

BHASIN V. HRYNEW AND THE DUTY OF GOOD FAITH: EVOLUTION OR REVOLUTION?

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In *Bhasin v. Hrynew*¹, the Supreme Court of Canada took on the "unsettled and incoherent"² body of jurisprudence regarding the duty of good faith in contract. The Court unanimously resolved the matter by finding a duty to perform contracts honestly, consistent with a principle of good faith. As revolutionary as this seems, the Court in *Bhasin* takes great care to mark the change as an evolution that requires merely two "incremental steps":

The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.³

The result establishes beyond question that every party to a real estate contract – or any contract – is now bound by the duty of honesty and the principle of good faith in performing a contract. As one experienced real estate lawyer has noted: the duty arises “in every kind of agreement that may be reached in connection with the sale of or dealing with land, including Listing Agreements, Commission Agreements, Buyer Representation Agreements, Agreements of Purchase and Sale and leases, to name just a few.”⁴

Is this a revolutionary change? Or is it just the evolution of long standing contract law principles? Has *Bhasin* fundamentally altered the good faith principle in pre-contractual negotiations? In the performance of signed contracts? The exercise of discretionary clauses? The fulfillment of conditions? Or is *Bhasin* just a codification of the duties that were already governing contracting parties?

¹ 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046 (“*Bhasin*”).

² *Bhasin* at para 32, citing Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987), at p. 169.

³ *Bhasin* at para 33.

⁴ Martin Rumack, “Ground-breaking Supreme Court Decision Affects All Real Estate Contracts”, in *REMonline.com*, Feb. 10, 2015, <http://www.remonline.com/ground-breaking-supreme-court-decision-affects-real-estate-contracts>, accessed Oct. 31, 2015.

These are the questions we will look at here. But first we'll recap *Bhasin*.

Bhasin Recap

Canadian American Financial Corp. ("**Can-Am**") markets education savings plans to investors. Harish Bhasin was a top retail vendor of Can-Am's plans, beginning in 1989. Their relationship was governed by contract. The one in effect at the relevant time was signed in 1998.

Larry Hrynew was a competitor of Bhasin. The two were hostile. Hrynew wanted to capture Bhasin's market. He approached Bhasin and suggested a merger. Bhasin rebuffed him.

A series of dishonest machinations by Hrynew and Can-Am followed. They were calculated to force Bhasin into the merger he did not want. He would not bend, however. Finally in 2001, Can-Am terminated his contract. Bhasin lost his business. Most of his workers went to Hrynew. Bhasin had to take on lower-paying work at a Can-Am competitor.

Bhasin sued Can-Am for breach of contract, Hrynew for inducing breach of contract, and both for conspiracy. In the Alberta Court of Queen's Bench, Justice Moen found that Can-Am acted dishonestly with Bhasin throughout, and when it terminated Bhasin's contract. Had it acted honestly, Bhasin could have taken steps to retain the value in his agency. Justice Moen, also found Can-Am in breach of the implied term of good faith. Her Honour found Hrynew had intentionally induced breach of contract, and that both Can-Am and Hrynew were liable for civil conspiracy.

The Alberta Court of Appeal allowed the appeal and dismissed Bhasin's lawsuit.

In the Supreme Court, Bhasin's appeal against Can-Am was allowed. The Court found that Justice Moen had made no reversible error by adjudicating the issue of good faith. The appeal against Hrynew was dismissed. The Court awarded Bhasin damages of \$87,000 plus interest.

It was on the precise issue of good faith in the performances of his contract with Can-Am that Bhasin was successful. Putting the case at its simplest, the Court found that "Mr. Bhasin [...] was misled and lost the value of his business as a result."⁵ Hence he was entitled to relief.

⁵ *Bhasin*, at para 1.

Defining “Good Faith”

What exactly is “good faith”?

If the case law before *Bhasin* was *unsettled and incoherent*, that must have something to do with the fact that defining “good faith” with precision is difficult.⁶ “[T]he obligation of good faith and fair dealing is incapable of precise definition,” observed Iacobucci J. in *Wallace v. United Grain Growers Ltd.*⁷ Professor O’Byrne talks about “locating” good faith in the common law, not defining it.⁸

Pinpointing what good faith *is* can often be approached by defining what it *isn’t*, i.e. bad faith. In his influential decision dealing with the assignment of a lease, *Gateway Realty Ltd. v. Arton Holdings Ltd.*, Justice Kelly described bad faith as follows⁹:

In most cases, bad faith can be said to occur when one party, without reasonable justification, acts in relation to the contracts in a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, or to cause significant harm to the other, contrary to the original purpose and expectation of the parties.¹⁰

So, Justice Kelly says, “good faith” is conduct that is the “guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in “bad faith”- a conduct that is contrary to community standards of honesty, reasonableness or fairness.”¹¹

In the contractual context, (former) Associate Chief Justice O’Connor’s description of good faith in *Transamerica Life Canada Inc. v. ING Canada Inc.*¹² implies that it is the absence of bad faith:

Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into.

⁶ See William Tetley, Q.C., “Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering”, (2004) 35 JMLC 561-616, <https://www.mcgill.ca/files/maritimelaw/goodfaith.pdf>, accessed Oct. 30, 2015.

⁷ 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para 98 (“*Wallace*”).

⁸ See Shannon Kathleen O’Byrne, “The Implied Term Of Good Faith And Fair Dealing: Recent Developments”, in *The Canadian Bar Review*, 2007, vol. 86, pp. 193 – 245, at p. 196 (“*O’Byrne, Good Faith*”).

⁹ 1991 CarswellINS 320 (“*Gateway*”).

¹⁰ *Gateway* at para 60.

¹¹ *Gateway supra* at para 39.

