38 Support for this approach can be found in *Mitsui Construction Ltd. v. Attorney General of Hong Kong* (1986), 71 N.R. 285 (Hong Kong P.C.), where Lord Bridge of Harwich stated that, where possible, a court should attribute to contracting parties a businesslike intention. His comment at p. 291 is particularly apt to the construction of Clause 21:

> It is obvious that this is a badly drafted contract. This, of course, affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis.

39 The general principle enunciated by the Privy Council in *Mitsui Construction* has been applied in *32262 B.C. Ltd. v. 271617 B.C. Ltd.* (1996), 24 B.C.L.R. (3d) 21 (B.C. C.A.) at 23-24 (*per* Gibbs J.A.); *Air Transit Ltd. v. Innotech Aviation of Nfld. Ltd.* (1989), 78 Nfld. & P.E.I.R. 24 (Nfld. T.D.) at 37; and *Ivany v. Lancaster Investment Inc.* (1994), 119 Nfld. & P.E.I.R. 51 (Nfld. T.D.) at 58. The Privy Council was not stating a new principle. It was merely re-stating a well-established and fundamental rule for the construction of agreements where the language used by the parties is not clear.

40 The parties obviously intended that payment of delay rental be made in some fashion. An interpretation that permits payment by mail accords with the language of Clause 21, in particular the incorporation by reference of Thatcher's mailing address set out in Clause 24. Such an interpretation also conforms to accepted business practice and attributes a businesslike intention to the parties. It achieves a commercially sensible result.

41 Interpreting the Thatcher lease in the context of commercial reality and a presumed businesslike intention is not to be confused with implying terms in the written contract. Finding that the parties contemplated and intended that payment of the delay rental could be by mail does not amount to implying a term in the Thatcher lease. This is not a case where certain details of the contractual relationship have been left out of the written agreement, necessitating the implication of terms in the sense of adding to the written document. The Thatcher lease deals with the manner of payment. The intention of the parties could have been expressed more clearly and the difficulty of interpretation avoided. That cannot excuse the Court from the duty to construe the words actually used.

42 Because there is no addition to the Thatcher lease, an interpretation permitting payment by mail does not conflict with Clause 23, the "entire agreement" clause. It reads as follows:

> **23. Entire Agreement:-**
>
> The terms of this Lease express and constitute the entire agreement between the parties, and no implied covenant or liability of any kind is created or shall arise by reason of these presents or anything herein contained.

43 There is an affinity between so-called "entire agreement" clauses and the parol evidence rule. The parol evidence rule excludes any extrinsic evidence of the parties' intentions that adds to, subtracts from, or varies the meaning of a written document. The parallel between an entire agreement provision like Clause 23 and the more general parol evidence rule is clear. In *Hayward v. Mellick* (1984), 45 O.R. (2d) 110 (Ont. C.A.) at 120, Houlden J.A. (in a dissenting judgment) went so far as to describe the "entire agreement" clause in that case as "simply a restatement of the parol evidence rule."

44 In *Turner v. Visscher Holdings Inc.* (1996), 23 B.C.L.R. (3d) 303 (B.C. C.A.) at 308 and 318, it was observed that courts have generally equated entire agreement clauses with the parol evidence rule. An entire agreement clause may, however, be broader than the parol evidence rule. Otherwise the clause would be redundant. The effect of "entire

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agreement" clauses will necessarily depend on their precise wording: *Chitty on Contracts*, 27th ed., vol. 1 (London: Sweet & Maxwell, 1994) at para. 12-089.

45 The conclusion that the Thatcher lease contemplates and permits payment of the delay rental by mail is not based on extrinsic evidence of the parties' intentions, and therefore does not offend the parol evidence rule. Even if Clause 23 of the Thatcher lease is broader than the parol evidence rule, the conclusion does not amount to an "implied covenant or liability of any kind". Construing the Thatcher lease as evincing a contractual intention that Pancontinental may pay the delay rental by mail does not amount to finding a collateral agreement over and above the written lease, nor does it impose any obligations beyond those already contained in the agreement.

