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**Supreme Court considers good faith contractual performance****Barbara L Grossman and Jason Chin**  
(Student-at-Law),  
*Dentons Canada LLP***The Supreme Court of Canada is incrementally developing the common law duty of good faith contractual performance.**

The Supreme Court of Canada's ("SCC") recent contract decision in *Bhasin v. Hrynew* ("*Bhasin*") attempts to bring coherence to the issue of good faith contractual performance by incrementally developing the common law. *Bhasin* concerned the exercise of

an unqualified non-renewal right in a commercial dealership agreement.

While *Bhasin* is not a real estate case, a large body of real estate case law is reviewed and confirmed in the SCC's decision. The decision also provides guidance about how *Bhasin*'s conception of good faith might develop.

**Good faith**

The SCC took two incremental steps to develop the common law of contracts. First, it held that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance.

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## CHARTER ISSUES

**Courts consider their role in social policy****John B. Laskin, Molly Reynolds and Nick Kennedy,**  
*Torys LLP***The Ontario Court of Appeal has held that specific social policy issues are legislative matters, not "justiciable" issues.**

In *Tanudjaja v. Attorney General (Canada)* ("*Tanudjaja*"), a majority of the Ontario Court of Appeal held that homelessness and inadequate housing are matters that should be addressed by legislatures, not courts.

The majority held that the applicants' *Charter* claim alleging the failure of the Ontario and federal governments to address homelessness and inadequate housing did not raise a justiciable issue and should be struck out.

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*Liberty is the right to do what the law permits.*

~ Charles de Montesquieu  
(1689 – 1755)

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# Commercial Property and Leases

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Second, the SCC held that, as a manifestation of that general organizing principle, there is a common law duty of honest contractual performance applicable to all contracts. The SCC explained that good faith is not a free-standing rule, but a standard that girds specific legal doctrines.

The concept of good faith requires that

parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

The SCC noted that existing case law would guide future development of the principle.

In tracing the development of the general organizing principle, the SCC reviewed several real estate cases that contributed to the present understanding of the duty of good faith contractual performance.

The SCC cautioned that the organizing principle should not be used as a pretext for scrutinizing the motives of contracting parties and should not veer into judicial moralism.

## Honest performance

The SCC recognized a new common law duty of honest contractual performance as a specific manifestation of the general organizing principle of good faith. It is a general doctrine of contract law rather than an implied term. This duty means

simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

The SCC recognized that the precise content of honest performance will vary with context, and held that it could be relaxed by express terms in the contract. The SCC was careful to note that the duty of honest performance prevents active deception, but does not compel disclosure.

Indeed, the SCC cited the American case of *United Roasters, Inc. v. Colgate-Palmolive Co.* In that case, a party to a lease did not disclose that it had decided to terminate the contract prior to the required notice period. The court observed:

It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision [prior to the notice period].

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*The SCC held that there is a common law duty of honest contractual performance applicable to all contracts.*

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## Duty distinguished

The SCC distinguished the duty of honest performance from the higher fiduciary duty of loyalty and to put the interests of the other contracting party first.

The SCC also distinguished the duty from the existing law concerning civil fraud and estoppel, which does not require that the defendant intend that his false representation be relied upon.

## Real property

The SCC reviewed and confirmed three previously recognized categories of cases in which the common law of contract had already recognized a duty of good faith contractual performance. Many of the cases within these categories are familiar to real estate lawyers.

Furthermore, the SCC placed these real estate cases squarely in the spotlight by indicating that while the list is not closed, claims for breach of good faith performance would generally not succeed if they did not fall within the recognized doctrines.

### *Parties' co-operation*

Courts have implied a duty of good faith when co-operation is necessary

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to achieve the objects of the contract. The decision in *Dynamic Transport Ltd v. O.K. Detailing Ltd.* illustrates this category of cases. The vendor failed to co-operate in obtaining *Planning Act* approval for a subdivision, thus defeating the sale.

### *Discretionary power*

The SCC also referred to a category of cases in which a party abuses a discretionary power contained in a contract. For instance, in *LeMesurier v. Andrus*, a home purchaser was found to have breached a duty of good faith in abusing her discretion under the rescission clause when a small portion of the land (.16 %) could not be conveyed because of an immaterial driveway curb encroachment.

