

IMPLIED OBLIGATION OF GOOD FAITH

The recent Supreme Court of Canada decision of Bhasin is the most significant Canadian case in history relating to good faith contractual obligations and a case that goes to the core of how contractual obligations are to be performed and interpreted. Initial reactions have varied from suggesting this changes everything to it changes nothing. By opening the door to a general principle of good faith obligations in all contracts, the Supreme Court of Canada has laid the foundation for a new approach to contractual obligations which will change how parties should negotiate and perform contracts. Conduct which may appear to be permitted in a contract may now give rise to large unanticipated liabilities. Conduct which appeared to give limited or no rights to remedies may now make available new and greater remedies.

This conference brings together leading practitioners and other authorities in the area of good faith in Canadian Law who will provide clear guidance on the current law and possible future developments.

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WEBINAR, JUNE 2, 2015 • TORONTO, JUNE 2, 2015 • CALGARY, JUNE 9, 2015

SPEAKERS

COURSE LEADER

Roderick Winsor, Blaney McMurtry LLP

GUEST SPEAKERS

Mark Geiger, Blaney McMurtry LLP

Eric Golden, Blaney McMurtry LLP

Gordon Hilliker, Q.C.

Martin Kratz, Bennett Jones LLP

Eli Lederman, Lenczner Slaght LLP

Ned Levitt, Dickinson Wright

John McCamus, Davies Ward Phillips & Vineberg LLP

Prof. Shannon O'Bryne, Faculty of Law, University of Alberta

Andrea Rush, Blaney McMurtry LLP

Natalie Vukovich, Daoust Vukovich LLP

COURSE HIGHLIGHTS

- APPLICATION TO ALL CONTRACTS
 - Good Faith Obligations In Canadian Contract Law Before Bhasin
 - The Synthesis: Bhasin
- APPLICATION TO SPECIFIC TYPES OF CONTRACTS
 - Leasing, Franchising And Insolvency
 - Insurance, Employment And Intellectual Property
- WHAT THE FUTURE HOLDS

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IMPLIED OBLIGATION OF GOOD FAITH

PROGRAM OUTLINE

8:00 - 8:45

REGISTRATION AND BREAKFAST

8:45 - 9:00

INTRODUCTION

Roderick Winsor

1. APPLICATION TO ALL CONTRACTS

9:00 - 9:45

OVERVIEW OF CONTRACTUAL GOOD FAITH OBLIGATIONS IN CANADIAN CONTRACT LAW BEFORE BHASIN

Roderick Winsor, John McCamus (Toronto), Prof. Shannon O'Byrne (Calgary)

- Arguments for and against an implied obligation of good faith
- How Canadian Courts have responded to these concerns before Bhasin; the subject matter approach
- Application restricted to specific types of terms
- The general principle approach

9:45 - 10:30

THE SYNTHESIS: BHASIN

John McCamus, Eli Lederman (Toronto), Roderick Winsor (Calgary)

- What does Bhasin say?
- How is this different?
- What does Bhasin not say?

10:30 - 10:45

REFRESHMENT BREAK

10:45 - 11:30

PANEL DISCUSSION

The meaning of good faith

- What terms subject to good faith obligations
- In what circumstances will remedies be available which are not available in the absence of the breach of good faith
- Is there a duty to Negotiate in Good Faith

- Examples of future duties which may be accepted as coming within the general good faith principle

2. APPLICATION TO SPECIFIC TYPES OF CONTRACTS

11:30 - 12:10

GOOD FAITH IN INSURANCE CONTRACTS

Roderick Winsor (Toronto), Gordon Hilliker (Calgary)

- History
- Why have so many Canadian Courts chosen to treat insurance contracts differently with respect to good faith?
- Which terms in insurance contract are subject to good faith obligations?
- What difference does an implied obligation of good faith make in insurance contracts?
- To whom is the duty owed?
- By whom is the duty owed?
- Bhasin: What difference will it make?
- How does bad faith lead to a different remedy

12:10 - 1:10

NETWORKING LUNCH

1:10 - 1:50

GOOD FAITH IN INTELLECTUAL PROPERTY

Andrea Rush (Toronto), Martin Kratz (Calgary)

