

Civil Litigation**Cost awards from Ontario Land Tribunal, part two**By **Ronald D. Davis and Bree Pierce**

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(April 21, 2023, 1:29 PM EDT) -- In this second of three parts, we explore the four types of conduct that may attract a costs award before the Ontario Land Tribunal (OLT) under OLT Rule 23.9: (i) unreasonable, (ii) frivolous, (iii) vexatious, or (iv) conduct in bad faith.

There is no statutory or regulatory definition for the four terms. We must turn to reported decisions to learn how they have been interpreted.

Unreasonable, frivolous, vexatious

Although the first three criteria under OLT Rule 23.9 for costs — “unreasonable,” “frivolous” and “vexatious” — are semantically distinguishable, reported tribunal decisions tend to distill them down to one characteristic: *reasonableness*.

Thus, the tribunal (and other *Statutory Powers Procedure Act* tribunals) often reduce “unreasonable, frivolous or vexatious” to a simple test — sometimes referred to as *the simple test* — that the OLT regularly cites:

Would a reasonable person say about the conduct in question ‘that’s not right; that’s not fair; that person ought to be obligated to another in some way for that kind of conduct.’

OLT vice-chair David Lanthier has suggested that this simple test is an objective one.

The OLT, its predecessors, and even the courts have defined “unreasonable, frivolous, or vexatious” in myriad ways. This table sets out some of those definitions.

The jurisprudence shows that, when tribunals exercise their discretion to award costs and assess whether a party’s conduct has been unreasonable, frivolous or vexatious, they gravitate to a reasonableness analysis, often in the form of the simple “that’s not right; that’s not fair” test.

Bad faith

The OLT tends to deal with the fourth Rule 23.9 criterion, “bad faith,” by either combining it with the other three criteria, or as a separate conclusory finding.

In part because bad faith is a broad concept, spanning disparate areas of law (criminal, contract, labour), and in part because the three other costs criteria (unreasonable, frivolous, vexatious) are often sufficiently robust to subsume bad faith, few tribunal decisions define bad faith. They simply make findings of bad faith, undefined.

It may thus not be crucial to understanding OLT costs principles to have a definition of bad faith. Without one, however, our understanding of the Rule 23 costs criteria would be incomplete. We

review definitions of bad faith from different tribunals and the courts in the following section.

Bad faith: Local Planning Appeal Tribunal

In *Nikmanesh v. King (Township)*, 2019 LNONLPAT 32, the Local Planning Appeal Tribunal made a costs order against an unsuccessful applicant for a minor variance in King City. The tribunal found the applicant's conduct to be unreasonable, but not in bad faith, and explained:

Although the [applicant's] conduct was clearly unreasonable and frivolous, it was not done in bad faith or vexatiously or egregiously. *Bad faith involves an intent to deceive in order to gain some advantage* and that is not the situation in this case. [...]

[Emphasis added.]

Bad faith: Human Rights Tribunal of Ontario

Under a former provision of the *Ontario Human Rights Code*, if the Human Rights Tribunal of Ontario dismissed a complaint, it could make a costs order against the Human Rights Commission where the tribunal found the complaint to be trivial, frivolous, vexatious or made in bad faith. The Divisional Court examined bad faith in this context in *Ontario Human Rights Commission v. Jeffrey*, [2007] O.J. No. 3767:

A complaint made in bad faith is one pursued for improper reasons or motives and is not prompted by an honest mistake as to one's rights or duties. The term bad faith normally connotes moral blameworthiness on the part of the person accused, and includes conduct designed to mislead or pursued for an improper purpose. Bad faith contemplates a state of mind affirmatively operating with a furtive design or ill will ...

An allegation of bad faith is very serious, as it goes beyond an allegation of neglect or dereliction of duty and alleges a sinister motive in conduct or a decision to embark upon a course of conduct because of a dishonest purpose. *It is the opposite of good faith and it implies actual or constructive fraud, the conscious doing of wrong or design to mislead or deceive.*

[Emphasis added.]

Bad faith: Ontario Information and Privacy Commissioner

The Ontario Information and Privacy Commissioner in *Midland (Town) (Re)*, adopted a definition of "bad faith" similar to the Human Rights Tribunal's above. The commissioner quoted directly from *Black's Law Dictionary*:

Black's Law Dictionary (6th ed.) offers the following definition of 'bad faith':

The opposite of 'good faith', generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... *'bad faith' is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.*
[emphasis added]

Bad Faith: The courts in Bhasin v. Hrynew

Since the Supreme Court's 2014 decision in *Bhasin v. Hrynew*, 2014 SCC 71, bad faith has assumed a prominent place in contract law. Contractual bad faith differs from the bad faith criterion in OLT Rule 23, but it is still useful to consider how the courts have interpreted bad faith.

In *Bhasin*, Justice Thomas Cromwell for the court noted as follows:

Some suggest that there is a general duty of good faith: *Gateway Realty Ltd. v. Arton Holdings Ltd.* As Kelly J. put it in *Gateway Realty*, at para. 38:

The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. 'Good faith' conduct 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.* [...]

Apart from these types of situations in which a duty of good faith arises, common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.

For example, this court confirmed that there is a duty of good faith in the employment context in *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362. [...].

[Emphasis added.]

Bad faith summary

There is no simple or single definition of bad faith. Synthesizing the decisions reviewed above, what emerges is this: bad faith is serious, dishonest, nontrivial and improper intentional conduct meant to gain an advantage at the expense of another. Beyond that, bad faith is a "know it when you see it" phenomenon.

One thing bad faith probably is not: the mere absence of good faith. Someone may commit an act that is negligent, misguided, or otherwise not in good faith, but it may not be in bad faith.

However, the absence of good faith *may* betoken bad faith.

This is the second of a three-part series. Having established *when* the OLT will order costs, the third and final part of our article will look at the scope and scale of costs awards. Read the first article: [Cost awards from Ontario Land Tribunal, part one.](#)

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