

Canadian Contractual Interpretation Law

SECOND EDITION

Geoff R. Hall

B.A. (McGill), M.A., LL.B. (Toronto), LL.M. (Harvard)

Partner, McCarthy Tétrault LLP

 LexisNexis
NORTON ROSE
CALGARY LIBRARY

necessity to consider not only the words of the contract but also, as mandated by article 1426, the external context.¹³¹

At the same time, as in the common law, the factual matrix may not overwhelm the text of the contract. This result flows from articles 2863 and 2864 of the *Civil Code of Québec*:

2863 The parties to a juridical act set forth in a writing may not contradict or vary the terms of the writing by testimony unless there is a commencement of proof.

2864 Proof by testimony is admissible to interpret a writing, to complete a clearly incomplete writing or to impugn the validity of the juridical act which the writing sets forth.¹³²

The point has also been made in the case law.¹³³

1.4 INTERPRETATION IS AN OBJECTIVE EXERCISE

1.4.1 The principle

It is a fundamental precept of the law of contractual interpretation that the exercise is objective rather than subjective. “The goal in interpreting an agreement is to discover, *objectively*, the parties’ intention at the time the contract was made.”¹³⁴ [Emphasis added.] The objective approach applies to both the words of a contract and their context. Therefore, the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix.¹³⁵ “Bearing in mind the relevant background, the purpose of the document, and considering the entirety of the document, what would the parties to the document *reasonably* have understood the contested words to mean?”¹³⁶ [Emphasis added.] Put another way, “[i]n interpreting a

¹³¹ *STMicroelectronics inc. v. Matrox Graphics inc.*, [2007] J.Q. no 14364 at para. 59 (Qué. C.A.). See also *Vanier v. Ville de Montréal*, [2004] J.Q. no 6523 at para. 21 (Qué. C.A.) and *Shaughnessy Village Realities Inc. v. Syndicate of the Co-Owners of Complexe du Fort*, [2008] J.Q. no 8914 at para. 25 (Qué. C.A.).

¹³² S.Q. 1991, c. 64, arts. 2863 and 2864.

¹³³ *Sobeys Québec Inc. v. Coopérative des consommateurs de Sainte-Foy*, [2005] J.Q. no 17876 at para. 54 (Qué. C.A.).

¹³⁴ *Gilchrist v. Western Star Trucks Inc.*, [2000] B.C.J. No. 164, 73 B.C.L.R. (3d) 102 at para. 17 (B.C.C.A.).

¹³⁵ The first edition of this book was cited with approval for this point in *Golden Capital Securities Ltd. v. Investment Industry Regulatory Organization of Canada*, [2010] B.C.J. No. 1458, 8 B.C.L.R. (5th) 227 at para. 44 (B.C.C.A.).

¹³⁶ *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1999] O.J. No. 3290, 45 O.R. (3d) 417 at para. 9 (Ont. C.A.). There are numerous judicial pronouncements to a similar effect. See, for example, *Alberta (Treasury Branches) v. Macleod Dixon*, [2001] A.J. No. 114, [2001] 6 W.W.R. 265 at para. 32 (Alta. Q.B.); *Barque Investments Ltd. v. DKT Computer Learning Centre Inc.*, [2001] A.J. No. 1190, 297 A.R. 337 at para. 12 (Alta. Q.B.); *Greenholls Golf and Country Club 617654 Saskatchewan Ltd. v. Morhart*, [2002] S.J. No. 6, 215 Sask. R. 124 at para. 8 (Sask. Q.B.); and *CISH Care Institute of Safety and Health Inc. v. West Fraser Home Centres Inc.* [2004] B.C.J. No. 1318 at para. 98 (B.C.C.A.).

contract, what is relevant is the parties' outward manifestations ...".¹³⁷

The proposition that contractual interpretation is objective rather than subjective is universally accepted by the courts and is only occasionally challenged in academic literature.¹³⁸

The objective nature of the endeavour affects the entire interpretive exercise. It defines the perspective for interpretation — the words in their context mean not what the parties subjectively believe them to mean but rather what a reasonable third party would take them to mean — and renders evidence of subjective intention absolutely inadmissible.

2.4.2 The words mean what a reasonable person would take them to mean

Since interpretation of the words of a contract is objective, meaning must therefore be assessed from the perspective of a reasonable person. This perspective is nicely illustrated by *642718 Alberta Ltd. (c.o.b. CNE Centre) v. Alberta (Minister of Public Works, Supply and Services)*.¹³⁹ The issue was whether an offer to purchase document (referred to as the "Third Offer"), forwarded to the plaintiffs by the defendant Province of Alberta constituted an acceptance of a purported oral agreement to purchase land. Interpretation of the Third Offer was approached on the following basis: "The question then becomes, what should the Plaintiffs reasonably have concluded was intended by the Province when they forwarded this document."¹⁴⁰ This formulation aptly demonstrates the objective perspective to contractual interpretation: the question was not what the *Defendant* intended by the words it used but rather "what should the *Plaintiffs reasonably* have concluded was intended ...". [Emphasis added.]

2.4.3 The parties' subjective intentions must not be considered

There is an obvious but profound implication to the requirement that the words of a contract must be interpreted objectively: the parties' subjective intentions are irrelevant, and evidence of them is inadmissible. "The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the

¹³⁷ *Lacroix v. Loewen*, [2010] B.C.J. No. 833, 4 B.C.L.R. (5th) 282 at para. 37 (B.C.C.A.).

¹³⁸ For example, Ruth Sullivan, "Contract Interpretation in Practice and Theory" (2000) 1: S.C.L.R. (2d) 369 argues that the concept of objective intention is incoherent because under the "classical theory" of contract law, which justifies the enforcement of contracts by the fact that they are entered into freely by autonomous individuals, only enforcement of subjective intention would make sense.

¹³⁹ [2004] A.J. No 870, [2005] 10 W.W.R. 555 (Alta. Q.B.), *var'd* [2005] A.J. No. 1177, 371 A.R. 390 (Alta. C.A.).

¹⁴⁰ [2005] A.J. No. 1177 (Alta. Q.B.).