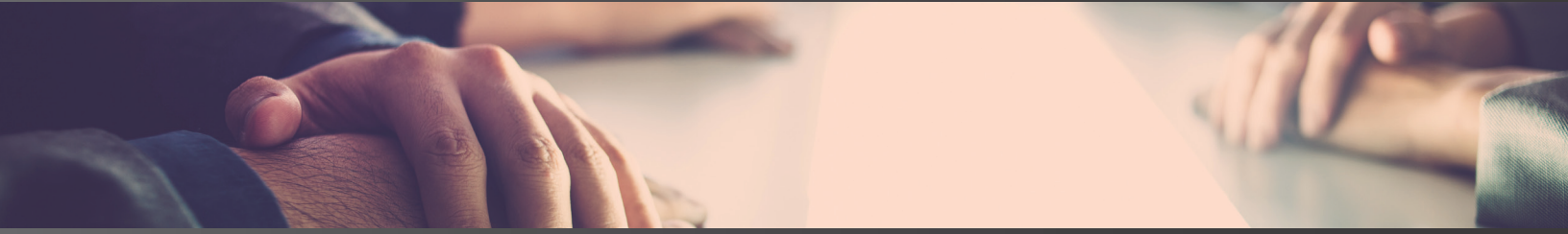
- Patents
 - Examples of bad faith during prosecution of a patent, and effect on validity
- Trademarks
 - Relationship between reasonableness and good faith
 - Examples of bad faith during prosecution of a trademarks, and consequences during oppositions and challenges to validity
- Copyright/moral rights
 - Copyright and moral rights are economic and non-pecuniary rights which cut across contracts and torts
 - (General Overview) : A list of factors within the Copyright Act establish the balance between creators and users (rights and limitations)
 - Fair dealing, transformative use- good faith exercises of user rights or infringing adaptation?

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PROGRAM OUTLINE (CONT'D)

1:50 - 2:30

GOOD FAITH AND LEASING

Natalie Vukovich (Toronto), Martin Kratz (Calgary)

- Application of Bhasin to leasing
- What terms of the lease are subject to good faith obligations
- Negotiation of leases
- Negotiation of other leases which affect an earlier lease
- Application to limitation of liability terms
- Renewals and terminations

2:30 - 2:45

REFRESHMENT BREAK

2:45 - 3:30

GOOD FAITH AND EMPLOYMENT

Mark Geiger (Toronto)

- Could Faith obligation in employment generally:
Recent Developments
- Inequality of bargaining position – coercion
- Contra preferentem – and good faith
- Reciprocal - for employees duty of good faith and honest service
- Duty on termination
- Duty otherwise than on termination – some growing authority
- Exemplary and Punitive damage awards (increasingly important) for lack of good faith terminations and dealings
- Relationship between various employment rights issues and good faith
 - Statutory Duties: Codification of historically non-existent obligations
 - Accommodation for disability, religious obligation, family status etc.
 - Bill 168 – Harassment policies, domestic abuse issues – lessons from Jian Ghomeshi
 - OHS/A obligations “all reasonable steps to protect”
 - ESA obligations: leaves, hours of work, overtime, etc.
 - Human Rights obligations other than accommodation

3:30 - 4:10

GOOD FAITH IN FRANCHISING

Ned Levitt (Toronto), Martin Kratz (Calgary)

- Statutory obligation (Alberta, Manitoba, Ontario, Quebec, PEI, New Brunswick)
- Common law duty
- Situations where the duty was breached
- Imposition of unreasonable standards
- Lack of support and disclosure/withholding information
- Term extensions
- Termination of the franchise agreement
- Rebates

4:10 - 4:30

GOOD FAITH IN INSOLVENCY

Eric Golden (Toronto)

4:30

COURSE CONCLUSION

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RODERICK WINSOR

COURSE LEADER

Rod has handled many high profile cases such as the bombing of Air India 182, shooting down by the Soviet Union of KAL 007, sinking of the Ocean Ranger, the Ontario Special Needs and Canada Post class actions and the year long Aviaco-Boeing civil conspiracy trial. He has been awarded Martindale-Hubbell's highest rating of Av, recognized as a leading practitioner by Lexpert and included in LMG's *Guide to the World's Leading Lawyers in Insurance*. He has published widely including *Good Faith in Canadian Insurance Law* (Canada Law Book) and "*Implied Obligation of Good Faith*" in *Review of Civil Litigation* (Carswell).



MARK GEIGER

Mark Geiger is the founding member of the labour and employment group at Blaneys. Mark acts for employers and individuals in many sectors. That includes giving advice, negotiating collective agreements, arbitrations and labour board hearings, occupational health and safety cases, human rights,

employment standards and many civil cases. Mark has represented Employer Associations and individual companies in the construction industry, health care, and the film industry across Canada in virtually all aspects of labour and employment related issues before courts, statutory tribunals and in countless negotiations, many affecting all of Ontario or all of Canada.



ERIC GOLDEN

Eric Golden has been a lawyer at Blaney McMurtry since his call to the Bar in 1996, returning after his articles there and a summer caddying at the Old Course in St. Andrews. His litigation practice focuses on bankruptcy and insolvency, banking, PPSA matters, professional negligence claims against lawyers, fraud,

commercial leasing and other forms of contractual disputes. Eric acts for some of Canada's largest and leading retailers and pension funds, as well as financial institutions, investment funds and leasing companies. He also acts on behalf of many trustees, receivers and monitors on matters relating to the BIA and CCAA.



