Court File No.: CV-20-00641220-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

APPLICANTS

- and -

ALL JS GREENSPACE LLC

Respondents

BOOK OF AUTHORITIES OF THE RESPONDENT, ALL JS GREENSPACE LLC

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TO: **THE EMAIL SERVICE LIST**

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2.	Jules A. Monteyne, “The New Duty of Good Faith and How it Applies to Insolvency Proceedings”, Annual Review of Insolvency Law (ed. Janis Sarra), 2019 ANNREVINSOL 16
3.	McElcheran, Kevin, *Commercial Insolvency in Canada* (3d), (LexisNexis Canada Inc, 2015)
4.	R. Sahni, “The New Duty of Good Faith in Canadian Insolvency Proceedings”, National Creditor Debtor Review, Vol. 35, No. 1, March 2020

Tab 1

2014 ANNREVINSOLV 6

Annual Review of Insolvency Law
Editor: Janis P. Sarra

6 — La bonne foi est une considération de base — Requiring Nothing Less than Good Faith in Insolvency Law Proceedings

La bonne foi est une considération de base — Requiring Nothing Less than Good Faith in Insolvency Law Proceedings

Janis Sarra [*]

I. — Introduction

It is hard to believe that anyone would argue for the corollary of good faith in insolvency proceedings, *i.e.* "bad faith" in the conduct of the creditors and others. Yet, amazingly, there is a critical mass of practitioners who argue strenuously that good faith should not be a requirement imposed on creditors in Canadian insolvency proceedings. It may be that they do not appreciate that the Supreme Court of Canada has already weighed in on this issue, calling good faith one of the baseline considerations of the court when it is determining whether or not to exercise its authority in insolvency proceedings. [2] Based on this reasoning, and a recent Supreme Court of Canada judgment advancing the Canadian law doctrine of good faith in contractual relations, [3] the obligation already exists.

Yet there is anecdotal evidence that suggests that parties in some instances are increasingly failing to deal honestly, candidly, forthrightly or reasonably with other stakeholders in insolvency proceedings; or are acting in a way that undermines the interests of others or of the proceeding itself; and/or are acting contrary to the objectives of the insolvency legislation; all hallmarks of a failure to act in good faith, as recognized by the Supreme Court. [4]

Hence, an important question is whether there should be a statutorily codified obligation to act in good faith enshrined in the *Bankruptcy and Insolvency Act (BIA)* [5] and the *Companies' Creditors Arrangement Act (CCAA)*, [6] as there is in the *Civil Code of Québec (Civil Code)* [7] and the United States *Bankruptcy Code*. [8] This article suggests that such a duty either needs to be codified or the courts need to make clearer to parties that a standard of good faith conduct is a minimum requirement for parties in insolvency proceedings and that the court is prepared to act when conduct is brought to its attention that does not meet this standard. The fact that some creditors already

> [68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of the *CCAA*.

Hence, the Supreme Court's finding that good faith is a baseline consideration in insolvency law arises out of its broad statutory authority, and the court can consider the good faith actions of all parties to a *CCAA* and *BIA* proceeding. As the Court held, the court should assess whether the order sought *and the means it employs* advance the policy objectives and remedial purpose of the *CCAA*, which is to avoid the social and economic losses resulting from liquidation of an insolvent company. [19] The Court observes that the chances for successful reorganizations are enhanced where all stakeholders are treated as advantageously and fairly as the circumstances permit. [20]

This broad authority clearly mandates Canadian courts to assess the good faith conduct of the parties in insolvency proceedings; yet there are only rare instances in which such an assessment has been undertaken. There are numerous possible reasons. First, without an express requirement, non-repeat [21] and vulnerable creditors may be unaware that counter-parties to the proceedings have such obligations; thus, the lack of transparency about such an obligation may encourage certain behaviours in the negotiations for a workout, a part of the proceeding that the court does not see or hear about unless an express issue is brought before it.

Second, the vast majority of participants may be assuming good faith on the part of all participants, and a lack of good faith may be difficult to detect unless it is suspected and evidence of it sought. Even then, it may be very difficult to ascertain and demonstrate, which would be a prerequisite to court intervention to censure reprehensible conduct.

Third, some parties lack the resources to bring complaints about parties failing to act in good faith. Insolvency proceedings, particularly under the *CCAA*, are already very expensive, and most creditors that are likely to be at the receiving end of conduct that fails to fulfill the good faith obligation are often at the vulnerable end of the spectrum of creditor power. Courts must be alert to this risk in their determination of issues. Whatever the reasons for the rarity of good faith complaints, parties have received a wake-up call in a recent Supreme Court decision.