46 In my view, Clause 23 of the Thatcher lease is designed to prevent any terms being added to the lease by one party later claiming that there were additional terms agreed to but not reduced to writing. It cannot, however, prevent the court from asking what the words "paid to the Lessor at the address specified" actually mean. Here, it is simply a matter of interpreting a term that is already part of the written agreement. The court must determine the meaning of that phrase by construing the language of Clause 21 in the context of the document as a whole in its commercial setting. Concluding that Clause 21 permits payment by mail does not add a term to the lease. That term has existed and been part of the lease from inception. It is, in effect, already a part of the "entire agreement".

*(3) When is payment by mail received?*

47 The second issue is at what point in time should payment by mail be considered received by the lessor. As with the manner of payment, determining the effective date of payment is a matter of construing the terms of the Thatcher lease to discover the real intention of the parties. Clause 21 simply says that the delay rental "shall be paid to the Lessor at the address specified in Paragraph 24". There is no specific reference to the time of receipt. When considering the meaning of the wording of Clause 21 in this context, I am mindful of my earlier discussion of "commercial reality" and "businesslike intentions".

48 The trial judge relied on the reasoning in authorities holding that where the lease permits payment by mail, payment is made when posted: *Gloyd v. Midwest Refining Co.*, 62 F.2d 483 (U.S. N.M. Ct. App. 10th Cir., 1933); *Texas Gulf Sulphur Co. v. Ballem* (1970), 72 W.W.R. 273 (Alta. C.A.); aff'd (1970), [1971] 1 W.W.R. 560 (S.C.C.); and *Paramount Petroleum & Mineral Corp. v. Imperial Oil Ltd.* (1970), 73 W.W.R. 417 (Sask. Q.B.).

49 The decision of the United States Circuit Court of Appeals in *Gloyd v. Midwest Refining Co.* bears some striking similarities to the case at bar. The lessor resided in Oklahoma City. The lessee had its head office in Denver. The "unless" form of freehold lease was silent with respect to the manner of making delay rental payments. Prior to the second anniversary date, the lessee mailed the delay rental payment to the lessor by ordinary post. For reasons unknown the payment was never delivered to the lessor, and he subsequently took the position that the lease terminated for late payment of the delay rental. The Court held that the lessor must have contemplated and intended that the delay rental payments would be forwarded by mail, and in those circumstances payment was made at the time of mailing (p. 487):

> Gloyd requested the Midwest Company to waive its right to make the payment at the depository designated in the lease, and to make such payments directly to him. Gloyd was a resident of Oklahoma City and knew that the Midwest Company's principal office was located in Denver. He must have contemplated and intended that such payments should be forwarded to him by mail. If he impliedly authorized the Midwest Company to make such payment through the mail, the depositing of the check in the post office at Denver in an envelope properly addressed with postage duly prepaid on or before the due date constituted payment.

50 American oil and gas cases are persuasive when not in conflict with authoritative Canadian decisions: *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1994), 157 A.R. 65 (Alta. C.A.) at 70. *Gloyd* is persuasive here because of the similar wording of the payment clause, the modest amount of the annual delay rental, and the distance between the locations

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of the parties. Moreover, it is consistent with the judgment of this Court in *Texas Gulf Sulphur Co. v. Ballem* (1970), 72 W.W.R. 273 (Alta. C.A.); aff'd (1970), [1971] 1 W.W.R. 560 (S.C.C.).

51 In *Texas Gulf* this Court held that the mailing of a delay rental payment before the anniversary date constituted timely payment. The "unless" form of lease in that case provided that payment could be made by mail. It did not, however, stipulate when a payment by mail was considered received by the lessor. Since the lessee was permitted to make payment by ordinary mail, Cairns J.A. (for the Court) held at p. 283 that the lessee need only mail the payment prior to the anniversary date to prevent termination of the lease:

> [The lessee] may deliver a cheque to the lessor or to a depository or he may take the alternate procedure of mailing a cheque to the lessor or the depository. The mailing of a cheque under these circumstances is, in my opinion, equivalent to making payment direct to the lessor or to the depository, and if this is done, as it was in this case prior to the termination of the lease, it constitutes compliance with it.

