

**GOOD FAITH IN CONTRACT PERFORMANCE:
BHASIN V. HRYNEW TWO YEARS ON**

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Introduction

It matters how one thinks about the law of contracts and, in particular, how one begins to think about it.

It has been over two years since the Supreme Court decided [*Bhasin v. Hrynew*](#).¹ The comments on the case from academics and others since then illustrate the importance of my first sentence. Those comments and the decisions of Canadian courts in the light of *Bhasin* deal with several aspects of the idea that there is a general organizing principle of good faith performance.

I shall deal with the decisions and comments in the following categories:

- confusion over the source of the obligation to perform in good faith;
- the actual source of the obligation and the consequences of that source;
- concerns for “certainty” in the law and what certainty actually looks like;
- standards of conduct;
- the decision in the broader context of “compulsory” good behaviour; and
- the prospect of a new principle of good faith in negotiations.

Confusion over the Source of the Obligation to Perform in Good Faith

Those who could even conceive of the common law as having or recognizing an obligation of good faith performance of one’s contractual obligations, assumed that such an obligation had to be an “implied term” of the contract. An example of the pre-*Bhasin* formulation is this statement by Weiler J.A. in 2006:

[18] It was a term of the agreement that Industry Canada would act fairly and take all reasonable steps to achieve the objectives of the agreement and the expectations of the parties. Simply paying the amount owed under the contract to CivicLife was not the sum total of Industry Canada’s legal obligations. It was an implied term of the agreement that Industry Canada would at all times deal fairly with CivicLife in order not to nullify the reasonable expectations that Industry Canada had itself fostered. *Industry Canada breached this implied term and the duty of good faith it owed to CivicLife in many respects.*² (Emphasis added.)

¹ 2014 SCC 71, [2014] 3 S.C.R. 494, 379 D.L.R. (4th) 385. As of 18 April 2017, it had been referred to over 260 times, 38 times by a court of appeal.

² [*Civiclifecom Inc. v. Canada \(Attorney General\)*](#), 2006 CanLII 20837 (C.A., Weiler, Rosenberg & Blair J.J.A.) See also this classic statement from the English Court of Appeal:

In addressing this question [*i.e.*, whether or not there is a “general overarching duty to co-operate in good faith”], I start by reminding myself that there is no general doctrine of “good faith” in

In [Yam Seng PTE Ltd v. International Trade Corporation Ltd.](#) Leggatt J. described the arguments against an obligation of good faith:

123 Three main reasons have been given for what Professor McKendrick has called the "traditional English hostility" towards a doctrine of good faith: see McKendrick, *Contract Law* (9th Ed) pp. 221-2. The first is ... that the preferred method of English law is to proceed incrementally by fashioning particular solutions in response to particular problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby the parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract. The third main reason given is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty. There is concern that the content of the obligation would be vague and subjective and that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight.³

I shall deal later with how Cromwell J. in *Bhasin* actually dealt with the kind of arguments mentioned by Leggatt J.⁴

This approach, the concept of good faith as an implied term, led to the idea that such an obligation would be "imposed" on the parties, perhaps even contrary to their intentions, and, moreover, by some "extraneous" authority, *i.e.*, the judge.

I shall not get into the jurisprudential origins or implications of this approach except to observe that I think it reflects the English and (to a much lesser extent) an older Canadian idea – English Positivism – that the common law of contracts is "hard" and not to be made "mushy" by weird and dangerous concepts like unconscionability and, of course, good faith.

English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract: ... If the parties wish to impose such a duty they must do so expressly.

[Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd. \(t/a Medirest\)](#), [2013] EWCA Civ 200, para. 105. Jackson L.J. was referring, *inter alia*, to [Yam Seng PTE Ltd v. International Trade Corporation Ltd.](#), [2013] EWHC 111, [2013] 1 Lloyd's Rep. 526 (Q.B.), a case where an English judge had accepted that there could be an obligation of good faith performance in a contract.

³ [2013] EWHC 111, [2013] 1 Lloyd's Rep. 526.

⁴ The actual extent or antiquity of the belief by judges that obligations of good faith performance exist and are necessary is shown by Cromwell J., para. 35, and by Hunt, "Good Faith Performance in Canadian Contract Law" (2015), 74 *Cambridge L.J.* 4. Hunt's statement, *ibid.*, p. 6, that the decision "is revolutionary" is, I think, a considerable overstatement. It is wrong to say, as Hunt does – though he quickly backs off from it – that the obligation "reflects a serious restriction on freedom of contract". Can one really claim that one should be free to tell lies?

In spite of what Cromwell J. said — I shall look at his words in a moment — commentators, but generally not judges, still cannot get their mind around the fact that the obligation of good faith performance developed and applied by the Supreme Court in *Bhasin v. Hrynew* is *not* an implied term.⁵

I don't think that it is actually dangerous to conceive of a duty of good faith as an "implied term" provided, however, that the consequences of that characterization are not mechanically followed. I shall describe those consequences (or those risks) in a moment.

The Actual Source of the Obligation and the Consequences of that Source

I claim some credit for the way in which Cromwell J. described the source of the obligation. He said:

[45] ... As A. Swan and J. Adamski put it, the duty of good faith "is not an externally imposed requirement but *inheres* in the parties' relation": *Canadian Contract Law* (3rd ed. 2012), at §§ 8.134-8.146.

(Emphasis added.)

Several consequences follow from this characterization of the source of the duty. First, the duty is obviously *not* an implied term. As I said, it is not an externally imposed requirement but something that is part, an integral part, of the parties' relation.⁶ Second,

⁵ See, e.g., a Lexpert seminar on June 2, 2015, called "The Implied Obligation of Good Faith", advertised [here](#).