In November 2014, the Supreme Court of Canadain *Bhasin v Hrynew* held that good faith is an organizing principle in Canadian commercial relations. [22] It held that it is appropriate to recognize a general organizing principle of good faith, which is a common law duty that requires parties to be honest in their dealings with one another; and that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. The Supreme Court held that good faith, as a basic level of honest conduct, is necessary to the proper functioning of commerce. To quote Cromwell J writing for a unanimous Court:

> [32] The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze": Ontario Law Reform Commission ("OLRC"), *Report on Amendment of the Law of Contract* (1987), at p. 169. This approach is out of step with the civil law of Québec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties.
>
> [33] In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.
>
> [34] In my view, taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

The Supreme Court noted that the doctrine of good faith traces its history to Roman law and found acceptance in earlier English contract law, the courts finding that in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith.[23] However, the Court noted that such broad pronouncements were restricted over the years to specific types of contracts and relationships, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts.[24]

The Supreme Court further held:

> [60] Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element

of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties ...

[63] The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

[64] As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, 1994 CanLII 85 (SCC); [1994] 2 S.C.R. 229 at p. 249; *R. v. Hart*, 2014 SCC 52 (CanLII), [2014] 2 S.C.R. 544, at para. 124; R. M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., The Philosophy of Law (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way ...

[65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

[66] This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs. [25]

As noted in the excerpt above, the Court held that, unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first. It also made clear that the existing doctrinal requirements of candidness, honesty, forthrightness and reasonableness that are necessary to good faith are not a closed list.

The Court in *Bhasin v Hrynew* recognized that there are limits to good faith as an organizing principle:

> [69] The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at §1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 A.B.L.R. 87.
>
> [70] The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 (CanLII), [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 (CanLII), [2002] 2 S.C.R. 601, at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.
>
> [71] Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

> [72] ... The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.
>
> [73] In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith.
>
> . . . . .
>
> [80] Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith ...

The Supreme Court of Canada summarized the principles as follows: (1) there is a general organizing principle of good faith that underlies many facets of contract law; (2) in general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed, which gives effect to aspects of that principle in particular types of situations and relationships; and (3) it is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations. [26]

Although decided in a non-insolvency context, the Supreme Court's reasoning in *Bhasin v Hrynew* regarding a general organizing principle of good faith has direct application to insolvency matters. Parties to insolvency proceedings should act honestly, candidly and reasonably and not capriciously or arbitrarily. [27] Parties must not lie or otherwise knowingly mislead each other about matters related to the insolvency proceeding. Moreover, stakeholders in insolvency proceedings should have appropriate regard for the legitimate interests of the other creditors and stakeholders, "appropriate regard" requiring that, while self-interest in pursuing their claims is valid, the parties should not seek to undermine the interests of others in bad faith. [28]

- Just as "come back orders" are aimed at encouraging parties with concerns about the initial order under the *CCAA* to come before the court, model initial orders could contain a provision that expressly reminds parties of their obligation to act in good faith in the proceedings, and encourages parties who are concerned about compliance with this standard to come before the court.

- Good faith should generally be a process obligation, but the court may have recourse to assessing the substantive positions of parties in assessing their good faith conduct.

- The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously or arbitrarily; [143] or where they lie or otherwise knowingly mislead each other about matters related to the insolvency proceeding. [144]

There also needs to be an articulation of principles that the court will apply in enforcing the obligation to act in good faith. For example, will the lack of good faith by a debt purchaser result in an order eliminating its voting rights, as occurs under the US *Bankruptcy Code*? These questions are difficult, but necessary to answer. There need to be meaningful remedies to bad faith conduct, the court weighing the equities in all the circumstances, and it may be that codification of the good faith standard is necessary if the court is to exercise its authority to grant meaningful remedies. While the majority of stakeholders act with good faith in insolvency proceedings, the current deterioration in conduct by some parties may be as a result of there being no downside risk. Meaningful remedies address those situations where the conduct of parties is not in good faith, and should act as both "carrot" and "stick" in guiding parties in their workout discussions and their positions before the court.

In summary, the requirement of good faith conduct is part of the existing common law and civil law; insolvency is not some special situation in which different standards of commercial conduct should apply, and really, the question is whether to incorporate it into the statutes or rely on the courts' exercise of their authority. With the increasing number of creditors and financiers from outside Canada, it argues for creating an express requirement that parties act in good faith enshrined in the *CCAA* and *BIA*, as such creditors may interpret the absence of a statutory provision as a signal that a different standard applies.

Footnotes

* Dr Janis P Sarra, Presidential Distinguished Professor, University of British Columbia and Professor of Law, UBC Law. My sincere thank you to the reviewers who provided very helpful comments on the draft of this article.

2 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379 [*Century Services*].

3 *Bhasin v Hrynew*, 2014 SCC 71.

4 The “anecdotal evidence” comes from interviews with some insolvency professionals and parties to proceedings, but no one was prepared to go on record for purposes of this article, which in itself is indicative of the need for a candid public policy discussion.

5 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended *(BIA)*.

6 *Companies' Creditors Arrangement Act*, RSC 1985 c C-36, as amended *(CCAA)*.

