CONSTRUCTION LAW LETTER

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GUEST ARTICLE

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HERE WE GO AGAIN? SENATE INTRODUCES BILL S-224, THE *CANADA PROMPT PAYMENT ACT*

Is the construction industry about to have another round of prompt payment?

In 2013, the *Prompt Payment Act* was quietly introduced in the Ontario Legislature as a private member's bill by an MPP who had grown up in the construction industry. Before anyone could blink, it seems, the bill passed second reading and was on the verge of becoming law in Ontario. Will the same thing happen at the federal level?

On April 13, 2016, the Canadian Senate passed the first reading of Bill S-224, An Act respecting payments made under construction contracts, to be known as the *Canada Prompt Payment Act*. On April 19, Bill S-224 was put on the Order Paper for second reading.

The *Canada Prompt Payment Act* follows on the heels of Ontario's Bill 69, *Prompt Payment Act, 2013* which received a second reading in the Ontario legislature in 2015, but died on the order table with the provincial election, and after it was shelved by the provincial government with a promise to undertake a robust review of the Ontario *Construction Lien Act*, including a review of prompt payment issues.

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The first report resulting from that review will be released any day.

Bill 69 had numerous technical problems. It is clear that the drafters of the *Canada Prompt Payment Act* have learned many of the lessons of Ontario's Bill 69. It is much more scaled back in scope than Bill 69, and focuses almost exclusively on imposing mandatory payment terms on construction parties, both in terms of timing and consequences of non-payment. It does not address some of the more controversial issues that were addressed in Bill 69 such as a prohibition on all holdbacks (other than statutory holdbacks), explicit prohibitions on "pay when paid" clauses, and on onerous financial disclosure obligations. However, it does permit milestone payments whereas Bill 69 did not, an omission that was heavily criticized.

The *Canada Prompt Payment Act* was introduced by the Honourable Senator Don Plett, the founding president of the National Council of the Conservative Party of Canada and, before politics, the owner of a heating and ventilation company. It is not a government bill or a bill that has been commented on by the federal government, which holds a majority in the House of Commons, so it is not clear that Bill S-224 would ever have become federal law. However, the issue of prompt payment in the construction industry is one of the biggest hot button issues today and the *Canada Prompt Payment Act* has garnered a lot of early attention.

Purpose

The stated purpose of the *Canada Prompt Payment Act* is to strengthen the stability of the construction industry and to lessen the financial risks faced by contractors and subcontractors by providing for timely payments to them under construction contracts involving the federal government. It attempts to accomplish this purpose by prescribing the timelines for making payments on federal construction projects and the consequences of failing to pay on time.

Application

As a proposed federal law, the *Canada Prompt Payment Act* would only apply to construction contracts made with the federal government, or "government institution", and related subcontracts. The Act defines the scope of a government institution to include a department or ministry of state of the Government of Canada, and any body or office listed in

Schedule I to the *Access to Information Act*, any parent Crown corporation, and any wholly-owned subsidiary of a Crown corporation, within the meaning of s. 83 of the *Financial Administration Act*.

The Act would apply in respect of a construction contract whether or not the contract states that it is to be governed by the laws of Canada. It will apply to all contracts without any ability of the parties to contract out of or waive any of the rights, obligations or remedies provided for under the *Canada Prompt Payment Act*.

Prescribed Times for Progress Payments

The Act will codify into law a requirement for progress payments, and the timing of those progress payments. Section 7 stipulates that a government institution must make progress payments to a contractor on a monthly basis or at shorter intervals provided for in the construction contract. Where no date for progress payments is provided for in the contract, the government must pay the contractor on or before the 20th day following the later of: (a) the last day of the payment period, or (b) the receipt of the payment application from the contractor.

Similarly, contractors on federal government projects would have to pay their subcontractors (and subcontractors their sub-subcontractors) progress payments on a monthly basis or at shorter intervals provided for in the contract. Where the contract does not specify progress payments, the contractor, according to s. 8, must pay the subcontractor (and each subcontractor must pay its sub-subcontractors) on or before the 30th day following the later of: (a) the last day of the payment period, or (b) the receipt of the payment application by the contractor (or subcontractor, as the case may be).

