FIELD LAW

Labour and Employment

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Commercial Contracts Include an Implied Duty of Good Faith

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There has long been an implied duty that an employer must act in good faith when terminating employment contracts. Until now, such a duty was not necessarily implied in other commercial contracts. However, all companies should be aware that the recent decision of the Supreme Court of Canada in *Bhasin v. Hyrnew* has changed that.

Mr. Bhasin, the Appellant, operated a retail business as an enrollment director for Canadian American Financial Corp. ("**Can-Am"**). His business sold Can-Am Registered Education Savings Plans to investors. During the course of this arrangement Can-Am and Bhasin entered into an agreement, which governed their relationship. The term of the agreement was three years. The applicable provision provided that the contract would renew automatically unless one of the parties gave six months' notice to the other that they intended to terminate. The Respondent, Mr. Hrynew, also operated a business as a Can-Am enrollment director in direct competition with Bhasin's business.

As part of their on-going steps to ensure compliance with the Alberta Securities Commission's requirements, Can-Am appointed Hrynew to be the Provincial Trading Officer. This position would give him access to Bhasin's business information, for auditing purposes, to which Bhasin strongly objected. Can-Am further indicated to Hrynew that they would effect a reorganization that would merge Hrynew's and Bhasin's businesses and make Bhasin an employee of Hrynew's. During the course of the negotiations with Hrynew and the planning stages of the restructuring Can-Am mislead Bhasin by, among other things, assuring him that there were no such plans. Later, Can-Am gave notice to Bhasin under their agreement that they intended to terminate the relationship. Following this termination Hrynew managed to solicit the majority of Bhasin's employees while Bhasin sought alternative employment, which he eventually found, but in a less profitable position.

The Alberta Court of Appeal found that the conduct of Can-Am did not amount to a breach of the agreement between the parties as Can-Am, technically, adhered to the wording of the relevant clause. Can-Am properly

gave Bhasin six-months' notice as required, therefore it was not possible for the termination to be a breach of the contract, irrespective of the reason notice was given. However, the Supreme Court of Canada, following the lead of the lower court, found that an implied duty of good faith and honest performance of the contract existed and Can-Am had breached that duty.

Justice Cromwell, writing for the Court, found that it was "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." He wrote that this was in keeping with the expectation of all parties entering into any contract; that the other contracting party will not engage in misleading or deceitful conduct. This incremental change to the law, he posited, would make "the law more certain, more just and more in tune with reasonable commercial expectations." Justice Cromwell was careful to note that this duty of good faith does not overturn the rule of business efficacy nor did it rise to the level of a fiduciary obligation. Contracting parties are expected to be pursuing their own best interests; they are simply not permitted to do so in a manner that undermines the basic expectations of the other party and rely on a strict reading of the contract to avoid such an obligation. It is important to note that Justice Cromwell found that this duty operated irrespective of the intentions of the parties, therefore it is not possible to contract out of such an obligation and an 'entire agreement clause' was not and will not be "an impediment to the duty arising".

Good faith has previously been implied by the courts in some specific types of contracts- employment contracts, as pertaining to the matter of termination, have long been one of those. In *Honda Canada Inc. v Keays* the Supreme Court said that an employer could not engage in conduct that was "unfair or is in bad faith by being for example untruthful, misleading or unduly insensitive." The Bhasin decision is very similar, if more expansive. Although there continues to be no obligation to actively serve the interests of the other party to one's own detriment, there is an obligation to have "appropriate regard to the legitimate contractual interests of the contracting partner". Exactly how this good faith obligation may affect employment contracts and contracts with independent contractors and sub-contractors remains to be seen. At this time, companies are advised to ensure that they act in good faith, not only in dealing with their employees, but also other entities and individuals that they contract with for goods or services.

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