




***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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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

Implication of Terms

- Promotes the process of **contractual interpretation**
- The scope of the individual **contract** defines the scope of the duty of good faith
- Express **contractual terms** trump implied terms

General Organizing Principle

- Promotes the **common law process**
- Good faith manifests in general doctrines developed by **courts**
- It operates **irrespective of parties' intentions**

b. Impact on Legal Reasoning

Implication of Terms

- **Reasoning Upwards** from the factual matrix underlying the agreement
- **Outcome:** obligation precisely determined for the particular agreement

General Organizing Principle

- **Reasoning Downwards** from an abstract requirement of justice
- **Outcome:** general doctrines developed by courts for “classes” of situation

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

Doctrine of Precedent

- A precedent applies *if* the elements of the factual matrix from which it was generated are present in the instant case

General Organizing Principle

- A general legal doctrine applies to cases falling within its scope **unless** the factual matrix of those cases contains elements that defeat the reasons embedded in the legal doctrine.

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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