

# A PRIMER ON CONTRACTUAL INTERPRETATION

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## Geoff R. Hall

### Lawyer Profile



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### Biography

Geoff R. Hall is a partner in the Litigation Group based in our Toronto office. Mr. Hall's practice focuses on corporate/commercial litigation, including contract disputes, shareholder disputes, Aboriginal litigation, administrative law litigation, tax dispute, and insolvency litigation.

Mr. Hall's recent major engagements include the following:

- Counsel to Fairmont Hotels Inc. in the Supreme Court of Canada in a case argued in May 2016 that will define the proper test for rectification where there are tax implications (currently under reserve)
- Lead Canadian counsel to The Toronto-Dominion Bank defending a \$5.5 billion action arising from the collapse of Stanford International Bank
- Counsel to the successful defendant in *Re GrowthWorks Canadian Fund Ltd.*, 2015 ONSC 6875, a dispute over the interpretation of a contract
- Counsel to one of the successful respondents in *Wabauskang First Nation v. Minister of Northern Development and Mines*, 2014 ONSC 4424 (Div. Ct.), an application for judicial review alleging a breach of the duty to consult Aboriginal peoples
- Counsel to the successful responding party in *Canada Forgings Inc. v. Atomic Energy of Canada Limited*, 2013 ONSC 6145, a summary judgment motion in a major procurement dispute

Mr. Hall is listed in the current edition of the *Lexpert/ALM 500 Directory*, a guide to the 500 leading lawyers in Canada, and is listed in the current edition of *Canadian Legal Lexpert Directory* as a leading lawyer in the area of corporate commercial litigation.

In addition to his practice, Mr. Hall is a widely published author and speaker. His book *Canadian Contractual Interpretation Law* is the leading Canadian treatise on contractual interpretation. The third edition was published in May 2016. Since its initial publication in 2007 it has been cited by courts across Canada over 170 times, including six times by the Supreme Court of Canada. He is an Adjunct Professor at the University of Toronto Faculty of Law, where he teaches two courses on contracts and contractual interpretation.

## Geoff R. Hall

### Lawyer Profile

Mr. Hall holds a BA from McGill University (1987, Gold Medallist in Economics), an MA in Economics from the University of Toronto (1988), an LLB from the University of Toronto (1991, Silver Medallist), and an LLM from Harvard Law School (1996). Mr. Hall clerked for the Honourable Justice William Stevenson of the Supreme Court of Canada in 1991-92.

## SUMMARY OF THE EIGHT COMMON LAW FUNDAMENTAL PRECEPTS OF CONTRACTUAL INTERPRETATION

1

Words and their context

Since contractual interpretation for the most part involves no greater social goals than getting the meaning right, courts are obsessed with interpretive accuracy.

The courts have increasingly recognized over the past 45 years that context is central to interpretive accuracy.

Context has two aspects:

- the context of the document
- the surrounding circumstances

There can be a tension between text and context.

Similar to arts. 1425 and 1426 of the *Civil Code of Québec*.

2

A contract is to be construed as a whole with meaning given to all of its provisions

"The normal rules of construction of a contract require that the various clauses of a contract cannot be considered in isolation but must be given an interpretation that takes the entire agreement into account.": *Canadian Newspapers Co. v. Kanda General Insurance Co.* (1996), 30 O.R. (3d) 257 (C.A.) at 270, leave to appeal refused [1996] S.C.C.A. No. 553.

- achieves interpretive accuracy
- eliminates ambiguities and inconsistencies

A good example is *McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6:

"any policy issued on this application shall become effective when delivered to and accepted by me" was interpreted to mean the effective date of a backdated policy.

Similar to arts. 1427 and 1428 of the *Civil Code of Québec*.

## SUMMARY OF THE EIGHT COMMON LAW FUNDAMENTAL PRECEPTS OF CONTRACTUAL INTERPRETATION

3

The factual matrix

A hugely important aspect of contextual interpretation, which is a legacy of Lord Wilberforce

“In order for the agreement of 6th July, 1960 to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. ... We must ...enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.”: *Prenn v. Simmons*, [1971] 3 All E.R. 237 (H.L.).

“The aggregate profits of R.T.T. earned” was interpreted to refer not only to one specific holding company (R.T.T.) but also to the entire R.T.T. group.

“No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as ‘the surrounding circumstances’ but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.”: *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.) at 574.

“Japanese flag ...Newbuilding motor tank vessel called Yard No. 354 at Osaka Zosen” was interpreted not to mean a vessel built at Osaka (as that was impossible, because the ship was too big) but rather as a means of identifying a particular tanker to be built.

“it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable [person]”, with the exception of evidence of previous negotiations, evidence of the parties’ subjective intention, and the requirement that the background facts must have reasonably available to all parties at the time of contracting: *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 W.L.R. 896 (H.L.) at 913, adopted in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 58.