⁶ In *Canaccord Genuity Corp. v. Pilot*, 2015 ONCA 716 (Weiler, van Rensburg & Roberts JJ.A.), Weiler J.A. said:

[50] In any event, the *T.D. Waterhouse [Canada Inc. (TD Waterhouse Private Investment Advice) v. Little*, 2010 ONCA 145] decision relied on in [*Canaccord Genuity Corp. v. Sammy*, 2014 ONSC 3691] and [*Canaccord Genuity Corp. v. Gary Lorne Beck*, 2013 ONSC 7964] predates the Supreme Court of Canada's decision in *Bhasin v. Hrynew*, In that case, Cromwell J., on behalf of the Court, decided it was time to take two incremental steps. First, he acknowledged that there is a general organizing principle of good faith in contractual performance; and second, he recognized that there is a general duty to act honestly in the performance of contractual obligations: para. 33. He explained, at para. 73: "This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract." *The duty of good faith is a general doctrine of contract law that imposes a minimum standard of honest contractual performance: para. 74. It is not an implied term and therefore operates regardless of the intentions of the parties and the existence of an entire agreement clause: para. 72.* (Emphasis added.)

See also *Balmoral Custom Homes Ltd. v. Biggar*, 2016 ONCA 967, (Cronk, Juriansz & Roberts JJ.A.), para. 8. In *Yam Seng Leggatt J.* said:

137 As a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. In particular the requirement that parties will behave honestly is so obvious that it goes without saying. Such a requirement is also necessary to give business efficacy to commercial transactions.

[2013] EWHC 111, [2013] 1 Lloyd's Rep. 526 (Q.B.). I would omit the phrase, "[a]s a matter of construction". An English judge would find this usage natural because the process of "construction" or "interpretation" is the method chosen to deal with all kinds of problems of "incomplete" contracts. I shall not ex-

an “entire agreement clause” has no effect on the existence of the obligation.⁷ Such a clause imports or invokes the parol evidence rule and is a solicitor’s attempt to lift an agreement out of the murky background facts from which it arose, but an obligation or duty that inheres in the parties’ relation cannot be conceived as external to it or to the written agreement, the terms of which record the relation’s features.⁸

Third, and what is more important, the obligation cannot be disclaimed.⁹ It is conventionally said that a term cannot be implied in (or into) a contract if it would conflict with an express term of the contract. In this sense, an implied term comes from a source that is subordinate to the express terms of the contract. Cromwell J. is emphatic in rejecting this approach to the duty. He said:

[74] ... I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. *It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.*

[75] Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of

plore my arguments now; I only observe that bringing all the problems that they do within those processes strains them beyond the breaking point. See Swan & Adamski, *Canadian Contract Law*, section 8.1.6, pp. 696-723.

⁷ For a useful statement of the effect of an entire agreement clause see [Soboczynski v. Beauchamp](#), 2015 ONCA 282 (Hoy A.C.J.O., Epstein & Hourigan JJ.A.)

⁸ The parol evidence rule is probably the least understood “rule” in the law of contracts. The “rule” can *exclude nothing* because the question before the court — whether it understands it or not — is to determine *where* the parties’ agreement is to be found. Is it to be found in the collection of pages proffered by one of the parties or in those pages and some other stuff, different pages or even oral statements, proffered by the other? *In answering these questions, no evidence directed at them can be excluded.* Moreover, the fact that the words of one document may be thought to be unambiguous is wholly irrelevant to the question — it’s a classic “boot-straps” argument. Of course, once the court has decided that the set of pages proffered by one party *is* the final expression of the parties’ agreement then it is obvious that nothing else matters. If the court then wants to say that the evidence that led to this conclusion was inadmissible, I suppose it can say so — a kind of proleptic inadmissibility — but why bother? The standard statement of the rule is simply silly and, of course, dead wrong.

⁹ In [High Tower Homes Corporation v. Stevens](#), 2014 ONCA 911 (Hoy A.C.J.O., Epstein & Hourigan JJ.A.), Hoy A.C.J.O. said:

[36] In *Bhasin v. Hrynew*, ... — a decision released after this appeal was argued and on which the parties subsequently made written submissions — Cromwell J., writing for a unanimous court, clarified that the duty of good faith should not be thought of as an implied term. He recognized a new duty of honest contractual performance as a general doctrine of contract law that operates irrespective of the intentions of the parties. *As such, the parties cannot exclude it by an entire agreement clause: Bhasin*, at para. 74. (Emphasis added.)

honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, *the parties are not free to exclude it ...*¹⁰

(Emphasis added.)

Cromwell J. does suggest that, just as the parties can qualify the standard of reasonableness by defining what would satisfy them, they can similarly qualify what would be the standard to be met with respect to the obligation to perform in good faith or honestly. He refers to the Uniform Commercial Code, §1-302(b), which provides:

The obligations of good faith, diligence, reasonableness, and care ... may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.¹¹

I have great difficulty in conceiving how an obligation of either honest or good faith performance can be qualified in the sense envisaged by the UCC or Cromwell J. A performance that is only a little bit dishonest or done with just a teeny, little bit of bad faith seems to be one that is neither honest nor in good faith. The image I have in mind is of being just a little bit pregnant! Of course, the consequences of a very minor and non-material breach of the obligation of good faith or honest performance may not be significant and may not even lead to an award of damages.

It may be that some skilled drafter is able to convince a court that the obligation imposed by the Supreme Court has been both properly recognized, *i.e.*, not excluded, but successfully qualified. I just don't know what words might achieve this result.

