Bhasin and the future development of the Canadian common law of contract

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“Decomposing Bhasin v. Hrynew: toward an institutional understanding of the general organizing principle of good faith in contractual performance”

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University of Toronto Law Journal 67:3, 2017
Overview

1. Comparative analysis (England, Australia, US) illuminates the distinctive features of *Bhasin*

2. *Bhasin’s* contribution to Canadian common law of contract is *institutional* rather than substantive
   a) Contract v Adjudication
   b) Potential Impact on Judicial Legal Reasoning
   c) Potential Impact on Doctrine of Precedent
1. *Bhasin* and the Common Law World

**England:**
- *Yam Seng, High Court, 2013*: good faith can be implied into “any ordinary commercial contract” (**implied term in fact**)

**Australia:**
- Recent decisions at state level recognized a **general** obligation of good faith in commercial contract (**implied term** either in fact or in law)

**United States**
- A **general** obligation of good faith is recognized in major commercial contracts (**implied term**)
2. Bhasin’s Institutional Shift

Implication of Terms

General Organizing Principle
# a. Contract v Adjudication

<table>
<thead>
<tr>
<th>Implication of Terms</th>
<th>General Organizing Principle</th>
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<tbody>
<tr>
<td>- Promotes the process of contractual interpretation</td>
<td>- Promotes the common law process</td>
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<tr>
<td>- The scope of the individual contract defines the scope of the duty of good faith</td>
<td>- Good faith manifests in general doctrines developed by courts</td>
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<td>- Express contractual terms trump implied terms</td>
<td>- It operates irrespective of parties’ intentions</td>
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b. Impact on Legal Reasoning

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<td><strong>Reasoning Upwards</strong> from the factual matrix underlying the agreement</td>
<td><strong>Reasoning Downwards</strong> from an abstract requirement of justice</td>
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<tr>
<td><strong>Outcome</strong>: obligation precisely determined for the particular agreement</td>
<td><strong>Outcome</strong>: general doctrines developed by courts for “classes” of situation</td>
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c. Doctrine of Precedent

Piecemeal Approach

↓

General Organizing Principle

- Bhaisn permits courts to develop new contractual doctrines *independent* of well-consolidated cases established by binding precedent, to the extent that the incrementality test is satisfied,
## Piecemeal Approach v General Org. Principle

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<th><strong>Doctrine of Precedent</strong></th>
<th><strong>General Organizing Principle</strong></th>
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<td>A precedent applies <em>if</em> the elements of the factual matrix from which it was generated are present in the instant case.</td>
<td>A general legal doctrine applies to cases falling within its scope <em>unless</em> the factual matrix of those cases contains elements that defeat the reasons embedded in the legal doctrine.</td>
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Conclusion

*Bhasin*’s provides an *institutional* contribution to Canadian common law:

a) Sources of Law

b) Judicial Legal Reasoning

c) Doctrine of Precedent
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