7 *Civil Code of Québec*, SQ 1991, c 64. Technically, the *Civil Code* is not a statute; it was adopted in a statute by the National Assembly, but comprises a body of rules laying down the *jus commune*, and is considered the foundation of all other laws: *Civil Code of Québec*, preliminary provisions.

8 United States *Bankruptcy Code*, 11 USC, as amended.

9 See *supra* note 3. One US practitioner who has appeared recently in two Canadian proceedings observed that he was accustomed to the good faith obligation under the US *Bankruptcy Code*, but was unaware that creditors had any such obligation under Canadian legislation.

10 *CCAA*, ss. 11.02(3) and 33(3); *BIA*, ss. 50(12), 50.4(9), 50.4(11) and 65.12(2).

11 *CCAA*, ss. 11.02(3). See also *Century Services*, *supra* note 1 at para 69.

12 *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560.

13 *Ibid.* at 46.

14 See for example, *Canada Labour Code*, RSC 1985, c L-2 and Ontario *Labour Relations Act, 1995*, SO 1995, c 1.

15 See for example, *BIA* ss. 50(9) and 50.4(5); *CCAA* s. 23(2). See also, *Re Braich* (2003), 2 CBR (5th) 75 (BCSC [In Chambers]); *Re Hover* (2000), 21 CBR (4th) 263 (QB); *Re Katz* (1991), 6 CBR (3d) 211 (Ont Bktcy).

16 *Century Services*, *supra* note 1.

17 *Civil Code*, *supra* note 6, articles 6, 7 and 1375. These provisions are discussed in greater detail in part III of this article.

18 *Century Services*, *supra* note 1 at para 70.

19 *Ibid.*

20 *Ibid.* at para 70.

21 By “non-repeat” creditors, I mean smaller, less sophisticated creditors that are not repeat players in the Canadian insolvency law regime.

22 *Bhasin v Hrynew*, *supra* note 2.

23 *Ibid.* at para 35, citing Lord Kenyon in *Mellish v Motteux* (1792), Peake 156, 170 ER 113 (KB) at 157. The Court also held: "For example, Lord Northington wrote in *Aleyn v Belchier* (1758), 1 Eden 132, 28 ER 634, at 138, cited in *Mills v Mills* (1938), 60 CLR 150 (HCA), at 185, that '[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void.' ... In *Carter v Boehm* (1766), 3 Burr 1905, 97 ER 1162, at 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts: see also *Herbert v Mercantile Fire Ins Co* (1878), 43 UCQB 384 (Ont); R Powell, "Good Faith in Contracts" (1956), 9 *Curr Legal Probs* 16."

24 *Bhasin v Hrynew*, *ibid.* at para 36.

25 *Ibid.* at paras 60-66.

26 *Ibid.* at para 93.

27 *Ibid.* at para 66.

28 *Ibid.* at paras 63-65.

29 Oxford Dictionary, 2014, online: http://www.oxforddictionaries.-com/us/definition/american_english/good-faith?q=good+faith&-searchDictCode=all.

30 *Black's Law Dictionary*, 5 th ed (Minn: West Publishing) at 623.

31 *Ibid.* at 127.

32 Claire Moore Dickerson, "From Behind the Looking Glass: Good Faith, Fiduciary Duty and Permitted Harm", 1995 22 *Fla St U L Rev* 955.

33 *Ibid.*

34 Claire Moore Dickerson, "Cycles and Pendulums: Good Faith, Norms, and the Commons", 1997 54 *Wash & Lee L Rev* 399.

35 For another example of good faith in performance, see the recent judgment in *SCM Insurance Services Inc v Medisys Corporation Health LP*, 2014 ONSC 2632, which in the context of an agreement to right of first negotiation, the Court held that there was an obligation to negotiate in good faith, good faith referring to refraining from acting in a manner that would have the result that the plaintiffs did not have a reasonable opportunity to acquire the business. On the facts, the Court found no violation of good faith.

36 *Century Services*, *supra* note 1 at para 70.

37 *Civil Code of Québec*, *supra* note 6.

38 *Ibid.*, preliminary provision.

39 Québec *Charter of human rights and freedoms*, SQ c C-12.

40 *Civil Code of Québec*, *supra* note 6, preliminary provision.

41 *Ibid*, see arts. 6, 7 and 1375. See also the observations of the Supreme Court of Canada in *Bhasin v Hrynew*, *supra*, note 2 at para 83; and C MMélanges, *Enquête de justice et d'équité*, ed Yvon Blais, 2003, at 497.