Concerns for “Certainty” in the Law and What Certainty Actually Looks Like

When the decision came down, there were many claims that the law had now become uncertain. These claims were made in many law firm posts or comments. One such comment stated:

While the Supreme Court embarked on its analysis with the admirable intention of enhancing commercial certainty, the decision is likely to have the opposite effect on the predictability of contract law. Future courts will now have to grapple with what, exactly, “honest performance” entails, and the extent to which that duty may be modified by express contractual terms.¹²

In “Lexpert’s Top 10 Business Decisions of 2015”, 11 January, 2016, it was said that the “... courts delivered body blows to business positions on some controversial and meaningful issues: the Supreme Court of Canada imputed a duty of good faith into contract law, creating a great deal of controversy and uncertainty in doing so...”.¹³

¹⁰ Cromwell J. made reference to [Civiclifecom Inc. v. Canada \(Attorney General\)](#), above, note 2, para. 52.

¹¹ *Bhasin*, para. 77.

¹² http://www.mcmillan.ca/Files/177622_Let's%20Be%20Honest.pdf>

¹³ <http://www.lexpert.ca/article/lexperts-top-10-business-decisions-of-2015/> I am not quite sure what a “meaningful” issue is – and I’m sure that the author of the blurb had no idea either.

I think that part, even an important part, of how lawyers and judges think about the law is informed or influenced by their concept of certainty – what the concept looks like – and their tolerance of what they believe is uncertainty. A false or unattainable concept of certainty can create serious problems in understanding the law and one’s expectations of what it looks like.

Oliver Wendell Holmes said:

... The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. *But certainty generally is illusion, and repose is not the destiny of man....*¹⁴

(Emphasis added.)

What then might certainty look like or how might we attain it? A solicitor needs to know what to do to make a valid contract for a client. She or he has to know how to apply the rules of offer and acceptance, how, for example, to make sure that there is consideration – if there could be any doubt that it would exist – and how to avoid such traps and pitfalls as there may be. It’s generally not hard for a law of contracts to satisfy these needs.

Certainty looks quite different from other points of view. The solicitor who wants to draft a non-competition clause will be told by the law, the cases and text-writers, that such a clause has to be reasonable. In fact, with respect to employees, such a clause is, as we all know, *prima facie void*. This knowledge doesn’t prevent the solicitor from telling the client what temporal and geographical limits on the clause are likely to be considered reasonable by a court. The solicitor’s advice will be: don’t over-reach and only ask for what you really have to have and can easily defend before a judge. In other words, the content of the word “reasonable”, when told to the client, will be informed by the solicitor’s knowledge of the cases where non-competition clauses were (or were not) upheld and by the general recognition of the fact that over-reaching is dangerous.

Words like “reasonable”, “good faith”, “best” or “commercially reasonable efforts”,¹⁵ when used in contractual language cannot be replaced by a rule. Those words set or define a standard of conduct, against which a party’s actions will be tested. It is foolish to expect that the “general organizing principle” of good faith performance imposed by the Supreme Court in *Bhasin v. Hrynew* can be reduced to a rule. Yet this expectation seems to be held by some civil litigators.

A case comment of *Bhasin v. Hrynew* said this:

It remains to be seen in the common law jurisprudence how courts can develop the law to finally settle the debate surrounding the source of good faith and to establish a principled approach towards what constitutes bad faith in order to

¹⁴ O.W. Holmes, “[The Path of the Law](#)” (1897), 10 *Harvard Law Review* 457.

¹⁵ I’m not sure about the phrase one occasionally encounters, “reasonable best efforts”. Can anyone have any good idea what it means?

resolve the lack of coherence and commercial certainty in the world of contract law.¹⁶

The authors seem to have an expectation of what the courts can do that is very unlikely to be met. The source of the obligation of good faith performance is precisely stated by Cromwell J. to *inhere* in the parties' relation; it's just there, it is not an implied term, it is not imposed by the court.

If good faith is "defined", as it probably inevitably has to be, as an absence of bad faith, we don't need to know more about what's bad faith than that it is or includes dishonesty, dissimulation, failing to disclose what has to be disclosed;¹⁷ or mean, stingy performance. There are other adjectives that could be used but the important points are two: (i) we don't actually need much precision; it's only important to know that there is a line that should not be crossed; and (ii) it's not usually hard to say when the line has been crossed. As will be noted later, a careful solicitor does not advise a client to sail close to any line, whether it's the good faith line or the fiduciary line, that is dangerous to cross.

One consistent objection to the imposition of a duty of good faith performance over the years has been that the imposition of an obligation of good faith performance would do two bad things. One of those two things, as I have illustrated, is that the imposition of the duty would make the law uncertain. Cromwell J. refers to this argument at para. 39 and deals with it by observing that the current law, *i.e.*, the law absent a duty of good faith performance, is actually uncertain because (para. 41) it lacks coherence and fails to build on the experience of both Quebec and the United States. In Quebec, under the *Civil Code*, Arts. 6, 7, & 1375, and in the United States under the *Uniform Commercial Code* §§1-304, 1-305 and §1-201(b),¹⁸ and the Restatement, §205, obligations of good faith performance have been imposed for years without anyone complaining that contracts were somehow made uncertain, let alone unmanageably uncertain.

The second of the "bad things" would be the imposition on the parties of an obligation (or obligations) that they had not expected. This objection is without merit. It seems very hard to argue convincingly that one should be free to tell lies — and imposing serious consequences on a party who does tell lies seems eminently justifiable.¹⁹

¹⁶ Effendi, Pessione & Nguyen, "*Bhasin v. Hrynew*: Towards Clarity and Coherence with respect to Good Faith in Contract Performance" (2016), 46 *Advocates' Quarterly* 94 at 122.