MARTIN KRATZ

Martin Kratz, QC leads the intellectual property and co-leads the ecommerce practice for Bennett Jones. His practice is focused on intellectual property and technology law, including substantive IP and IP transactions, procurement, commercialization, strategy and opinions, anti-spam, data protection, privacy, ecommerce,

strategic alliances, mergers, acquisitions and licensing and technology transfers among technology companies. His practice includes the software, telecommunications, electronic commerce, entertainment, energy and pharmaceutical industries. Having published over 350 articles or books, Martin is national co-director of Osgoode Hall Law School's Intellectual Property LLM program and teaches in that program as well as the Health Law LLM program.



ELI LEDERMAN

Eli S. Lederman is a partner at Lenczner Slaght. Eli's practice covers a broad range of complex commercial litigation matters, including securities law, class actions, commercial contracts, oppression and other shareholder litigation. He regularly acts for directors and officers of private and public corporations and

advises boards and their committees on governance and litigation matters. Eli has extensive trial experience in commercial litigation and in medical malpractice actions, and also acts as counsel in commercial arbitrations. He has appeared as lead counsel at all levels of Court including the Supreme Court of Canada, the Court of Appeal for Ontario and the Ontario Superior Court of Justice. Eli often represents physicians faced with legal difficulties related to medical practice, appearing frequently before the College of Physicians and Surgeons of Ontario. In addition, he has appeared before the Ontario Securities Commission, at Coroner's Inquests and other administrative and regulatory tribunals. Eli also presents on various topics, including issues related to medical negligence.



NED LEVITT

Edward (Ned) Levitt is a Certified Franchise Executive and a partner at Dickinson Wright LLP, Toronto, Canada. He provides legal services to Canadian and international clients on all aspects of Canadian franchise law. He was General Counsel to the Canadian Franchise Association and is a member of the

American Bar Association Forum on Franchising, the International Bar Association, and the International Franchise Association. Among his many publications is Canadian Franchise Legislation (2001, LexisNexis/Butterworths). He has been recognized by The Best Lawyers in Canada, Who's Who Legal, and in Martindale-Hubbell. Ned can be reached at 416.646.3842 or nlevitt@dickinsonwright.com.



JOHN MCCAMUS

John D. McCamus is a Professor of Law and University Professor at Osgoode Hall Law School of York University, a faculty which he served as Dean from 1982-1987. He is also currently an Associated Scholar in the Toronto office of Davies Ward Phillips & Vineberg LLP. From 2007, he has served as

Chair of Legal Aid Ontario. His published work includes, *The Law of Contracts*, 2d ed. (2012) and with the late P.D. Maddaugh, *The Law of Restitution*, 2d ed. (2004). From 1998, Professor McCamus served on the American Law Institute's Advisory Committee for the Restatement of Restitution and Unjust Enrichment 3d (2011).



PROF. SHANNON O'BRYNE

Shannon O'Byrne is a professor at the University of Alberta, Faculty of Law. Her work has been recognized and cited by courts across the country, including the Supreme Court of Canada and this most recently in *Bhasin v Hrynew* 2014 SCC 71. In 2002, Shannon received the University's highest teaching award, the

AC Rutherford Award for Excellence in Undergraduate Teaching. In 2014, she was recognized with the Distinguished Service Award for Contributions to Legal Scholarship, awarded by the Law Society of Alberta and the Canadian Bar Association (Alberta branch). Shannon was also recognized in 2014 with a University of Alberta Alumni Award of Excellence.



ANDREA RUSH

Andrea Rush is a specialist in intellectual property, certified by the Law Society and a registered patent and trade-mark agent, in Ontario and Quebec. Andrea received the Law Society Award for Lifetime Achievement in Professional Development (2015) and is peer reviewed in Chambers, WTR 1000, Who's Who, Lexpert and

Martindale Hubbell under both litigation and prosecution. Andrea has appeared as lead counsel before the Supreme Court of Canada, Federal Court, Copyright and Trademarks Opposition Board, and counsels on commercialization and advertising. She is with U of T's Hart House orchestra, and on the Board of Governors of the Technion.



NATALIE VUKOVICH

Natalie Vukovich is co-founder of a boutique dedicated to commercial leasing law and litigation, and real estate matters. Her practice is transaction-oriented, entailing a wide variety of commercial leasing arrangements. Actively engaged in the ICSC, RealLeasing, Georgetown University's Advanced Commercial Leasing

Institute. Has lectured and written extensively. Named in Lexpert's Guide to the Leading 500 Lawyers in Canada every year since it was instituted and also identified in "The Best Lawyers in Canada". Significant experience in large-space transactions, international retail, supermarkets and unique spaces. B.Sc. (Math) Laurentian University (1980); LL.B. Dalhousie University (1983); Called to the Ontario Bar in 1985.

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