Tab 2

2019 ANNREVINSOLV 16

Annual Review of Insolvency Law
Editor: Janis P. Sarra

16 — The New Duty of Good Faith and How It Applies in Insolvency Proceedings

The New Duty of Good Faith and How It Applies in Insolvency Proceedings

Jules A Monteyne [*]

I. — INTRODUCTION

On 8 April 2019, Bill C-97 received First Reading, implementing many of the promised legislative changes in the budget announcement of March 2019. [1] Bill C-97, which received Royal Assent on 21 June 2019, contains provisions that could result in some major changes to the insolvency framework in Canada, including changes to the *Bankruptcy and Insolvency Act* (*BIA*), [2] the *Companies' Creditors Arrangement Act* (*CCAA*), [3] the *Canada Business Corporation Act* (*CBCA*), [4] and the *Pension Benefits Standards Act* (*PBSA*). [5]

With these changes, the Federal Government provided the first substantive overhaul of Canada's two main insolvency regimes, the *BIA* and *CCAA*, in nearly a decade. One of the more notable changes in this overhaul is a potentially significant policy makeover with the addition of the duty of all "interested persons" to act in *good faith* in proceedings under those regimes.

II. — NEW LEGISLATIVE PROVISIONS

Sections 4.2 of the *BIA* and 18.6 of the *CCAA* provide the identical good faith requirement, as follows:

> Duty of Good Faith
>
> **Good faith**
>
> **4.2(1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith -- powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.
>
> ...
>
> Duty of Good Faith
>
> **Good faith**
>
> **18.6(1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith -- powers of court**

Honest, reasonable, and fair behaviour on the part of all parties, while limiting the individual successes, can potentially achieve the best results for everyone. A broad and flexible power to punish bad faith in these contexts, therefore, achieves the policy goals of the legislative change.

Based on this analysis, a broad definition for a duty of good faith in insolvency proceedings could be a requirement to take timely actions, honestly and fairly.

V. — APPLICATION

If there are real considerations of good faith, and real consequences for failing that duty, then the duty, as defined above, has the ability to effect change in the practice of insolvency proceedings. A few basic scenarios provide examples of areas that could be subject to significant scrutiny.

1. — The Late Entrant

A late entrant is a common scenario in large insolvencies. It is the eve of a distribution order or a comeback motion. Parties have spent weeks negotiating compromises on their priority claims in order to avoid litigation and the depletion of an insolvent estate. Everyone has left something on the table with the understanding that if they do not, then everyone could be left with nothing.

Enter a non-participant to the previous negotiations with their own priority claim, claiming that they only just became aware of the insolvency proceedings. They draw a line in the sand, claiming that they are not willing to give up a cent of their priority. The other participants have all shown their hands at this point, and what they are willing to give up. While giving the late entrant an upper hand, it turns the entire proceeding on its head at a cost to everyone.

Do the late entrant's actions meet the requirements of good faith? This is obviously a fact-driven inquiry, but timeliness is most likely a factor.

Depending on the stage of the insolvency and the level of media coverage, there could definitely be questions of honesty with regards to their position that they were not previously aware of the insolvency proceedings. As well, the reasonable expectations of the other parties are that participants with significant priority interests would be involved from the outset. Finally, the collective loss caused by the late entrant could favour a finding of a breach of the duty of good faith.

Does the addition of a good faith requirement place greater scrutiny on participants using this tactic in insolvency proceedings?

2. — The Smoke and Mirrors Priority

The *BIA* and *CCAA* are complex statutes with many priorities arising, both from within and from other statutes. Many of these statutory priorities remain in a state of uncertainty, either as a result of conflicting decisions in different jurisdictions or as a result of a general lack of case law.[38] When an estate is liquidating, funds spent determining these priorities in court are funds that would otherwise be available for distribution. Parties are, therefore, incentivized to settle.

These areas of uncertainty become especially problematic when estates are significantly underfunded, and funds are so low that significant court battles could deplete the remainder of the estate. With a game of all-or-nothing, parties are even more driven to settle these uncertainties versus roll the dice on the courts. Parties resort to posturing with sometimes novel or untested statutory priorities. As a result, the entire basis of their claim could be the significant cost of litigation depleting the values remaining in the estate. This can force other parties to settle with frivolous claimants solely on the threat of the depleted estate.

Innovative priority claims can be both a timely and honest use of the procedure, but abuse of process as a result of asserting unsubstantiated priority claims can, in and of itself, constitute bad faith or, at least, a lack of good faith. Other parties may be playing within the rules of the insolvency legislation but are subject to this form of litigious blackmail. It also can hold hostage the collective gains to be made by other parties in order to create an individual gain by the party using the tactic.

Is this strategy contrary to the new duty of good faith? Given the open-ended nature of "any order that [the court] considers appropriate in the circumstances", is there a sufficient deterrent that the court could order to discourage parties from using the threat of estate depletion when other parties face this alternative?

VI. — CONCLUSION

Insolvency proceedings are some of the most complex proceedings in the modern commercial litigation context. They involve willing and sophisticated participants, like professional trustees and other specialized practitioners. They also involve unwilling participants, like employees, retirees, and customers of struggling companies along with sophisticated lenders financing debt using tools designed to guarantee the return of their investment. As a result, there is an infinite number of situations in which the good faith of participants could be challenged.

