Communications, Energy and Paperworkers Union of Canada, Local 777, (the union) and Imperial Oil Strathcona Refinery, (the employer)

Elliott Member

Heard: January 6-7, 2004
Judgment: July 7, 2004
Docket: G.A.A. 2004-045

Counsel: Gwen J. Gray, Q.C., for Union
Donald Wilson, for Employer

Subject: Labour

***Elliott Member*:**

I The Grievance and the Agreed Facts

The grievance

1 Jim Leonard, on behalf of himself and 4 other employees, filed a grievance[1] in 2001 claiming that call-out pay was not paid by the employer in accordance with article 9.08(a) of the Collective Agreement[2] between the parties to this arbitration. The relevant part of article 9.08 reads:

> 9.08 Non-schedule overtime (less than 12 hours notice)
>
> (a) The minimum payment for call-out work will be equivalent to five (5) hours pay at the employee's regular rate unless the sign-in occurs between 22:30 and 07:30 hours, in which case the minimum payment will be six (6) hours at the employee's regular wage rate. Call-out payments will apply to employees contacted outside their normal hours.
>
> (b) However, when an employee is scheduled, and the work continues into their normal day or shift, the overtime payment will be based on hours actually worked.

The facts

2 The facts are straightforward and are not in dispute. As the agreed statement of facts[3] records:

> 5. Esso Petroleum Canada, a division of Imperial Oil Limited ("Imperial") and the Hourly Wage Employees of the Strathcona Refinery entered into the Joint Industrial Council Agreement ("JIC Agreement") effective January 1, 1992. The JIC Agreement (Agreed Exhibit "5") governed the wages, hours of work and working conditions applied to the hourly wage earner employees of the Strathcona Refinery from January 1, 1990 up to September 11, 1996.
>
> 6. On July 3, 1995, the Communications, Energy and Paperworkers' Union of Canada, Local 777 was Certified as the bargaining unit at the Imperial Oil Strathcona Refinery (the "union") (Agreed Exhibit "6").
>
> 7. Imperial Oil Strathcona Refinery and the Union entered into negotiations to bargain for a collective agreement (the "First Collective Bargaining Agreement"). The First Collective Bargaining Agreement (Agreed Exhibit "9") was

executed by the parties with an effective date of September 11, 1996.

8. A second collective agreement was bargained for by Imperial and the Union in 1998 (the "Second Collective Bargaining Agreement"). The Second Collective Bargaining Agreement (Agreed Exhibit "11") was executed by the parties with an effective date of July 8, 1998.

9. The overtime language in the First Collective Bargaining Agreement was specifically re-negotiated to the wording in the Second Collective Bargaining Agreement in 1998. Three specific clauses of the Second Collective Bargaining Agreement that were the subject of negotiations were:

Article 9 - Overtime

9.01 All work in excess of an employee's normal working hours or hours performed on an employee's scheduled day off will be paid at the rate of two times the employee's hourly rate except as outlined in Clause 9.14.

9.06 Scheduled Overtime

(a) When an employee is required to work more than two hours of overtime, either immediately before or after their regular working time ...

9.08 Non-scheduled overtime (less than 12 hours notice)

(a) The minimum payment for call-out work will be equivalent to five (5) hours pay at the employee's regular rate unless the sign-in occurs between 22:30 and 07:30 hours, in which case the minimum payment will be six (6) hours at the employee's regular wage rate. Call-out payments will apply to employees contacted outside their normal working hours.

(b) However, when an employee is scheduled, and the work continues into their normal day or shift, the overtime payment will be based on hours actually worked.

9.09 Except for 12 hour shift employees:...

10. A third collective agreement was bargained for by Imperial Oil and the Union in 2001 (the "Third Collective Bargaining Agreement"). The Third Collective Bargaining Agreement (Agreed Exhibit "17") was executed by the parties with an effective date of August 16, 2001.

11. Jim Leonard and four other employees, Rick Henderson, Angela Burke, Ken MacDonald and Todd Babiuk, were scheduled to work a regularly scheduled shift on January 7, 2001 at 18:00 hours. All five were requested to come in early and arrived for work between 16:30 and 17:30 hours. All five were paid overtime for the actual number of overtime hours worked. They are all claiming that they should be entitled to the "call-out premium" pay set out in Clause 9.08(a) of the Collective Bargaining Agreement (five hours straight time).

II The Collective Agreement

3 In their 1998 collective agreement (the "second collective agreement" described in the agreed statement of facts), the parties agreed on the following provisions:

1.01

The purpose of this agreement is to define and promote a harmonious relationship between the Company and its employees represented by the Union; to define the negotiated wages, hours of work, and working conditions, and to outline the procedures for the prompt and equitable resolution of complaints and grievances.