52 In a brief oral judgment reported at (1970), [1971] 1 W.W.R. 560 (S.C.C.), the Supreme Court of Canada dismissed the lessor's appeal and agreed that the lessee in *Texas Gulf* made payment of the delay rental within the time required to preserve the lease:

> We are all of the opinion that the respondent complied with the requirements of the oil and gas lease in effecting payment of the delay rental in question here within the time required by such lease.

53 The same conclusion was reached in *Paramount Petroleum & Mineral Corp. v. Imperial Oil Ltd.* (1970), 73 W.W.R. 417 (Sask. Q.B.). The lease in that case provided that payment could be made by mail, but, like the lease in *Texas Gulf*, did not contain any provision relating to receipt or presumed receipt by the lessor of payments made by mail.

54 The "manner of payment" clauses in both *Texas Gulf* and *Paramount Petroleum* specified that delay rental payments were to be either "mailed or delivered" by the lessee to the lessor. The parties agreed that the delay rental could be paid by mail. It was held in both cases that, in circumstances where the lessee was entitled to mail the delay rental payment, payment was effected when the payment was posted.

55 Paddon Hughes argues that the delay rental payment must have been delivered to Thatcher's San Francisco residence prior to the anniversary date to preserve the lease. Counsel for Paddon Hughes conceded in oral argument that proof of personal receipt by Thatcher was unnecessary. It would have been sufficient if the payment were delivered by the postal authorities to Thatcher's San Francisco residence on or before August 20, 1985.

56 The argument that there must be delivery before the anniversary date is met by the judgment in *Texas Gulf* where Cairns J.A. observed at p. 283:

> [The appellant] had done all that it was called on to do under the lease and the letter actually "arrived" at the bank within the term of the lease as it was posted to the depository at the address mentioned in the mailing clause, as altered by the assignment. It was out of the control of the appellant and was under the control of the bank from the time of receipt by the post office.

57 The same can be said for Pancontinental in the case at bar. Having mailed the delay rental payment to Thatcher's San Francisco address well before the anniversary of the lease, Pancontinental had done what was required of it under Clause 21, namely pay the delay rental to Thatcher at the address specified.

58 The reasons given by the Saskatchewan Court of Queen's Bench in *Paramount Petroleum* for rejecting a similar "delivery" argument illustrate the practical necessity of attributing an intention to the parties that payment be made when mailed. Johnson J. discussed the rationale behind his decision at pp. 430-31:

> It was urged by counsel for the plaintiffs that the mailing of the letter containing the cheque ought to have been done in sufficient time to allow delivery to the lessor's depository before the expiration of the relevant 12-month period.

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> But inevitably the question arises as to how much time before expiration should this be done. One week? Two weeks? A month? Or a reasonable time? Then, of course, suppose that after such letter has been so mailed by depositing in a post office box, the highway-transport truck, the airplane or the train carrying such letter is destroyed or wrecked so that the letter is never delivered or is delivered after the expiration of the year, is the lessor entitled to say that the lease has "clicked"? If art. 22 is to be construed so as to charge the lessee with ensuring delivery or tender of the cheque before the expiration of the year, the lessee's dilemma is quite obvious. Registered mail does not assist him because such mail is exposed to the same perils in transmission as ordinary mail and a lessor anxious to frustrate a lessee can refuse to accept mail delivery or can move without leaving a forwarding address and a depository on instructions from a lessor may refuse to accept letters. **It follows, therefore, that a lessee is thrown back on personal delivery or personal tender of payment if the closing words of art. 22 mean mailed *and* delivered**....
>
> If from art. 22 of the lease it is to be taken that the mailing of the annual acreage rental cheques or drafts must be in sufficient time for delivery to be effected before the expiration of the 12-month period, there is opened up a considerable area for controversy between the parties. Suppose the lessee mails his packages in what would be considered ample time for them to be delivered to the depository or the lessor, how is he to know that delivery has taken place in time? If the lessor denies having received the mailed package before the expiration of the 12-month period, what can the lessee do? Date of delivery of any mailed package is subject to variation for many reasons **but one date can be easily and definitely established and determined, namely, the date of mailing**. The postmark on a letter shows clearly when a letter is mailed and it becomes an easy matter for a lessor to determine if a lessee has paid in time by simply examining the postmark stamped on the letter by the sending post office. Apart from the rare dating mistake made by the post office, this mark provides proof of the date of mailing and reliance on such a mark obviates any problem of determining the date of delivery and eliminates the possibility of controversies on this point.
>
> [emphasis added]