Milestone Payments

One of the major criticisms of Ontario's Bill 69 was that it did not contemplate contracts for which milestone payment structures were established, wherein a contractor needed to complete or attain certain milestones before becoming entitled to any payment for the work related to that milestone.

Section 12 contemplates that the federal government may enter into a construction contract that does provide for milestone payments. However, with milestone payments, the government must make the payment on or before the later of: (a) the 20th day after the achievement of the milestone, or (b) the 10th day after the issuance of the certificate for payment for the milestone by the payment certifier.

The *Canada Prompt Payment Act* permits milestone payments in subcontracts in s. 11, but only if: (a) the construction contract between the government institution and the contractor is structured on a milestone payment basis, and (b) before entering into a construction contract with a subcontractor, the contractor (or a subcontractor with its sub-subcontractors) provides written notice to the subcontractor (or sub-subcontractor, as the case may be) of any milestone payments relating to the construction work that is to be the subject of the subcontract.

For milestone payments in subcontracts, the payer must make the payment on or before the later of: (a) the 30th day after the achievement of the milestone, or (b) the 20th day after the issuance of the certificate for payment for the milestone by the payment certifier (s. 13).

Deemed Approval and Disputes

As with Bill 69, all invoices submitted by payees are deemed to be approved by the payer 10 days after the receipt of the invoice unless, before that time, the payer or the payment certifier, in a written notice to the payee, disputes the amount in the invoice.

Section 16 goes further to specify what portion of the invoice can be subject to a dispute. The payer must pay the full amount of the invoice, and may not hold back any amount unless a notice of dispute is provided setting out the reasons for the dispute or amendment required and the amount being disputed.

The portion of an invoice capable of being disputed is limited in s. 16(3). A payer's dispute is limited to: "(a) an estimate of the loss, damage or cost of completion or correction of the construction work where the loss, damage or cost is recoverable under the construction contract, and (b) an estimate of any portion of the value of a change that is the subject of the disagreement where the dispute of a payment application in whole or in part is limited to the value of the change or its method of evaluation".

Interest

A payer (whether the government institution, the contractor or a subcontractor) must pay interest on any amount due at the rate provided for in the construction contract. If the construction contract does not provide for a rate of interest on late payments, then the interest is at the rate prescribed by regulation (s. 18).

Right to Suspend or Terminate

If the government fails to make a payment when due, in accordance with the Act, the contractor must immediately provide written notice of default to the government institution. Similarly, if a subcontractor has not been paid when required under the Act, the subcontractor must provide notice of default to the contractor, with a copy of the notice of default sent to the government institution. Unlike under Ontario's Bill 69, the default notice must also be delivered to all subcontractors.

If payment continues to be outstanding for seven days after receipt of the notice of default, whether from a contractor or a subcontractor, the payee may suspend performance of the work (s. 17(3)). Section 19(3) also provides that, after that seven days' notice, the payee may also terminate, if the notice of non-payment includes a notice of termination. The suspension or right to terminate is lifted if, within the seven days' notice period, payment is made.

Right to Information

Under s. 21, a subcontractor may, at any time and by written notice, require a payer with whom the subcontractor has entered into a construction contract to disclose the due dates for the progress payments and the final payment to the payer under a construction contract that relates to the construction work that is the subject of the construction contract between the subcontractor and the payer.

Section 21 also stipulates that, immediately upon receiving a payment, every payer other than a payer who is a government institution, must provide notice to each of its payees of the date and amount of the payment received that relates to the construction work performed by the payee.

A payer is liable to its payees for damages if the payer does not provide the notice or the information required under s. 21.

Process and Next Steps

Usually, a bill becomes law by passage through the House of Commons and then passage through the Senate. Royal Assent is then given by the Governor General and a bill becomes a law. It is common for private member's bills, such as Bill S-224, to be initiated in the Senate rather than the House. After the bill finishes its third reading in the Senate, it will then pass through the House. The process for a bill to become a law in each Chamber is similar. Passing a bill in the Senate includes a first reading, second reading, committee stage, report stage and a third reading.

Bill S-224 passed first reading on April 13, 2016 and was introduced for second reading in the Senate on April 19. If it passes second reading, it would likely be sent for consideration at committee, then public hearings, and finally third reading. If it passed all reading stages in the Senate, Bill S-224 would then move to the House of Commons and, if passed, be granted Royal Assent.