1.02

Recognizing the common dependence of the Company and of its employees upon the success of the business, the parties to this agreement support the mutual objective of increased safety, productivity and efficiency, and jointly promote the goodwill between the parties to achieve this objective through Union/Company discussions on matters mutually agreed to.

4 Under article 3.01, the employer, subject to the terms and conditions of the collective agreement, maintains the right to

(a) manage operations in an efficient, profitable manner to maintain our competitive capability;

5 Article 8 sets out wages and shift differentials for employees, recognizing that shift differentials compensate employees for the inconvenience of working shift in certain instances described in article 8.03.

6 Article 9 deals with overtime. The relevant articles read as follows:

9.01

All work in excess of an employee's normal working hours or hours performed on an employee's scheduled day off will be paid at the rate of two times the employee's hourly rate except as outlined in Clause 9.14.

9.03

Employees are expected to perform overtime work whenever called upon. Overtime will be distributed as equitably as possible amongst employees qualified in the department concerned.

. . .

9.07

Shutdown and start up related unscheduled overtime will be offered on the following basis:

(a) Overtime will be offered first to the employees in the required trade that have already been working on the specific job if the job started before 15:00 (job continuation).

(b) To the qualified employee of the trade group working on the shutdown or start up crew with the lowest overtime according to the DOR and maintaining the current shift schedule being worked.

(c) qualified employees working on the shutdown or startup with the least overtime worked according to the DOR.

(d) qualified employees with the least overtime worked according to the DOR.

7 Article 9.08 reads, in full,

9.08 Non-scheduled overtime (less than 12 hours notice)

(a) The minimum payment for call-out work will be equivalent to five (5) hours pay at the employee's regular rate unless the sign-in occurs between 22:30 and 07:30 hours, in which case the minimum payment will be six (6) hours at the employee's regular wage rate. Call-out payments will apply to employees contacted outside their normal hours.

(b) However, when an employee is scheduled, and the work continues into their normal day or shift, the overtime payment will be based on hours actually worked.

(c) (i) When an employee is required to work more than 2 hours of overtime, either immediately before or after

their regular working time, a meal, per clause 9.06(c), will be provided by the Company. An additional meal will be provided for each subsequent period of continuous work of 4 hours of overtime.

(ii) An overtime meal will be provided for each period of continuous work of greater than four (4) hours of overtime. If an employee is called in with less than two (2) hours notice, there will be an overtime meal provided, after the first one (1) hour of work and for each period of continuous work of grater than four (4) hours thereafter.

(d) In Mechanical, a call-out sheet shall be completed per the Administrative procedure. If additional work arises while an employee is on site, the employee will be offered the opportunity to complete this task as part of the original call-out. If that person declines, then another employee will be called out.

8 Articles 9.09 and 9.10 read:

9.09

Except for 12 hour shift employees:

(a) employees are entitled to a minimum eight (8) hour break from the time they leave work until they are required to report for scheduled work again, pay will be kept whole for all regular scheduled hours missed;

(b) employees whose return requires two (2) hours or less of regular scheduled time are not required to report that day and their pay will be kept whole;

(c) when a call-out occurs between 05:00 and 7:30, the employee will be paid the call-out premium or applicable overtime premium for actual hours worked (whichever is greater), and then work through into the next day until a total of 8.59 hours has been worked. The employee is then entitled to leave work early and have their pay kept whole.

(d) When a maintenance employee is called-out before 05:00 and the work continues into a scheduled day or shift, the overtime payment will be paid for all hours worked and their pay will be kept whole.

9.10

When an employee is requested to return for scheduled overtime after the employee has left the refinery, and the scheduled overtime is cancelled with less than 12 hours notice to the employee, the employee shall be entitled to 2 hours regular pay.

9 Article 9.12 reads:

When an employee is required to work overtime immediately after their normal quitting time, the employee will be paid a minimum of one-half hour at overtime rates.

III The Incident and the Evidence

The incident

10 An incident at the Imperial Oil Strathcona Refinery's utility plant required Jim Leonard and 4 other employees to be called in on January 7, 2001, ahead of the shift they were regularly scheduled to work. They all came in between 1 1/2 hours and 30 minutes early. All 5 were paid overtime for the actual number of overtime hours worked. All claim they are entitled to call-out pay described in article 9.08(a), being 5 hours straight time.

Greg Powell's evidence

11 Mr. Powell has been a process operator at Imperial Oil Strathcona Refinery for 18 years and has been employed by the employer for 22 years. He is the Chief Shop Steward and was part of the committee involved in negotiating the Collective Agreement in question.

12 Mr. Powell gave his understanding of call-out which he described as being asked to return to work outside a person's working hours. A call-out at the refinery could occur as a result of employee sickness, an emergency, an unforseen event or "plant upset".

13 Mr. Powell said call-outs are quite frequent at the refinery and, for a call-out, employees are paid a "call-back premium".

