



A LOOK AT THE SUPREME COURT'S DECISION IN *BHASIN*, IN WHICH THE COURT RECOGNIZED FOR THE FIRST TIME THAT CANADIAN CONTRACT LAW INCLUDES A DUTY OF GOOD FAITH

Ivanhoé Cambridge was represented in-house by Claude Gendron, Executive Vice President, Legal Affairs and General Counsel assisted by Denis Boulianne, Vice President, Legal Affairs, Chantal Laporte, Senior Director, Legal Affairs and Assistant General Counsel and Alexandra Popa, Legal Counsel, Legal Affairs – Corporate; as well as by **Norton Rose Fulbright Canada** with a team consisting of Mario Caron, Miguel Manzano, Jean Bertrand, Sophie Perreault, Anna-Isabelle Morency-Botello, Marly Ochmann St-Jean and Catherine Tees.

#### CALLOWAY REIT AND I.G. ACQUIRE TWO SHOPPING CENTRES

► CLOSING DATE: SEPTEMBER 10, 2014  
Calloway Real Estate Investment Trust and its affiliates and Investors Real Property Fund (I.G.) acquired the joint interests of Wal-Mart Canada Realty Inc. SmartCentres Realty Inc. on a joint venture basis in two shopping centres located in Lachenaie, Quebec, and Edmonton, Alberta. The properties are anchored by Walmart stores. The purchase price was approximately \$125 million.

Calloway REIT and its affiliates were represented by **Osler, Hoskin & Harcourt LLP**, with a team that included Rod Davidge, Tim Watson in Toronto, Nicole Cloutier in Quebec and Tina Peters in Alberta (real estate), as well as Shuli Rodal and Jordan Giurlanda (competition).

I.G. was represented by its in-house counsel Christina Viera, and by Stephen Lloyd, Don Kowalenko, Geneviève Lefort and Clark Kassian of **Dentons Canada LLP**.

Wal-Mart and SmartCentres were represented by Wal-Mart in-house counsel Chris Hanson and SmartCentres in-house counsel Joseph Amato, and by **Davies Ward Phillips & Vineberg LLP**, with a team that included Gregory Howard, Steven Martin and Pawel Mielcarek (real estate) and Mark Katz (competition). Also acting were Daniel Martin of **De Grandpré Chait LLP** in Quebec, and John Cross and Dan Chubb of **Miller Thomson LLP** in Edmonton. 📍

#### *BHASIN V. HRYNEW*

► DECISION DATE: NOVEMBER 13, 2014  
The Supreme Court of Canada has recognized for the first time that good faith performance is a general organizing principle of contracts. The principle includes a duty applicable to all contracts to act honestly in performing contractual obligations, which cannot be excluded by the terms of an agreement.

In *Bhasin v. Hrynew*, the Court unanimously held that good faith contractual performance is an overarching organizing principle of the common law of contract that underpins and informs the various rules in which the common law currently recognizes obligations of good faith.

The organizing principle means that parties must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily, and have appropriate regard to the legitimate contractual interests of their contracting partner. Although the principle currently manifests itself through several existing doctrines under which the law requires parties to be honest, candid and forthright or to deliver reasonable contractual performance, the principle is not limited to these doctrines, but can also apply to novel contexts in which it is appropriate to develop the common law incrementally.

As a specific manifestation of this organizing principle of good faith, the Court recognized a new common law duty that applies to all contracts to act honestly in the performance of contractual obligations. This duty of honest performance does not impose a duty of loyalty or disclosure, but it prohibits parties from lying or otherwise knowingly misleading each other about matters directly linked to the performance of the contract. In *Bhasin*, the corporate defendant was found to have breached this duty and was therefore held liable in damages to the plaintiff.

The plaintiff in the appeal was Mr. Harish Bhasin, a dealer for the corporate defendant, Heritage, a company that markets RESPs. The contract between the two contained a clause providing that their agreement would

automatically renew at the end of each three-year term unless one side gave the other notice of non-renewal, and also contained other provisions allowing Heritage to undertake audits of Bhasin's business. Heritage and another enrollment dealer, the individual defendant Mr. Larry Hrynew, wished to merge Bhasin's dealership with Hrynew's against Bhasin's will. Heritage sought to exercise its audit powers to require Bhasin to provide Hrynew with confidential information about his dealership, and repeatedly misled him. It also equivocated when Bhasin directly asked Heritage whether the merger with Hrynew was a done deal, even though from its perspective it was. When Bhasin refused to go through with the audit, CAFC exercised the non-renewal right and Bhasin lost the value of his business as a result.

Bhasin was successful in his good faith claim at trial, where the Alberta Court of Queen's bench made numerous findings of bad faith against Heritage, but the judgment was overturned by the Alberta Court of Appeal on the basis that there is no general duty to perform most contracts in good faith.

In allowing the appeal, the SCC acknowledged that Heritage's conduct did not fit within an existing category where the law recognizes a duty of good faith performance. Nevertheless, it held that it fit within the newly recognized category of the duty of honest performance, which it articulated as an incremental extension of the common law in response to the facts of the case. Since Heritage breached this duty in relation to Bhasin, he was awarded damages by the Court.

Neil Finkelstein and Brandon Kain of **McCarthy Tétrault LLP** represented the appellant Harish Bhasin, with a team that included Professor John D. McCamus of Osgoode Hall Law School and Stephen Moreau of **Cavalluzzo Shilton McIntyre Cornish LLP**.

Eli Lederman, Jon Laxer and Constanza Pauchulo of **Lenczner Slaght Royce Smith Griffin LLP** represented the appellants Heritage Education Funds Inc. and Larry Hrynew. 📍