¹² (2003), 2003 CanLII 9923 (ON CA), 68 O.R. (3d) 457 (C.A.), at para. 53 (“*Transamerica*”).

Good faith is a minimum standard for a party's conduct. It is located just on the other side of bad faith. But it sits on this side of the fiduciary duty.

In *Shelanu Inc. v. Print Three Franchising Corp.*¹³, Justice Weiler considered the distinction between the two. The fiduciary duty demands selfless conduct, she said, while the duty of good faith allows a party to act in its own self-interest, but without ignoring the legitimate interests of the other. In Justice Weiler's words¹⁴:

"Unconscionability" accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in deference to that other's interests, it then proscribes excessively self-interested or exploitative conduct. "Good faith," while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The "fiduciary" standard for its part enjoins one party to act in the interests of the other — to act selflessly and with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour. Much the most contentious of the trio is the second, "good faith." It often goes unacknowledged. It does embody characteristics to be found in the other two.

The duty of good faith, Justice Weiler continued, "requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith."¹⁵

What these cases tell us is that trying to define "good faith" can be circular (*good faith is present when parties act... in good faith*), or achievable only through negation (*good faith is the absence of bad faith, or something short of a fiduciary duty*).

The Supreme Court in *Bhasin* was obviously alive to the definitional dilemma.¹⁶ So, Justice Cromwell's decision sidesteps it. *Bhasin* does not establish a definition of good faith. Instead, it establishes good faith as an "organizing principle... that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily."¹⁷ It is "not a free-

¹³ 2003 CarswellOnt 2038 ("*Shelanu*").

¹⁴ *Shelanu* at para 68. Emphasis added. See also *Bhasin* at para 86.

¹⁵ *Shelanu* at para 70.

¹⁶ *Bhasin* at paras 79 - 90.

¹⁷ *Bhasin* at para 63.

standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations.”¹⁸

In the result, Justice Cromwell speaks of a *principle* of good faith, which entails a *duty* of honest performance in this threefold summary¹⁹:

- (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.

Performance Not Negotiation

The Court in *Bhasin* takes pains to underscore that it is dealing with the good faith in contractual *performance*. It is not addressing pre-contractual negotiation.²⁰ This is clear from the opening paragraph²¹:

The key issues on this appeal come down to two straightforward questions: Does Canadian common law impose a duty on parties to *perform* their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to *perform* contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations.

¹⁸ *Bhasin* at para 64.

¹⁹ *Bhasin* at para 93.

²⁰ The word “negotiation” never appears in the decision.

²¹ *Bhasin*, at para 1. Emphasis added.

On the other hand, vernal shoots of a pre-contractual good faith duty have been emerging for years. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*²², the Supreme Court of Canada foresaw the emergence of a pre-contractual duty. In the words of Justice LaForest.²³:

The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties. The approach taken by my colleague, Sopinka J., would, in my view, have the effect not of encouraging bargaining in good faith, but of encouraging the contrary.

The doorway to LaForest J.'s comment was cracked open in the tendering context in *Martel Building Ltd. v. Canada*.²⁴ The Supreme Court found a *prima facie* duty of care under the first stage of the *Anns* test, but policy reasons to negate the duty under the second stage, or as the Court put it²⁵:

compelling policy reasons to conclude *that one commercial party should not have to be mindful of another commercial party's legitimate interests in an arm's length negotiation. [...]*

It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Such a conclusion would of necessity force the disclosure of privately acquired information and the dissipation of any competitive advantage derived from it, all of which is incompatible with the activity of negotiating and bargaining.

The Supreme Court did, however, leave open the question of whether good faith applied to pre-contractual negotiations²⁶:

As a final note, we recognize that Martel's claim resembles the assertion of a duty to bargain in good faith. The breach of such a duty was alleged in the Federal Court, but not before this Court. As noted by the courts below, *a duty to bargain in good faith has not been recognized to date in Canadian law.*

²² [1989] 2 S.C.R. 574

²³ *Ibid.* at p. 672.

²⁴ 2000 SCC 60 (CanLII), [2000] 2 S.C.R. 860 ("*Martel*").

²⁵ *Martel* at para 55. Emphasis added.

²⁶ *Ibid.* at para. 73.

These reasons are restricted to whether or not the tort of negligence should be extended to include negotiation. Whether or not negotiations are to be governed by a duty of good faith is a question for another time.

Justice Finlayson in *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.*²⁷ cited *Martel* for the proposition that there is no duty to bargain or negotiate in good faith.

In *Peel Condominium*, Epstein J. (as she then was) relied on a pre-contractual good faith duty in negotiations between a developer and a condominium corporation, and found that the developer was obliged to incorporate all of the purchasers' "reasonable expectations" in the disclosure documents. In a statement foretelling the result in *Bhasin*, Justice Epstein held²⁸:

Finally, I turn to an important point that, in my view, can clearly be made by the facts of this case. It is based on the vulnerability of the purchaser in the course of a purchase of a condominium unit from the Developer. The point is that a developer should not be allowed to rely on obscure or unclear contractual provisions in the condominium documentation in such a way as to defeat the reasonable expectations of the purchaser. Such would be contrary to the principles of good faith and fair dealing between contracting parties, contrary to the consumer protection objectives of the Act and to the developer's fiduciary obligations to purchasers of units.

I start with the principle that contracting parties owe one another a duty to act reasonably and in good faith and to perform contracts honestly made. *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (C.A.). In the case of contracts entered into as governed by consumer protection legislation such as the Act, these obligations are reinforced by terms designed to promote fair dealing between contracting parties.

