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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Commercial Litigation Update

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This newsletter is designed to bring news of changes to the law, new law, interesting decisions and other matters of interest to our commercial litigation clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Commercial Litigation group:

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SUPREME COURT ESTABLISHES GENERAL DUTY OF GOOD FAITH IN CONTRACTS

Roderick S.W. Winsor

Background

Contractual disputes have many different causes. Many result from gaps in the contract or different interpretations of the terms. Others arise where a party may have performed in accordance with the words in a contract but violated the spirit of the contract.

Courts and legislatures have struggled with how to address these disputes, seeking fair and practical results yet respecting the intent of the parties. Approaches have varied. Principles of contractual interpretation have evolved to address many such disputes. However, in a minority of cases some feel the results have been unsatisfactory.

Implied Obligation of Good Faith

One possible answer has been to impose an implied obligation of good faith governing contracts that supplements or modifies the other terms in the agreement. Many jurisdictions, including Quebec, have legislated such terms.

Even in the rest of Canada, legislation governing specific types of commercial relations, such as franchises, has imposed good faith obligations. But the courts in these jurisdictions have resisted the imposition of a general implied obligation of good faith applicable to all contracts. The primary reasons given are that:

- "Good faith" is an inherently unclear concept that will permit *ad hoc* judicial moralism to undermine the certainty of commercial transactions.
- Imposing a duty of good faith is inconsistent with the basic principle of freedom of contract.

So while we have seen cases where courts have referred to a good faith duty, generally these have been confined to particular types of obligations (such as the exercise of discretionary powers), or types of relationships (such as employment and insurance).

The recent Supreme Court of Canada decision in *Bhasin v. Hrynew* has fundamentally changed this.

Bhasin's dealership contract with CanAm could be renewed but the parties were free not to renew it. CanAm did not renew, thereby effectively putting Bhasin out of business. His competitor and fellow CanAm dealer, Hrynew, was then effectively given the dealership by CanAm.

Bhasin sued CanAm and Hrynew alleging that they conspired to take his business without compensation. He alleged that CanAm had breached an

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"…the future is not clear … The Court has clearly invited expansion of the good faith duty beyond honesty, however, any such expansion must be incremental … We will see an increase in the allegations of bad faith, and probably more litigation. But the result in most cases is unlikely to change."

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implied obligation of good faith. The Alberta Court of Appeal dismissed the claim finding there was no basis to imply an obligation of good faith and, in the absence of such a duty, there was no basis for a claim.

In reversing this decision, the Supreme Court of Canada directly addressed key questions related to a general implied obligation of good faith. Key points included:

- There should be an implied obligation of good faith applicable to all contracts, described as an "organizing principle."
- This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract, even the right to act knowing this may harm the other party. But it does require some consideration of the interests of the other party.
- For now the court was satisfied that it should include a duty of honesty. Parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.
- Concerns previously recognized about a general good faith duty were noted but found inapplicable to a duty of honesty.
- The Court chose not to articulate the scope of such a principle or related questions such as the meaning of good faith. Rather courts should approach the application of this principle in the future as specific cases arise.

This was sufficient for Bhasin to succeed as CanAm was found to have misled him with respect to their plan not to renew, and to lie about Hrynew's role. This had the consequence that Bhasin was denied a proper opportunity to protect his business in the event the agreement was not renewed. This lost opportunity was valued at $87,000, which Bhasin recovered. He was not awarded damages for the failure to renew but for the dishonest conduct related to this.

What Does the Future Hold for Commercial Parties?

The short answer is that the future is not clear. The Court has clearly invited further expansion of the good faith duty beyond honesty. However, any such expansion must be incremental and consider the noted concerns relating to a good faith duty.

We will see an increase in the allegations of bad faith, and probably more litigation. But the result in most cases is unlikely to change. However, in some cases the duty of honesty may make a significant difference, as it did in *Bhasin*.

To the extent that *Bhasin* establishes a good faith requirement to conduct oneself in accord with reasonable business standards of conduct, the consequences of the good faith duty may be more dramatic. While a good faith duty may reduce some disputes and litigation, reducing the chances of litigation based on literal interpretations of contracts, we are likely to see a significant increase in litigation as parties seek to benefit from the duty, uncertain of its scope and meaning.