There is no set timeframe to predict how long it might take for Bill S-224 to complete each legislative stage. After its last debate on April 19, 2016, it has slowly moved down the Order Paper, going from item number 4 to number 8. Any item on the Order Paper that has not been dealt with or revisited within 15 sitting days automatically gets dropped.

This puts the deadline for debating Bill S-224 at June 7th or 8th, 2016. If Bill S-224 is not debated again at Second Reading before then, it will be dropped and the sponsor will need to take steps to re-introduce it. With private bills, it is rare for a dropped bill to be able to revive.

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INSURANCE COVERAGE DENIED FOR POLLUTION DAMAGE

Precision Plating Ltd. v. Axa Pacific Insurance Company

The British Columbia Court of Appeal recently considered the applicability of a pollution exclusion clause contained in a commercial general liability insurance policy. The policyholder, Precision Plating Ltd., operated a metal plating business in which chemicals used in the plating process were stored in large, open vats. When a fire occurred on the premises the automatic sprinkler system was activated, causing water to enter the tanks containing the chemicals. The sprinklers continued to run for a period of time until the fire department was able to control the fire. In the meantime, the water from the sprinklers caused the chemical tanks to overflow, sending chemicals into the premises as well as neighbouring businesses. Precision sustained damage to their own property and claims were brought against them by neighbouring businesses, which likewise suffered damage.

When Precision presented the claim, its insurer denied coverage arguing that the policy excluded damages caused by the release of pollutants. The policy defined pollutants to include, amongst other things, "acids and chemicals" but also "thermal irritants, smoke, soot, and fumes".

Precision challenged the denial of coverage in the Supreme Court of British Columbia. It argued that the exclusion for pollution-related damages should not be given effect because it was ambiguous. As well, it said the policy clearly covered damages arising from fire, and fire was, indeed, the originating cause of the loss in this instance. Precision also pointed to the fact that the pollution exclusion clause purported to exclude damages arising from "thermal irritants", including "smoke" and "soot", which are typically associated with fire. How could it be that the policy could cover fire losses but exclude the very things that fire causes such as thermal irritants, soot and smoke?

The trial judge agreed and found the clause was ambiguous in that the policyholder could reasonably expect to have coverage for fire losses in these circumstances notwithstanding the fact there was also damage due to the release of pollutants. The trial judge held that the pollution exclusion could not exclude coverage for the escape of pollutants caused by a fire.

The insurer brought an appeal to the British Columbia Court of Appeal. The Court of Appeal observed that the claims brought against Precision by all but one of the neighbours alleged that it was the release of chemicals from Precision's premises that caused their damages. Only one alleged that, in addition to the escape of the chemicals, Precision was also liable to them for damages resulting from a "hostile fire". The appeal court was asked whether Precision's liability for the release of pollutants, which was not a covered peril under the policy, could nonetheless still result in coverage if a concurrent cause of the damage was a covered peril.

The court held that since the pollution exclusion clause specifically referred to property damage "caused by, or contributed to" by the release of pollutants, it meant that the policy would not cover liability associated with such a release, regardless of whether it was the sole or concurrent

cause of the loss. The Court of Appeal also dealt with the issue of ambiguity that had motivated the trial judge to conclude the pollution exclusion clause should not operate in this instance. The court found that the policy was unambiguous in excluding coverage for the release of pollutants and there was no controversy that the chemicals stored on Precision's premises met the definition of "pollutant". The Court of Appeal found that Precision would have had a reasonable expectation that it would be covered for any liability for damage to neighbouring properties from fire, but it could have no reasonable expectation that it would be covered for the escape of chemicals from its premises. The court was not satisfied that this presented any ambiguity and, accordingly, found that the insurer was not under any obligation to defend Precision in respect of the claims brought by its neighbours since those claims would never be covered under Precision's liability policy.

Following the result in the British Columbia Court of Appeal, Precision sought leave to the Supreme Court of Canada. However, Canada's highest court declined to hear the appeal and thus the British Columbia Court of Appeal's decision on coverage in this instance will stand.

Because of this ruling, businesses engaged in the handling of products that could meet the definition of pollutant should discuss with their insurance professional the extent of coverage available under any given commercial liability policy. Most standard commercial policies will contain exclusion causes for pollution. However, specialty insurance policies are available when coverage for pollution losses is desirable, albeit it will likely come with a higher premium cost. As this case reveals, it is best to understand fully the coverage purchased before a loss occurs.