14 Two types of call-out were described by Mr. Powell

- when an employee is required to return to work more than 12 hours after working, this situation was also described as "scheduled overtime"
- when an employee is required to return to work less than 12 hours after working, this situation was also described as "non-scheduled overtime", a "call-out" and as a "call-in".

15 Mr. Powell described the minimum pay for non-scheduled overtime as intended to compensate an employee for the inconvenience to their personal life in being unexpectedly called in to work.

16 Both scheduled overtime and call-outs are paid differently from an employee who continues to work immediately following the end of a shift.

17 Mr. Powell gave evidence about the bargaining described in the agreed statement of facts and of the grievances referred to later in this award. Mr. Powell said that correspondence during the Holingshead grievance, and settlement of the Strembiski grievance by David Barrett and Mr. Griffiths, then plant manager, supported Mr. Powell's and the union's interpretation of article 9.08.

Mr. MacDonald's evidence

18 Francis MacDonald is now retired. Formerly he was employed by Imperial Oil for 32 years. Mr. MacDonald started working as a back-up to the workforce scheduler from 1985-1990 and from 1990 until his retirement in 2003 he was the employer's workforce scheduler.

19 Mr. MacDonald described the comprehensive work schedules he created for one-year periods which I summarize as follows:

- workers are divided into teams with 5 teams comprising a business unit
- a work schedule is created for each member of the team in a business unit
- each team has a different schedule. Each schedule describes, for the team,
    - regular days of work
    - days off
    - vacations
- the schedule includes management, supervisors, business units and the employees included in each business unit.

20 The refinery requires 24 hour coverage by workers, 7 days a week — all positions in the refinery must be covered at all times.

21 The schedules create a comprehensive picture of the times at which an employee is, and is not, scheduled to work. Since 1996 the schedule has been computerized.

22 The schedule gets changed as a result of a number of issues — sickness, overtime requirements, exchanges of shifts not involving overtime. All these and more circumstances result in something other than what was originally scheduled and are recorded in what are described as "exception reports" — essentially a report showing an "exception" — a variation or change — to the schedule.

23 Exception reports are initially created by the employee or shift manager, or may be made by an employee and corrected by a shift manager, typically on the day the exception arises. The reports are put in a box at the worksite, collected by a security officer on their last round of a shift and, during Mr. MacDonald's employment, delivered to Mr. MacDonald.

24 Mr. MacDonald then reviewed the exception report against the schedule and any changes to it, and verified or corrected the exception report. That information was then passed on to the payroll department to make appropriate adjustments to an employee's pay.

25 Mr. MacDonald said his verification of exception reports served 2 purposes:

- to verify the hours worked were correct according to the schedule and correctly recorded
- to verify any exception reports accurately described the "exception" claimed.

26 In the course of his review of exception reports as work scheduler, Mr. MacDonald would examine reports relating to scheduled overtime and claims for pay for call-out. When he felt it necessary, Mr. MacDonald would correct the exception report.[4] At one time an employee would have been notified by the payroll department if the claim made in an exception report had been denied or modified in some way. Mr. MacDonald was unable to say whether employees are currently notified if a change is made to an exception report.

27 For the purpose of this hearing Mr. MacDonald provided a summary document[5] which described call-outs for all business units at the refinery from 1996 to 2003.

28 Mr. MacDonald had some difficulty in preparing the summary because some claimed call-outs were not properly categorized. Mr. MacDonald gave 3 examples of claimed call-outs which in fact were schedule overtime:

- election day coverage
- an awards dinner
- vacation selection.

29 Mr. MacDonald then went through a number of examples which illustrated the employer's interpretation of article 9.08.[6] Mr. MacDonald also described situations arising in his review where, in his view, an incorrect claim of call-out had been made and payment had been made, which he described as a mistake. This could have resulted in either too much or too little being paid to an employee.

30 Mr. MacDonald said that his practice and interpretation of article 9.08 between 1996 and 2003 was consistent throughout that period of time.

31 In summarizing his review for this arbitration hearing Mr. MacDonald said there were, in his view

- 187 correct call-outs during the period he reviewed
- 27 instances when employees came in early
- of the 27, some would work sufficient hours that the overtime pay would exceed the minimum call-out pay.[7] In these cases even if there was disagreement over whether the call-out premium was payable under article 9.08(a) the matter

was not an issue because more hours were worked than the minimum pay under article 9.08(a)

[7] For example, Exhibit 6.

• of the other 27, employees had come in early but had worked overtime at the end of their shift.

32 From the evidence it was not entirely clear to me whether, of the remaining employees, they had been scheduled to work a regular shift or an overtime shift. From Mr. MacDonald's evidence it appeared that most of the remaining 27, if not all, had been scheduled to work a regular shift but were called in early.

33 As for the Strembiski grievance (referred to later in this award) Mr. MacDonald said he disagreed with the decision of the then plant manager. Mr. MacDonald said that the decision in the Strembiski grievance did not cause him to change his (MacDonald's) practice or interpretation of article 9.08.

