

GOOD FAITH IN CONTRACTING: A REMINDER THAT IT'S PROCESS THAT MATTERS

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Ever since the Supreme Court of Canada's 2014 decision in *Bhasin v. Hrynew*, the duty of good faith in contracting has been an ever-present and heavily relied upon concept in commercial litigation.

The February 2016 decision in [Mayotte v. Her Majesty in Right of Ontario](#) (2016 ONSC 1233) provides some additional guidance on how that duty works. Most importantly, *Mayotte* is a reminder that a contracting party's good (or bad) faith is determined by evaluating the process by which the contract is reached and carried out, not by the contract's outcome. Put simply, the duty of good faith ensures a certain standard of performance rather than any specific contracting result.

Mayotte involved a class proceeding brought by members of the Private Issuer Network (PIN), a group of private individuals operating Service Ontario "stores" across the province, against the Government of Ontario. The plaintiff PIN members alleged that the Province failed to act in good faith when setting their compensation for completing various transactions, which the Province had unilateral authority to establish under the parties' existing contract.

The plaintiffs argued that their compensation was objectively inadequate given the Province's growing profits from the use of private Service Ontario providers. While the Court agreed that the Province owed the PIN members a duty of good faith in setting their compensation, the Court also made clear that there was no precedent for the duty of good faith being tied to a contracting outcome rather than the contracting process.

Therefore, to prove that the Province failed to meet its duty of good faith, the plaintiffs had to show that the Province acted unreasonably in fixing their compensation. However, the Court found that the Province's compensation decisions driven by a concern about the use of public resources, a consideration which would have been communicated to the plaintiffs. The Court found that although the plaintiffs did not like the end result of the Province's use of the discretion afforded to it under their contract, the Province exercised that discretion in good faith.

While the Court's conclusions in *Mayotte* are not ground-breaking, the decision is a helpful reminder that the duty of good faith in contracting is about process, not outcome. The duty of good faith in contracting is an

evolving principle whose boundaries will continue to be tested and pushed by litigants and their lawyers. As helpful decisions like *Mayotte* appear, McMillan LLP will endeavour to continue to keep you informed.

McMillan LLP's [advocacy and litigation group](#) has extensive experience in litigation contract disputes in a wide variety of contexts. Please don't hesitate to contact us for advice with respect to your specific contractual duties and rights.

by Kyle M Lambert

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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