



# Good Faith, Honesty & the *Bhasin v. Hrynew* Decision: Where to From Here?

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# Overview

1. The expectation of contractual honesty in *Pre-Bhasin* era
2. The decision in *Bhasin*
  - a. Facts
  - b. Reasoning
3. Conclusion: Critical Issues

# 1. GOOD FAITH & HONESTY Pre-BHASIN

1. No general duty of good faith
2. **Good faith** as informing ad hoc exceptions:
  - ✧ Employment Contracts or Franchise Agreements
  - ✧ Exercise a contractual discretion
3. Statutory Obligations
  - ✧ Franchise and Employment Law
4. Misrepresentation (fraudulent, negligent)
5. Estoppel and Equitable Doctrines (e.g., estoppel by representation)

## 2. DECISION IN *BHASIN*: a. FACTS

- **Commercial dealership agreement** between Mr. Bhasin and Canadian American Financial Corp. ("Can-Am")
- 1. **Three year term with automatic renewal clause:** automatically renewed unless written notice
- 2. **Entire Agreement Clause:** no other express or implied terms apply
- 3. **Not a Franchise or Employment agreement** to which statutory duties of fair dealing and good faith would apply

## FACTS (Con't)

- Can-Am repeatedly **lied to Bhasin** about its intention to not renew the contract
- Bhasin's contract was **not renewed**.
- Bhasin **lost the value** in his business.
- **Bhasin sued Can-Am** for breach of implied duty of good faith (not renew=discretion)

# PROCEDURAL HISTORY

## TRIAL JUDGE:

– implied a term of good faith as matter of law

## CA: Reversed

– implication of term is precluded by:

- 1) entire agreement clause
- 2) parole evidence rule
- 3) duty of good faith cannot be extended by analogy with franchise or employment agreement

# SCC: How to protect Bhasin's expectations?

- Apparently, existing remedies are not easily available:
  - Implication of terms
  - Statutory duties
  - *Ad hoc* exceptions recognized by case law

## SCC: How to protect Bhasin's expectations?

- “Can-Am’s conduct..does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist” Para 72
- So, “Should There Be a New Duty?” Para 71



# SCC's LINE of REASONING

**STEP 1:** good faith is a "general organizing principle" of the common law of contract

**STEP 2:** a new duty of honesty

– duty to not to lie or knowingly mislead others about matters linked to performance

# The “General Organizing Principle”

## Judicial Doctrine (?)

- Its "minimum core requirements" mandatorily govern the relationship between the parties (Para 77)
- Therefore “It operates irrespective of the intentions of the parties” (Para 74)
- Not excluded by a “generically worded entire agreement clause” (Para 78)

## Contractual Term (?)

- Parties can relax the requirements of the doctrine so long as they respect its minimum core (Para 77)
- Not be used as “a pretext for scrutinizing the motives of contracting parties” (Para 70)
- Its violation provides ground for contractual damages

### 3. CONCLUSION: CRITICAL ISSUES

1. What is the precedential significance of *Bhasin*? What is the holding?
2. What is the precedential significance of *ad hoc* duties of good faith established in the pre-*Bhasin* era?
3. What is a general organizing principle?
  - Who?
  - What?
  - How?
4. What are the outer boundaries of good faith?

## CRITICAL ISSUES (Con't)

5. To what extent private parties can relax the duties of good faith?
6. Ultimately, what is the impact of *Bhasin* on contractual freedom and legal certainty?



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