Canadian courts are likely to continue to take a conservative approach. One of the effects of the implied obligation of good faith may be to "fill in the gaps" to resolve disputes, recognizing that it may not be realistic to expect parties to fully set out the terms of an agreement.

The Court recognized that parties should be free to limit their responsibilities and in effect define

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their own standards of performance, but within limits which are not explained. So while the intent may be to provide certainty and clarity, the effect may be otherwise.

The reality is that the broader the concept, the greater the disputes likely to be generated. So while good faith may be seen as a way of reducing the need to have long detailed agreements, parties wishing to minimize the risk of disputes arising based on an obligation of good faith will need to address the risk in agreements with some care, particularly in the case of ongoing "relation contracts," such as service agreements, as opposed to discrete "transaction contracts."

Last it should be noted that *Bhasin* addresses many questions related to good faith but does not answer many of them. For example, can parties contract out of a good faith duty other than honesty? What is good faith? Is silence dishonesty? How can one reconcile a duty not to mislead but accept there is no general obligation of disclosure?

Some answers are to be found in other cases. But while one of the goals of the Supreme Court of Canada was to provide more certainty and clarity, it will take some time to see if this is achieved. ■

NOT ALL EXPERTS ARE TREATED LIKE EXPERTS: THE COURT OF APPEAL PROVIDES MUCH NEEDED CLARITY ON THE REQUIREMENTS OF CALLING EXPERT EVIDENCE

John Polyzogopoulos and Simon Reis

When can a witness who has not been retained by a party to the litigation give opinion testimony at trial? Must that witness comply with the requirements of Rule 53.03 of the *Rules of Civil Procedure*, which is directed at expert witnesses and requires that no opinion evidence may be tendered unless a report is prepared and signed by the expert witness, who must in turn acknowledge that he or she has a duty to the Court to be unbiased and impartial?

The confusion surrounding these critical issues was cleared this past week with the release of the Court of Appeal's decision in *Westerhof v Gee Estate*. The result of the decision is good news for litigants and their counsel, as all relevant evidence will be before the courts while at the same time, the cost and delays of preparing expert reports that comply with the *Rules of Civil Procedure* will be minimized.

The Facts of *Westerhof* and its Procedural History

The Plaintiff Mr. Westerhof was injured in a car accident. The Defendant Estate admitted liability and the trial proceeded on causation and damages alone. At trial, rulings were made on the admissibility of various medical evidence. The trial judge ruled that medical witnesses who treated or assessed Mr. Westerhof could not give opinion evidence concerning their diagnosis or prognosis as they were required to first comply with Rule 53.03 even though they were not witnesses retained to provide expert evidence for the litigation. The medical witnesses included Mr. Westerhof's treating chiropractor and psychiatrist as well as two medical witnesses retained by Mr. Westerhof's Statutory Accident Benefits (SABS) insurer.

On appeal, the Divisional Court affirmed the trial judge's decision, concluding that all opinion evidence requires compliance with Rule 53.03, including opinion evidence from treating medical practitioners who were not retained by a party to the litigation. In so holding, the Divisional Court focused on the nature of the proffered evidence rather than the status of the witness as previous

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"[T]he Court of Appeal concluded that a non-party expert ... who was retained for a purpose other than the litigation, may give opinion testimony where the opinion is based on personal observations or examinations relating to the subject-matter of the litigation [without the need to prepare a formal expert report]."

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Courts had done. If the evidence is opinion evidence as it relates to such matters as causation, diagnosis, and prognosis compliance with Rule 53.03 was required. If the evidence is factual evidence alone - such as observations of the injured plaintiff and a description of the treatment provided - compliance was not required.

The Decision of the Court of Appeal

The Court of Appeal rejected the Divisional Court's conclusions. The Court of Appeal held that a witness with special skill, knowledge, training or experience who has not been engaged by a party to the litigation may give opinion evidence at trial, without complying with Rule 53.03 where

- the opinion to be given is based on the witness's observation of or participation in the events at issue; and
- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

The Court of Appeal termed such experts "participant experts," which would include a treating physician.

In turn, the Court of Appeal concluded that a non-party expert - such as a physician retained by a SABS insurer - who was retained for a purpose other than the litigation, may give opinion testimony where the opinion is based on personal observations or examinations relating to the subject-matter of the litigation.

