

Good Faith, Honesty and the Bhasin v. Hrynew Decision: A Corporate Social Responsibility and the Law Perspective

A Presentation for the Workshop “*Good Faith, Honesty and the Bhasin v. Hrynew Decision: Where to From Here?*”

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Quick Roadmap

- “Corporate Social Responsibility” defined
- the CSR-law connection
- the CSR penumbra of law
- the Donoghue v. Stevenson example
- the Sault Ste. Marie/Wholesale Travel example
- the Sparrow example
- the BCE example
- the Bhasin v. Hrynew example
- CSR response to Bhasin v. Hrynew



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Basic Message

Firms that adopt a CSR approach are attempting to anticipate and address their social, environmental and economic impacts in a proactive manner. Firms that adopt a proactive CSR approach may do so for legal and “extra legal” reasons. Certain legal decisions codify basic concepts of ethical behavior, that can guide firms in their proactive CSR approach (CSR penumbra of black letter law). It is argued here the Bhasin v. Hrynew decision is one of those decisions. Firms wishing to signal their intention to conduct their contractual activity in an honest manner may draw on key tenets of Bhasin v. Hrynew, and by doing so may enhance their reputation and anticipate future legal developments.

Corporate social responsibility defined

CSR: the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that:

- Contributes to sustainable development, health and the welfare of society;
- Takes into account the expectations of stakeholders;
- Is in compliance with applicable law and consistent with international norms of behaviour; and
- Is integrated throughout the organization and practiced in its relationships.

(From: ISO 26000 social responsibility standard)

CSR and the law: the quick story

As defined, CSR-oriented firms consider their impacts, comply with the law, as well as meet “international norms of behavior”, take into account the interests of their stakeholders in a transparent and ethical way, and practice CSR in their firm and in their relationships.

CSR firms often expressly commit to meeting a wide variety of environmental/commercial/social commitments.

They may do so for legal and extra-legal reasons.

Doing so may have legal and extra legal implications.

CSR penumbra to black letter law

Certain court decisions and certain laws expressly codify and signal ways of behaviour that resonate strongly with ethical, CSR ideals. Perhaps similar to Cass Sunstein's "expressive function of law".

Donoghue v. Stevenson/Loblaws/Joe Fresh-Supplier Codes
Sault Ste. Marie/Wholesale Travel- ISO 14001, OHSAS 18001
BCE decision-long term best interests of corporation,
consideration of diverse stakeholders, "responsible corporate
citizen" – stakeholder advisory bodies
Sparrow decision-Crown duty to consult/accommodate-private
sector Impact/Benefit agreements

Bhasin v. Hrynew & the CSR penumbra of black letter law

Firms (allegedly) behaving badly (financial, transportation manufacturing, sharing economy transportation firms)

Commitments:

- strive to act in an honest, reasonable, candid and forthright manner;
- attempt to avoid misleading contracting partners;
- make efforts to avoid acting in an abusive, unfair or dishonest way
- try to act with appropriate regard for the interests of the contracting partner

The pros and cons of a CSR approach to Hrynew v. Bhasin

- may reveal problematic activity/decrease the likelihood of negative activity happening, and lead to corrective actions before it leads to litigation and public disapproval
- may bolster reputation, attract new clients
- may anticipate future legal developments, influence judgements
- but creates a “line in the sand” upon which the behavior of the firm will be judged, both in law and the court of public opinion

Conclusions

Firms that adopt a CSR approach are attempting to anticipate and address their social, environmental and economic impacts in a proactive manner.

Firms that adopt a proactive CSR approach may do so for legal and “extra legal” reasons.

Certain legal decisions codify basic concepts of ethical behavior, that can guide firms in their proactive CSR approach (CSR penumbra of black letter law).

Arguably, Bhasin v. Hrynew decision is one of those decisions.

Firms wishing to signal their intention to conduct their contractual activity in an honest manner may draw on key tenets of Bhasin v. Hrynew, through development of up front commitments concerning contractual performance

By doing so they may enhance their reputation, decrease likelihood of problematic activity and anticipate future legal developments.

On the other hand, commitments of this nature create standards of behavior that can backfire on firms who do not live up to the terms of their commitments