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Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 5th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Heintzman & Goldsmith on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

Contracts Must Be Honestly Performed Says The Supreme Court Of Canada

In its recent decision in ***Bhasin v. Hrynew,*** the Supreme Court of Canada has established two fundamental principles for the Canadian common law of contract.

First, parties are under a general obligation to perform contracts in good faith.

Second, the parties have a duty to act honestly in the performance of contracts. These contractual obligations can no longer be relegated to some kinds of contracts or situations. Rather, they are principles that apply to every sort of contract.

It is, perhaps, somewhat surprising that these principles were still in dispute under Canadian contract law and that the Supreme Court had not previously ruled on them. Having now done so in ***Bhasin v. Hrynew***, this decision is of great importance to the common law of contract in Canada and should be well understood by anyone concerned with the performance of contracts.

Background

The following facts were found by that trial judge:

Bhasin and Hrynew were both retail dealers who marketed education savings plans developed by Canadian American Financial Corp. ("Can-Am"). Bhasin's agreement with Can-Am was for a term of three years and automatically renewed unless one of the parties gave six months' notice of termination.

Hrynew was in effect a competitor of Bhasin and wanted to obtain capture Bhasin's market. On many occasions, Hrynew had proposed to Bhasin that they merge their dealerships and he campaigned with Can-Am to direct such a merger. Bhasin had resisted any such merger. Can-Am appointed Hrynew as the officer to review dealership compliance with securities laws, but Bhasin object to Hrynew reviewing his business records.

Can-Am had discussions with the Alberta Securities Commission about restructuring its agencies. Can-Am did not tell Bhasin about these discussions. Can-Am repeatedly misled B about its future plans for its agencies. When Bhasin continued to refuse to allow Hrynew to review his records, Can-Am gave notice of non-renewal of the agreement. As a consequence, Bhasin lost his business and his workforce went to work for Hrynew.

Decisions of the Trial Judge and Alberta Court of Appeal

Bhasin sued Can-Am and Hrynew. The trial judge held that Can-Am breached the implied term in its contract with Bhasin that the contract would be performed in good faith. He found that Mr. Hrynew pressured Can-Am not to renew its Agreement with Mr. Bhasin and that Can-Am dealt dishonestly with Mr. Bhasin and ultimately gave in to that pressure.

The Court of Appeal allowed the appeal and dismissed B's lawsuit. The court held that there was no self-standing contractual duty of good faith in Canadian law. In addition, the court found that Bhasin had suffered no recoverable damages because, quite apart from any alleged bad faith conduct by it, Can-Am was entitled in any event to give notice of non-renewal of the contract.

Decision of the Supreme Court of Canada

The Supreme Court forthrightly stated that it was necessary to clarify – or some might say, reform – the Canadian common law relating to the performance of contracts. Speaking for a unanimous court, this is how Justice Cromwell approached the matter:

> "In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations." (emphasis added)

The Supreme Court explained what it meant by "an organizing principle." Such a principle "states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations."

Having recognized the organizing principle of good faith performance of contracts, Justice Cromwell held that the court should now recognize a contractual duty of honest performance:

> "I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step."

Justice Cromwell then summarized the position in three paragraphs which should be duly noted for application in future cases:

> "A summary of the principles is in order:
>
> (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." (emphasis added)

Having stated the legal principles, Justice Cromwell found that Can-Am had breached its contractual duty of honest performance. Can-Am wanted to force a merger of the Bhasin and Hrynew agencies, effectively giving Mr. Bhasin's business to Mr. Hrynew. To accomplish that end, it acted dishonestly with Bhasin throughout the period leading up to its exercise of the non-renewal clause. It told the Alberta Securities Commission that Bhasin's agency was to be merged under Hrynew's but it said nothing of this to Bhasin. Can-Am was working to forestall the Commission's termination of its license in Alberta and was prepared to do whatever it could to forestall that possibility. When questioned by Bhasin about Can-Am's intentions with respect to the merger, it equivocated and did not tell him the truth. Nor was it truthful with Bhasin about its dealings with the Commission and the Commission's intentions, and repeatedly misrepresented to Bhasin that he was bound by duties of confidentiality. Can-Am continued to insist that Hrynew audit Mr. Bhasin's agency, on the supposed basis that it required to do so by the Commission, even though it arranged for its own employees to conduct the audit of Hrynew's agency.

The Supreme Court noted that the trial judge had found that this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of its agreement with Bhasin and its exercise of the non-renewal provision. The court concluded that "Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause."

Discussion

The decision in ***Bhasin v. Hrynew*** is significant on three levels.

First, it firmly establishes good faith performance as an organizing principle in the common law of contract in Canada. From now on, the interpretation of all contractual obligations of performance involves asking this question: is this interpretation consistent with good faith performance? Similarly, the actual performance of contracts can be analyzed by asking this question: does this conduct amount to the good faith performance of the contract?

Second, every contract will now have an implied term that the contract will be performed honestly. In ***Bhasin v. Hrynew*****,** the Supreme Court noted that Bhasin was not a franchisee of Can-Am. Nor was there any fiduciary obligation between the two parties. Bhasin's claim was dealt with on the basis of the general law of contract. Accordingly, the court's conclusions will apply to all contracts.

It seems very doubtful that the parties will try to contract out of or exclude this implied obligation: it's hard to imagine them expressly agreeing that "dishonest performance of this

contract shall be permitted" or words to that effect; and it's hard to imagine that a court will find that the parties impliedly excluded the duty of honesty.

Third, the facts in the ***Bhasin v. Hrynew*** case provide good examples of the kind of circumstances that may constitute dishonest contractual performance. Misleading or acting untruthfully toward the other party, particularly in the lead-up to the termination of the contract or contractual rights; misrepresenting the intentions of a regulatory tribunal or dealings with the tribunal; and preferring one contracting party over another in a like position; all have the potential to amount to dishonest performance of the contract.

Honesty is, however, a word which may have different meanings in different circumstances. It may mean one thing for the principles of equity and another thing for the principles of criminal law. Using the conclusions in ***Bhasin v. Hrynew,*** Canadian courts will now, through actual cases, develop the scope of that word for Canadian contract law, just like they have with the words "reasonable", and "good faith". This is a serious matter for building contracts and one which American courts have wrestled with. Thus, for a cost plus contract, what sort of unjustified additions to the costs amount to "dishonesty"? What sort of mis-management of a project site amount to "dishonesty"? Perhaps we just know it when we see it.

***Bhasin v. Hrynew*, 2014 SCC 71**

Building Contract - Performance - Good Faith - Honest Performance

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