Bhasin v. Hrynew – A Modest Incremental Step

Prepared for: Legal Education Society of Alberta
51st Annual Refresher: Business

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For presentation in:
Lake Louise, Alberta – May 6 – 8, 2018

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INTRODUCTION

In 2014 the Supreme Court of Canada issued its decision in *Bhasin v. Hrynew*[1]. The Court articulated two principles which it described as "incremental steps" in the development of the common law of contracts. The first step was to acknowledge that good faith contractual performance is a general organizing principle which underpins and informs the various rules in which the common law recognizes obligations of good faith contractual performance. The second step was to recognize a common law duty to act honestly in the performance of contractual obligations.

When *Bhasin* was released there was, despite the cautious language of the Court, concern that the new layer of uncertainty may have been added to the interpretation and enforcement of contracts, specifically commercial contracts. Whether these concerns are justified, time will tell but indications are that the Courts are taking a cautious, conservative approach to the case. In this paper, we endeavour to briefly discuss the *Bhasin* decision and identify how the decision has thus far been applied in the Alberta Courts in particular.

THE FACTS

Mr. Bhasin, through Bhasin & Associates, was an enrollment director for Canadian American Financial Corp. (Can-Am). The nature of his business was selling Can-Am's education savings plans to investors. In return, his company received compensation and bonuses from Can-Am. Over the years, Bhasin developed a very successful sales force and became one of the top enrollment directors in Canada. At issue in the case was Can-Am's termination of the 1998 agreement between Bhasin and Can-Am. The relevant provision stated that the agreement would automatically renew at the end of its 3-year term unless one of the parties gave written notice to the contrary.

Mr. Hrynew was another enrollment director for Can-Am and a competitor of Bhasin. He had the largest agency in Alberta and a good working relationship with the Alberta Securities Commission ("ASC"), which regulated Can-Am's business. Hrynew had approached Bhasin numerous times with a proposal about a merger of their agencies, but was turned down. Hrynew also encouraged Can-Am to force the merger and threatened to leave if the merger would not take place.

At some point, the ASC raised concerns with Can-Am about compliance with securities laws and required that a provincial trading officer ("PTO") be appointed to audit its enrollment directors. Can-Am appointed Hrynew as the PTO. Bhasin objected to having Hrynew conduct an audit of his agency and review his confidential business records.

[1] *Bhasin v. Hrynew* [2014] 3 SCR 494; 2014 SCC 71 (CanLII); For a detailed analysis of the case and discussion of comparative obligations under U.S. law see O'Byrne and Cohen, (2015) 53 Alta L Rev 1.

Can-Am misled Bhasin by telling him that Hrynew, as PTO, was under an obligation to treat the information confidentially and that the ASC had rejected a proposal to have an outside PTO, which was not true. Bhasin continued to refuse to allow Hrynew to audit his records, and Can-Am eventually gave him notice of non-renewal under the agreement. Once the term of the agreement expired, Bhasin lost the value in his business and his assembled workforce. The majority of his sales agents were solicited by Hrynew's agency.

At trial, it was found that Can-Am acted dishonestly with Bhasin throughout the events leading up to the non-renewal, including by misleading him about its intentions with respect to the merger and about the fact that it had proposed a structure to the ASC where Bhasin would work for Hrynew's agency. Ultimately, the Court (Moen J. of Alberta QB) found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The Court of Appeal reversed the finding on the basis that the contract was unambiguous and contained an entire agreement clause.

THE SUPREME COURT ON GOOD FAITH

The Supreme Court reviewed the state of good faith in Anglo-Canadian common law, and compared it to the law of good faith in other jurisdictions. The Court noted that the Anglo-Canadian approach has been 'piecemeal', applying good faith notions to some types of contracts and relationships (such as insurance, employment, tendering), but failing to take a consistent or principled approach. As a result, the unanimous Court held that it was appropriate to make two incremental changes in the common law: 1) to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract and 2) to recognize that there is a common law duty to act honestly in the performance of contractual obligations. The Court held that "[d]oing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty" (at para. 34).

The Court further stated a basic level of honest conduct is necessary and expected in commercial dealings, and that it is applicable to both long term contracts and transactional exchanges:

> Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct

> will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24 (at para. 60).

The Court defined an organizing principle of good faith as a standard that underpins and is manifested in specific legal doctrines. However, that list is not closed, and the organizing principle may be applied to situations where the existing law is found to be wanting and where it is appropriate that incremental development take place.

The crux of the organizing principle is that a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner, which requires not seeking to undermine those interests in bad faith. The Court cautioned that the duty of good faith must not be used to undermine the freedom of the contracting parties to pursue their individual self-interest, as that would result in *ad hoc* judicial moralism.

With respect to the duty of honest contractual performance, the Court stated that it means that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract", but that it "does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract" (at para. 73).

The Court summarized the principles pronounced in the case, as follows:

> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> (2) 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.
>
> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations. (At para. 93)

CONSIDERATION OF *BHASIN*

There are many subsequent Alberta decisions citing *Bhasin*. The following two Court of Appeal decisions have given it a more in-depth consideration:

Styles v. Alberta Investment Management Corp., 2017 ABCA 1. The Alberta Court of Appeal considered *Bhasin* in the context of termination of employment. In that case an employee was terminated without cause prior to the vesting of benefits under the employer's long term incentive plan. The trial judge dealt with the matter on the basis of discretion and found that there was a "common law duty of reasonable exercise of discretionary contractual power". The Court of Appeal