¹⁷ Some agreements include a clause that says, "There is no fact undisclosed that, if disclosed, would be material".

¹⁸ §1-201(b)(20) provides: "'Good faith,' except as otherwise provided in Article 5 [dealing with letters of credit], means honesty in fact and the observance of reasonable commercial standards of fair dealing".

¹⁹ It seems hard to argue that one should be free to tell lies, even little ones, and even if a party were to seek contractual permission to do so, it has been held that it cannot. See, *e.g.*, *ABRY Partners v. F & W Acquisition, LLC*, 891 A.2d 1032 (Del. Ch. 2006, Strine V.C.), where this "permission" was explicitly denied on the grounds of public policy. See also *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650, [2005] 7 W.W.R. 419, where a seller, knowing that the goods it was selling were defective, dangerous and completely unsuitable for the buyer's purposes, was unable to rely on an ex-

It is worth considering what kind of rules, principles or doctrines would lead to or away from certainty. First, we would have to consider carefully what certainty would look like. Certainty comes in many different forms. It is fairly easy (and contributes to certainty) to have to say if a child is or is not over 4 feet tall. Yes, there will be many children close to the line, but the line is clear and probably easy to draw. (We might worry about children who cannot stand straight or who have lost their legs, but those problems can be ignored unless, of course, it matters and then we shall just have to deal with the difficulty with fairness and kindness.) What about drawing a line between men who are bald and those who are not? What confidence could anyone have that the line could be drawn in a defensible way? If much depended legally on whether a man were bald or not, we would have a hard time defending the separation of men into two groups. By the way, the drawing of lines in apartheid South Africa was as difficult and, since so much depended on where the line was drawn, as manifestly indefensible and unjust.²⁰

If we consider the problem of certainty in matters more likely to be of concern to a solicitor, it is, I think, fairly obvious, for example, that the conventional statement of the doctrine of consideration does *not* contribute to certainty. We know (with considerable certainty) that a commercial bargain will be enforced, but do we know what will happen with a going-transaction adjustment? In other words, there are pockets of certainty and pockets of uncertainty. To the extent that before *Bhasin v. Hrynew* there were pockets of the law where obligations indistinguishable from an obligation to perform in good faith existed, the law was considerably uncertain because it was seldom clear if a court would be moved to recognize that a pocket applied or that the parties' relation existed in a pocket, or if the parties, on going to court, met judges like those on the Alberta Court of Appeal when *Bhasin v. Hrynew* was before it who would not recognize that the pockets existed.²¹ Almost every instance of a contractual rule or principle would present the same pattern: a solicitor could give advice that could be safely relied on so long as she or he could control what the client did. Outside that area when clients could do what they wanted or where assumptions were upended, certainty simply does or did not exist.

The open recognition of an obligation of good faith performance, far from causing uncertainty, actually contributes to certainty because parties (and their legal advisers) now

emption clause. It always mystifies me that anyone thought that such a seller could succeed in its attempt to shift the risk of loss to the buyer in the circumstances. In civilian systems the same idea is captured within the scope of the principle that exemption clauses cannot relieve a party against its own gross fault. *Civil Code of Quebec*, Art. 1474.

²⁰ For a recent example, though not in Canada, of just such invidious line-drawing, see [here](#).

²¹ 2013 ABCA 98, 362 D.L.R. (4th) 18, [2013] 11 W.W.R 459. The Court stated:

[27] A number of fundamental propositions of law are relevant, and much authority can be cited for each. To control the length of this judgment, we simply summarize a number of applicable settled legal rules.

1. There is no duty to perform most contracts in good faith....

It is this statement that *Bhasin v. Hrynew* repudiates.

know that bad faith will be punished or dealt with in some way. In other words, because a large element of uncertainty exists when courts are faced with a party who has behaved badly – courts *like* to get scumbags – giving them the tools to do so openly makes both the development and application of the law more certain.

When *Bhasin v. Hrynew* was before the Alberta Court of Appeal, the Court regarded it as necessary that some obligation of good faith be found “independent of the express terms” of the contract. What do these phrases suggest the Court was expecting to find, even if it was not “looking for” something? There is, for example, this statement by the Ontario Court of Appeal in *LeMesurier v. Andrus*.²² The defendant purchaser refused to close a transaction for the purchase of property because, she alleged, the vendor could not give good title to 12 sq. ft. of a lot size of 7,500 sq. ft. In giving the reasons for judgment of the Court of Appeal, Grange J.A. said:

I think the purchaser's reliance upon this clause²³ 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. As Middleton J. put it in *Hurley v. Roy* (1921), 50 O.L.R. 281 at p. 285, 64 D.L.R. 375 at p. 377: "The policy of the Court ought to be in favour of the enforcement of honest bargains .." ..

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.²⁴

²² [1986] 54 O.R. (2d) 1, 25 D.L.R. (4th) 424 (C.A., Howland C.J.O., Zuber & Grange JJ.A.).

²³ The clause, a standard one in the TREB form in use at the time, provided:

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 ... 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.

²⁴ (1986), 54 O.R. (2d) 1, at 7, 25 D.L.R. (4th) 424, at 430.

The fact that motivated the defendant's repudiation of the transaction was a significant "correction" in the Toronto housing market so that, when the defendant repudiated the transaction, the house was worth much less than she had agreed to pay.