IV The Issue and Arguments

The issue

34 The issue in this arbitration is the correct interpretation of article 9.08 in the circumstances described in the agreed statement of facts, namely:

> 11. Jim Leonard and four other employees, Rick Henderson, Angela Burke, Ken MacDonald and Todd Babiuk, were scheduled to work a regularly scheduled shift on January 7, 2001 at 18:00 hours. All five were requested to come in early and arrived for work between 16:30 and 17:30 hours. All five were paid overtime for the actual number of overtime hours worked. They are all claiming that they should be entitled to the "call-out premium" pay set out in Clause 9.08(a) of the Collective Bargaining Agreement (five hours straight time).

Union argument

35 The union argues that[8]

• the words "when an employee is scheduled" refers to the scheduling of overtime work. Article 9.08(b) makes it clear that if overtime is scheduled, that is, the employee is given 12 or more hours notice of the requirement to work overtime, and the work continues into their normal day or shift, no call-out premium is paid for the work.

• This interpretation is consistent with the past practice of the Employer. In the Employer's Step 1 and II responses to the Hollinshead grievance *[Agreed Exhibit Book TAB 21 & 22]*, the Employer acknowledges that the overtime was unscheduled (less than 12 hours notice), that it continued into the normal day or shift and that Article 9.08(a) provides for the minimum payment. The premium pay was denied because the total amount of overtime hours worked by the grievor on the day in question (front end and back end) exceeded the minimum hours set out in Article 9.08(a).

• If the Employer interpreted Article 9.08(b) to refer unscheduled overtime running into the normal day or shift not attracting premium pay, it did not indicate this in its response to the Hollinshead grievance.

• The Strembiski grievance makes the matter clear *[Agreed Exhibit Book Tab 25]*. The Step I response upheld the grievance. In this instance, the Employee was called to work 1.5 hours prior to his normal shift and was paid in accordance with Article 9.08(a), i.e. 6 hours of regular wages.

• Subsequently, the Giurati grievance, *[Agreed Exhibit Book Tab 26]*, raised the same issues as arose in the Hollinshead grievance. The Employee was called in with less than 2 hours notice to work. He also worked overtime at the end of his shift. His pay for his total overtime hours exceeded the minimum call-out pay in Article 9.08(a). The Step 1 Response *[Tab 29]* from Mr. David Barrett followed the same reasoning applied in Hollinshead. That is, the total overtime paid for the day exceeded the minimum required by Article 9.08(a).

• The Step 2 Response to the Giurati grievance *[Tab 30]* represented a revisionist history of the intent and application of

Article 9.08(a) by a new manager, Mr. Coutremanche, who had not been involved in the negotiation of the collective agreement in question. He interpreted Article 9.08(b) to mean that "when non-scheduled overtime is performed immediately prior to the employee's scheduled time, the overtime payment will be based on hours actually worked." This interpretation is contrary to the settlement of the Giurati grievance.

• There had been no renegotiation of the collective agreement during the period in question. The Union did file notice to arbitrate but decided internally not to push the Hollinshead-type of grievance where the individual did receive a total overtime payment in excess of the Article 9.08(a) minimum as a result of working overtime both before and after his normal shift.

The Leonard grievance was the next opportunity for the Union to raise the issue.

• The Employer's interpretation of Article 9.08(b) as referring to unscheduled overtime hours that continue into normal day shift is inconsistent with the bargaining history of these parties and the past practice of the Employer. The Union argues that it did not "bargain" away the premium call-in pay when it continues into the regular shift of employees.

36 The union argues that there is a patent ambiguity on the face of Article 9.08, which permits the introduction of parole evidence in the form of the bargaining history and past practice. The ambiguity arises in Article 9.08(b) in the use of the phrase "when an employee is scheduled". Does it refer to scheduled overtime or to the employee's normal work schedule?

37 The union does not argue estoppel, simply that the grievances described confirm a consensus of understanding between the parties that supports the union's interpretation.

Employer's argument

38 The employer's argument included the following points:

• ... unless the wording of Article 9.08 of the Second Collective Bargaining Agreement is ambiguous, previous (and subsequent) agreements are not relevant to the consideration of the issues.

• "When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the agreement."[9]

9 *Phipson on Evidence*, 13th Ed., para 38-01 and *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*, [1998] A.J. No. 1120, [1999] 5 W.W.R. 726 (Alta. C.A.) [at p. 735].

• There are ... exceptions to the parole evidence rule. The most commonly encountered exception to the rule is when the words of a contract are ambiguous in which case evidence of surrounding circumstances may be admitted, not to vary, add to or contradict the terms of the contract, but to enable a court to construe the language in relation to the facts and circumstances in which the parties adopted the language in question. It is important to note that for this purpose "ambiguous words" are not words which are hard to understand, but words that are ambiguous "in the sense that they are susceptible of more than one meaning".[10]

10 *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.).