59 In my view, the policy that underlies the decision in *Paramount Petroleum* is sound and applies to the circumstances of the case at bar.

60 The decision of this Court in *Canadian Fina Oil Ltd. v. Paschke* (1957), 21 W.W.R. 260 (Alta. C.A.), dealt with a situation where a lease would expire unless delay rental was paid on or before October 12. Payment by mail was allowed, and the lessee mailed a cheque on October 12. It was not received by the lessor's depository bank until October 13. The Court ruled that payment had not been made in time. While *Paschke* appears on its face to support Paddon Hughes' position, this Court subsequently commented in *Texas Gulf* that the primary ruling in *Paschke* was that the lease had already expired before the mailing of the cheque. In *Texas Gulf*, Cairns J.A. said at p. 279 that "this was the only point decided by the appellate division" in *Paschke*. He further found that neither the trial nor appeal judgments conclusively decided that payment by mail was ineffective unless actually received on or before the due date (p. 280):

> Both of these judgments on this point are clearly based on an assumption that the lease was in effect when the payment was mailed. In other words, a hypothetical set of facts was set up in both judgments and the judgments on that part of the case were definitely based on an assumed set of facts, which both courts had held to the contrary. It is therefore my opinion that the reasons of Egbert, J., as well as those of Porter, J.A., in view of the fact they could have no application to the case are *obiter*, and this court is not bound to follow the reasons of the appellate division on this point.

61 Nor are we bound by the *obiter* expressed in *Paschke*. Where the lease permits payment of the delay rental by mail, *Texas Gulf* says that payment is made at the moment it is mailed in an envelope addressed to the lessor at the mailing address set out in the lease. The Thatcher lease, as I have interpreted it, permits payment of the delay rental by mail and the decision of this Court in *Texas Gulf* directly applies. By mailing the delay rental to Thatcher at his San Francisco address, Pancontinental "paid ... the Lessor at the address specified" within the meaning of Clause 21. Under the terms of the lease, payment was effected on the date of mailing. The lease had not then terminated. The trial judge correctly held that Thatcher was paid the 1985 delay rental payment on the day it was mailed to him, namely August 9, 1985.

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62 In my view, this appeal fails on another ground. Pancontinental's alternative submission is that the Court can infer from the evidence that the 1985 delay rental *in fact* arrived or was delivered at Thatcher's residence before August 20, 1985. There is no conclusive evidence of when the payment was actually delivered to Thatcher's address in San Francisco. As I mentioned earlier, Paddon Hughes concedes that delivery of the payment at the address specified in Clause 24 was sufficient to constitute payment; it need not be shown that Thatcher personally received the payment. In its factum, Paddon Hughes refers to evidence of the number of days it took prior and subsequent mailings to reach Thatcher's address as "good evidence of a 5 to 7 day mail service to San Francisco" (para. 56). It is of passing interest to note that Clause 24 of the Thatcher lease, the notice clause, stipulates that notices are deemed received by the addressee 7 days after mailing. This 7 day period roughly corresponds to the "good evidence of a 5 to 7 day mail service to San Francisco" referred to by Paddon Hughes. Although there is no direct evidence from the postal authorities on this point, there is unchallenged evidence of other correspondence and payments mailed to Thatcher in San Francisco that justifies the 5 to 7 day transmittal time urged by Paddon Hughes. That evidence supports a reasonable inference that the payment mailed by Pancontinental on August 9 would have arrived at Thatcher's address between August 14 and August 16, well before the anniversary date of August 20, 1985. If it were necessary to do so, I would draw an inference that the delay rental payment was actually delivered before the anniversary date.

