Decomposing Bhasin v Hrynew: Toward an Institutional Understanding of the General Organizing Principle of Good Faith in Contractual Performance

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In Bhasin v Hrynew, the Supreme Court of Canada recognized good faith in contractual performance to be a ‘general organizing principle’ of the common law of contract. The true impact of Bhasin on the future development of the Canadian contract law remains the subject of considerable debate among legal scholars and practitioners. This article explores Bhasin’s evolutionary impact on the Canadian common law of contract, by providing an institutional understanding of the general organizing principle of good faith in contractual performance. It is contended that Bhasin’s contribution to the common law of contract is institutional rather than substantive – Bhasin fundamentally alters the organization of the sources of contract law by introducing a new law-making mechanism (that is, ‘law-making through good faith’) that is separate from, and potentially supersedes, the traditional doctrine of precedent. To support the central claim that Bhasin’s contribution is institutional rather than substantive, I employ three different kinds of arguments that correspond to three distinct, but closely related, dimensions of the principle of good faith in contractual performance: (a) semantic structure; (b) historical origins; and (c) economic function. Although these three lines of inquiry rest on quite different methodological premises, they converge in supporting the central idea that good faith performance is best understood as an institutional mechanism to allocate law-making power rather than a substantive legal principle.

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A ANALYTICAL GOALS
In Bhasin v Hrynew, the Supreme Court of Canada undertook two fundamental steps. First, it recognized good faith in contractual performance to be a ‘general organizing principle’ of the common law of contract. Second, it articulated a new ‘duty of honesty’ in contractual performance that emanates directly from the principle of good faith. The Court’s purported intent was to bring coherence to contract law, thereby fostering legal certainty and protecting reasonable commercial expectations. Yet, the true impact of Bhasin on the future development of the Canadian common law of contracts remains the subject of considerable debate among legal scholars and practitioners. Supportive commentators have welcomed the decision as an important step towards greater clarity in contract law. More critical commentaries have raised the

2 Ibid at para 62.
4 See e.g. Hall, ‘Bhasin,’ supra note 3 at 336: ‘Bhasin’ is a huge and welcome step in that it rationalizes a heretofore hopelessly confused area of law; Swan, ‘The Obligation,’ supra note 3 at 404: ‘The development of the new organizing principle will contribute to certainty because it shows [or prescribes] where judges should now start to think about the obligations on [and the consequences for] parties who tell lies. ... The effect