

## BREAKING CASE LAW

### *Bhasin v. Hrynew*



## This Issue

Honest Performance  
Now Underpins  
Freedom of Contract

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

In this decision issued November 13, 2014, the Supreme Court identified a “general organizing principle” of good faith underpinning contract law. The decision is significant because the contract in question was not a kind that traditionally attracts a duty of good faith or honest performance (employment, insurance and tendering). The decision was an appeal from a decision of the Alberta Court of Appeal.

Mr. Bhasin (the Appellant) was an enrolment director for Can-Am Financial Corporation (a Respondent) by way of a three-year dealership agreement. The contract contained an “entire agreement” clause, and a provision that the contract would automatically renew at the end of three years unless one party gave 6 months’ written notice. Leading up to the renewal date, Can-Am was in some compliance trouble with the Alberta Securities Commission. So Can-Am appointed one of Mr. Bhasin’s enrolment director competitor (Mr. Hrynew) as a provincial trading officer as required by the Commission – whereby Mr. Hrynew would have access to Mr. Bhasin’s confidential business information – and told Mr. Bhasin Mr. Hrynew had a duty (which he did not) to keep the information confidential. Can-Am also represented to the Commission as a done deal that Mr. Hrynew would be taking over Mr. Bhasin’s dealership business – when Mr. Bhasin had not agreed to that. Can-Am enacted the non-renewal clause of the contract and Mr. Bhasin lost his business.

The Court found a common law “organizing principle” of good faith in contract law as an underpinning standard that manifests in specific doctrines. This creates a duty of honest performance of contractual obligations that applies to all contracts. Parties cannot contract out of this duty. Honest performance means not acting capriciously or arbitrarily, and not lying or misleading the other party about one’s contractual performance. The duty of honest performance does not equate to a duty of loyalty, and does not require one party to put the other party’s interests above its own. For instance, failing to disclose a material fact, or intentionally causing an economic loss are not necessarily bad faith.

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The Court stated this principle did not interfere with freedom of contract but rather enhanced it because a basic level of honest conduct is necessary in commerce. Other rationales for the decision were that other jurisdictions (Quebec, US) had this same duty; that the duty accorded with reasonable expectations of the parties; and it would enhance commercial certainty.

Comment: We can expect much litigation on what kind of conduct breaches the duty of honest performance (what is “bad faith”)? What parts of the contract does this duty govern? How can contract drafters work around this duty?

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