63 I concur with the conclusion of the trial judge that the 1985 delay rental payment was paid to Thatcher before the anniversary date and the lease did not therefore terminate for late payment as contended by Paddon Hughes.

**IV. Conclusion**

64 Both the Bishop and Thatcher leases were preserved by payment of the delay rental payments before their respective 1985 anniversary dates. I would dismiss the appeal.

***Côté J.A.* (dissenting):**

**A. Introduction**

1 This issue is whether mailing a cheque is payment on the date of mailing.

**B. Facts**

2 I will extract some of the facts recited in the appellant's factum and accepted by the respondents' factum.

3 The appellant is the registered owner of an estate in fee simple. When the appellant acquired title to the Lands, there were caveats on title, claiming an interest in the Lands by virtue of three Petroleum and Natural Gas Leases. The three leases were pooled with other lands with the intention of forming a one-section spacing unit.

4 One lease was the Bishop Lease. It contains an "unless" clause which reads as follows:

> PROVIDED that if operations for the drilling of a well are not commenced on the said lands within one (1) year from the date hereof, this Lease shall terminate and be at an end on the first anniversary date, unless the Lessee shall have paid or tendered to the Lessor on or before said anniversary date the sum of Fifty-three --- 34/xx ($53.34) Dollars (hereinafter called the "delay rental"), which payment shall confer the privilege of deferring the commencement of drilling operations for a period of one (1) year from said anniversary date, and that, in like manner and upon like payments or tenders, the commencement of drilling operations and the termination of this Lease shall be further deferred for like periods successively.
>
> (emphasis added)

5 The Thatcher Lease also contains an "unless" clause which is worded identically to the "unless" clause in the Bishop Lease.

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6 The manner in which the delay rental payments in the Bishop Lease were to be made is set out in paragraph 21 as follows:

> **21. Manner of Payment:-**
>
> All payments to the Lessor provided for in this Lease shall, at the Lessee's option, be paid or tendered either to the Lessor or to the depository named in or pursuant to this clause, and all such payments or tenders may be made by cheque or draft of the Lessee either mailed or delivered to the Lessor or to said depository, which cheque or draft shall be payable in Canadian funds at par in the bank on which it is drawn. In the case of payments which are mailed, such payments shall be deemed to be received by the Lessor as of the date of mailing...
>
> (emphasis added)

7 The form on which the Thatcher Lease was prepared was the same as the form of the Bishop Lease, but most of the manner of payment clause 21 of the Thatcher Lease was struck out at the time of execution. So Thatcher's clause read:

> **21. Manner of Payment:-**
>
> All payments to the Lessor provided for in this Lease shall be paid to the Lessor at the address specified in Paragraph 24.
>
> (emphasis added)

8 Accordingly, the provision in the Bishop Lease that payments which are mailed shall be deemed to be received as of the date of mailing, was *not* found in the Thatcher Lease.

9 Paragraph 24 of the Thatcher Lease provided that *notices* "might be given by registered letter addressed ... to the Lessor at San Francisco California, U.S.A. 94110 507 Peralta Avenue ..." It did *not* speak of payment.

10 After hearing evidence of Pancontinental's routine for office mailing procedures, the trial judge concluded that the delay rental payments were made timely and properly. He inferred from circumstantial evidence that they had been mailed on August 9, 1985. Mr. Thatcher did not acknowledge his until September, and the Bishops' depository got their cheque August 26. Both those dates were well after the expiry date.