British Columbia Court of Appeal
Kirkpatrick, Garson and Harris JJ.A.
June 18, 2015

Supreme Court of Canada
McLachlin C.J.C., Moldaver J., and Gascon J.
January 14, 2016

John O'Dea, Q.C.
McInnes Cooper, St. John's

Ken Anderson
McInnes Cooper, St. John's

NEWFOUNDLAND AND LABRADOR CROWN IMMUNITY FOR MECHANICS' LIEN HOLDBACKS: THREE KEY RISKS FOR SUBCONTRACTORS

Brook Construction (2007) v. Blackwood Contractors Ltd.

It's now certain: in Newfoundland and Labrador, liens can't be placed on Crown land or holdbacks with the possible exemption allowing for a lien to be placed on the holdback for public streets. Here's how the Newfoundland and Labrador Court of Appeal's decision in *Brook Construction (2007) v. Blackwood Contractors Ltd.* increases the risks for subcontractors in Crown infrastructure projects in Newfoundland and Labrador.

The Case

The Newfoundland and Labrador Crown owned land in St. Anthony to construct a school. Brook was the general contractor for the project; Blackwood was the subcontractor for the supply and installation of heating, plumbing and ventilation. On November 2, 2012, Blackwood ceased work on the project and registered a lien under the Newfoundland and Labrador *Mechanics' Lien Act* (the "Act") on the Crown land for $604,513.84. The lien also claimed a charge against the holdback. On November 26, 2012, Blackwood filed a statement of claim against Brook alleging breach of contract and asserting it brought the action "to enforce the lien as provided in the *Mechanics' Lien Act*". However, it didn't claim enforcement of the lien by sale of the property or name the

Crown as a party to the action. Brook applied to the court to vacate the lien on two grounds: (1) that Blackwood failed to commence an action naming the Crown as owner, and (2) that it could not claim a lien against Crown land. The judge ordered the lien be vacated upon Brook posting a bond, and concluded that there was a distinction between the rights to claim a lien on Crown land, and to claim a lien against the holdback — and that the lien could exist against the holdback because an action could be taken under the Act even where the work was on Crown land. Brook appealed this decision.

The Appeal Decision

The key issue in the appeal was whether the Act allowed Blackwood to lien the Crown's holdback funds, which the Court of Appeal said was a novel and important issue. The Court of Appeal concluded it did not, ultimately addressing four key legal points:

1. The holdback lien is "parasitic" on the land lien

The right to the lien on the holdback is "parasitic" on, not separate and distinct form, the existence of a lien on the land. Referring to s. 12 of the Act ("holdback") the court noted it was clear that the statutory holdback must only be maintained respecting contracts "under and by virtue of which a lien may arise" and where there is a lien under s. 6 of the Act ("general right to a lien"), which creates the statutory lien and without which there would be no claim on the land benefitted by the work. The court explicitly noted that mechanics' lien legislation in other provinces created "trust" provisions for the purpose of the holdback — but the Newfoundland and Labrador Act has no trust provisions.

2. The failure to sue the Crown was fatal

Blackwood's failure to name the Crown as a defendant in its statement of claim rendered the claim deficient. A lien claimed against land must include the owner of the land as a party, and a claim against a fund of money must include the person holding the money as a defendant. Section 24(1) of the Act ("when lien stops") requires a lien claimant to file an action within 90 days after the work has been completed "to realize the claim".

3. The Crown is immune from the Act

The Act doesn't bind the Crown. Under the Newfoundland and Labrador *Interpretation Act*, no provision of a statute binds or affects the Crown unless that statute expressly states it does and decided Canadian cases and secondary sources are unanimous on this point. Without an express statement in the Newfoundland and Labrador Act, the Newfoundland and Labrador Crown is not statutorily obligated to hold back funds nor are they lienable — even though it may hold back funds voluntarily or be required to do so pursuant to a contract. In reaching this decision, the court rejected Blackwood's argument that the fact the exemption for a "public street, road or highway" in s. 5 of the Act isn't expressly limited to municipalities means it applies to Crown-owned streets, roads and highways, supporting its argument that the Act applies to Crown land. However, the court noted, without deciding, that it is possible the public street exemption applies only to those owned by municipalities and not those owned by the provincial Crown because the Crown is not expressly subject to a mechanics' lien.