A divided Court of Appeal overturned the ruling. Writing for the majority, Justice Finlayson found that the purchaser could rely on the developer to carry out the agreement honestly and in good faith only after the contract was negotiated and signed that. He stated²⁹:

²⁷ (1999), 28 R.P.R. (3d) 186 (OSC), appeal allowed, 2001 CanLII 24035 (ON CA), 53 O.R. (3d) 1 (C.A.). See also *1402066 Ontario Ltd. (c.o.b. Cupps Coffee House) v. Cupps International Inc.*, [2002] O.J. No. 2493.

²⁸ *Ibid.* at R.P.R. p. 203

²⁹ *Supra*, O.R. at para. 38.

I think that the weakness of the trial judge's analysis is that she fails to draw a bright line between the status of the respective developer and purchaser prior to executing a binding agreement of purchase and sale and the obligation of the contracting parties to complete the closing of the sale in good faith.

Other cases discussed the "special relationship" that must be present for a duty of good faith to be imposed on pre-contracting parties. Justice Weiler in *Cornell, supra* described the circumstances that might give rise to such special relationship. First, one party must rely on the other for information necessary to make an informed decision; second, the other party must be in a position, using that information, to bring about the decision. The first party's reliance must be justified in the circumstances, based on five factors³⁰:

- (1) A past course of dealing between the parties in which reliance for advice, etc., has been an accepted feature;
- (2) The explicit assumption by one party of advisory responsibilities;
- (3) The relative positions of the parties particularly in their access to information and in their understanding of the possible demands of the dealing;
- (4) The manner in which the parties were brought together, and the expectation that could create in the relying party; and
- (5) [W]hether "trust and confidence" knowingly [has] been reposed by one party in the other.

A 'special relationship' would not, in and of itself, create an entitlement for one party to rely on the other, according to Justice Weiler³¹:

The entitlement arises either because one party has no ability to readily inform himself or herself by accessing important information or because one party has an inability to appreciate the significance of the information.

The courts seem to go no further than this in finding a pre-contractual duty of good faith.

³⁰ *Cornell, supra* at para 34.

³¹ *Ibid.* at para 35.

While crystallizing the principle of good faith in performance, *Bhasin* respects the concerns raised in *Martel* regarding pre-contractual conduct, to preserve the essence of negotiation, and avoid fettering the marketplace. As Justice Cromwell said³²:

The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest... Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency... The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or “palm tree” justice. In particular, *the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.*

It seems therefore doubtful that *Bhasin* immediately affects the negotiation of real estate agreements. That question remains to be decided.

Good Faith in the Real Estate Context

Good faith is nothing new.³³ As the court in *Bhasin* observed³⁴, the concept dates back to Roman law. It appears in early English law.

In the real estate context, an early precursor to *Bhasin* is the 1921 decision of the Ontario Court of Appeal in *Hurley v. Roy*³⁵. A vendor agreed to sell and his wife agreed to bar her dower. The agreement of purchase and sale contained a standard title clause. It said that if the purchaser should furnish the vendor with a valid objection to the title, that the vendor was unable or unwilling to remove, the agreement would be null and void. A title search disclosed that the wife was in fact a joint tenant. As a result, the purchaser required a conveyance rather than a mere bar of dower. The wife declined, unless one half of the purchase price was paid to her. The vendor invoked the title clause and his inability to give good title, and sought to rescind the agreement. The purchaser sued for specific performance.

³² *Bhasin* at para 70. Emphasis added.

³³ See O’Byrne, “Implied Term”.

³⁴ *Bhasin* at para 35ff.

³⁵ [1921] O.J. No. 205.

In brief reasons, the majority of the Court granted specific performance. The Court stated³⁶:

The provision enabling the vendor to rescind has no application to the facts. The vendor can convey if he allows his wife to have her share of the price. This provision was not intended to make the contract one which the vendor can repudiate at his sweet will. *The policy of the Court ought to be in favour of the enforcement of honest bargains, and it should be remembered that, when a contract deliberately made is not enforced because of some hardship the agreement may impose on one contracting party, the effect is to transfer the misfortune to the shoulders of the other party, though he is admittedly entirely innocent.*

As early as 1958, our Supreme Court held that a party who seeks to avoid a contractual obligation to complete an agreement of purchase and sale had to act reasonably and in good faith: *Mason v Freedman*³⁷. The vendor wanted to use the title clause to repudiate the contract when the purchaser required a bar of dower. Judson J. rejected this defence, citing *Hurley v. Roy*³⁸:

This proviso does not apply to enable a person to repudiate a contract for a cause which he himself has brought about ... Nor does it justify a capricious or arbitrary repudiation. I am content to adopt the words of Middleton J. in *Hurley v. Roy* that the provision, "was not intended to make the contract one which the vendor can repudiate at his sweet will".

Judson J. continues³⁹:

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.

Mason v Freedman was relied on in the 1986 Ontario Court of Appeal decision, *LeMesurier et al. v. Andrus*⁴⁰. A purchaser sought to avoid an agreement of purchase and sale because title to a property that was supposed to be "50 feet x 150 feet" encroached on a neighbour's property by 3-4 inches. Arguing that the vendor could not give good title, the purchaser terminated, relying on the standard title clause⁴¹. The Court of Appeal, reversing the trial

³⁶ *Ibid.*, at para. 22. Emphasis added.

³⁷ [1958] S.C.R. 483, 14 D.L.R. (2d) 529.

³⁸ *Ibid.*, at p. 486 S.C.R., pp. 532-3 D.L.R..

³⁹ *Ibid.*, at p. 487 S.C.R., p. 534 D.L.R..

⁴⁰ 54 O.R. (2d) 1.