• In this context, it is respectfully submitted that sub-article 9.08 (a) and sub-article 9.08 (b) clearly relate to two different circumstances, the latter applying to all situations where an employee is called to work overtime with less than 12 hours' notice, the employee is otherwise scheduled to work *and* the overtime continues into the regularly scheduled shift.

• ... the wording selected and utilized in sub-article 9.08(b) makes it clear that the latter sub-article is intended to be read as a qualification to the much broader subsection 9.08(a).

• Sub-article 9.08(b) of the Second Collective Bargaining Agreement specifically, clearly and unambiguously addresses overtime pay in factual circumstances where an employee is called in to work early (or stay late) on a day where that

employee is otherwise scheduled to work. In that case, the employee is compensated at overtime rates for the actual hours worked in addition to the normal shift.

• ... minimum "call-out" payments described in article 9.08(a) must therefore be intended to apply to circumstances where an employee was asked to come to work on a day they would not otherwise have been scheduled to do so. Such payments have been, typically, included in collective agreements to recognize the inconvenience and disruption to an employee who is asked to come to work when otherwise not scheduled to do so and provides minimum guaranteed income to an employee called in to work on what is otherwise a day off.[11]

11 *Brantford (City) v. C.U.P.E., Local 181* (2000), 93 L.A.C. (4th) 14 (Ont. Arb.) (Armstrong).

• The language of 9.08 is clear that Imperial did not intend to pay call-in pay where an employee was called in prior to his or her regular starting time (or stays after his or her shift) ...

• Imperial has paid call-outs in accordance with the plain and apparent meaning of article 9.08 since the Second Collective Bargaining Agreement came into effect, consistent with the intent and clear language of Article 9.08.

• If Imperial did misapply the Second Collective Bargaining Agreement on rare previous occasions in making a call-out payment, it is respectively submitted that this extrinsic evidence cannot be utilized to interpret the Agreement. Past practice may only be considered to interpret a clear ambiguity in the terms of a collective agreement[12] . Thus, only where a term is ambiguous, can past practice be considered to demonstrate the manner in which one party interpreted that ambiguity.

12 *York University v. C.U.P.E., Local 1356* (1976), 12 L.A.C. (2d) 213 (Ont. Arb.) (Abbott).

V Decision

Interpretive approach

39 I use as my approach to the interpretation of collective agreements the same principle that the Supreme Court of Canada has adopted for the interpretation of legislation.[13] I refer to this approach as the *modern principle of interpretation*. In my view, the modern principle of interpretation is a superior statement, as a guide to interpretation, than the rule stated in *Halsbury's Laws of England* to which Canadian texts refer,[14] which relies heavily on the "intention of the parties". The modern principle of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.

40 The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by the modern principle of interpretation which, for collective agreements, is:

In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.

41 Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.

42 Before applying the modern principle of interpretation to this grievance I will identify the components of the modern principle and what they encompass. The modern principle of interpretation is a method of interpretation rather than a rule, but still encompasses the many well-recognized interpretation conventions. The modern principle directs interpreters:

1 to consider the entire context of the collective agreement

2 to read the words of a collective agreement

- in their entire context
- in their grammatical and ordinary meaning

• 3 to read the words of a collective agreement harmoniously

- with the scheme of the agreement
- with the object of the agreement, and
- with the intention of the parties.

1 What is the "entire context of a collective agreement"

43 The "entire context" includes

• the collective agreement as a whole document. One provision of a collective agreement cannot be understood before the whole document has been read because what is said in one place will often be qualified, modified or excepted in some fashion, directly or indirectly, in another

• reading one provision of the collective agreement keeping in mind what is contained in other provisions. In the first instance it must be assumed negotiators knew not only the provisions specifically bargained but all the others contained in the collective agreement. An example is the use of words that have defined meanings. Those meanings must be applied whenever the defined word is used in the collective agreement

• keeping in mind the legislative framework within which collective agreements exist and keeping that framework in mind as part of the entire context.

2 Reading the words

44 Words in a collective agreement are to be read

(a) within their entire context in order to figure out the scheme and purpose of the agreement and the words in a particular article must be considered within that framework,

(b) in their grammatical and ordinary meaning. Typically this involves taking the appropriate dictionary definition of a word and using it, unless the dictionary meaning is modified by a definition, by common usage of the parties or by the context in which the word is used, and

(c) harmoniously with

- the scheme of the agreement (which could include the arrangement of provisions and the purpose of the agreement or a particular part of the agreement)
- its object
- the intention of the parties, assuming an intention can be discerned. The intention is to be found in the words used, but evidence of intention from other sources may be appropriate in order to decide on what the words used by the parties actually mean.