Notice as well — and this is a very important point — the starting point of both Middleton J. and Grange J.A.: they start from the point that "honest bargains" ought to be enforced; they disparage attempts to get out of such a bargain on a technicality; and Grange J.A., writing in 1986, at least sees that it may be possible to have an "independent doctrine of good faith in contract", using as illustrations the UCC and the American Restatement.

From the point of view of the solicitor, giving advice to a client based on what the Alberta Court of Appeal said, whether or not the Supreme Court had reversed the decision of the Court of Appeal, would be dangerous.²⁵ Notwithstanding many judicial statements that there is, for example, no obligation to negotiate in good faith, reliance on such a supposed rule would lead a solicitor to give manifestly bad advice, advice likely to cost the client money and to make the agreement the client might have thought it had, unenforceable, either wholly or at least partially.²⁶ As in the former case, the problem with the statement of the rule regarding the obligation to perform in good faith and the attitude to contracting or contractual relations it illustrates, is that they ignore the various instances where the courts impose rules or reach results that look just like ones that would exist were an obligation to perform in good faith acknowledged.

The constraints imposed on a party's conduct during a relation, *i.e.*, what an obligation of good faith in performance entails, is, to speak not very helpfully, not to behave in bad faith. Good faith then entails an obligation to behave decently and honestly. Those words are, of course, very open-ended but they nevertheless suggest clear limits on what a party may do. The fact that a line in a particular case may be hard to draw, doesn't mean that one cannot easily say in other cases where they fall in relation to the line: I may not be able to define the line precisely, but, at least for the vast bulk of the cases, I can say on what side of the line a particular case or a particular action falls.

This analysis leads to the point made in a recent on the general organizing principle. In [Styles v. Alberta Investment Management Corporation](#),²⁷ several of the themes I have discussed here came together. The reasons for judgment of the Court of Appeal focused on standards of conduct.

²⁵ See, *e.g.*, Brandon Kain, "The Second Opinion: Good Faith in the Shadow of Contractual Rights", [here](#).

²⁶ The cases would include: [Stevens v. Stevens](#), 2013 ONCA 267, 114 O.R. (3d) 721, (C.A., Weiler, Sharpe and Rouleau JJ.A.); [McMaster University v. Wilchar Construction Ltd.](#), [1971] 3 O.R. 801, 22 D.L.R. (3d) 9; *aff'd* without reasons, (1973), 12 O.R. (2d) 512n, 69 D.L.R. (3d) 400n (H.C.J., Thompson J., & C.A.) and [Stepps Investments Ltd. v. Security Capital Corporation](#) (1976), 14 O.R. (2d) 259, 73 D.L.R. (3d) 351 (H.C.J., Grange J.) This point will be elaborated in dealing with the obligation to negotiate in good faith, below.

²⁷ 2017 ABCA 1

Standards of Conduct

The common law recognizes several different standards of conduct. I shall mention three (and quickly dismiss one). The standards are represented by (i) the fiduciary duty; (ii) the obligation of good faith performance; and (iii) the obligation to behave reasonably. The latter standard being applicable in many different situations.²⁸

Cromwell J. was emphatic in distinguishing the obligation of good faith performance from a fiduciary duty. He said:

[65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While “appropriate regard” for the other party’s interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. *Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.*

(Emphasis added.)

A party owing a duty of good faith performance does not have to defer or subordinate its interest, its goals, to those of the other. A fiduciary duty, on the other hand, exists in a relation where such subordination of the fiduciary’s interests must occur. There were a number of cases where courts had confused the two duties and had resisted the recognition of an obligation of good faith performance on the ground that it might require a party to forego its attempt to realize its own interests in the relation.²⁹ I shall not further consider the fiduciary duty.

In *Styles* the plaintiff had been employed by the defendant as an investment manager. His employment contract provided for dismissal without cause, specifying the payment instead of notice he would then receive. His contract also provided that he would receive the benefits of a “Long Term Incentive Plan”, provided that certain conditions were met. The principal, relevant condition of the Plan was that the employee be employed by the defendant for at least four years. The employee was dismissed before he had worked for four years with the defendant. No reasons for the dismissal were given and the plaintiff was paid what his employment contract provided. He was not paid anything under the Plan. He sued to recover the payments he alleged he was due under the Plan.

²⁸ There are others like the frequently encountered undertakings to use “reasonable efforts”, “reasonable commercial efforts” or “best efforts”.

²⁹ The cases include [Martel Building Ltd. v. Canada](#), 2000 SCC 60, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1, and [978011 Ontario Ltd. v. Cornell Engineering Co. Ltd.](#) (2001), 53 O.R. (3d) 783, 198 D.L.R. (4th) 615 (C.A., Weiler, Rosenberg & MacPherson JJ.A.)

The trial judge had held that the employer had an obligation to give reasons for the dismissal and that it had an obligation, derived from *Bhasin v. Hrynew*, to exercise the discretion the trial judge held the employer had with respect to the Plan, to exercise it in good faith. Accordingly the plaintiff was awarded some \$450,000.

In a comprehensive dissection, even evisceration, of the trial judge's reasons, the Alberta Court of Appeal allowed the defendant's appeal.³⁰ The Court of Appeal held that there was in fact no discretion under the terms of the Plan, accordingly, there was no possibility of that discretion being exercised in bad faith. An important aspect of that analysis was on the consequences of the standards of conduct represented, on the one hand, by good faith and, on the other, by reasonableness.