⁴¹ "Provided that the title to the property is good and free from all encumbrances except for any registered restrictions or covenants that run with the land providing that such are complied with and except for any minor easements for the supply of domestic utility services to the property. If within the time allowed for examining the title any valid objection to title

judge's dismissal of the action, found for the vendor. Because the property had been sold, the Court awarded damages, and observed⁴²:

I think the purchaser's reliance upon this [title] clause can be described as "capricious or arbitrary" where the vendors had removed the curb and replaced it within the lot line so that it did not encroach on the adjacent lot, and I cannot find her action to be "reasonable and in good faith". If we were to give the clause the meaning and force ascribed to it by the trial judge, there would be very few contracts for the sale of urban land that could survive. It would be a rare case where a careful survey would not disclose some minor discrepancy. Vendors *and purchasers owe a duty to each other honestly to perform a contract honestly made*.

The approach may be merely an example of the development of an independent doctrine of good faith in contract law at least in the performance of contracts, one explicitly set forth in the American Uniform Commercial Code and in the American Restatement and exhibited, although perhaps in disguised form, in many English and Canadian cases -- see the lecture of Professor Belobaba, *Special Lectures of the Law Society of Upper Canada* (1985), p. 73, particularly the examples set forth on p. 83 et seq.

In the case at bar, certainly with the corrective measures taken by the vendors, the purchaser was obliged in the absence of some legitimate interest of hers being adversely affected to perform her part of the bargain with an abatement. An abatement was indeed offered; the purchaser could have negotiated the amount of that abatement or could have had the amount determined by the court. She did neither; she repudiated the agreement and refused any form of performance.

The Ontario Court of Appeal again spoke of a duty of good faith in the context of condominium disclosure statements in *Abdool v. Somerset Place Developments of Georgetown Ltd.*⁴³ Robins, J.A. was clear on the point⁴⁴:

... is made in writing to Vendor and which Vendor is unable or unwilling to remove, remedy or satisfy and which Purchaser will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies theretofore paid shall be returned without interest or deduction and Vendor and Vendor's Agent shall not be liable for any costs or damages. Save as to any valid objection so made by such day and except for any objection going to the root of the title, Purchaser shall be conclusively deemed to have accepted Vendor's title to the property."

⁴² *Supra*, at p.XX. Emphasis added.

⁴³ 1992 CanLII 7640, 10 OR (3d) 120 (ON CA), leave denied, S.C.C. Bulletin, 1993, p. 952.

⁴⁴ *Ibid.*, at p.XX.

Contracting parties, it must be remembered, owe one another a duty to act reasonably and in good faith and to perform contracts honestly made.

In the 2003 *Transamerica* decision (*supra*), a non-real estate case, the Court of Appeal affirmed that "there is no stand-alone duty of good faith that is independent of the terms of a contract". It added⁴⁵:

Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into...

In *Bhasin*, *Transamerica* was cited in support of the defence position that there was no such thing as a general duty of good faith in all contracts⁴⁶. Cromwell J. responded⁴⁷:

This Court ought to develop the common law to keep in step with the "dynamic and evolving fabric of our society" where it can do so in an incremental fashion and where the ramifications of the development are "not incapable of assessment".

Just as good faith had taken hold in real estate long before *Bhasin*, so also it had become fixed in such areas as employment law⁴⁸, franchise law⁴⁹ and insurance law⁵⁰. Yet, it had not received the independent and overarching treatment that that *Bhasin* would come to give it. Cromwell J. noted that, "It is often unclear whether a good faith obligation is being imposed as a matter of law, as a matter of implication or as a matter of interpretation⁵¹. "

⁴⁵ *Transamerica*, at para 53.

⁴⁶ *Bhasin*, at para. 39.

⁴⁷ *Bhasin*, at para. 40.

⁴⁸ *Wallace; Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), [2008] 2 S.C.R. 362

⁴⁹ *Shelanu*, *supr a.*

⁵⁰ *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 (CanLII), [2006] 2 S.C.R. 3; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595.

⁵¹ At para. 48

The following sections will focus on the role *Bhasin* and how the good faith principle may play in three specific areas of real estate:

- i. Conditions
- ii. Discretionary Clauses
- iii. Disclosure

i. Conditions

A body of case law establishes that conditions precedent in real estate contracts entail an obligation on the party who must fulfill them to act in good faith and use their best efforts. As Reid, J. said in *Great Georgian Realty Group v. Genesis Marketing Organization Ltd.*⁵² (before going on to cite *Mason v. Freedman* on good faith):

He who would excuse himself by way of such conditions precedent puts his own conduct under the glass.

In other words, the party obliged to fulfill the condition who later seeks to rely on its own non-fulfillment of it, bears the onus of establishing "that it took all reasonable steps to fulfill the condition".⁵³

"Reasonable" is the key word here. The fulfilling party need not exhaust all options. As the court said in *Wypych v. McDowell*⁵⁴:

In hindsight, I am sure that the defendants could have done something in addition or done some things differently in attempting to get the mortgage, but perfection is not demanded in these cases. They acted reasonably, in good faith and used their best efforts. They were hurt and disappointed when rejected. They are not to be faulted.

What is "reasonable" in this context? The jurisprudence starts with the seminal decisions of *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*⁵⁵ and *Great Georgian (supra)*.

In *Dynamic*, the purchaser of lands brought an application for specific performance. The vendor refused to complete the sale. It claimed that the agreement was unenforceable as it did not specify who was responsible for *Planning Act* approval. Both parties were aware

⁵² [1977] O.J. No. 2220, 15 O.R. (2d) 701 ("*Great Georgian*"), at para 41.

⁵³ *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2009 CarswellOnt 494 at para 71 ON SC), appeal allowed on other grounds 2010 ONCA 310, appeal dismissed [2012] 2 SCR 675, 2012 SCC 51 ("*Southcott*").

⁵⁴ 1990 CarswellOnt 530, [1990] O.J. No. 674, 11 R.P.R. (2d) 89 (ON Dis. Ct.), at paras 11-12.