11 There is a good deal of evidence to suggest that the cheques were mailed to Bishop and Thatcher after the expiry date. But the trial judge found otherwise, and had some evidence to support that. I would not have found as he did, but I cannot say there is palpable and overriding error. So we must take it that the two cheques were mailed before the deadline, even though they may well have arrived after it expired.

12 The trial did not turn upon the onus of proof, and I cannot see how it affects the result, so long as those fact findings stand.

### C. Is Mailing Alone Timely Payment?

13 The respondents contend that merely mailing Mr. Thatcher's delay rental cheque in time sufficed, whether or not it reached his address in time, or at all. I do not agree with this proposition. Under ordinary law, mailing is not payment. There is an old English idea that a cheque which never arrives is payment. That idea is bizarre, and I believe that the Canadian business community will be astonished to hear such a rule. *Chitty on Contracts* suggests that mailing a cheque is payment, if the creditor expressly or impliedly authorized sending a cheque by post (para. 21-044, 27th ed. 1994). But the two English cases cited for that proposition are old, and give few reasons. The footnote in *Chitty* seriously qualifies the proposition, and the two cases cited in the footnote which are more recent say *obiter* that mere mailing is

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not payment: *Tankexpress v. Compagnie Financière Belge des Petroles* (1948), [1949] A.C. 76 (U.K. H.L.) 91-92, 100; *The Effy*, [1972] 1 L1. R. 18.

14 One Canadian case holds that mailing is not payment, though it provides no positive reasons: *Bordo v. 403512 Ontario Inc.* (1983), 41 O.R. (2d) 68 (Ont. H.C.), 75. It does, however, reject the theory that the post office is an agent, or the like (pp. 73 ff.).

15 McClung J.A. clearly decided that mailing a cheque was not payment: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1992] I.L.R. 1-2895, 127 A.R. 43 (Alta. C.A.), 64. He was dissenting, but the Supreme Court of Canada reversed the majority: [1994] 2 S.C.R. 490, [1994] 7 W.W.R. 37, [1994] I.L.R. 1-3077, 168 N.R. 381, 155 A.R. 321 (S.C.C.). The Supreme Court of Canada plainly assumed the same thing as McClung J.A. decided. The waiver issues they discussed would not arise if mailing were payment.

16 When an offer may be accepted by mail, acceptance is effective immediately when mailed, whether or not it is received late or never. Acceptance by mail of an offer made in person has also been held valid and effective upon mailing, in limited circumstances, where it was implied that acceptance would be by mail. However, this is not a case of offer and acceptance. It is one of payment.

17 The Alberta Court of Appeal has held that where a lease provides that payment may be made by mail, it could be implied that the parties intended or agreed that payment was made on the date that payment was mailed: *Texas Gulf Sulphur Co. v. Ballem* (1970), 72 W.W.R. 273 (Alta. C.A.); aff'd. briefly (1970), [1971] 1 W.W.R. 560 (S.C.C.). A U.S. Court said that the Lessor must have *contemplated and intended* that the payments should be forwarded to him by mail, although the lease was silent concerning how payment was to be made, since the Lessor knew that the Lessee lived in another city: *Gloyd v. Midwest Refining Co.*, 62 F.2d 483 (U.S. N.M. Ct. App. 10th Cir., 1933).

18 But, just because the parties to an oil or gas lease guess that a certain type of performance might be used, does not mean that they intend or permit it. I note the phrase "contemplated and intended". The term "contemplated" has several meanings. "Contemplated" may refer to what one might guess would happen, or to what is impliedly required or permitted as sufficient. In the law of contracts, what one party guessed that the other would do to perform is irrelevant. If I contract to buy a load of coal, I may well guess, even expect, that the vendor will get the coal from his usual supplier. But the vendor does not break the contract if he gets the coal elsewhere. And if his usual supplier goes out of business, or has a fire, that in no way excuses the vendor's nonperformance.