4. *The Proceedings Against the Crown Act* doesn't save the lien against the holdback

The court divided on this issue (and in particular, on the effect of s. 24(1) of the *Proceedings Against the Crown Act*, which deals with the ability to issue legal process against the Crown for payment of money owing or accruing as remuneration for goods or services), but the major-

ity decided that the *Proceedings Against the Crown Act* does not modify the law to make that Act applicable to Crown land and/or the holdback.

The Three Key Risks

Practically, the ultimate decision that liens can't be placed on Crown land or holdback, with the possible exception of the holdback for public streets, increases the risks for subcontractors in Crown infrastructure projects in Newfoundland and Labrador.

1. Reduced security for Crown projects

Subcontractors in Crown infrastructure projects in Newfoundland and Labrador have lost the security provided by a holdback lien, and they might quote higher prices to general contractors for this work to compensate for this added risk.

2. Litigation on the public street exemption question

While the decision left open the possibility that the public street exemption applies to Crown streets and roads, it strongly suggests that the exemption only applies to those owned by municipalities. This creates a significant risk for subcontractors working in this sector, and litigation on this issue is highly likely.

3. Names matter

If the general contract between the Crown and the general contractor provides for a holdback or states the Crown is subject to the Act, a prudent subcontractor will name the Crown in both its claim for lien and statement of claim — or risk losing the claim altogether.

Newfoundland and Labrador Court of Appeal
J.D. Green C.J.N.L., B.G. Welsh, C.W. White JJ.A.
April 13, 2015

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NOTHING TO FEAR: JUDICIAL RESTRAINT POST-*BHASIN*

When the Supreme Court of Canada released its decision in *Bhasin v. Hyrnew* a year and a half ago, it recognized the existence of an overarching, organizing principle of good faith that governs the performance of all contracts, and that, flowing from this principle, there exists a duty of honesty in contractual performance that requires contracting parties to be honest with and not knowingly mislead each other in relation to the performance of their contractual obligations. Notwithstanding the Supreme Court's caution that the decision only amounted to an "incremental change", the decision caused a great deal of commercial uncertainty as to what risks contracting parties would now be exposed. There were initial fears that waves of litigation would lead to waves of expanding new duties imposed upon contracting parties.

But does subsequent case law confirm that these concerns are well-founded? A very early and necessarily preliminary look at the body of cases that address these two developments indicates the answer is largely "no". With few exceptions, courts across the country have adopted a conservative stance in line with the "incremental change" of the decision, construing the principle and duty quite narrowly. Most often, courts have refused to recognize novel duties flowing from the organizing principle, and the duty of honesty itself has largely been interpreted to simply mean "not lying or knowingly misleading". Though the cases arising from construction disputes offer an even smaller sample, they too support this conservative attitude.

Attempted Applications of the Organizing Principle of Good Faith

Implying Terms for Business Efficacy

Parties have advanced a series of novel claims grounded in the organizing principle of good faith. In *Moulton Contracting Ltd. v. British Columbia*, the British Columbia Court of Appeal dealt with a contract between the B.C. government and Moulton to allow the latter to harvest timber. Moulton suffered losses when it was prevented from logging under the timber sale licences by a blockade on the road access put up members of a First Nation. The trial judge held that the Province had impliedly promised and represented to Moulton that it had engaged in all necessary consultation with First Nations and had discharged its duty to consult, and was not aware of any First Nations expressing dissatisfaction with the consultation undertaken by the Province, save as disclosed to Moulton. The Province subsequently received a threat that there would be a blockade but did not inform Moulton of this until two months later, after Moulton had started logging. The blockade went up a few days after that, and Moulton was never able to complete the logging under the timber sale licences.