⁵⁵ [1978] 2 SCR 1072, [1978] S.C.J. No. 52.

approval was required, but the agreement was silent as to who would obtain it.⁵⁶ The Court found that it was the vendor who would have to divide the land. So, with an eye to *Planning Act*, sec. 19(1)⁵⁷, the Court held that it was an implied term that the vendor would obtain approval.⁵⁸

However, the vendor's only obligation was to "make and pursue a *bona fide* application", and "pursue such application with due diligence".⁵⁹ If the vendor did all this and its application was rejected, the purchaser's case would be dismissed.

In *Great Georgian*, Reid, J. held that the vendor's failure to take any steps to attempt to satisfy the condition in the contract precluded the vendor from relying on the condition to nullify the contract. The condition obliged the vendor to install services by a specified date. Reid J. found that the vendor took no steps to install the services. He also found that the deadline for installing them was recklessly agreed to, stating⁶⁰:

It is obvious that the basis on which [the vendor] Genesis set the due date was insubstantial and speculative. That in itself could be recklessness. It is obvious as well that the factors that caused Genesis to fail were unknown to Genesis at the time it chose the date of April 19, 1974, and that Genesis had made no real inquiry into them.

Had [Genesis] made even the most casual inquiries beforehand they might have learned Hydro's and Caledon's problems and policies. That should have been enough to have given them pause because it meant, on the face of things, they would have to install services before the winter. It should not have been difficult for them to have ascertained some time might be consumed in obtaining ministerial consent, if indeed it was forthcoming, to any change in conditions they might request.

They made no such inquiries. When they signed the contract they had no real reason to think they could complete it on time. They signed the contract "blind", as it were, with an almost deliberate blindness.

⁵⁶ *Ibid.* at S.C.J. p.10

⁵⁷ "A person who proposes to carry out a division of land shall apply for approval of the proposed subdivision in the manner prescribed by The Subdivision and Transfer Regulations."

⁵⁸ *Ibid.* at p.11

⁵⁹ *Ibid.* at p.13

⁶⁰ *Great Georgian* at paras 54-56. Emphasis added.

The jurisprudence since *Dynamic* and *Great Georgian* has expanded and clarified what level of due diligence will allow a party to rely on a condition precedent to void a transaction.

In *Borthwick v. St. James Square Associates Inc.*⁶¹ the defendant condominium developer was found to have recklessly set an interim occupancy date in light of existing information. As a result, the developer did not have a right of termination, notwithstanding the wording of the agreements of purchase and sale permitting it to terminate if the condominium development was not completed within 14 months, as contemplated by the agreements.

In *Marleau v. Savage*⁶², the defendant, entered into a conditional share purchase agreement to buy a nursing home from the plaintiffs. One of the conditions required the defendant to acquire Ministry of Health approval of the transaction (a statutory requirement under the *Nursing Homes Act*). The plaintiffs argued that the defendant's efforts were not sufficient to allow it to rely on the condition precedent to void the agreement for failing to obtain Ministry approval.

The Court dismissed the claim. The delays and obstacles had been caused by third parties over which the defendant had no control.⁶³ The evidence showed that the purchaser had gone to great lengths to get Ministry approval, but was impeded by external events. One of the plaintiffs was involved in the Ministry approval process, but when the defendant made him aware of the problems, he offered no help. After multiple failed applications, it became clear that purchaser would not be able to satisfy the Ministry. The purchaser eventually decided she did not "want to waste any more money on an application which is not going to be accepted".⁶⁴

Marleau contrasts with *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*⁶⁵ and *Southcott, supra*.

In *Dodge*, a Magna International subsidiary agreed to subdivide and sell four acres from the 42-acre tract to Dodge. Magna was to obtain consent for severance. Magna got the consent. It was conditional on Magna building a road. Circumstances changed. Magna

⁶¹ [1989] O.J. No. 172.

⁶² [2000] O.J. No. 2399, [2000] O.T.C. 449 (ON SC).

⁶³ *Ibid.* at para 76 and 78.

⁶⁴ *Ibid.* at para 38.

⁶⁵ [2001] O.J. No. 4397, 56 O.R. (3d) 341 (ON SC), appeal dismissed (2003) 63 OR (3d) 304 (CA), leave denied November 6, 2003 (SCC) ("**Dodge**").

didn't need the road any longer. Not wanting to bear the \$500,000 expense of building the road, Magna declared its agreement at an end. Dodge sued.

Dodge won. Lax J. found that the changed circumstances, and Magna's unilateral decision not to build the road, were not enough to relieve it of its unqualified obligation. Lax J. found⁶⁶:

This was an arbitrary, capricious and unreasonable breach of a binding contract for the sale of land. It is neither unfair nor unreasonable to construe the provision as I have. For these reasons, I conclude that [Magna] breached the Agreement of Purchase and Sale when it refused to comply with the conditions of severance.

In *Southcott*, the agreement of purchase and sale required the vendor Catholic School Board to obtain a severance from the local Committee of Adjustment.⁶⁷ The vendor acknowledged that the provision imposed a contractual obligation to act in good faith and use its best efforts to obtain a severance.⁶⁸

The closing date arrived and the vendor had not obtained the severance. It declared the agreement at an end.

The court found that the vendor did not act with reasonable diligence, and had breached its best efforts obligation in multiple ways. In the Court of Appeal, the vendor did not dispute the finding. It argued instead that even if it had not breached its obligation, there would be insufficient time to complete the agreement, which had a time of the essence clause. *Southcott* responded that a party in breach (including the duty to perform in good faith) cannot rely on a time of the essence clause. The Court of Appeal agreed⁶⁹:

In my view, given the trial judge's unchallenged finding that the Board was in breach, the Board was not entitled to rely on the time of the essence clause and terminate the agreement.