3 The meaning of "context"

45 The word "context" itself means

> the circumstances that form the setting ... for [a] statement ..., and in terms of which it can be fully understood.
>
> Concise Oxford Dictionary (10th)

and the Merriam-Webster Dictionary includes in its definition of *context*:

> the weaving together of words; the parts of a discourse that surround a word or passage and can throw light on its meaning; the interrelated conditions in which something exists or occurs.

46 And so, *entire context* in terms of a collective agreement and the interpretation of the words used in it includes considering

- how words have been weaved together
- how those words connect with other words
- the discourse (other information) that can throw light on the text to uncover the meaning
- any conditions that exist or may occur that might affect the meaning to be given to the text.

47 . . . . .

Testing the interpretation

48 Once an interpretation is settled upon, it should be tested by asking these questions:

- is the interpretation plausible — is it reasonable?
- is the interpretation effective — does it answer the question within the bounds of the collective agreement?
- is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

It is the modern principle of interpretation that I have used to analyze the collective agreement, evidence and argument and to make a decision on the grievance.

Interpretation analysis

49 Using the modern approach to interpretation, I analyse the interpretation issue in this way.

Entire context of the collective agreement

50 The collective agreement in question is created with a purpose article (article 1.01) which says that the purpose of the agreement is to *define and promote a harmonious relationship* between the employer and its unionized employees.

51 It is within this overall context that specific provisions must be interpreted, so that where there is genuine doubt about how to apply a provision of the collective agreement an interpretation encouraging or enhancing a harmonious relationship is the interpretation to be preferred.

52 In answering the interpretation question in this arbitration it was not necessary to resort to or rely on this article, although I kept it in mind.

The context of the article in question

53 Looking at the entire context of the collective agreement requires looking at all relevant provisions of the collective agreement. I have looked at the purpose article. Looking at article 9, and reviewing the evidence, it is clear that scheduling, in various forms, plays an important part of the employer's management of the workforce and on how employees organize their working and personal lives. The evidence is that non-scheduled call-ins are commonplace, and the collective agreement itself says that employees are expected to perform overtime whenever called upon (article 9.03).

54 Article 9.08 has a heading, an unusual feature of article 9. [Only one other article in article 9 has a heading].

55 The heading to article 9.08 must be viewed as a definition of what "non-scheduled overtime" means. Although "scheduled overtime" is an expression used in the collective agreement, it is not specifically defined. In my view, given the heading to article 9.08 "Non-scheduled overtime (less than 12 hours notice)" and treating that heading as a definition of "non-scheduled overtime" this effectively leaves "scheduled overtime" with only one plausible meaning — that scheduled overtime means overtime that is scheduled with at least 12-hours notice to an employee. This interpretation is confirmed by the evidence.

56 Looking further into the context of article 9.08 and how the words are weaved together, article 9.08(a) does not use the phrase "non-scheduled overtime" but rather "call-out work". "Call-out work" is not defined. Nor is "called-in", another term used in article 9.08.

57 "Call-out" and "call-in" are terms commonly found in collective agreements. Left undefined in a collective agreement they must be given meaning based on common usage. "Call-in", "call-out" and "call-back" provisions have been given a variety of meanings[15] in a variety of contexts. The meaning to be given to those words depends on the collective agreement in which the provision occurs and considered in the context in which the term is used.

58 In the 1998 collective agreement, I am satisfied that "call-out" and "call-in" have equivalent meanings.

59 In the collective agreement in question, "call-out" means asking an employee to come to work, with less than 12 hours notice, at a time at which he was not scheduled to work. Obviously, if the employee was scheduled (either scheduled to work a regular shift or scheduled to work on a scheduled overtime shift) he or she would not need to be "called in" or "called out". I have reviewed the call-in cases provided by employer counsel. In this arbitration there is no need to give "call-in" any more defined meaning than I have given it. The collective agreement does not state a purpose for call-in pay, merely when it is payable, and when it is not.

60 For ease of reference I quote article 9.08(a) and (b) again:

> 9.08 Non-schedule overtime (less than 12 hours notice)
>
> (a) The minimum payment for call-out work will be equivalent to five (5) hours pay at the employee's regular rate unless the sign-in occurs between 22:30 and 07:30 hours, in which case the minimum payment will be six (6) hours at the employee's regular wage rate. Call-out payments will apply to employees contacted outside their normal hours.
>
> (b) However, when an employee is scheduled, and the work continues into their normal day or shift, the overtime payment will be based on hours actually worked.

61 Article 9.08(a) is pay for call-out work, and is a recognition of the likely inconvenience of an employee coming to work when he or she was not scheduled to do so. But the 1998 agreement says that when an employee "is scheduled" and "the work" continues into their normal day or shift, the "overtime payment" will be based on hours "actually worked".