Given this complexity and the potential to take advantage of these limited resource and high stakes situations, the Federal Government has determined that a statutory duty of good faith is beneficial overall to the participants in these proceedings.

As determined above, by summarizing how good faith has been interpreted in other areas of law, a sensible interpretation is the requirement to take timely actions, honestly and fairly.

Footnotes

* Jules Monteyne is an associate in the Restructuring & Insolvency group at Blake, Cassels & Graydon LLP. At the time of writing, he was an associate in the Pension & Benefits and Bankruptcy & Restructuring groups at Koskie Minsky LLP. The author wishes to thank Adriana Zichy and Rebecca Meharchand for their assistance in the preparation of this article.

1 Bill C-97, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019) [Bill C-97].

2 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

3 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

4 *Canada Business Corporation Act*, RSC 1985, c C-44.

5 *Pension Benefits Standards Act,* RSC 1985, c 32 (2nd Supp).

6 Bill C-97, *supra* note 1, cl 133 and 140.

7 Section 11.02(3)(b) of the *CCAA* imposes a good faith requirement on applicants (e.g. the insolvent company) seeking a stay extension, but this is limited to a single party in specific circumstances. In any case, the meaning of good faith in this context has received limited treatment. In addition, good faith arises in the context of a "purchaser in good faith for valuable consideration" from an individual on the brink of insolvency (see *Clarkson Co v Tony Costakos Paint Contractor Ltd* (1984), 27 BLR 1, 1984 CarswellOnt 101 (Ont SC), and this definition seems to focus on the *bona fides* of the purchase.

8 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 BCLR (5th) 1, 72 CBR (5th) 170, 326 DLR (4th) 577, [2011] 2 WWR 383, 296 BCAC 1, 2011 DTC 5006 (Eng), [2010] GSTC 186, 2011 GTC 2006 (Eng), 409 NR 201, 503 WAC 1, [2010] SCJ No 60 (SCC) [*Century Services*].

9 Janis P Sarra, "La bonne foi est un consideration de base -- Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", in Janis P Sarra and the Honourable Barbara E Romaine, eds, *Annual Review of Insolvency Law 2014*, (Toronto: Carswell 2015) at 145 [Sarra].

10 *Bhasin v Hrynew*, 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046, 2014 CarswellAlta 2047, [2014] 3 SCR 494, 584 AR 6, 4 Alta LR (6th) 219, 27 BLR (5th) 1, 20 CCEL (4th) 1, 379 DLR (4th) 385, [2014] 11 WWR 641, 464 NR 254, 623 WAC 6, [2014] SCJ No 71 (SCC) [*Bhasin*].

11 *Sarra*, *supra* note 9 at 182.

12 For a detailed overview on the duty of good faith as previously owed by particular stakeholders in insolvency, see Linc A Rogers, David Sierardzki & Matthew Kanter, "What does "Good Faith" Mean in Insolvency Proceedings", (2015) 4 *Insolvency Institute of Canada* 55.

13 *Arrangement relatif à 9354-9186 Quebec inc (Bluberi Gaming Technologies Inc)*, 2019 QCCA 171, 2019 CarswellQue 94, EYB 2019-306890 (CA Que), leave to appeal allowed 2019 CarswellQue 7047, 2019 CarswellQue 7048 (SCC).

14 See Halsbury's Laws of Canada (online), *Contracts*, "Interpretation of Contracts: Good Faith and Contractual Interpretation" at HCO-119; CED 4th (online), *Employment (Western),* "Common Law and Contracts of Employment: Common Law of Employment: Elements of Employment Relationship: Duty of Good Faith" (II.1.(c).(0.i)) at §168.1; Halsbury's Laws of Canada (online), *Insurance (2019 Reissue)*, "Payment of Insurance Proceeds: Duties of Insurer: Good Faith Response to Claims" at HIN-80; Halsbury's Laws of Canada (online), *Patents, Trade Secrets and Industrial Designs (2016 Reissue)*, "Patents of Invention: Application for Patent: Objection by Patent Examiner: Prosecution of Application" at HPT-108; Halsbury's Laws of Canada (online), *Pensions (2015 Reissue),* "Administration of Pension Plans: Duties of the Administrator: Other Common Law Duties: Duty of Good Faith" at HPE-282.

15 *Gateway Realty Ltd v Arton Holdings Ltd* (1991), 106 NSR (2d) 180, 1991 CarswellNS 320, 288 APR 180, [1991] NSJ No 362 (NSTD), affirmed 1992 NSCA 70, 1992 CarswellNS 518, 112 NSR (2d) 180, 307 APR 180, [1992] NSJ No 175 (NSCA) at para 39.