It is a well-established principle of contract law that a party cannot use its own breach or default in satisfying a condition precedent as a basis for being relieved of its contractual obligations while a party in breach of its

⁶⁶ *Ibid.* at para 48.

⁶⁷ *Southcott* at para 11.

⁶⁸ *Ibid.* at para 70.

⁶⁹ *Southcott*, ONCA at paras. 12-13.

obligation to do what is required to complete a transaction cannot terminate the agreement by relying on a time of the essence clause.⁷⁰

While the trial decision was overturned on other grounds, the principle set out above remains good law⁷¹.

Bhasin does not alter the duties that a party fulfilling a condition in a real estate agreement bears. It does consolidate and codify them, however.

ii. Discretionary Clauses

There are two types of discretionary clauses- (a) those involving matters of taste, sensibility, personal compatibility or judgment of the party, which are assessed on a subjective standard. (b) those involving matters such as operative fitness, structural completion, mechanical utility or marketability, which are assessed on an objective standard of reasonableness.⁷²

The language of the contract will drive the court's determination as to whether the parties intended it to be assessed on an objective and reasonable standard or on a subjective standard. In either case, the party exercising discretion clause must do so honestly and in good faith.

However, where a clause is not qualified with any objectively reasonable language, the party exercising its discretion will be able to do so in a subjectively beneficial manner, without much consideration of the other party's interest.

In *Marshall v. Bernard Place Corp.*⁷³, the impugned clauses stated⁷⁴:

This Agreement is conditional upon the inspection of the Property by a home inspector of the Purchaser's choice and at the Purchaser's own expense, and receipt of a report satisfactory to him in his sole and absolute discretion. Unless the Purchaser/Co-operating Broker gives notice in writing, delivered to the Vendor/Listing Broker on or before 3:00 p.m. Wednesday, August 19, 1998, that this condition is fulfilled, this Agreement shall be null and void and the deposit shall be returned to the Purchaser in full, without interest or deduction. The Vendor agrees to co-operate in

⁷⁰ *Southcott Court of Appeal supra* at paras. 12-13.

⁷¹ An appeal to the Supreme Court of Canada was dismissed: [\[2012\] 2 S.C.R. 675](#).

⁷² *Greenberg v. Meffert et al* (1985), 50 O.R. (2d) 755, 1985 CanLII 1975 (ON CA), leave denied 56 O.R. (2d) 320n (SCC).

⁷³ 2002 CanLII 24835 (ON CA).

⁷⁴ *Ibid.* at para. 4. Emphasis added.

providing access to the Property for the purpose of this inspection at reasonable times upon reasonable notice given by the Purchaser. *This condition is included for the sole benefit of the Purchaser* and may be waived at his sole option by notice in writing to the Vendor/Listing Broker within the time period stated herein.

At trial, Justice Keenan found that the language of the contract gave "a very broad subjective discretion to the purchasers" and that the "intention of the parties as disclosed by their contract was that the purchasers, after receiving the inspection report, could back out of the deal if they were not satisfied that [they] were getting what they bargained for".

On appeal, the vendor took the position that the purchasers' discretion had to be exercised in an objectively reasonable way. It argued that the purchasers were obliged to complete the purchase unless the inspection report revealed defects of a nature that went to "operative fitness, structural completion, mechanical utility or marketability".

The Court of Appeal disagreed. There was "a significant subjective element" to the exercise of discretion and that⁷⁵:

On a plain reading of the condition, subjective factors relating to "sensitivity, personal compatibility or judgment" are not precluded by words of limitation or exclusion. Had it been the intention of the parties to exclude such factors, it is not unreasonable to assume that suitable qualifying language would have been introduced to the condition.

However, the court did say that the subject matter of the agreement attracted elements of an objective standard. As a result, the court first assessed the objective reasonableness, and then the subjective elements⁷⁶:

The integrity of the property and its condition are matters which are capable of objective measurement. As indicated above, this suggests that, in the first instance, objective factors must ground the exercise of discretion under the condition. If such objective factors exist, the language of the condition will then establish what latitude is given to the party seeking to rely on the condition in determining whether the risks associated with the identified deficiencies in the property are acceptable in the circumstances.

⁷⁵ *Ibid.* at para. 25.

⁷⁶ *Ibid.* at para. 26.

The Court held that the purchasers met the requirements of good faith, honesty and reasonableness for three reasons⁷⁷:

First, the deficiencies revealed by the inspection report related to the construction, design or condition of the [property]. The report thus identified objective, physical factors concerning the structural integrity of the [property]... the inspection report detailed objective facts on which they were entitled to and did base the exercise of their discretion under the inspection condition.

Second, there is no evidence that the respondents engaged in the type of collusive conduct at issue in *Greenberg [v. Meffert, supra]*, as to establish dishonesty or bad faith...There is no evidence whatsoever of similar improper conduct in this case. Further, on the record before this court, the respondents were serious purchasers who, prior to the inspection, did not have any intention to resile from the Agreement or to invoke the inspection condition to avoid completion of the transaction.

Third, the inspection condition did not contain language which tied it to the "operative fitness, structural completion, mechanical utility or marketability" of the [property], as might warrant imposition of an exclusively objective standard of reasonableness. No concept of materiality was embodied in the condition, either in relation to the cost of repairs or the overall significance of the deficiencies. *Accordingly, once the inspection report identified objective facts relating to deficiencies in the property, the expansive language of the inspection condition agreed to by the parties permitted the respondents to assess whether the risks, uncertainties and inconveniences associated with the deficiencies outlined in the report were acceptable, according to their own subjective circumstances and perspectives.*

As with condition precedents, *Bhasin* does not appear to modify the duty owed by a party under discretionary clauses, so much as codify it. This is evidenced in the recent decision of *International Sausage House Ltd. v. Hammer Estate*⁷⁸. The court followed *Bhasin* to decide whether the defendant used its discretion reasonably to decline exercising an option to purchase. The clause provided:

⁷⁷ *Ibid.* at paras. 32-34. Emphasis added.

