



# New Rules of Contractual Interpretation

BY J. ROBERT GARDINER

**THE SUPREME COURT** of Canada has established two precedent-setting decisions during 2014 that will affect the interpretation of every contract affecting a condominium corporation and its security providers.

The Supreme Court of Canada established a new criteria to be used by judges and arbitrators when interpreting contractual provisions in *Sattva Capital Corp. v. Creston Moly Corp.* The Court held that a practical, common sense approach should be taken when interpreting a contractual provision. Previously, judges were bound by strict legal principles,

but now a judge or arbitrator is entitled to consider the entire “factual matrix” in order to understand the mutual, objective intentions of the parties when interpreting contractual provisions in a particular factual context. Now a court can do justice to actuality by looking behind the strict wording of the contract to assess all of the circumstances. Instead of the traditional legal rules of interpretation, a court can construe a contract taking into account the wider factual context, as well as legal principles.

In a second precedent setting case, *Bhasin v. Hrynew*, the Supreme Court of Canada ruled that parties

to a contract must now perform their obligations honestly and in good faith, in a manner that is reasonable and not capricious or arbitrary. Previously, case law had restricted the “good faith” obligation to only a few specific types of contracts. The concept of good faith is now implied in contractual scenarios, requiring that a party act honestly, candidly and on a forthright basis (that implied duty can now only be excluded by very specific contractual wording).

A contracting party must have appropriate regard to the legitimate interests of other contracting parties. Each party must provide reasonable contractual performance in the specific context of the situation. However, contracting parties are entitled to pursue their individual self-interests and may sometimes cause a loss to the other party, even intentionally, in the legitimate pursuit of economic self-interest; to do so is not necessarily contrary to the concept of good faith. Nonetheless, a party has a duty to avoid seeking in bad faith to undermine the legitimate contractual interests of the other party.

A duty of honest contractual performance was deemed by the Court to be a manifestation of the principle of good faith. Parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. That does not impose a duty of loyalty or of disclosure, nor does it require a party to forego advantages flowing from the contract; it is simply a requirement not to lie or mislead the other party about one’s contractual performance.

In the condo world, s. 37 of the *Condominium Act* imposes a duty of honesty and good faith upon directors and officers. Now condo boards and managers can also rely upon service providers to perform their contracts to those standards.

These new honesty and good faith principles of contract law constitute a lesser standard than the higher obligations applicable to a fiduciary duty (which arises where a person having a special position or control over another owes a duty of loyalty to the

other party, such as a duty to refrain from taking advantage of the fiduciary's office or position to receive a personal benefit to the detriment of a person the fiduciary should have protected).

In this case, Heritage Education Funds Inc. ("Heritage") markets educational savings plans to investors through contracted retail dealers such as Bhasin. Hrynew, a retail dealer and a competitor of Bhasin, attempted to negotiate

a merger of their companies, but Bhasin refused to do so. Heritage appointed Hrynew to review each of its retail dealers for compliance with the security laws of Alberta. Heritage did not disclose to Bhasin its plans (which it had outlined to the Alberta Securities Commission) whereby Bhasin, at the end of his contractual term, would no longer be a retail dealer, but instead would be working for Hrynew's agency. Instead, Heritage repeatedly misled

Bhasin, telling him that Hrynew (as Heritage's newly appointed compliance officer) was under an obligation to treat all of Bhasin's financial information confidentially. When Bhasin refused to allow Hrynew to audit his records, Heritage gave notice to Bhasin of non-renewal of his Agreement with Heritage, with the result that Bhasin lost the value of his business and a majority of his company's sales agents were successfully solicited by Hrynew's agency.

The Supreme Court of Canada held that Heritage had breached both its duty of good faith, performance of its contract, as well as the newly proclaimed duty to act honestly in the performance of contractual obligations.

Contract law is subject to many legalistic common law principles that often take contracting parties by surprise, especially when a dispute arises in cases where the parties have failed to negotiate carefully drafted provisions. Often our condominium clients simply rely upon a service provider's self-serving small print, or else draft simplistic contracts lacking appropriate warranties, conditions and protective clauses, while ignoring principles of contract law that would appear obvious to the condo's lawyer, had the lawyer been involved in the initial negotiations. Unfortunately, often condo lawyers are not called upon to analyze a service provider's contractual provisions until it is too late. ❖



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