- the factual matrix must not be allowed to overwhelm the words chosen by the parties: *Sattva* at para. 57.

## SUMMARY OF THE EIGHT COMMON LAW FUNDAMENTAL PRECEPTS OF CONTRACTUAL INTERPRETATION

4	The organizing principle of good faith	<p>There is a general organizing principle of good faith that underlies many facets of contract law: <i>Bhasin v. Hrynew</i>, 2014 SCC 71 at para. 93.</p> <p>The organizing principle requires that “parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily”: <i>Bhasin v. Hrynew</i>, 2014 SCC 71 at para. 63.</p> <p>In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships: <i>Bhasin v. Hrynew</i>, 2014 SCC 71 at para. 93.</p> <p>One manifestation is a new common law duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations: <i>Bhasin v. Hrynew</i>, 2014 SCC 71 at para. 93.</p> <p>Similar to arts. 6, 7 and 1325 of the <i>Civil Code of Québec</i>.</p>
5	Interpretation is an objective exercise	<p>“The goal in interpreting an agreement is to discover, objectively, the parties’ intention at the time the contract was made.”: <i>Gilchrist v. Western Star Trucks Inc.</i> (2000), 73 B.C.L.R. (3d) 102 (C.A.) at para. 17.</p> <p>“The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party’s subjective intention has no independent place in this determination.”: <i>Eli Lilly &amp; Co. v. Novopharm Ltd.</i>, [1998] 2 S.C.R. 129 at para. 54.</p>
6	Commercial efficacy	<p>Commercial contracts must be interpreted in accordance with sound commercial principles and good business sense: <i>Scanlon v. Castlepoint Development Corp.</i> (1992), 11 O.R. (3d) 744 (C.A.) at 770-1, leave to appeal refused [1993] 2 S.C.R. x.</p> <ul style="list-style-type: none"> <li>• corollary: an interpretation which is commercially absurd is to be avoided</li> <li>• can result in a tension between text and context</li> <li>• objective, does not consider one party’s perspective alone, considers the entire factual matrix</li> </ul>

## SUMMARY OF THE EIGHT COMMON LAW FUNDAMENTAL PRECEPTS OF CONTRACTUAL INTERPRETATION

7	Every effort should be made to find a meaning	<p>"Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat [words are to be understood that the object may be carried out and not fail]. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.": <i>Hillas &amp; Co. Ltd., Arcos Ltd.</i> (1932), 147 L.T. 503 (H.L.) at 514.</p> <p>"[E]very effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted.": <i>Marquest Industries Ltd. v. Willows Poultry Farms Ltd.</i> (1968), 1 D.L.R. (3d) 513 (B.C.C.A.) at 517-518.</p>
8	A contract is to be interpreted as of the date it was made	<p>"It is a fundamental rule of contractual interpretation that the intention of the parties is to be determined as of the time when the contract is made": <i>Davidson v. Allelix Inc.</i> (1991), 7 O.R. (3d) 581 (C.A.) at 587.</p> <ul style="list-style-type: none"> <li>• result: discussions in 1986 were irrelevant to the interpretation of a contract made in 1984</li> <li>• reason: a contract's meaning should not depend on the time when someone goes to court to have it interpreted</li> </ul>



## RELEVANT ARTICLES FROM THE CIVIL CODE OF QUÉBEC

6. Toute personne est tenue d'exercer ses droits civils selon les exigences de la bonne foi.

7. Aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de la bonne foi.

1375. La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction.

### SECTION IV DE L'INTERPRÉTATION DU CONTRAT

1425. Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.

1426. On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.

1427. Les clauses s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'ensemble du contrat.

1428. Une clause s'entend dans le sens qui lui confère quelque effet plutôt que dans celui qui n'en produit aucun.

1429. Les termes susceptibles de deux sens doivent être pris dans le sens qui convient le plus à la matière du contrat.

1430. La clause destinée à écarter tout doute sur l'application du contrat à un cas

6. Every person is bound to exercise his civil rights in good faith.

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

1375. The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

### DIVISION IV INTERPRETATION OF CONTRACTS

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

1427. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.

1428. A clause is given a meaning that gives it some effect rather than one that gives it no effect.

1429. Words susceptible of two meanings shall be given the meaning that best conforms to the subject matter of the contract.

1430. A clause intended to eliminate doubt as to the application of the contract to a

particulier ne restreint pas la portée du contrat par ailleurs conçu en termes généraux.

1431. Les clauses d'un contrat, même si elles sont énoncées en termes généraux, comprennent seulement ce sur quoi il paraît que les parties se sont proposé de contracter.

1432. Dans le doute, le contrat s'interprète en faveur de celui qui a contracté l'obligation et contre celui qui l'a stipulée. Dans tous les cas, il s'interprète en faveur de l'adhérent ou du consommateur.

specific situation does not restrict the scope of a contract otherwise expressed in general terms.

1431. The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

1432. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.