Applying these principles, the Court considered each impugned evidentiary ruling made by the trial judge. The Court concluded that some of the treating physicians and non-party experts should not have been excluded from giving expert opinion testimony for failure to comply with Rule 53.03, while others were properly excluded. Notably, the Court held that the trial judge erred in excluding the opinion testimony of a treating psychiatrist and pain specialist, as well as two non-party experts who conducted a functional abilities assessment of Mr. Westerhof in August 2005 and prepared a report for Mr. Westerhof's SABS insurer. Despite their non-compliance with Rule 53.03, these witnesses were entitled to testify concerning the medical history they took from the plaintiff, the tests they performed, and the treatment results they observed, including their observations about whether Mr. Westerhof was experiencing pain.

The Court held that the trial judge's erroneous evidentiary rulings prevented Mr. Westerhof from placing important evidence before the judge and jury that could reasonably have affected the outcome of the trial. These errors warranted the granting of a new trial.

The Implications of *Westerhof*

The decision in *Westerhof* and its companion case, *McCallum v Baker*, brings much needed clarity to the scope of Rule 53.03 and will have significant practical consequences for litigants heading to trial.

Although, *Westerhof* arose in a personal injury context, the decision applies equally across other areas of civil and commercial litigation, where "participant" or non-party expert witnesses not retained by one of the parties to the litigation may be present, such as engineers, financial advisors, accountants, and environmental consultants.

Westerhof provides greater certainty to litigants that they will be able to introduce the necessary evidence to prove their case. Previously, where an

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"Because of the central role that experts play in the determination of issues in litigation, they owe a duty to the court to be independent, and provide objective and unbiased opinions in relation to the matters on which they give evidence."

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expert witness did not comply with Rule 53.03, litigants were forced to either abandon the expert's evidence or seek leave of the Court before trial to excuse non-compliance. Now, where the requirements stated in *Westerhof* are met, litigants will have greater certainty knowing whether their treating physicians or other experts not retained for the purpose of trial can testify.

Lastly, *Westerhof* may help to cut down on the delay and costs of going to trial. Where an expert witness is uncooperative, unavailable, or otherwise unable to meet the requirements of Rule 53.03, the expert's evidence may still be introduced, without the possibility of further delay and costs in obtaining Rule 53.03-compliant reports or in retaining new experts. ■

MUCH ADO ABOUT NOT MUCH: THE ONTARIO COURT OF APPEAL SETS THE RECORD STRAIGHT ON EXPERT EVIDENCE IN ONTARIO

Catherine MacInnis

Last spring we published an article on the impact of a decision of Justice Janet N. Wilson in *Moore v. Getahun* ("***Moore***"), which appeared to drastically change the law on expert evidence in Ontario. That decision was met with much controversy and appealed on several grounds.

On January 29, 2015, the Ontario Court of Appeal released its decision in *Moore*, clarifying the law on the use of expert evidence, with a focus on access to justice and the "…*timely, affordable and just resolution of claims.*"

Background

The realities of modern litigation require the use of expert reports. Parties involved in commercial litigation often hire experts to ascertain the value of a business or property. Because of the central role that experts play in the determination of issues in litigation, they owe a duty to the court to be independent, and provide objective and unbiased opinions in relation to the matters on which they give evidence.

In preparing their opinions, experts have always worked closely with lawyers to ensure they understand the facts and specific issues on which they are being asked to provide an opinion. Those communications are generally protected from disclosure to the other side on the basis of litigation privilege. In some instances, expert witnesses were seen as having gone too far - advocating along with their instructing lawyer on behalf of the party retaining them rather than providing an unbiased professional opinion. It was in the context of such concerns that Justice Wilson rendered her trial decision in *Moore*. Specifically she stated:

> "*I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.*"

In Justice Wilson's view, counsel could no longer rely on litigation privilege to protect their communications with their clients' experts and should expect to disclose all communications with experts. The Ontario Court of Appeal flatly rejected Justice Wilson views in this regard, and took the opportunity to re-state the law on expert evidence in the Province.