### *Evading contractual duties*

The third category involves situations in which a party seeks to evade a contractual duty by engaging in conduct that is not strictly precluded by the contract. In the seminal case of *Mason v. Freedman*, the vendor of a farm regretted the sale and attempted to use a clause that would terminate the contract if he was unable to obtain a bar of dower from his wife.

He had made no efforts to obtain a bar of dower. The SCC held in that case that

[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner.

### **Future developments**

The SCC in *Bhasin* focussed on contractual performance, and did not comment on good faith in contract negotiation. While Canadian common law courts have rejected a duty of good faith at the contract formation stage, it remains to be seen how, post-*Bhasin*, the organizing principle of good faith will apply to contract negotiations pursuant to an existing contract, such as a lease renewal option which requires the parties to negotiate market rent for the renewal term.

In *SCM Insurance Services Inc. v. Medisys Corporate Health LP*, a recent interlocutory injunction decision that predates the SCC's *Bhasin* decision, the Ontario Superior Court considered an implied duty to negotiate in good faith in the context of a contractual right of first negotiation to purchase a business.

The court provided some guidance on the minimum content of such a duty: whether the party honestly believes its position asserted in the negotiations is reasonable.

REFERENCES: *Bhasin v. Hrynew*, 2014 CSC 71, 2014 SCC 71, 2014 CarswellAlta 2047, 2014 CarswellAlta 2046, 4 Alta. L.R. (6th) 219, 27 B.L.R. (5th) 1, 20 C.C.E.L. (4th) 1, 379 D.L.R. (4th) 385, [2014] 11 W.W.R. 641, 464 N.R. 254 (S.C.C.), paras. 63, 33, 93, 70, 74, 73; *United Roasters Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (U.S. C.A. 4th Cir. 1981), discussed at para. 87 of *Bhasin v. Hrynew*; *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, 1978 CarswellAlta 298, 1978 CarswellAlta 62, [1978] 2 S.C.R. 1072, 9 A.R. 308, 6 Alta. L.R. (2d) 156, 85 D.L.R. (3d) 19, 4 R.P.R. 208, 20 N.R. 500, [1978] S.C.J. No. 52 (S.C.C.); *LeMesurier v. Andrus*, 1986 CarswellOnt 670, 54 O.R. (2d) 1, 25 D.L.R. (4th) 424, 38 R.P.R. 183, 12 O.A.C. 299, [1986] O.J. No. 2371 (Ont. C.A.), leave to appeal refused, (sub nom. *Andrus v. Lemesurier*) [1986] 2 S.C.R. v (note), (sub nom. *Le Mesurier v. Andrus*) 63 O.R. (2d) x (note), 74 N.R. 239 (note), 21 O.A.C. 239 (note) (S.C.C.); *Freedman v. Mason*, 1958 CarswellOnt 73, (sub nom. *Mason v. Freedman*) [1958] S.C.R. 483, 14 D.L.R. (2d) 529 (S.C.C.), para. 6.; *SCM Insurance Services Inc. v. Medisys Corporate Health LP*, 2014 ONSC 2632, 2014 CarswellOnt 7391 (Ont. S.C.J.).

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## Charter Issues *continued from page 1*

The vigorous dissent would have allowed the case to go forward to a full hearing. This decision has important implications both for those intent on bringing novel *Charter* claims and for the role of the courts in addressing those claims.

### **Applicants**

The application was commenced by one organization and four individuals:

1. the Centre for Equality Rights in Accommodation, a non-profit

organization that serves low-income tenants and people who are homeless;

2. a single mother who had been on the waiting list for subsidized housing for two years;
3. a severely disabled father who lived with his family of six in a two-bedroom apartment and had been on the waiting list for four years;
4. a widowed mother of two at risk of homelessness; and

5. a man who had been living on the street or in shelters.

The applicants asserted that adequate housing is a necessity, and that both governments have instituted changes to legislation, policies, programs and services that have led to increased homelessness and inadequate housing.

### **Application**

They claimed that these conditions deprive them (and others similarly situated) of the rights to life, liberty

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