Good Faith in Contracting – Misrepresentation by Omission
A Commentary on the Court of Appeal Decision in
Canaccord Genuity Corp. v. Pilot

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The plaintiff, Canaccord Genuity Corp., was an investment dealer. As part of the employment contracts entered into with the four defendants, who were agents in its Thunder Bay office, it provided each agent with a transition loan which as to be forgiven at the rate of 20% per annum as long as they remained employed with Canaccord, but the balance was to become due if their employment was terminated.

Canaccord closed its Thunder Bay corporate office in 2012 and demanded repayment of the balance of the loans. The sales agents defended the action, claiming that Canaccord made a misrepresentation by omission by not telling them it already intended to close the Thunder Bay office before they signed their agreements in July and August 2011.

Canaccord brought a successful motion for summary judgment before Justice Victoria R. Chiappetta against two of the agents, Pilot and Colosimo, who then appealed to the Court of Appeal.

The Court of Appeal decision, released Oct. 27, 2015, is reported at 2015 ONCA 716.

It appears that the motions court judge relied at least in part on the "entire agreement" clause in the contract. In dismissing this reason for judgment, the Court of Appeal stated:

> [43] The motion judge held that "[t]here are no factors contracted in the obligation for repayment of the loan, including misrepresentation." To the extent that her comment was an oblique holding that the entire agreement clause in the contract applied, as submitted by the respondent, she erred in making this determination

> without the benefit of a full record, and without any analysis. The interpretation of the entire agreement clause would engage a number of considerations, including evidence from Colosimo as to the degree to which he relied on his relationship with Canaccord continuing beyond one year at the time of the Agreement, evidence from Canaccord regarding its knowledge of Colosimo's reliance and any role it played in creating that reliance, as well as evidence as to industry practice.

Basically, the Court held that an entire agreement clause could not be construed in the abstract, but must be looked at in the context of the entire transaction, and that it was not amenable to being dealt with on a summary judgment motion.

More interesting, though, is the Court's dealing with the issue of misrepresentation by omission.

The court stated,

> [44] Arguably, the fact that the loan was to be forgiven at the rate of 20 percent for each year that Colosimo remained employed with Canaccord is indicative of the expectation of both parties that Colosimo would be employed for longer than just over a year. In *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book Inc., 2010), at p. 366, S.M. Waddams states:
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> > An interesting group of cases has to do with the obligation to stay in business… If A promises to employ B as exclusive agent for 10 years, can A avoid any obligation by ceasing to do business after 6 months? The cases are superficially irreconcilable. In some cases a term is readily implied that the business will continue for the stated period; in others the power to imply such a term is severely denounced. What lies behind such contradictions? The answer is, it is suggested, that a term is implied when the court thinks the implication necessary to avoid an agreement that would be unfair.

The Court noted that the motions court judge relied on three prior cases, (two of which were very similar cases also involving Canaccord) for the proposition that loans made by a brokerage firm to an agent are enforceable irrespective of whether termination of the agent is done in good faith:

> [47] In her reasons for judgment, the motion judge stated that, in coming to her conclusion that there was no genuine issue requiring a trial, she had considered the reasons in *Sammy* and *Beck*, both cases in which Canaccord sought summary judgment for repayment of loans following termination of agency agreements. In *Sammy*, the defendant claimed that Canaccord had lured him into an agency relationship in order to acquire his book of business with the intent of terminating the relationship and keeping the business. In addition to counterclaiming for damages for misrepresentation and unjust enrichment, the defendant contended that the Canaccord's breach of its duty to act in good faith discharged him from repayment of the loan. Perell J. held that even if Canaccord had breached a duty of good faith towards Sammy, Canaccord's loan to him was repayable. In coming to his conclusion, he observed that the case before him was analytically similar to *T.D. Waterhouse v. Little* (2009), 76 C.C.E.L. (3d) 243 (Ont. S.C.), aff'd 2010 ONCA 145, 79 C.C.E.L. (3d) 216. Beck, the other decision the motion judge referred to, also relies on *T.D. Waterhouse*.

The Court of Appeal disagreed with this proposition, saying:

> [49] In my opinion, this court's decision in *T.D. Waterhouse* is not a general statement that loans made by a brokerage firm to an agent are enforceable irrespective of whether termination of the agent is done in good faith. To the contrary, the court left that question open. This court in *T.D. Waterhouse* only held that even if termination in good faith was required, there was no evidence capable of raising a triable issue that the agent's termination was motivated by bad faith. Here, as I have indicated, there is some evidence of a course of conduct by Canaccord that could give rise to that inference.

In any case, these cases predated a more recent Supreme Court of Canada case which has changed the law with respect to good faith in negotiating contracts. The Court set this out as follows:

> [50] In any event, the *T.D. Waterhouse* decision relied on in *Sammy* and *Beck* predates the Supreme Court of Canada's decision in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494. In that case, Cromwell J., on behalf of the Court, decided it was time to take two incremental steps. First, he acknowledged that there is a general organizing principle of good faith in contractual performance; and second, he recognized that there is a general duty to act honestly in the performance of contractual obligations: para. 33. He explained, at para. 73: **"This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract." The duty of good faith is a general doctrine of contract law that imposes a minimum standard of honest contractual performance: para. 74. It is not an implied term and therefore operates regardless of the intentions of the parties and the existence of an entire agreement clause:** para. 72. [*emphasis added*]

The Court also held that the motions court judged erred in holding that the only remedy available for misrepresentation was damages, as recission was also an available remedy.

In the result, summary judgment was set aside and the matter will have to be tried on the merits, if not settled.

In summary then, the Court of Appeal is paying more than lip service to the Supreme Court of Canada decision in *Bhasin v. Hrynew* and parties are going to have to take much more care in their pre-contractual negotiations.

It is interesting that the concept of good faith has for many years been a part of the law of insurance contracts (which are referred to as contracts "*uberrimae fidei*"), which were treated differently from other commercial and consumer contracts. One wonders if the distinction is being blurred and insurance contract case law will become applicable to litigation of more general contracts.