The Outrage and the Appeal

It is hard to think of a decision in recent memory that has inspired more debate in the legal community than the trial decision in *Moore*. With a virtual

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"… the law requires experts to produce independent and unbiased opinions, while allowing lawyers to consult with the experts to increase efficiencies and ultimately minimize costs to the parties."

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moratorium imposed by that decision on communications between lawyers and their clients' experts, many believed that the practical result of the trial decision in *Moore* would be to decrease the effectiveness of expert witnesses and increase the overall cost for parties in litigation.

A wide range of legal organizations in the Province responded with their concerns and sought to be heard by the Ontario Court of Appeal. They were welcomed by the Court. At the outset of the decision, written by Justice Robert J. Sharpe, the Court noted that opposing counsel on the appeal agreed that Justice Wilson's statements on communications with expert witnesses were erroneous.

The Court of Appeal went on to state: "…*banning undocumented discussions between counsel and expert witnesses or mandating disclosure of all written communications is unsupported by and contrary to existing authority*…"

The Court found that experts require a high level of instruction from lawyers in order to be in a position to prepare reports that will satisfy the rules of evidence. While this process could have a tendency to potentially affect the impartiality of expert opinions, the Court found that there are sufficient checks and balances in place to prevent courts from being misled as a result. Specifically, the ethical and professional standards of lawyers and their experts forbid them from permitting partisan expert reports to be tendered in evidence. Further, the adversarial process, which permits the cross-examination of expert witnesses, is designed to weed out tainted evidence.

In coming to his conclusion that Justice Wilson erred in finding that the consultation process between lawyers and experts must end, Justice Sharpe noted:

> "*Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. Such a rule would encourage the hiring of "shadow experts" to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes suggested by the trial judge would not be in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes.*"

The result of this decision by the Court of Appeal is to shore-up the existing common law principles and to reject the new direction proposed by Justice Wilson in her decision in *Moore*. As was the case before the trial decision in *Moore*, the law requires experts to produce independent and unbiased opinions, while allowing lawyers to consult with the experts to increase efficiencies and ultimately minimize costs to the parties. In our view, this is good news for lawyers and their clients and for the judicial system as a whole. ■

LITIGATION IN THE DIGITAL AGE: NEW RULES ON THE SERVICE OF COURT DOCUMENTS IN ONTARIO

Alexandra Teodorescu

There is a new but little-known way to serve court documents in Ontario. Ontario Regulation 170/14 enacted under the *Courts of Justice Act* amended the

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"EDX services are web or cloud-based, and provide law firms and self-represented individuals with an alternative to service by mail, fax or email."

Rules of Civil Procedure to allow documents that do not require personal service to be served by way of electronic document exchange ("**EDX**"). The court system in Ontario has a long way to go before truly entering the digital age, and this is but a small step in the right direction.

Subrule 16.01(4) was amended as follows:

> (4) Any document that is not required to be served personally or by an alternative to personal service,…(b) may be served on a party acting in person or on a person who is not a party,…(iii) by use of an electronic document exchange of which the party or person is a member or subscriber, but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day.

Similarly, subrule 16.05(1), which prescribes the manner in which service can be effected on a lawyer of record, was amended to allow for service of a document by use of an EDX system of which the lawyer is a member or subscriber.

These new rules came into force on January 1, 2015.

EDX services are web or cloud-based, and provide law firms and self-represented individuals with an alternative to service by mail, fax or email. Individuals who wish to serve documents by way of EDX must subscribe to the service through an accredited provider of such a service. Documents can only be served on another party if that party is also a member of the same EDX system. As a result of being browser-based, EDX services do not require additional downloads or software to run.

The new rules are apparently largely the result of lobbying efforts by CourtSide EDX, which is currently the only EDX platform that complies with the *Rules*.

CourtSide EDX offers two types of membership: standard and premium. There is no monthly fee for a standard membership, which charges $3.00/service/party for documents up to 40 pages, and $8.00/service/party for documents more than 40 pages. A premium membership costs $15.00/month, but service fees are reduced to $2.00/service/party for documents up to 40 pages, and $5.00/service/party for documents exceeding 40 pages. Premium memberships are individual (i.e.: each lawyer at a firm must pay the monthly membership fee); if one lawyer at a firm elects to be a premium member, all other subscribers at that particular firm must also have premium memberships.