The majority of the court held:

[59] The concepts of "dishonesty, arbitrariness, and capriciousness" on the one hand, and "unreasonableness" on the other hand have distinct meanings in law: As stated in A. Swan and J. Adamski, *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis, 2012) at para. 8.135: "... the obligation to behave in good faith imports quite a different kind of obligation than an obligation to behave reasonably." A discretion may be exercised "unreasonably", "subjectively", "idiosyncratically" or "selfishly" without it following that the discretion has been exercised arbitrarily or dishonestly. What is objectively "unreasonable" may make sense to a particular contracting party with unorthodox business or non-business objectives. Even if a discretion is "unreasonably" exercised because it extends beyond the proper contractual rights of the party exercising the discretion, that does not necessarily engage any element of bad faith, even though it is a breach of contract. Choosing an option that is subsequently found to be "unreasonable" is a long way from dishonesty or arbitrariness.

[60] When a contract gives one party a discretion on how to perform, that is a method of risk allocation between the parties to the contract. They have contracted and agreed that the party with the discretion will have an element of power over how performance is to be accomplished. This may be because all of the possible situations surrounding performance are impossible to predict, meaning that one party or the other has to have some flexibility at the time of performance. Alternatively, it may simply be part of the bargain: one party was only prepared to enter into the contract on the basis that it was given an element of discretion as to how it will actually perform. Whatever the reasons, if one party is given a discretion it should be allowed to exercise that discretion without being second-guessed by the courts with the benefit of hindsight.

I don't disagree with the decision of the Court of Appeal. I think what the Court said, particularly in para. 59, may, however, mislead. In our text we say, following on from what the court quoted:

... A party who acts in good faith does not have to subordinate its interest to that of any other party; it simply cannot use the power the agreement gives it in ways

³⁰ I have seldom met such a sustained criticism of a trial judge's reasons.

that are abusive, unfair or dishonest.³¹ An obligation to behave reasonably, on the other hand, does entail some subordination of a party's interests in the sense that its rights or its conduct will be tested with reference to an external, objective standard.³²

These distinctions are important in understanding what the Supreme Court did in *Bhasin v. Hrynew* and what courts do all the time when they deal with problems of reasonableness: reasonable notice; reasonable exercise of a discretion, *i.e.*, where consent may not be "unreasonably withheld"; "reasonable efforts" or "commercially reasonable efforts"; and, of course, in all the situations, both in contract and tort, where a duty to act with "reasonable care" will be imposed. It would be an odd contractual relation where a party could act idiosyncratically or even wholly selfishly when it has an obligation to do something reasonably.

The point is that it has been some (very long) time since standards of reasonableness were thought to import some large and unacceptable degree of uncertainty into the law or contractual relations. In fact, the use of such standards provides for what I can call clear "situational" certainty: what is, for example, "reasonable notice" will depend on the facts as they are when the length of a notice has to be calculated.

The same general feature applies to the standard of good faith performance. It is dangerous to sail, or to tell a client to sail, close to a line, whether it is the line that demarcates the scope of a fiduciary duty, or a line between honesty and dishonesty. Stepping back from the line — to mix a metaphor — is the safest thing to do. In other words, it's not generally hard to say what is conduct that will, for example, engage a fiduciary duty or be dishonest. There are, of course, hard and difficult decisions to be made, but then what else would one expect? Lawyers have to give clients advice all the time on what conduct might be a breach of a director's, an agent's or an employee's fiduciary duty — and, of course, to consider their own fiduciary duties.

There is one aspect of *Styles* that the Alberta Court of Appeal did not consider. The court held that the employer did not have to give reasons for the dismissal.³³ In the only decision of the Supreme Court dealing with the scope of the duties imposed by

³¹ See, *e.g.*, Weiler J.A. (dissenting) in *Peel Condominium Corp. No. 505 v. Cam-Valley Homes* (2001), 53 O.R. (3d) 1, 196 D.L.R. (4th) 621, [2001] O.J. No. 714 at para. 82 (Ont. C.A.), and *Mason v. Freedman*, [1958] S.C.R. 483, 14 D.L.R. (2d) 529.

³² The relation between an obligation of good faith and a duty to behave reasonably was the focus of the judgment in *Degelder Construction Co. Ltd. v. Dancorp Developments Ltd. (No. 2)*, 2000 BCSC 1095, 78 B.C.L.R. (3d) 256, [2000] B.C.J. No. 1484 (B.C.S.C.), *affd* 2002 BCCA 479, [2002] B.C.J. No. 1946 (B.C.C.A.), when a mortgagor challenged the mortgagee's exercise of its powers under the mortgage. In the circumstances the Court held that the mortgagee had acted in good faith, *i.e.*, honestly, and that was the extent of its obligation: it was not required to act reasonably in the sense of balancing its rights against those of the mortgagor.

³³ 2017 ABCA 1, para. 37.

Bhasin v. Hrynew, [Potter v. New Brunswick Legal Aid Services Commission](#),³⁴ Wagner J., writing for the majority, said:

[99] In the instant case, this basic requirement [to provide “legitimate business reasons” for an administrative suspension] was not met. To begin with, Mr. Potter was given no reasons for the suspension. It seems to me that, in most circumstances, an administrative suspension cannot be found to be justified in the absence of a basic level of communication with the employee. At a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright: *Bhasin v. Hrynew*, ... at para. 66. Failing to give an employee any reason whatsoever for his suspension is, in my opinion, not being forthright. Moreover, the limited evidence presented in support of the Board’s ostensible purpose of facilitating a buyout is undercut by the actions the Board took to have Mr. Potter terminated. As I mentioned above, the Board’s resolution of January 5, 2010, and the January 11, 2010 letter to the Minister in which the Board recommended that Mr. Potter be terminated ought to have been admitted at this stage of the analysis. With respect, this constituted a significant error on the trial judge’s part. Add to this the facts that Mr. Potter was replaced during the suspension period and that that period was indefinite, and there remains no doubt in my mind that the suspension was unauthorized. To reiterate, which factors must be considered will vary with the context and will depend on the nature and circumstances of the suspension.

