



Supreme Court of Canada Releases A Garbage Decision (Literally) that Advances the Duty of Good Faith in Contracts

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By Noel Courage

The Supreme Court of Canada has waded into a dispute about garbage in [Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District](#)¹. This judgment comes hot on the heels of another case about the duty of good faith in contracts, *Callow v Solllinger* (see our article about *Callow* [here](#)). The newest case considers whether exercise of discretion under a contract is done in good faith, or is a breach of the contractual requirement to act in good faith. The Court provided a practical decision – it held the parties to their contract, permitted reasonable business discretion, and found that there was no breach of contract.

The Duty

The duty to exercise discretion in good faith is a general doctrine of contract law. It operates in every contract. It is not intended to interfere with the objectives of the contracting parties or impose unreasonable duties on them. It does require parties to exercise discretion in accordance with the purposes of their contract.

There is no way to contract out of the good faith implied undertaking that discretionary power will be exercised in good faith, in light of the purposes of the contract.

The Dispute

In this case, the District had a waste removal and disposal contract with Wastech. The contract gave the District absolute discretion to allocate waste to providers. Wastech was not guaranteed a certain amount of waste or income. The District did provide a forecast of all the waste expected to be handled for the following operating year. The parties decided not to include an adjustment clause that would deal with a potential reduction in waste transport to closer landfill sites (i.e. less profitable trips for Wastech).

A dispute arose after Wastech was allocated more of the shorter disposal trips, which caused Wastech to fall well shy of its operating profit target. The District had used its discretion to allocate waste with objectives of maximizing efficiency, preserving remaining site capacity, and operating the system in the most cost-effective manner. This was done in accordance with the District's business objectives. Wastech countered that the contract was a long-term relational agreement dependent upon an element of trust and cooperation in allocating disposal services. Wastech took the dispute to arbitration and asked for compensatory damages.

The Decision – a Good Faith Exercise of Discretion

In this case, the Court had to determine what constraints the contract imposed on the duty to exercise discretion in good faith. The intention of the parties is determined by reference to the contract as a whole, and the court is to give effect to that intention. Metro's exercise of discretion was not unreasonable with regard to the purposes for which the discretion was granted, and was therefore not a breach of the duty. Where discretion is exercised consistent with the purpose of the contract, then it will usually be considered reasonable, and aligned with the bargain the parties chose to put in place. The emphasis is on the parties' own bargain, not what a court sees as fair according to its own view. It does not matter whether the discretion was exercised in a morally opportune or unwise business manner.



An exercise of discretion causing the other party loss of some or even all of the anticipated benefit under the contract will not be a breach unless it can be shown that discretion was exercised in a manner unconnected to the contractual purposes. Courts may find a breach where a party has not exercised its discretion in a way that is connected to the purposes of the contract – for example, if discretion is used in an arbitrary or capricious manner. Exercising discretion in an unreasonable manner not connected to the underlying purposes for which the contract granted discretion, would typically be a breach of the duty to exercise discretion in good faith.

Practical Impact – Best Practices

The judgment is sensible because the District was not required to subvert its own interest in order to accommodate Wastech's business interest. A company should not be at risk of liability if it acts as a reasonable business person and in accordance with the contract.

The parties' mutual intention and agreement, as embodied in the contract, remains paramount. The duty of faith cannot be used after the fact, to create new, unbargained-for rights and obligations. It also cannot alter the express terms of the contract.

A company should bargain to protect itself against foreseeable changes and events. For example, in the present case, the parties declined to negotiate adjustment terms if the waste disposal needs changed. This would have protected the waste company, if it had persisted for such a clause. An alternative approach would be to negotiate minimum annual trips (i.e. revenue). Protecting yourself is street smart. Don't rely on others to exercise their business discretion to help your business.

¹ 2021 SCC 7 (CanLII). There were two written judgments, both agreeing that the appeal should be dismissed. The concurring judgment addressed the standard of review (correctness, under the BC *Arbitration Act*) and additional issues.

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