⁷⁸ 2015 BCSC 1155.

The Purchaser's obligation to complete the purchase of the Property is subject to and conditional upon delivery by the Purchaser to the Vendor, within the time provided for below, of written notice that the Purchaser, in its sole discretion:

(a) is satisfied with the results of, such physical inspections of the Property by such agents, consultants or other persons as the Purchaser deems necessary;

(b) is satisfied and has approved the environmental status of the Property;

(c) is satisfied with the results of, such enquiries and investigations regarding the feasibility of the Property as the Purchaser determines necessary [emphasis added]

The Court held that the defendant's decision that the project was not feasible was made in good faith and the defendant had exercised its discretion not to purchase reasonably. The Court went on to say that⁷⁹:

In reaching this conclusion, I recognize, as [the defendant] argued, the context in which the decision was made. By removing the condition, [the defendant] would be taking on financial obligations in the millions of dollars. It would be committing the business to several years of work advancing the project. The decision would be based on projections as to sales values, construction costs, the market for housing, municipal support and a number of other factors that are in large part, educated guesses. *The court should not be quick to second guess a developer's good faith decision that the project was not feasible.*

The deal was of no financial benefit to the defendant. Exercising its discretion to get out of it was reasonable.

⁷⁹ *Ibid.* at para. 190. Emphasis added.

iii. Disclosure

The duty to disclose in real estate transactions is a limited exception to the *caveat emptor* principle. Vendors may be liable if they know of latent defects which render the premises unfit for habitation or dangerous, and do not disclose them to the purchaser.⁸⁰

Bhasin makes clear that a duty to disclose is not part of the duty of honest contractual performance⁸¹:

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. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts [...] ***But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.***

The courts since *Bhasin* have been careful not to impose a duty to disclose, or any positive obligation on a party to inform the other party of something, unless required to do so under the terms of the agreement. They have balanced the principle that, on the one hand⁸²:

parties to a contract must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract",

and, on the other, that the duty of honesty in contractual performance:⁸³

⁸⁰ *McGrath v. MacLean* (1979), 22 O.R. (2d) 784, 1979 CanLII 1691 (ON CA); *Barbieri v. Mastronardi*, 2014 ONCA 416 (CanLII) at para 17.

⁸¹ *Bhasin*, *supra* at para 86. Emphasis added.

⁸² *Burquitlam Care Society v. Fraser Health Authority*, 2015 CarswellBC 2171, 2015 BCSC 1343, at para 24. Similar statements are found in *Kramer's Technical Services Inc. v. Eco-Industrial Business Park Inc.*, 2015 CarswellAlta 95, 2015 ABQB 59, at para 38.

⁸³ *Orthoarm Incorporated v. GAC International, LLC*, 2015 ONSC 5097, at para 74.

does not impose a duty of loyalty or of disclosure and must be applied consistently with the freedom of contracting parties to pursue their individual self-interest.

*Empire Communities Ltd. et al. v H.M.Q. et al.*⁸⁴ arose out of alleged nondisclosure of material facts in a real estate transaction. The plaintiffs argued that the Crown's and Ontario Realty corporation's failure to disclose Six Nations of the Grand River's lawsuits affecting the land before the sale was a breach of the *Bhasin* duty of honesty. Justice Myers (who obviously sees *Bhasin* as evolutionary) disagreed. That lawsuit sounded in damages. It did not affect the land. As a result Myers J. dismissed the action, stating⁸⁵:

The plaintiffs allege that the defendants were dishonest in failing to disclose the Six Nations' claims and lawsuit. If, as I find below, the defendants were not obliged to disclose the claims or lawsuit under the agreement between the parties or by the doctrine of latent defects, the intention of the defendants is irrelevant. Apart from the duty not to lie, *Bhasin does not create contractual obligations or replace the existing law*. As to the (possibly) new duty not to lie or knowingly misrepresent; absent a duty to disclose, the defendants' silence can be neither. *If one does not have a positive obligation to disclose certain facts, then silence as to those facts is neither dishonest nor a misrepresentation.*

Justice Myer gave this reasoning⁸⁶:

The Six Nations' claims and lawsuit were perhaps relevant to the assessment of profitability or economic feasibility of the plaintiffs' plans. But they did not prevent the lands from being used as intended. The plaintiffs have presented no precedent for the proposition that in the absence of a contractual requirement, a vendor must disclose information that might affect a buyer's assessment of the profitability of the intended use of land. That is far beyond any expansion of the doctrine of latent defect to date. Moreover, it is inconsistent with the prevailing policy of *caveat emptor* and the corollary doctrine of freedom of contract. The ability of parties to a real estate transaction to know their rights going into negotiations and to know that they are free to contract for changes to their

⁸⁴ 2015 ONSC 4355 (CanLII).

⁸⁵ *Ibid.*, at para 27. Emphasis added.

⁸⁶ *Ibid.*, at para 40.

rights if they agree to do so are fundamental building blocks of real estate law and practice.

While the authors of this paper are of the view that the duty created by *Bhasin* is greater than that expressed by Myers J., His Honour's observation that an action for damages need not be disclosed is not inconsistent with *Bhasin*.

In *Energy Fundamentals Group Inc. v. Veresen Inc.*⁸⁷, the Court took a different approach. The applicant had an option to take a 20% in a liquid natural gas ("LNG") facility. The respondent said the option no longer existed because the originally contemplated LNG import facility had been changed into an LNG export operation. The application Judge, Penny J., rejected this argument. He found that the option had not been terminated.

