



APPRAISER'S REQUIREMENT OF 'GOOD FAITH'

Part 1 – Contractual good faith

BY JOHN SHEVCHUK, C. ARB, AACI(HON)

VOLUNTEER, APPEAL SUB-COMMITTEE, BARRISTER & SOLICITOR



Introduction

Acting in 'good faith' is a condition of membership in the Appraisal Institute of Canada (AIC) that is set out in each of the AIC governing documents. The AIC *Code of Conduct* provides in part as follows:

Members of the Appraisal Institute of Canada (AIC) pledge to conduct themselves in a manner that is not detrimental to the public, the AIC or its members, or the real property appraisal profession. Members' relationships with other members, the AIC and the public shall be governed by courtesy and *good faith* and respect the AIC and its procedures. [Emphasis added.]

Paragraph 5.1.2 of the AIC *Consolidated Regulations* and *CUSPAP Ethics Standard Rule 4.1* contain similar wording.

What does the phrase 'good faith' mean? The *Paperback Oxford English Dictionary* defines 'good faith' as "n. honesty or sincerity of intention." *Barron's Canadian Law Dictionary* defines 'good faith' as "A standard implying absence of intent to take advantage or defraud another party; absence of ulterior motive ... To act in good faith, one must act openly, fairly and honestly ..."

What are the indicia of acting in 'good faith?' Many AIC members are not only appraisers, they also run businesses or engage in business activities outside the sphere of appraisal. Do the

requirements of 'good faith' vary with the circumstances? Is there a standard applicable to your work as an appraiser and one that applies to your non-appraisal activities?

This article is the first of two parts. Here, a recent decision of the Supreme Court of Canada will be reviewed to introduce some of the notions that inform the requirements 'good faith.' The case involves a contract and the court discusses the concept of 'good faith' in commercial relations. The second part, to come in a subsequent article in this publication, will build upon the court case to investigate the ways in which the appraiser's duty of good faith might vary from that required in a strictly commercial setting.

Good faith in commercial settings – *Bhasin v Hrynew*

You may be surprised to learn that, until very recently, it was unsettled in Canadian law whether there is, or should be, a generalized principle of good faith in the performance of contracts. Certain specific classes of contracts (employment, insurance, franchising, construction tendering) have been exceptions, but despite regular attempts by plaintiffs in our courts, a generally applied principle of good faith has not been universally adopted. The Supreme Court of Canada decision in *Bhasin v Hrynew* 2014 SCC 71 [*Bhasin*] changes this.



The factual background

In *Bhasin*, Mr. Bhasin, through his business Bhasin & Associates, sold education saving plans (ESPs) as an 'enrolment director' on behalf of the respondent Canadian American Financial Corp. (Can-Am). Over a period of 10 years or so, Bhasin built up a sales force to sell the ESAs and became quite successful.

In 1989, Bhasin entered a replacement contract with Can-Am that contained a clause providing for automatic renewal at the end of a three-year term, unless one of the parties gave six months written notice that the agreement would not be renewed.

At the same time, Can-Am also had an agreement with the respondent Mr. Hrynew. Hrynew was also very successful as an enrolment director in the sale of ESAs, having at the time the largest agency in Alberta and a good working relationship with the Alberta Securities Commission (Commission). It was found at trial that these two circumstances gave Hrynew a strong position with Can-Am. Hrynew and Bhasin were competitors who did not get along. Hrynew had proposed a merger with Bhasin on several occasions and, when Bhasin continued to rebuff Hrynew's invitations, the latter attempted to have Can-Am force the merger on Bhasin.

Can-Am ran into enrolment director compliance issues with the Commission and was forced to appoint a single provincial trading officer to review enrolment directors for compliance. Can-Am appointed Hrynew, which put Hrynew in the position of auditing all enrolment directors, including Bhasin. Bhasin objected to his competitor reviewing his confidential business records. The trial court judge found that Can-Am repeatedly misled Bhasin by telling him that Hrynew was required to treat Bhasin's business records as confidential and that the Commission had refused to allow an outside person to perform the enrolment director audits. Perhaps not trusting what Can-Am was telling him, Bhasin refused to

allow Hrynew to review his records. Can-Am threatened to terminate Bhasin's agreement and, in May 2001, gave notice of non-renewal.

When Bhasin's agreement with Can-Am was not renewed, Bhasin lost his sales force, most of them going to work for Hrynew. Bhasin had to take up less profitable work with a Can-Am competitor.

During the time that Bhasin was resisting disclosure to Hrynew, a number of parallel activities were underway. By June 2000, in part to assuage the concerns of the Commission, Can-Am formulated a restructuring of its agencies in Alberta. The plan included Bhasin working for Hrynew's agency. Bhasin knew nothing of the restructuring plans and, when Bhasin asked if a merger was "a done deal," Can-Am did not admit to this.