16 *Ibid* at para 61, referencing The American Law Institute, *The American Restatement of the Law Seconds Contract*, 2nd ed of The American Law Institute, Washington, DC, 17 May 1979 (St. Paul, Minn.: American Law Publishers 1981) at 100.

17 *Bhasin, supra* note 10.

18 *Ibid* at para 35, referencing *Mellish v Motteux* (1792), Peake 156, 170 ER 113 (Eng KB) at 157.

19 *Ibid* at para 66.

20 *Ibid* at para 48, referencing JD McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 865-66 [McCamus].

21 *Bhasin*, *supra* note 10 at para 47, referencing McCamus, *supra* note 20 at 840-856.

22 *Dynamic Transport Ltd v OK Detailing Ltd*, [1978] 2 SCR 1072, 1978 CarswellAlta 62, 1978 CarswellAlta 298, 9 AR 308, 6 Alta LR (2d) 156, 85 DLR (3d) 19, 4 RPR 208, 20 NR 500, [1978] SCJ No 52 (SCC).

23 *Mitsui & Co (Canada) Ltd v Royal Bank*, [1995] 2 SCR 187, 1995 CarswellNS 59, 1995 CarswellNS 84, EYB 1995-68607, 142 NSR (2d) 1, 32 CBR (3d) 1, 123 DLR (4th) 449, 407 APR 1, 180 NR 161 (SCC).

24 *Freedman v Mason*, [1958] SCR 483, 1958 CarswellOnt 73, 14 DLR (2d) 529 (SCC); *Black's Law Dictionary Free Online*, 2nd ed (2005), *sub verbo* "bar", defines a "bar of dower" as "a provision...which has the effect of defeating or cutting off the dower-rights which the wife would otherwise become entitled to in the particular land".

25 *Ibid* at 487.

26 *702535 Ontario Inc v Non-Marine Underwriters, Lloyd's London, England*, [2000] OJ No 866, 2000 CarswellOnt 904, 184 DLR (4th) 687, [2000] ILR I-3826, 130 OAC 373, 107 OTC 396 (Ont CA), leave to appeal refused 2000 CarswellOnt 4335, 2000 CarswellOnt 4336, 264 NR 400 (note), 145 OAC 400 (note), [2000] SCCA No 258 (SCC) at paras 28-29.

27 *Whiten v Pilot Insurance Co*, 2002 SCC 18, 2002 CSC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, REJB 2002-28036, [2002] 1 SCR 595, 58 OR (3d) 480 (note), 20 BLR (3d) 165, 35 CCLI (3d) 1, 209 DLR (4th) 257, [2002] ILR I-4048, 283 NR 1, 156 OAC 201, [2002] SCJ No 19 (SCC) at para 129.

28 *Ibid* at para 83.

29 *Patent Act*, RSC 1985, c P-5, s 73.

30 *GD Searle & Co v Novopharm Ltd*, 2007 FC 81, 2007 CF 81, 2007 CarswellNat 202, 2007 CarswellNat 2324, [2008] 1 FCR 477, 296 FTR 254 (Eng), 56 CPR (4th) 1, [2007] FCJ No 120 (FC), reversed (2007), 2007 CAF 173, 2007 FCA 173, 2007 CarswellNat 3019, 2007 CarswellNat 993, [2008] 1 FCR 529, 58 CPR (4th) 1, 281 DLR (4th) 207, 361 NR 290, [2007] FCJ No 625 (FCA), leave to appeal refused 2007 CarswellNat 3623, 2007 CarswellNat 3624, 381 NR 398 (note), [2007] SCCA No 340 (SCC) at para 73.

31 US *Bankruptcy Code*, §1126 and §1129; for an example of the shifting duty to creditors in the "zone of insolvency", see *Wasserman v Halperin et al* (*re: The Classica Group)*, No 04-19875 (DHS), 2006 Bankr LEXIS 2599, n.7; for an example of the duty remaining static to the corporation and its shareholders, see *North American Catholic Educational Programming Foundation Inc v Gheewalla*, 930 A2d 92, 101 (Del Supr 2007).

32 *In re USDigital, Inc*, (2011), 443 BR 22 at paras 19-21.

33 *In re Walt Disney Co Derivative Litigation*, 906 A2d 27, 67 (Del 2006) at para 30.

34 *Installer Services (Hutt Valley) Ltd v Colson*, [2019] NZHC 210 at paras 97-102.

35 *Kapoor v National Westminster Bank plc and another*, [2012] 1 All ER 1201 at paras 51, 80.

36 *Scuderi v Morris* (2001), 39 ACSR 592 at para 58.

37 *Burger King Corp v Hungry Jack's Pty Ltd*, [2001] NSWCA 187 at para 616.

