

APPRAISER'S REQUIREMENT OF 'GOOD FAITH'

Part 2 - Non-contractual 'good faith'

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"IT IS QUITE COMMON FOR QUESTIONS TO ARISE OVER THE OWNERSHIP OF BUILDINGS, STRUCTURES AND OTHER ITEMS THAT ARE ON THE LAND AT THE TIME OF SALE OR AT THE END OF A TENANCY."

Introduction

This is the second part of a consideration of the phrase 'good faith'¹ in the Appraisal Institute of Canada (AIC) *Code of Conduct (Code)*:

Members of the 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.]

Regulation 5.1.2 of the *Consolidated Regulations* (2014) of the AIC (*Regulations*) and *Canadian Uniform Standard Professional Appraisal Practices (CUSPAP)* Ethics Standard Rule 4.1 also refer to good faith.

In the previous article, the Supreme Court of Canada decision in *Bhasin v. Hrynew* 2014 SCC 71 (*Bhasin*) was reviewed to determine the extent of the obligation of good faith in contractual relations. The court recognized a new common law duty in relation to good faith. It is a duty to honestly perform contractual obligations and to avoid conduct that would frustrate the reasonable commercial expectations of the parties.

While *Bhasin* provides direction to AIC members regarding contractual relations, this is only one aspect of the obligation

of good faith in the *Code*. The obligation exists whether or not there is a contract.

Direction from the courts

A computerized search of Canadian federal statutes for the phrase 'good faith' results in 498 hits covering a wide variety of legislation. A similar magnitude of hits would be found in provincial and territorial legislation. The use of the phrase 'good faith' is pervasive in our laws. However, a crisp articulation of good faith is elusive.

The phrase has no technical meaning.² Often, statutory definitions do no more than equate good faith with honesty. Other definitions go a little further saying that an act is performed in good faith if done honestly, whether negligently or not.³

Some courts have juxtaposed 'good faith' with 'bad faith,' stating that the former is merely the absence of the latter.⁴ With respect, this simply leads one to ask what is meant by 'bad faith.' Another approach is to rely upon legal dictionaries such as *Black's Law Dictionary*.

It is sometimes said that the requirement of good faith is twofold: a) honest statements or conduct and b) no ulterior motive.⁵ Good faith can go beyond personal honesty and absence of malice. It may require some other quality, state of mind or knowledge. Good faith is more than 'honest ineptitude.'⁶

One judge observed that “... good faith is founded on honesty. It is not equivalent to saintliness. It is not devoid of self-interest...”⁷ “Negligence, stupidity, or blindness to what others might be well able to see are not equivalent to lack of good faith.”⁸

In the absence of any particular context, the core of ‘good faith’ is honesty. Circumstances dictate the nature and extent of the obligation.

AIC Professional Practice Committees will find direction from the following:⁹

66 ... The concept of good faith has been defined in various ways:

“A thing is deemed to be done in good faith if it is done honestly, whether or not it is done negligently.”

“Good faith: Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder on inquiry.”

67 Honestly considering known facts before rendering a decision is another hallmark of acting in good faith. By contrast, a board that acts unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of it may be found to have acted in bad faith.

An alternative expression of the good faith obligation for those exercising powers and duties analogous to AIC Professional Practice committees follows:¹⁰

The absence of good faith may be found in a reckless or capricious approach to the exercise of the power in question. The term ‘good faith’ is not to be considered in isolation from the process to which it is applied ... An honest attempt to exercise the power is not demonstrated merely by the absence of dishonesty or malice or personal interest ... Good faith requires more than the absence of bad faith. It requires a conscientious approach to the exercise of power.

Regulation 5.9 (Member on Member Complaints) contemplates sanctions

for AIC members making complaints against other AIC members in the absence of good faith. A court decision relating to complaints under securities legislation may provide some insight into what good faith requires in the context of Regulation 5.9.¹¹ The member originating the complaint should expect to have to establish an honest belief arising after considering sufficient information that there was a violation of the *Bylaws, Code, Regulations, Policies or CUSPAP*.¹²

AIC members’ obligation of good faith

Certain relationships automatically import good faith. Employment, insurance, franchising and construction tendering are examples. *Bhasin* extended the law by establishing that good faith is necessary in every contract situation.

AIC members voluntarily accept the requirement of good faith, but they have not delineated the characteristics of their obligation.

At a minimum, an AIC member’s obligation of good faith, as set out in the *Code*, demands honesty and candour in one’s dealings with others. Depending on the context, it can mean more. Good faith will not be demonstrated where one is reckless or turns a blind eye to circumstances. Once a member is fixed with knowledge, good faith will be demonstrated if actions are consistent with an effort to act honestly, and likely without ulterior motive, in the face of that knowledge.

Perhaps a good working definition of ‘good faith’ satisfactory for the purposes of the *Code* is that which appears in the 9th edition of *Black’s Law Dictionary*:¹³

A state of mind consisting in
 (1) honesty in belief or purpose,
 (2) faithfulness to one’s duty or obligation,
 (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent

to defraud or to seek unconscionable advantage. – Also termed *bona fides*.

References

- 1 *Canadian Property Valuation*, Vol. 59, Book 2, 2015, page 34
- 2 *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, [2002] B.C.J. No. 1957 (B.C.S.C.)
- 3 Examples: *Sale of Goods Act*, R.S.A. 2000, c. S-2, s. 2(1); *Sale of Goods Act*, R.S.B.C. 1996, c. 410, s. 2; *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 1(2)
- 4 *Mogridge v. Clapp*, [1892] 3 Ch 382 at 391 [UK]
- 5 See for example *Central Estates (Belgravia) Ltd v Woolgar* [1971] 3 All ER 647, [1972] 1 QB 48 at 55
- 6 *Mid Density Developments Pty Ltd v. Rockdale Municipal Council* (1993), 44 FCR 290 at 299-300; 116 ALR 460 at 468-469
- 7 *1172773 Ontario Ltd. v. Bernstein*, [2000] O.J. No. 4102 (Ont.S.C.J.) at para. 38
- 8 *Official Trustee in Bankruptcy v. Mitchell* (1992), 16 Fam LR 87 at 95 [Aust.]
- 9 *Vigliotti v. Canada (Attorney General)*, [2001] O.J. No. 2845 (Ont.S.C.J.)
- 10 *Applicant WAFV of 2002 v. Refugee Review Tribunal*, BC200300027 [2003] FCA 16 at [39]
- 11 *Silver v. Imax Corp*, 2009 CarswellOnt 874 (Ont. S.C.J.)
- 12 *Consolidated Regulations* (2014) of the Appraisal Institute of Canada, clauses 5.1.1 - 5.1.5
- 13 St. Paul: West Publishing Co., 2004, Thomson Reuters, 2009

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