"However"

62 Article 9.08(b) starts with the word "However". "However" is a word of several meanings and as with all words with multiple meanings, the context in which the word is used determines its meaning. The *Shorter Oxford English Dictionary on Historical Principles* (3rd) includes in the meaning of "however"

> For all that, nevertheless, notwithstanding, yet = but at the beginning of the sentence.

63 Each of these meanings conveys a limitation or restriction on what precedes the "however". Stylistically the word "however" could be replaced by using the more forceful word "but" and the meaning would be the same. Article 9.08(b) is a limitation on when call-out pay is to be paid.

64 Several other words require interpretation:

- *scheduled*. The crux of the question in this arbitration is: *what is the meaning to be given to the words "when an employee is scheduled"* in the context of article 9.08(b)? *"scheduled"* in my view must mean scheduled to work on a regular shift or on a scheduled overtime shift. There is no reason in article 9.08 to make a distinction between scheduled for a regular shift or scheduled for an overtime shift. Even if a distinction were made, nothing indicates which meaning "scheduled" should have. In my view, the words that follow: *and the work continues into their normal day or shift* indicates that *scheduled* must mean scheduled for their normal day or scheduled for an overtime shift. Consequently I take "scheduled" to mean scheduled to work a regular shift or scheduled to work an overtime shift

- *the work* must refer back to the work referred to in article 9.08(a), namely "the call-out work"

- *normal day or shift* means their regularly scheduled work day or the shift they were previously scheduled to work, whether the schedule was a regular or overtime shift.

Other provisions of the collective agreement

65 Looking at the entire context of the collective agreement requires looking at other provisions of the collective agreement to see whether they shed any light on how the article in question should be interpreted.

66 Article 9.09(c) and (d) deals with a call-out situation with a continuation of work into the next day or "scheduled day or shift".

67 The fact that different words were used in article 9.09 than 9.08 suggest to me that the parties intended to achieve a different result under each of the two articles. If they did not intend a different result the same words or very similar words would have been used.

Other information

68 The modern rule of interpretation calls on "other information" to be considered that can throw light on the text to discern its meaning, recognizing that the text is paramount and the "other information" can only help interpret the text, not change it.

69 Within this inquiry I have considered the union's argument that there was a "consensus understanding" about how article 9.08 was to be interpreted and the history of the article.

70 The union provided 3 grievances which it argues demonstrate a consensus between the parties on the interpretation of

article 9.08(a) and (b).

71 Of the 3 grievances,

• the Hollinshead grievance, in 1998, was a grievance involving a somewhat different issue. The union says that if the employer had maintained the interpretation it now maintains, the argument would have been raised by the employer at that time. As the argument was not raised, the union argues that the employer agreed with the union's interpretation. In the Hollinshead grievance the employer did not specifically address the point in issue, relying entirely on the fact that more money had been paid as a result of the hours worked than would have been payable under the call-out provision.

I am not satisfied this is or can be said to represent a consensus understanding

• the Strembiski grievance, in 1998, was upheld by the plant manager. This involved an employee working an unscheduled 1.5 hours before his scheduled shift. This decision by the employer supports the union interpretation.

• the Guraiti grievance, in 1999, involved the denial of a grievance which included a similar fact situation to this grievance.

Was there a "consensus understanding"?

72 Mr. Powell gave his understanding of the agreement reached between the union and employer during bargaining of the 1998 collective agreement. For the employer, Mr. MacDonald gave his understanding of article 9.08 and how, as scheduler, he had interpreted the article, acknowledging that at one point his views differed from a plant manager.

73 Neither the evidence of Mr. Powell or of Mr. MacDonald is determinative. As the Supreme Court of Canada has said, evidence of one party's subjective intention has no independent place in the determination of what an agreement means.[16]

74 The central issue is not what one side or the other thinks a provision means, the issue is how to interpret what has actually been agreed to. In my view the evidence is not sufficiently clear or firm to establish that a consensus existed. At one point the employer certainly gave mixed messages about its understanding of article 9.08, but in the context of the grievances referred to, I do not believe a consensus on the interpretation can be said to have existed.

75 Had it been necessary to do so, I would certainly have found the employer bound to a decision of a plant manager whatever the views of a less senior person may be.

Bargaining history

76 I have reviewed the earlier agreements provided to me but they do not affect my interpretation and I do not need to comment on them.

Conclusion

77 I conclude that the employer's interpretation of article 9.08 is correct. I have tested my conclusion and am satisfied

• the interpretation is reasonable. It is based on the words agreed to by the parties

• the interpretation answers the question and the parties will be able to administer the collective agreement within the interpretation or modify the article through agreement

• the interpretation is within the bounds of fairness and reasonableness given the agreement of the parties. I recognize that call-outs involve inconvenience, but this collective agreement alerts employees to that inconvenience. It limits compensation for that inconvenience to situations when the employee is not otherwise scheduled to work on the day in question. In this arbitration "fairness" is what has been bargained. No doubt a good case can be made that non-scheduled call-outs can be very inconvenient and should always be compensated, on the other hand the nature of the work at this worksite and the amount of work may well justify a limitation. Consequently, I am satisfied that the interpretation

decision I have reached is within the general bounds of fairness and acceptability.