Following the non-renewal, Bhasin sued Can-Am and Hrynew alleging that there was an implied term of good faith that Can-Am had breached, that Hrynew had induced breach of contract and that Can-Am and Hrynew were liable to Bhasin for civil conspiracy. *[In the end, the claims of inducing breach of contract and civil conspiracy were not successful and need not be referred for present purposes.]*

Trial court and appeal court decisions¹

The Alberta Queen's Bench held that there was an implied term of the contract that decisions regarding renewal or non-renewal of Bhasin's agreement would be made in good faith and that Can-Am breached the term of good faith. In particular, the trial court held that, in the time leading up to the non-renewal, Can-Am had misled Bhasin about its merger intentions and the new structure proposed to the Commission, it did not communicate that the restructuring and merger decisions were final, that Can-Am was working closely with Hrynew and that Can-Am expected Bhasin to be working with Hrynew. The trial court held that, if Can-Am had acted honestly, Bhasin could

have taken appropriate action to safeguard the value of his business.

On appeal to the Alberta Court of Appeal, the trial court decision was overturned on the basis that the trial judge had erred in implying a term of good faith into the agreement, in light of the clause that the express terms in the agreement were the entire agreement.

The Supreme Court of Canada decision

Bhasin appealed to the Supreme Court of Canada, arguing that a general duty of good faith in contract should be recognized in Canadian law or, at the very least, the court should recognize a duty of honest performance of contractual obligations.

The Supreme Court of Canada agreed with Bhasin that there is a common law duty applicable to all contracts to act honestly in the performance of contractual obligations.² The court said that the recognition of this requirement was driven by the need to remove the uncertainty that exists in Canadian law, to allow a more consistent approach to the application of the requirement of good faith and to align the law with the expectations of commercial parties.³

Mr. Justice Cromwell, writing for the court, supported the need for a general organizing principle of good faith and a duty to be honest in performing contractual obligations with the following passage:

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 ...⁴



In deciding if there is a need for a new duty of honesty in performance of contractual obligations, Mr. Justice Cromwell observed that Can-Am's conduct did not fit within any of the situations or relationships under which the law imposes a duty of good faith. The court noted that, historically, a decision not to renew a contract was a discretion that could be freely exercised by a party to the contract.⁵ Mr. Justice Cromwell wrote that a new common law duty is necessary:⁶

[73] ... 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. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith...

[74] ... I am, at this point, concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but as a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties...

In the next article, we will explore situations where 'good faith' does indeed impose a duty to disclose or to forego advantages that arise through the relationship between the parties, whether by contract or otherwise.

In answer to the argument that imposing the common law duty of

honest performance of contractual obligations interferes with the long adherence to the concept of freedom of contract, Mr. Justice Cromwell wrote that there is little interference "... since parties will rarely expect that their contracts permit dishonest performance of their obligations."⁷

However, Mr. Justice Cromwell was careful to explain that there are limits of the new duty: "The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party."⁸ One can see immediately from this comment that there will be cases in the future testing the boundaries of this new duty.

In *Bhasin*, the law of good faith in commercial contractual relations was summarized as follows:⁹

- (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.

The Supreme Court of Canada found no basis to interfere with the trial judge's determination that Can-Am acted dishonestly toward Bhasin in the exercise of the non-renewal clause and, therefore, it followed that Can-Am breached its

duty to perform the agreement honestly. Damages were awarded on the basis of the value of the business as at the date of the contract expiry because it was found that Bhasin would have been able to retain the value of his business rather than seeing it effectively lost to Hrynew.

Closing

The Supreme Court of Canada decision in *Bhasin* has been considered by courts in Canada no fewer than 35 times in a variety of contexts. None so far have touched upon good faith requirements in a contract between a professional (e.g., appraiser) and a client, or an appraiser in his or her business relationships.

However, what is apparent going forward is that, in every commercial contractual relationship, there is a duty to be honest and the duty may go so far as to not adopt conduct that would frustrate the reasonable commercial expectations of the parties to the contract.

How this new duty meshes with AIC members' obligation under the Code of Conduct, the *Consolidated Regulation* and *CUSPAP* will be the topic of the next instalment.

End notes

¹ *Bhasin v Hrynew* 2011 ABQB 637; 2013 ABCA 98

² *Bhasin v Hrynew* 2014 SCC 71 [*Bhasin*], para. 33

³ *Bhasin*, para. 41

⁴ *Bhasin*, para. 60

⁵ *Bhasin*, para. 72

⁶ *Bhasin*, para. 73

⁷ *Bhasin*, para. 76

⁸ *Bhasin*, para. 86

⁹ *Bhasin*, para. 93

This article is provided for the purposes of generating discussion and to make practitioners aware of developments in the law. It is not to be taken as legal advice. Any questions arising from this article in particular circumstances should be put to qualified legal and appraisal practitioners.