38 See for example competing decisions around the pension deemed trust under the Newfoundland and Labrador *Pension Benefits Act,* 1997, SNL1996 CHAPTER P-4.01, in *Arrangement relatif à Bloom Lake General Partner Limited*, 2017 QCCS 4057, 2017 CarswellQue 7483, EYB 2017-284304, 52 CBR (6th) 45, 35 CCPB (2nd) 220 (CS Que), varied 2017 QCCA 1828, 2017 CarswellQue 10159, EYB 2017-287116, 54 CBR (6th) 255, 38 CCPB (2nd) 1 (CA Que), application/notice of appeal 2018 CarswellQue 1574 (SCC), and *Reference re Section 32 of the Pension Benefits Act*, 2018 NLCA 1, 2018 CarswellNfld 7, 38 CCPB (2nd) 13, 419 DLR (4th) 30 (NLCA).

Tab 3

Commercial Insolvency in Canada

Third Edition

Kevin P. McElcheran, LL.B., MCIArb.

Kevin McElcheran
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measured so long as such standards are not unreasonable having regard to the nature of the rights and duties.[206]

¶4.260 Part XI of the BIA does not define the concept of "commercial reasonableness" and does not permit the parties to set their own standards of commercial reasonableness as PPSA legislation does. Accordingly, while PPSA legislation permits an element of "subjectivity" in the test for commercial reasonableness, the BIA imposes an objective standard, giving rise to differing standards under both statutes in respect of personal property. From a practical point of view, the receiver should consider itself to be governed by the higher objective standard. In most cases, under this approach, the receiver should critically examine the standards of reasonableness set out in the security agreement before it concludes that performance to the agreed standard under PPSA legislation will also meet the duties imposed by the BIA.

¶4.261 Section 247 of the BIA imposes a general duty of good faith on a receiver. The standard of "commercial reasonableness" is the standard imposed on secured creditors and receivers under PPSA legislation and is therefore familiar. However, the imposition of the additional duty of "good faith" may bring with it a degree of uncertainty. As is the case in most insolvency situations, the efficient and expeditious realization of secured assets is a top priority. Uncertainty as to what "good faith" requires may paralyze the administration of receiverships and undermine the efficient realization of the debtor's assets.

(iii) Wage Earner Protection Program Act *Duties*

¶4.262 The WEPPA imposes significant, some would say onerous, duties on "receivers" (using the same comprehensive definition of "receiver" used in Part XI of the BIA) and on trustees. The protections for employees under WEPPA effectively work like insurance. The unpaid wage claims of employees are paid by the government, not directly by the estate, and the government (as "insurer") is subrogated to the priority position of the employees under sections 81.3 and 81.4 of the BIA. Notwithstanding that the government is responsible for the payment of the employee benefits provided by WEPPA, the government is not responsible for generating the data on which claims are determined. Rather, the system relies on imposing reporting obligations on receivers and trustees appointed in respect of employers.

¶4.263 Section 21 of WEPPA requires each trustee or receiver to identify each employee who is owed eligible wages, determine the amount of wages

[206] BIA, s. 59(4).

Tab 4

National Creditor Debtor Review

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• THE NEW DUTY OF GOOD FAITH IN CANADIAN INSOLVENCY PROCEEDINGS •

Raj Sahni, Partner, Bennett Jones LLP*

Canada's two main insolvency and restructuring statutes, the Bankruptcy and Insolvency Act ("BIA") and the Companies' Creditors Arrangement Act ("CCAA") were recently amended to include a new duty of good faith on the part of all "interested persons" involved in an insolvency proceeding. The amendments do not define "good faith" or "interested persons". Although requiring all participants in an insolvency proceeding to act in good faith may be a laudable objective, the statutory amendments are problematic. The amendments do not define what the duty of good faith actually entails while at the same time allow any interested person to complain to the court that the duty has been breached by another interested person. If the court finds that this undefined duty of good faith has been breached, the court is given very broad powers to make any order it considers appropriate in the circumstances. In addition, not defining "interested persons" could be problematic. To date, Canadian courts have been generous in allowing those claiming an "interest" in proceedings, including "social stakeholders"—a constituency with no economic interest in the debtor's estate—to participate in insolvency and restructuring proceedings.[1] This article discusses the new duty of good faith under the BIA and CCAA and considers how the duty might be interpreted, using the U.S. principle of equitable subordination for comparison.

The new duty of good faith has been enacted under sections 4.2 of the BIA and 18.6 of the CCAA, as follows:

> Good faith
>
> 1. Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings
>
> Good faith – powers of court
>
> 2. If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

A duty of good faith in insolvency and restructuring proceedings is not a new concept under Canadian law. Prior to the above-noted amendments, the statutes already mandated a good faith duty for trustees in bankruptcy, receivers and monitors, and the debtor

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company.[2] Moreover, the Supreme Court of Canada has previously recognized good faith as a "baseline consideration"[3] in restructuring proceedings and as a "general organizing principle of the common law of contract".[4] However, an express statutory duty on the part of all participants (including creditors) in an insolvency proceeding is new. In circumstances where restructuring and insolvency proceedings in Canada are already supervised by a court and court-appointed officers (monitors, receivers and trustees) to ensure that the proceedings are conducted in accordance with the law and that restructuring plans are fair and reasonable, it is not clear what benefit is derived from the addition of an undefined duty of good faith on the part of all interested parties to an insolvency proceeding.