Moulton claimed that the B.C. government breached an implied term of their agreement by failing to consult with the First Nations who had title to the land in question. In support of its argument for implying the term as a matter of business efficacy, Moulton relied on *Bhasin* to assert that the general principle of good faith authorized the implication of terms to give effect to the intentions of the parties and to redress power imbalances, as well as to more generally give due regard to the parties' legitimate contractual interests. While the trial judge agreed, the Court of Appeal held that the principle of good faith could not give rise to such an interpretation and that the duty of honesty was not raised as an issue. In short, *Bhasin* had no application to the case before it:

> *Bhasin* provides a new approach to the role of good faith in contract interpretation in Canadian law, but Moulton reads it too broadly in application to this case. There is no basis to say that the Province acted dishonestly, unreasonably, capriciously or arbitrarily (see para. 63) in failing to disclose to Moulton that [a member of the first Nation] had threatened to disrupt the logging when the threats were made. The question in this case is whether it had any obligation to disclose that information within the relationship created by Moulton entering into the [timber sale licences], given their terms, and, if the Province was so obliged, whether it is liable for failing to do so. No issues of honest contractual performance, as discussed in *Bhasin*, arise in this appeal.

Ontario courts have been equally reluctant to modify the methods by which Canadian law implies terms into a contract. In *High Towers v. Stevens*, the Ontario Court of Appeal ruled on much the same grounds that good faith cannot be used as a general tool to imply terms into a contract. In short, good faith is not to be employed in any specific sense in assessing whether terms should be implied as a matter of commerce.

Attempting to Subsume the Owner-Contractor Relationship under Employer-Employee

The New Brunswick Court of Queen's Bench was similarly conservative in *Algo Enterprises Ltd. v. UPM-Kymmene Miramichi Inc*. Algo was a wood contractor who provided services to UPM's predecessor company at its mills. Their business relationship ultimately ended, and Algo claimed UPM had breached its duty of good faith performance under the contract by failing to provide notice or reasons for ending the relationship. Using *Bhasin*, Algo attempted to argue that the court should recognize the owner-contractor relationship as sufficiently similar to employer-employee so that good faith obligations should arise in the form of notice and reasons. The court rejected this argument on the grounds that previous case law had already established that employment contracts and contracts for services were two distinct categories that should not be melded together. As such, no new duties arising from good faith obligations should be imposed upon a commercial contracting arrangement.

Overall Observations on the Organizing Principle

With very few exceptions, courts across the country have refused to use the organizing principle of good faith as a means of expanding existing contractual duties or recognizing new ones. Perhaps the best summation of Canadian courts' attitude towards advancing novel claims on the basis of *Bhasin*'s organizing principle of good faith is found in Justice Dunphy's decision in *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*, which cautioned very strongly against courts using *Bhasin* as a licence to invent new obligations that are divorced from the actual terms of the contract:

> *Bhasin* is no authority for unbridled creativity in the creation from whole cloth of obligations in a contractual context which the parties have not provided for or have addressed in a fashion which one party regrets in hindsight.

In short, overall, courts have been skeptical of any expansive interpretation of the organizing principle of good faith.

Attempted Interpretations of the Duty of Honesty in Contractual Performance

This conservatism has also been borne out in courts' interpretation of the new duty of honesty in contractual performance, which has been overwhelmingly construed in the narrowest of terms. It was held in *2176693 Ontario v. The Cora Franchise Group Inc*. to be a "duty not to overtly lie to your contractual counterparty", an interpretation perhaps even narrower than the Supreme Court's stipulation that it is intended to prohibit lying and knowingly misleading the other contracting party/parties. Courts have treated the duty of honesty as not necessarily preventing parties from acting in their own economic self-interest (see, for example, *Maxam Opportunities Fund Limited Partnership v. 729171 Alberta Inc*.), and have held in some cases that commercial unreasonableness was permissible so long as it did not amount to lying or active misleading (see *Szojka v. Pewter Financial Ltd*.). Other cases have held that not making any misrepresentations was sufficient to avoid breaching this duty (*D2 Contracting Ltd. v. Bank of Nova Scotia*).

Reasonableness in Contractual Performance

In *Mayotte v. Ontario*, the Ontario Superior Court of Justice refused to accept the plaintiff's argument that the standard of reasonableness that underpins the principle of good faith should be applied to the outcome rather than the process of contractual performance. Rather than pointing to any case law, the plaintiff's counsel argued that the Supreme Court's statement that parties "reasonably expect a basic level of honesty and good faith in contractual dealings" meant that they are entitled to reasonably expect a certain outcome. This claim was rejected as having no foundation in case law, including *Bhasin*.

