



BARGAINING IN GOOD FAITH: DAVID DIDN'T STAND A CHANCE

In November 2014, the Supreme Court of Canada established two things in the case of *Bhasin v. Hrynew*. First, good faith contractual performance is a general organizing principle of the common law of contract. Second, there is a common law duty which applies to all parties to act honestly in the performance of contractual obligations.

As quoted in the *Journal of Commerce* on February 19, 2015:

The case does provide reason for TLA members to ensure they negotiate rates in good faith and to be vigilant in ensuring that their licence holders do the same.

"It is the most significant development in contract law in a generation," said attorney Brian McLean. McLean learned of the ruling while involved in litigation against TimberWest, Western Canada's largest privately managed forest land owner. Using Bhasin v. Hrynew, McLean argued TimberWest violated the implied good faith in the contract.

"Before (Bhasin v. Hrynew) it was difficult to argue that there exists an obligation of good faith, specifically if there was no expressed term to that effect," said McLean. "It's now open in other areas to consider the applicability of such a principle."

The TimberWest case that lawyer Brian McLean is referring to was decided by the Supreme Court of British Columbia in *0856464 B.C. Ltd., Main Logging Ltd., Geoffrey Lawton Courtnall, and Penelope Olivia Courtnall vs. TimberWest Forest Corp., TimberWest Holdings Ltd., and TimberWest Forest Company* (2014 BCSC 2433).

This action arose from the unlawful termination of 0856464 BC Ltd.'s harvesting contract with TimberWest Forest Ltd. by TimberWest on January 3, 2008. The trial began January 27, 2014 before the Honorable Mr. Justice Sigurdson, and his Reasons for Judgment

were delivered on December 23, 2014.

In his Reasons for Judgment, Justice Sigurdson stated:

[185] The key question on the issue of good faith is whether the defendant, in its negotiation over rates for 2008, was intending to continue the contract or was acting to bring the contract to an end. Put another way, the issue comes down to whether the plaintiffs have proven that the dominant motive of the defendant

was to terminate the contracts over a rate dispute, and if so, whether in the circumstances, that is a breach of the contractual obligation of good faith.

[293] When TimberWest embarked on negotiating rates in November 2007 there is no doubt that at that time its long-term goal to control costs was securing the right to subdivide the Woodlands contracts. That was a very important goal for TimberWest and had been throughout 2007. It had an active strategy to pursue that objective. Terminations of contracts from rate disputes would put pressure on the union to agree to subdivision. Subdivision was something that TimberWest had sought without success after a number of unsuccessful approaches.

[294] The key question in determining whether the defendant negotiated in good faith is whether the execution of that strategy was the dominant motivation for the defendant in its negotiation strategy with Munns, or merely an incidental motive or an ancillary consideration. As noted, there are a number of factors to consider in determining whether the defendant acted in good faith.

[310] In sum, I find that in all the circumstances, the defendant breached its contractual obligation to negotiate in good

faith and Munns is entitled to damages for the unlawful termination of the contracts.

Justice Sigurdson found that TimberWest breached its contractual obligation to negotiate rates for logging in good faith, and that Munns was entitled to damages for the unlawful termination of the logging contract. The numbered company was awarded \$2.75 million, and TimberWest is entitled to a setoff of \$1.01 million.

Although this judgment is under appeal (TimberWest has appealed the decision and the numbered company has subsequently cross appealed), it is very significant to the contract logging community because it applies the Supreme Court of Canada's contractual duty of good faith to both the negotiation of logging rates, and to the performance of other obligations under logging agreements, which are long-term contracts of mutual cooperation.

At paragraph 169 Justice Sigurdson stated *"that the question of whether the defendant breached the obligation to negotiate in good faith involves a careful consideration of the particular facts and circumstances of the case and very much depends on the facts of the case."* While the circumstances surrounding the TimberWest decision were very specific and may not have broad application to other TLA members when negotiating rates, the case does provide reason for TLA members to ensure that when negotiating rates that they do so in good faith, and to be vigilant in ensuring that their licence holders do the same.▲

Stephen Ross is a Partner at Miller Thomson LLP and works out of their Vancouver office. His practice is concentrated in the areas of commercial litigation, forestry law and insolvency law. he can be reached at 604.643.1205 or sross@millerthomson.com