I would have thought that if reasons had, under *Potter*, to be given for a suspension then, *a fortiori*, they would have to be given for a dismissal. The Alberta Court of Appeal did not refer to *Potter*. I do not believe that if the Court of Appeal had referred to *Potter* it would have changed the outcome; it would, however, have been better if the loose ends in the decision had been cleared up.

One objection that the Alberta Court of Appeal had with the plaintiff’s arguments in *Bhasin*, was that there was no such thing as a stand-alone cause of action for breach of a duty of good faith performance. This argument came to a head — if that’s the correct way to describe the point — in [McDonald v. Brookfield Asset Management Inc.](#)³⁵ The action was a proposed class action arising out a failed investment in a limestone quarry. The shareholders lost the value of their shares when the corporation became insolvent and its assets were sold by the receiver to the defendant. There were technical reasons for the rejection of the class action but the representative plaintiff had also argued the *Bhasin v. Hrynew* would help him. The Court said:

[57] The plaintiff proposes to rely on what is described as “the good faith doctrine”. The simple answer to this proposed claim is that there is no such free-standing cause of action, and the good faith doctrine is only a “general organizing principle of the common law of contract”. The applicable cause of action is

³⁴ 2015 SCC 10, [2015] 1 SCR 500, 381 D.L.R. (4th) 1 (McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.)

³⁵ 2016 ABCA 375 (Fraser C.J.A., Slatter & O’Ferrall JJ.A.)

“breach of contract”. In *Bhasin v Hrynew* ... the Supreme Court of Canada concluded that contracting parties have a general obligation to perform their obligations under a contract honestly. The circumstances in which this doctrine will come into play are rare, but it will never come into play absent a contract. If there is no contract, there are no contractual obligations to perform. If there is nothing to perform, it cannot be performed in bad faith.

Some other cases — I have only looked at a selection of appellate cases — have tried to take *Bhasin* in odd directions. In [Bank of Montreal v. Javed](#),³⁶ Lauwers J.A. described the appellants’ argument:

(b) *Bhasin v. Hrynew* does not modify the unconscionability test

[11] The appellants rely on the decision of the Supreme Court of Canada in *Bhasin v. Hrynew*, They argue that *Bhasin* modified the test for unconscionability by requiring the court to import “a general organizing principle of good faith and recognizing a duty to perform contracts honestly,” in the words of Cromwell J., at para. 62. The appellants assert that the effect of *Bhasin* is to extend the test for unconscionability from an assessment of the equities of an agreement or transaction, to the assessment of a party’s performance of its obligations under the agreement.

[12] *Bhasin* does not provide any basis for the appellants’ argument that the Supreme Court extended the common law test for unconscionability. *Bhasin* recognized a duty of honest performance. There is no basis in the evidence for suggesting that the Bank did not conduct itself honestly throughout. Cromwell J. also observed that a duty of honest performance should not be confused with a duty of disclosure. The motion judge did not err in rejecting the appellants’ arguments on unconscionability.

The Decision in the Broader Context of “Compulsory” Good Behaviour

I can only very briefly mention some examples in this context. There is, of course, the very wide power conferred on courts under the oppression remedy of Canadian *Business Corporations Acts*,³⁷ the “just and equitable” power of dissolution under the *Partnerships Act*,³⁸ the concerns under, for example, the *Securities Act*,³⁹ and [IIROC Dealer Member Rules](#),⁴⁰ that participants in the capital markets behave properly. The *Arthur Wishart Act*

³⁶ 2016 ONCA 49 (Cronk, Pepall & Lauwers JJ.A.)

³⁷ It is worth noting that several jurisdictions that have been hostile to the notion of good faith performance, like England, have the oppression remedy as part of their corporate law: see United Kingdom *Companies Act*, s. 994; Australia, *Corporations Act 2001*, s. 234; and Singapore, *Companies Act*, s. 216.

³⁸ *Partnerships Act*, R.S.O. 1990, c. P.5, clause 35(f).

³⁹ E.g., sections 116, 127. In one recent well-reported instance, this power was used by the Ontario Securities Commission to prohibit several individuals from serving as corporate directors as result of their being previously convicted in a foreign jurisdiction, the United States, of various criminal offenses when they did not discharge their director’s duties in good faith: see [In Re Black](#) (February 26, 2015)

⁴⁰ Section 29.1

(*Franchise Disclosure*), 2000 also imposes on both franchisors and franchisees “a duty of fair dealing in its performance and enforcement”.⁴¹

It would be oddly inconsistent with this development if the general law of contracts were not to adopt the same concern for the integrity and honesty of contract parties generally.

The Prospect of a New Principle of Good Faith in Negotiations

The landscape reviewed by Cromwell J. when he developed his new general organizing principle of good faith performance looked very much like the landscape visible in considering a new principle of good faith in negotiations. In each case, there were (or are) pockets where obligations of good faith were recognized. It would have been bad advice to have told a client that it could behave badly in a contractual relation and expect there to be no consequences. It is equally bad advice to tell a client that it can behave badly in negotiations.