His Honour then imported a term into the contract requiring the respondent to give the applicant sufficient information to determine what the option was worth. The parties' agreement said nothing about such information. Justice Penny relied on *Bhasin*. He held that "business efficacy and good faith require the importation of an obligation...to provide sufficient financial information".⁸⁸

The Court of Appeal upheld Penny, J., but sidestepped *Bhasin* and the good faith issue. The respondent argues that Penny J. had erred by confounding the requirement of good faith performance of a contract with the test for implying contractual terms. The Court of Appeal dismissed this argument, stating⁸⁹:

In my view, the application judge's references to good faith do not undermine his earlier factual conclusions as to necessity and business efficacy.

As he indicated, in *Bhasin*, the court observed:

The implication of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions *by filling in gaps in the written agreement of the parties: Chitty on Contracts*, at para. 1-051 [emphasis added].

⁸⁷ 2015 ONSC 692, affirmed 2015 ONCA 514 (CanLII).

⁸⁸ *Ibid.* at ONSC para 92.

⁸⁹ *Ibid.* at para ONCA 49. Emphasis in the original.

Reference to this common doctrinal underpinning, after concluding that implication of the term was necessary to give business efficacy to the contract, does not amount to error.

We read this statement as saying that *Bhasin* reinforces the existing law regarding implied terms.

An interesting situation would have arisen if the respondent had failed to produce financial information, knowing the applicant would rely on its valuation to the applicant's detriment. In time, such a scenario will reach the courts and create more opportunities to consider the implications of *Bhasin*.

***Bhasin* - Revolutionary or Evolutionary?**

The Supreme Court of Canada found that the relationship between the parties in *Bhasin* did not fall within any existing category, such as employment or franchise, in which the duty of good faith applies.

The question that the Court set out to address was whether "a new common law duty under the umbrella of the organizing principle of good faith performance of contracts" ought to be created. Yes, said Justice Cromwell (revolutionary). However, the duty was already a widely recognized component of good faith (evolutionary). This is how Cromwell J. described it⁹⁰:

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.

⁹⁰ *Bhasin*, at para 73.

As a revolution, *Bhasin* is not – at least not yet – deeply disruptive. We noted above, the Court took care to emphasize that it was moving incrementally. This was no doubt to calm fears about revolutionary disruption.

The incremental approach also underscores the decision as being an evolution of the law. As the Court emphasizes, the principles *Bhasin* establishes flow from existing doctrine and decisions

Myers J. has made a series of helpful comments about the implications of *Bhasin*. In *Reserve Properties Limited v 2174689 Ontario Inc.*, His Honour described *Bhasin* as "a very measured case which makes incremental change to the common law"⁹¹. In *Warburg-Stuart Management Corporation V. DBG Holdings Inc. et al.*⁹², he observed that "[the] Supreme Court of Canada was very careful to make a minimal change, if any, to the common law".

Again, in *Empire Communities*⁹³, the Court made clear that *Bhasin* did not create "a freestanding, ill-defined, and potentially arbitrary duty of good faith against which to measure all aspects of contractual performance".

Justice Dunphy makes some especially insightful observations in *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*⁹⁴:

[...] It would be ironic indeed if a ruling intended to bring coherence and predictability by underscoring the common sense minimum standards of honesty in the commercial context should be misconstrued as a pretext for injecting uncertainty and risk of arbitrary outcomes into the world of commercial agreements whose very raison d'être is the pursuit of predictability and certainty.

Bhasin is no authority for unbridled creativity in the creation from whole cloth of obligations in a contractual context which the parties have not provided for or have addressed in a fashion which one party regrets in hindsight. Good faith and honesty are the boundaries of the field on which the contractual relationship is negotiated and performed.

⁹¹ 2015 ONSC 3469, at para 22.

⁹² 2015 ONSC 1594, at para 38.

⁹³ *Supra*, at para. 26.

⁹⁴ 2015 CarswellOnt 7876, 2015 ONSC 3404, at paras 155 – 166. Emphasis added.

Justice Belobaba who, as far back as 1985, long before his appointment to the Bench, had analyzed good faith law⁹⁵, summarized *Bhasin* as follows⁹⁶:

In *Bhasin*, an obviously important development in the continuing modernization of Canadian contract law, the Court in essence, did two things: one, it recognized that the 'situational' and 'relational' examples or pockets of a judicially recognized good faith doctrine were aspects of a broader organizing principle of good faith -- "that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily;" and two, the Court decided on the facts before it that it was time to recognize a new duty - "a general duty of honesty in contractual performance."

The Court made clear that this new duty of honesty in contractual performance flowed "directly from" and was an "aspect" (albeit "one of the most widely recognized aspects") of the general organizing principle of good faith. In other words, the pre-existing situational and relational aspects or pockets of implied good faith (such as the obligation to exercise discretionary contractual powers reasonably) were not eliminated but were simply realigned under a broad organizing principle of good faith. And the newly established duty of honesty in contractual performance was applied on the facts in *Bhasin* to confirm that the defendant Can-Am breached this duty by misleading the plaintiff and acting dishonestly in numerous ways leading up to and including the non-renewal of their agreement.

As we have shown above, a number of cases contain statements that suggest initial caution in the interpretation and application of *Bhasin*. But it is too early to tell what the future may hold. The law of unintended consequences lurks behind every new principle of law. What will emerge when *Bhasin* is applied to grey areas, like the duty to disclose, or the Court's right to imply terms. What will happen with contracts that embody terms the courts have never considered?

Bhasin - revolutionary or evolutionary? Both.

⁹⁵ E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Commercial Law: Recent Developments and Emerging Trends* (1985), 73.

⁹⁶ *Data & Scientific Inc. v. Oracle Corp.*, 2015 ONSC 4178, at paras. 10-11. Footnotes omitted.