A creditor in an insolvency proceeding can be expected to act in its economic self-interest to maximize returns in accordance with its legal rights and priorities, often in competition with other creditors and stakeholders. Combining an undefined statutory duty with a very broad power for a court to "make any order that it considers appropriate in the circumstances" may lead to an increase in disputes between creditors, the debtor(s), and other participants in insolvency proceedings, since an application impugning an interested person's good faith can be brought by any other interested person in the proceedings. Insolvency is often a zero-sum game, where one participant's gain is another participant's loss. Applications alleging bad faith could conceivably be launched out of self-interest by participants clamoring for priority or seeking to discredit the claims of other creditors to maximize their own recoveries or even by "social creditors" who do not have an economic interest in proceedings. This may in turn lead to increased uncertainty and costs to the detriment of all participants in an insolvency proceeding as a participant's intent and good faith (or lack thereof) becomes an issue to be considered by the courts in addition to the legal priorities of its claims.

As there is not yet (at the time of writing this article) any reported jurisprudence interpreting the new good faith requirement under the BIA and CCAA, it is helpful to review some examples where courts have considered creditors' conduct in insolvency and restructuring proceedings in Canada. Such a review will help provide some guidance as to how the duty of good faith might be interpreted and applied. Two relatively recent cases emanating from courts in the Canadian province of Quebec may be informative. In addition to the common law and statute-based legal system used in the rest of Canada, Quebec is the only province with a civil code, based on the French Napoleonic Code. The duty to act in good faith in court supervised proceedings has long been codified under the Quebec Civil law.[5] Therefore, while not previously a formal requirement under Canada's federal insolvency statutes (BIA and CCAA), whether a participant in an insolvency proceeding is acting in good faith is often considered (albeit sometimes informally) in insolvency cases before Quebec courts.

In its March 16, 2018 decision in the *Bluberi Gaming Technologies Inc.* CCAA case,[6] the Quebec Superior Court considered whether the secured creditor (Callidus Capital Corporation ("Callidus")) of the CCAA debtors should be permitted to vote in favour of its own plan of arrangement in respect of the CCAA debtors in circumstances where it was alleged that the secured creditor's plan was being advanced primarily to avoid and obtain releases from claims being pursued against Callidus by the CCAA debtors. While the Court recognized prior case law that confirmed creditors are entitled to vote their claims in "their own economic interests as long as their actions are not unlawful or do not result in substantial injustice",[7] the Court held that Callidus should not be permitted to advance and vote in favour of its proposed plan of arrangement in such circumstances:

> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. Under the present circumstances, this approach is both unfair and unreasonable. […] Callidus' behavior is contrary to the "requirements of appropriateness, good faith, and due diligence [that] are baseline considerations that a court should always bear in mind when exercising CCAA authority." […] In short, the Court finds that Callidus intends to use its vote for an improper purpose and that it should not be allowed to do so.[8]

The *Bluberi* decision was reversed on appeal and the Quebec Court of Appeal noted that Callidus was not acting improperly in seeking a release through the plan of arrangement proposed by it and that "voting rights should not be excluded on supposed 'equitable grounds'."[9] That decision was further appealed to the Supreme Court of Canada, which overturned the Quebec Court of Appeal's decision. The Supreme Court of Canada's reasons have not yet been released as of the date of this article, so it is unknown whether the Supreme Court of Canada considered the "good faith" issue. The Quebec Court of Appeal's stance in *Bluberi*, that creditors are entitled to act in their own self-interest and their voting rights of creditors should not be interfered with on equitable grounds, is in interesting contrast to its earlier stance in the *Uniforêt* case.[10] In *Uniforêt* the Quebec Court of Appeal upheld a Quebec Superior Court decision denying a debentureholder group's motion to vote in a separate class on the basis that it was found to be acting in a self-interested manner:

> [The] Petitioners' motives and good faith are seriously in issue. […] [The] Petitioners persist in obstructing the plan in order to achieve their own ends, without regard to the results on the Company, the creditors, and community as a whole. They obviously have no interest in facilitating the reorganization of the Company but seek to maximize their return at all costs, even if it means liquidation, in which case they too will lose.[11]

The inconsistency between the appellate court decisions in *Bluberi* and *Uniforêt* provide little clarity on how the good faith standard will be interpreted and applied by Canadian courts going forward. Clearly the Quebec Court of Appeal took the motives of the creditors seeking to exercise their voting rights into account in both cases. Still, on the one hand the court held that self-interested conduct by a creditor (proposing a plan of arrangement to seek releases only for itself from claims asserted

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Court File No.: CV-20-00641220-00CL

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