The Scope of Unconscionability

The recent case of *Bank of Montreal v. Javed* is equally illustrative of this conservative stance. Javed claimed that *Bhasin* allowed for broadening the scope of unconscionability, the doctrine by which a party may void a contract where there existed manifest unfairness in contract formation, to cover contractual performance as well. The Ontario Court of Appeal rejected this argument as lacking any grounding in *Bhasin*, since there the court created only a duty to perform contracts honestly, while the substance of unconscionability addresses other concerns (namely, inequality between the parties).

Misleading Subcontractors

In *Combined Air Mechanical Services v. Computer Room Services Corp.*, the court held that it was a breach of the duty of honesty in contractual performance for a general contractor to mislead a subcontractor into believing it was to be used as the subcontractor on a project for which the general contractor had submitted a tender (and won), when in fact the subcontractor was being held in reserve if the general contractor could not find subcontract work at a better price. There was an enforceable agreement between Combined Air and Computer Room that they work to put together a competitive

bid for the Hydro Barrie project, which gave rise to the contractual duties once the general contractor's tender for the owner's project was accepted.

Conclusion

In short, actors in the Canadian construction industry should not fear an imminent sea change in contracting as a result of *Bhasin* and subsequent cases. Although it was arguably ground-breaking at a theoretical level, the practical consequences have been summed up best in *Reserve Properties Ltd. V. 2174689 Ontario Inc*., which held that *Bhasin* was merely "a very measured case which makes little incremental change to the common law".

Though the influence of *Bhasin* may ultimately elicit more substantial changes in the law of contracts, this will come by way of very slow, measured change that reflects commercial realities and expectations. It is not, as some are concerned, a "wholesale revision of contract law to invite subjective assessments of the business practices and morals of parties… outside of or beyond the existing law" (*Warburg-Stuart Management Corp. v. DBG Holdings Inc*.). Commercial certainty remains a central concern of courts in interpreting good faith, and this attitude does not appear set to change any time soon.

CITATIONS

2176693 Ontario v. The Cora Franchise Group Inc., [2015] O.J. No. 885, 2015 ONSC 1265

Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd., [2015] O.J. No. 2743, 2015 ONSC 3404

Algo Enterprises Ltd. v. UPM-Kymmene Miramichi Inc., [2014] N.B.J. No. 348, 2014 NBQB 265

Bank of Montreal v. Javed, [2016] O.J. No. 256, 2016 ONCA 49

Bhasin v. Hyrnew, [2014] S.C.J. No. 71, 2014 SCC 71

Brook Construction (2007) Inc. v. Blackwood Contractors Ltd., [2015] N.J. No. 116, 2015 NLCA 18

Combined Air Mechanical Services v. Computer Room Services Corp., [2015] O.J. No. 3445, 2015 ONSC 610

D2 Contracting Ltd. v. Bank of Nova Scotia, [2015] B.C.J. No. 1946, 2015 BCSC 1634

High Towers v. Stevens, [2014] O.J. No. 6109, 2014 ONCA 911

Maxam Opportunities Fund Limited Partnership v. 729171 Alberta Inc., [2015] B.C.J. No. 332, 2015 BCSC 271

Mayotte v. Ontario, [2016] O.J. No. 921, 2016 ONSC 1233

Moulton Contracting Ltd. v. British Columbia, [2015] B.C.J. No. 331, 2015 BCCA 89

Precision Plating Ltd. v. Axa Pacific Insurance Co., [2015] B.C.J. No. 1262, 2015 BCCA 277, leave to appeal refused [2015] S.C.C.A. No. 317

Reserve Properties Ltd. v. 2174689 Ontario Inc., [2015] O.J. No. 2756, 2015 ONSC 3469

Szojka v. Pewter Financial Ltd., [2015] A.J. No. 1218, 2015 ABQB 708

Warburg-Stuart Management Corp. v. DBG Holdings Inc., [2015] O.J. No. 1173, 2015 ONSC 1594

INVITATION TO OUR READERS

Would you like to write a summary of a court decision that would be of interest to consultants, contractors or building owners?

Do you have an article that you think would be appropriate for *Construction Law Letter* and that you would like to submit?

Do you have any suggestions for topics you would like to see featured in future issues of *Construction Law Letter*?

If so, please feel free to contact us at constructionlaw@lexisnexis.ca