Courtside EDX is touted as making the service of documents more affordable, efficient and reliable. The benefits of EDX are two-fold. First, CourtSide EDX organizes all sent and received documents pertaining to each matter or case into a single PDF document with a corresponding table of contents. These documents are subsequently stored in the cloud and can be accessed at any time from any computer with internet access. Second, CourtSide EDX automatically produces a record of service, which eliminates the need for an affidavit of service in order to prove service.

Rule 16.09(4.1) confirms that service through an EDX system may be proved by a record of service that indicates the following:

a) the total number of pages served;

"Services such as CourtSide EDX may add value to lawyers practicing on the Commercial List, which generally hears cases such as large national insolvencies and other high stakes commercial matters."

b) the name of the person who served the document and, if the person served the document on behalf of a party, the name of the party and the nature of the relationship;

c) the name of the person on whom the document was served; and

d) the date and time at which the document was served.

Services such as CourtSide EDX may add value to lawyers practicing on the Commercial List, which generally hears cases such as large national insolvencies and other high stakes commercial matters. On such cases, the list of parties to be served are often very long, court records are voluminous, and matters are often brought on for hearing on very short notice. However, even in the Commercial List context, EDX may be of marginal benefit, given that the E-Service Guide, which came into effect July 1, 2014, permits service by email on Commercial List matters (even without acknowledgment of receipt of the email).

In addition, EDX may not ultimately achieve mainstream use for a number of other reasons. There is currently very little cost associated with serving court documents that do not require personal service. While couriering documents may be costly depending on location, number of parties being served and urgency, documents can also be faxed, mailed or emailed (so long as the recipient acknowledges receipt) at very little cost. Moreover, unless and until lawyers subscribe to the new service and the system receives widespread acceptance, very few litigants will be able to be served through EDX, as it is unlikely that unrepresented litigants would ever subscribe.

Ultimately, the success and effectiveness of CourtSide EDX, and EDX systems in general, will depend on the number of lawyers subscribing to the service. Right now, there is little incentive for law firms to subscribe, and therefore EDX will likely not substantially alter existing practices. However, this may change when the courts truly decide to become fully digital. If that were to happen, litigants will not only be able to serve court documents electronically, but, at the same time, will also be able to file them with the court electronically without the need to file paper copies. In addition, court records will be accessible to litigants, and perhaps even the public at large, through web-based browsers. There is no indication yet as to when such wholesale, but badly needed, upgrades to the court system may be on the horizon. ■

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Blaneys Ontario Court of Appeal Summaries (Blaneys OCA Blog) offers weekly summaries of all decisions released by the Court of Appeal for Ontario (other than criminal law decisions). [blaneyscourtsummaries.com]

Blaneys@Work examines recent events and decisions in the world of labour and employment law. [blaneysatwork.com]

Henry J. Chang's Canada-US Immigration Blog covers recent decisions, legislative changes and news related to Canada and US immigration. [www.americanlaw.com/immigrationblog/]

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Blaneys Fidelity Blog provides updates on recent developments in fidelity insurance in Canada and the United States, and covers other topics of interest to fidelity insurers. [blaneysfidelityblog.com]

Blaneys on Target provides general information to creditors and other persons interested in the Target insolvency and its CCAA proceedings. [blaneystargetccaa.com/updates/] ■

BLANEYS PODCAST

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Blaneys Podcasts are available for download at www.blaney.com/podcast. Topics to date include Powers of Attorney, Canada's Anti-Spam Legislation, Termination of Employment, Workplace Harassment, Family Law and Succession Planning. In the newest podcast, Lou Brzezinski answers questions about the firm's involvement in the Target insolvency proceeding on behalf of unsecured creditors.

New podcasts continue to be posted so check back regularly for the latest topic. Podcasts are also available for download on iTunes. ■

WINSOR TO SPEAK AT LEXPERT® CONFERENCE

Blaneys Roderick S.W. Winsor will speak at Lexpert®'s "Implied Obligation of Good Faith" conference, held June 2, 2015, in Toronto, and June 9, 2015, in Calgary. Winsor will discuss the recent Supreme Court of Canada decision of Bhasin, relating to good faith contractual obligations. For more information, visit www.lexpert.ca.

EXPECT THE BEST

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