19 Suppose that the Lessee here had decided to extend the lease by drilling rather than paying the delay rental, and had hired a drilling contractor to drill in time. Undoubtedly the parties would guess that the Lessee would use a contractor rather than drill personally, and in that sense they "contemplated" a contractor. But if the contractor misled the Lessee and did nothing, merely hiring a contractor to drill in time, without anything more, would not constitute drilling. The lease would expire.

20 The Thatcher lease contains no clause providing that payment could be made by mail as in *Texas Gulf*, *supra*. Therefore, it is unreasonable to imply that Thatcher intended that payment would be effective upon posting the cheque. Even if one held that the parties to the Thatcher lease guessed that payment might be made by mail (as in *Gloyd*, *supra*,) that does not mean that it was intended or permitted.

21 Furthermore, it is clearly an error of law to find an implied term in a contract contrary to one of its express terms: *Canadian National Railway v. Volker Stevin Contracting Ltd.* (1991), 120 A.R. 39 (Alta. C.A.), 44. To hold that the Thatcher lease intended or permitted the payment to be mailed would be an error of law in two ways, in my respectful opinion.

22 First, clause 23 of the Thatcher lease (A.B. 208) expressly excludes implied terms from the contract. The underlying theory that terms can be implied in a contract to provide business efficacy is based on adding those missing terms that the parties intended. That intention cannot be the opposite of the express terms of the contract.

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23 I am completely unable to confine clause 23 to excluding parol evidence, for it expressly bars an "implied covenant or liability of any kind". A distinction between implying a term, and interpreting a contract to find a term which is not express, is one which unfortunately I cannot see.

24 Second, the Bishop lease states that the Lessee may "mail or deliver" payments, but the Thatcher lease does *not* mention mailing payments. It says that the money shall be paid to the Lessor at the address specified. How can one then hold that the contract called for mailing, and not any other means of delivery?

25 The suggestion of the respondents seems to be that an express contract to pay in San Francisco is met by mailing in Calgary, even if the cheque is delayed or lost in the mail. The only rationale is that the payment was small. But early mailing by double registered mail would solve the expense. Anyway, the consequences were large.

**D. Other Binding Authority?**

26 *Canadian Fina Oil Ltd. v. Paschke* (1957), 21 W.W.R. 260 (Alta. C.A.) is a decision of the Alberta Court of Appeal on this general topic. The lease there contained the clause providing that all payments or tenders might be made by cheque or draft mailed or delivered to the Lessor or to said depository, as in the Bishop Lease. Most of the discussion in *Canadian Fina Oil Ltd.* was on a different point (precisely which day was the anniversary, i.e. deadline).

27 This Court said in *Canadian Fina Oil Ltd.* that the cheque had to arrive at the address named before the deadline, and that mailing it by then did *not* suffice. The Court took judicial notice of the fact that time is of the essence in the oil business, and that therefore the twin privileges of mailing payments, and paying by cheque, must mean that the cheque must arrive by the stipulated time.

28 In *Texas Gulf, supra*, the Alberta Court of Appeal held that those portions of *Paschke*, *supra*, were *obiter*, but did not say that they were wrong. Nor did it use any reasoning inconsistent with them. I see no reason not to follow the words in *Paschke*, even if they are *dicta*.

**E. Authorities of the Respondent**

29 None of the five cases relied on by the respondents is binding or persuasive in the present case.

***1.* Gloyd v. Midwest Refining Co., *62 F.2d 483 (U.S. N.M. Ct. App. 10th Cir., 1933)***

30 The facts in *Gloyd* are much like those of the present case. The Lessor and Lessee were located in different states, and the lease was silent with respect to how payment was to be made. This American judgment held that since the Lessor knew the Lessee resided in a different state he impliedly authorized payment by mail, which was effective upon mailing. I reject that reasoning above. *Gloyd's* discussion is extremely brief.

***2.* Henthorn v. Fraser*, [1892] 2 Ch. 27 (Eng. Ch. Div.)***

31 This case extends the rule of acceptance of offers by mail to other offers not made by mail as previously mentioned. Yet the Thatcher lease is not a case of offer and acceptance, so Henthorn is not relevant.