It is clear that there is, for example, an obligation to mark changes in a draft so as to bring them to the other side’s attention⁴² and not to snap at an offer known to have been made by mistake.⁴³ I acknowledge that the Supreme Court deprecated the idea that there could be an obligation to negotiate in good faith in *Martel Building Ltd. v. Canada*⁴⁴ but the argument based on an obligation to negotiate in good faith was not made; the plaintiff’s argument proceeding on a tort claim for pure economic loss.⁴⁵

There is, moreover, the Australian case of *Walton’s Stores (Interstate) Ltd. v. Maher*⁴⁶ which strongly supports the argument that duties of good faith can arise during the negotiations. A prospective tenant’s failure to tell the prospective landlord that it did not want the landlord’s premises, even though no lease had been executed, was held to be unconscionable conduct,⁴⁷ justifying an award of substantial damages.

An important point is that solicitors negotiating a transaction or relation will not advise a client to behave badly. Not only would such behaviour make the enforcement of any resulting contract more difficult and uncertain, but it would be a poor decision if the relation was to be productive for the parties. In other words, there is much to be said for

⁴¹ Subsection 3(1)

⁴² See, e.g., *Walton v. Landstock Investments Ltd.* (1976), 13 O.R. (2d) 693, 72 D.L.R. (3d) 195 (C.A., Brooke, Arnup & Houlden JJ.A.); *AMJ Campbell Inc. v. Kord Products Inc.* (2003), 63 O.R. (3d) 375, (Ont. S.C.J., Epstein J.)

⁴³ *McMaster University v. Wilchar Construction Ltd.*, [1971] 3 O.R. 801, 22 D.L.R. (3d) 9; aff’d without reasons, (1973), 12 O.R. (2d) 512n, 69 D.L.R. (3d) 400n (H.C.J., Thompson J., & C.A.); *Stepps Investments Ltd. v. Security Capital Corporation* (1976), 14 O.R. (2d) 259, 73 D.L.R. (3d) 351 (H.C.J., Grange J.); *Stevens v. Stevens*, 2013 ONCA 267, 114 O.R. (3d) 721, (C.A., Weiler, Sharpe and Rouleau JJ.A.).

⁴⁴ 2000 SCC 60, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1, per Iacobucci and Major JJ.

⁴⁵ What is more serious is that the Supreme Court’s argument regarded the negotiating relation as one unworthy of protection. See 2000 SCC 60, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1, paras 62 - 64.

⁴⁶ [1988] HCA 7, 164 C.L.R. 387, 88 A.J.L.R. 110 (H.C.A.)

⁴⁷ The court could not use the doctrine of promissory estoppel because, to give the landlord relief, the doctrine would have been wielded as a sword!

an argument that good behaviour, honest conduct and good faith, like good manners, grease the wheels of commerce and generally make things better.

Conclusion

It was my argument (for some 30 years) that the open recognition of an obligation of good faith performance was not a big step to take. What Cromwell J. did was to bring a number of separate cases – the principal ones were [Dynamic Transport Ltd. v. O.K. Detailing Ltd.](#),⁴⁸ [Mitsui & Co. \(Canada\) Ltd. v. Royal Bank of Canada](#)⁴⁹ and [Mason v. Freedman](#)⁵⁰ – as examples, well-established examples, of obligations that could as well be described as one of good faith performance, as anything else.

In other words, the decision was not radical; none of the cases where *Bhasin* has been cited would, I believe, necessarily have been decided differently had it not been cited. Cromwell J. just gathered a number of separate instances into his “general organizing principle”.

Some noise has been made that the courts are now limiting the scope of the decision – *Styles* has even been cited as an example of this development. This argument is only true in the sense that, as barristers try arguments on for size – “I may as well try this argument out for my client; what’s the downside?” – the courts will reject some, even as they allow others.⁵¹ There is nothing new in this development. What is most important is that the “new” duty is really no more than a generalization of well-recognized obligations, obligations that the courts and lawyers have acknowledged for a very long time.

As I have said, the same pattern that Cromwell J. saw with respect to good faith performance, is obvious in the argument that there is or can be a requirement to negotiate in good faith. The cases are all there; solicitors understand the need to behave properly and nothing much will change, except that it will no longer be possible to say that there is no obligation to negotiate in good faith. All that is needed is the judge willing to draw it all together as Cromwell J. did in *Bhasin v. Hrynew*.

⁴⁸ [1978] 2 S.C.R. 1072, 85 D.L.R. (3d) 19, where the co-operation of the parties is necessary to achieve the goal of the parties’ arrangement. See also *Mackay v. Dick* (1881), 6 App. Cas. 251 (H.L.)

⁴⁹ [1995] 2 S.C.R. 187, 123 D.L.R. (4th) 449, where a parties’ contractual discretion was limited. See also [Greenberg v. Meffert](#) (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 438, 37 R.P.R. 74, leave to appeal refused: [1986] 1 S.C.R. x, 30 D.L.R. (4th) 768, 64 N.R. 156. [Canadian National Railway Co. v. Inglis Ltd.](#) (1997), 36 O.R. (3d) 410, 153 D.L.R. (4th) 291 (C.A.)

⁵⁰ [1958] S.C.R. 483, 14 D.L.R. (2d) 529, where a vendor was not excused from completing the sale of a house on the ground that his wife had not barred her dower when he had made no attempt to have her do so. See also [100 Main Street East Ltd. v. W.B. Sullivan Construction Ltd.](#), (1978), 20 O.R. (2d) 410, 88 D.L.R. (3d) 1 (C.A.)

⁵¹ See, e.g., the attempt by mortgagors to invoke *Bhasin v. Hrynew* to postpone an inevitable foreclosure in [1026238 B.C. Ltd. v. Pastula](#), 2017 BCCA 118, para. 36.