VI Award

78 The grievance is denied.

79 From the evidence it is not clear whether employees are notified of changes made by management to exception reports filed by employees. If this is not currently being done I suggest such a system should be considered.

APPENDIX 1 — Exhibits

Exhibit #

1 Agreed statement of facts.

2 Agreed binder of documents with the following tabs:

Tab 1 Grievance Form re: Jim Leonard.

Tab 2 Grievance Form — Time Limit Extension — re: Jim Leonard.

Tab 3 Grievance Form signed by Jim Leonard.

Tab 4 Grievance Form — Time Limit Extension.

Tab 5 Joint Industrial Council Agreement dated January 1, 1992.

Tab 6 Certification dated July 3, 1995.

Tab 7 Memorandum of Settlement between Imperial Oil and Communications, Energy, and Paperworkers Union of Canada, Local 777 dated September 4, 1996.

Tab 8 Letter dated September 11, 1996 from Tom Ellenor of the Strathcona Unit, Local 777, CEP to J.S. Griffiths and W. Tingley.

Tab 9 Collective Bargaining Agreement effective September 11, 1996.

Tab 10 Letter dated July 8, 1998 attaching Collective Agreement Extension Ratified dated July 8, 1998.

Tab 11 Collective Bargaining Agreement effective July 8, 1998.

Tab 12 Proposal for Settlement between Imperial Oil and Communications, Energy, and Paperworkers Union of Canada, Local 777 dated April 6, 2001 (Company Offer).

Tab 13 Proposal for Settlement between Imperial Oil and Communications, Energy, and Paperworkers Union of Canada, Local 777 dated April 6, 2001 (Union Response).

Tab 14 Proposal for Settlement between Imperial Oil and Communications, Energy, and Paperworkers Union of Canada, Local 777 dated May 30, 2001.

Tab 15 Letter dated July 31, 2001 attaching Proposal for Settlement between Imperial Oil and Communications, Energy, and Paperworkers Union of Canada, Local 777 dated July 31, 2001.

Tab 16 Memorandum of Settlement between Imperial Oil and Communications, Energy, and Paperworkers Union of Canada, Local 777 dated August 1, 2001.

Tab 17 Collective Bargaining Agreement effective August 16, 2001.

Tab 18 Grievance Form re: Bruce Hollinshead.

Tab 19 Grievance Form signed by Bruce Hollinshead.

Tab 20 Overtime & Exception Report dated July 22, 1998, re: Bruce Hollinshead.

Tab 21 Memorandum dated September 2, 1998, to Bruce Hollinshead from David K. Barrett re: Grievance 98/07/22-09.

Tab 22 Memorandum dated October 19, 1998, to Tom Ellenor from J.S. Griffiths re: Grievance 98 07 22 09.

Tab 23 Grievance Form re: R. Strembiski.

Tab 24 Overtime & Exception Report dated July 16, 1998, re: R. Strembiski.

Tab 25 Memorandum dated September 2, 1998, to Rick Strembiski from David K. Barrett re: Grievance 98/07/16-08.

Tab 26 Grievance Form signed by Dominic Giurati.

Tab 27 Grievance Form re: Dominic Giurati.

Tab 28 Overtime & Exception Report dated January 13, 1999, re: Dominic Giurati.

Tab 29 Memorandum dated March 3, 1999, to Dominic Giurati from David Barrett.

Tab 30 Letter dated July 27, 1999, to T.G. Ellenor from R.G. Courtemanche re: Dominic Giurati.

Tab 31 Letter dated August 20, 1999, to G. Courtemanche from Bob Jamieson re: Dominic Giurati.

3 Payroll Data article 9.08(a) (b) — November 2003.

4 Overtime and Exception Report, November 25, 1986.

5 Overtime and Exception Report, July 29, 1997.

6 Overtime and Exception Report, July 15, 1998.

7 Overtime and Exception Report, July 23, 1998.

8 Overtime and Exception Report, December 16, 1996.

9 Overtime and Exception Report, December 3, 1998.

10 Overtime and Exception Report, January 7, 2001.

11 Overtime and Exception Report, August 7, 1998.

APPENDIX 2 — The Hearing

Sole Arbitrator: David C. Elliott
Counsel for the union: Gwen J. Gray, Q.C.
Counsel for the Employer: Donald Wilson
Witnesses:

For the union:	Greg Powell, Chief Shop Steward
For the Employer:	Francis MacDonald, former Work Scheduler for the employer

Dates and place of the hearing: 6-7 January 2004 at the Holiday Inn, Edmonton, Alberta.
All evidence was given under oath.