32 Nor does this case contain any general reasoning which would help the Lessee. Rather, it exposes the logical fallacy in suggesting that because the offeror knows that the offeree will probably use the post, he thereby authorizes use of the post. The judges say that the offeror does not authorize anything, and it is up to the offeree to decide how he will accept: see pp. 33, 36.

***3.* Texas Gulf Sulphur Co. v. Ballem *(1970), 72 W.W.R. 273 (Alta. C.A.); aff'd briefly (1970), [1971] 1 W.W.R. 560 (S.C.C.)***

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33 As noted, the oil lease in this case provided that payment could be made by mail, as does the Bishop lease. The Thatcher lease does not. The Alberta Court of Appeal relied on this precise clause in the *Texas Gulf* lease when it held that payment under these circumstances by mail was effective on the date of posting (p. 283). Indeed in the next paragraph the Court said:

> An option is nothing more than an offer and the manner of acceptance is stated therein and where it is specified how it may be accomplished, namely, by mail, then the date of posting is the date of acceptance.
>
> (p. 283; emphasis added)

34 The Court stated that if it were not for this clause contained in the *Texas Gulf* lease, which is also contained in the Bishop lease, the money would have had to been paid or tendered to the Lessor (p. 282). Since the Thatcher lease lacks this provision, I distinguish the *Texas Gulf* case.

35 The Supreme Court of Canada also focussed on the particular wording of the lease when affirming the Alberta Court of Appeal:

> We are all of the opinion that the respondent complied with the requirements of the oil and gas lease in effecting payment of the delay rental in question here within the time required by such lease.
>
> (p. 560 W.W.R., emphasis added)

36 In other words, the Supreme Court held that it was a matter of the wording of the individual lease.

***4.* Paramount Petroleum & Mineral Corp. v. Imperial Oil Ltd. *(1970), 73 W.W.R. 417 (Sask. Q.B.)***

37 The lease in this Saskatchewan judgment also contained wording like that in *Texas Gulf*, *supra*, and the Bishop lease. The judge held that mailing in time sufficed, and that receipt in time was not necessary. He gave a number of reasons, none of which convince me. For example, he stressed the uncertainties of the mail. But that is a reason *not* to permit it, still less make mailing payment, still less put the risk on the lessor who has no control over mailing. Speaking of dates on postmarks is obsolete. Businesses use meters and the post office does not cancel or date metered mail. This case is not binding as it is from another province, and declines to follow Alberta Court of Appeal decisions.

38 More importantly, the *Paramount* case is distinguishable because the Thatcher lease lacks the wording contained in the Paramount lease.

***5.* Plummer Enterprises (1983) Ltd. v. R.*, [1997] G.S.T.C. 35 (T.C.C.).***

39 The judge in this case held that payment is made where the letter is mailed unless the parties stipulate otherwise, and that the time of payment is the time of mailing. This case is clearly distinguishable from the Thatcher lease. It is the decision of a Tax Court judge concerning the technical concept of carrying on business. The only authority he cited is the very judgment of Chrumka J. under appeal in the present case, plus the *Gloyd*, *Texas Gulf*, and *Paramount cases*, *supra*, which are plainly distinguishable.

**G. Conclusion**

40 Under ordinary law, mailing is not payment. The Thatcher Lease and the Alberta cases say nothing to the contrary. No Canadian case says the contrary where the lease is silent on the point. So the Thatcher Lease expired, even on the trial judge's fact findings.

41 The Bishop Lease expressly deemed mailing to be payment, and so on the trial judge's fact findings it was renewed in time.

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42 I would allow the appeal, in response to the Thatcher expiry.

43 The appellant had to appeal, and had some success. I would give it $^{2}/_{3}$ of one set of costs of the trial and appeal. Column 5 of new Schedule C will be used unless either party asks in writing for a different column within twenty-one (21) days of these reasons.

*Appeal dismissed.*

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