February 24, 2026

Limiting Contractual Liability for Breaching the Duty of Good Faith

By: Jassmine Girgis

Case Commented On: *1401380 Ontario Limited (Wilderness North Air) v Hydro One Remote Communities Inc*, 2025 ONCA 827 (CanLII)

The contractual duty to exercise discretion in good faith applies to every contract, regardless of the parties' intentions; parties cannot exclude the duty altogether. But what if they do not seek to exclude the duty itself, and instead seek only to limit the consequences of breaching it? Is that distinction legally meaningful? And is it permitted?

This post discusses how the duty to perform in good faith endures on both conceptual and practical grounds as long as there is liability for breaching it, even where that liability is contractually limited.

In *1401380 Ontario Limited (Wilderness North Air) v Hydro One Remote Communities Inc*, 2025 ONCA 827 (CanLII), the Ontario Court of Appeal decided that parties may limit the scope of their liability for breach of the duty of good faith, and that doing so does not constitute contracting out of the duty itself.

Facts

On November 25, 2014, Hydro One Remote Communities Inc (Remote), a subsidiary of Hydro One Inc, issued a Request for Proposals (RFP) for fuel delivery to twelve remote communities. This was done to fulfill its mandate under the *Electricity Act, 1998*, SO 1998, c 15, Sch A, which statutorily requires Remote to supply fuel to remote First Nations communities not connected to Ontario's electrical grid (at para 4). The RFP contained a copy of Remote's standard form contract, which included a limitation of liability clause. Three carriers submitted bids: 1401380 Ontario Limited o/a Wilderness North Air (Wilderness), Wasaya Airways LP (Wasaya), and Private Air Inc, c.o.b. as Cargo North. Wasaya and Cargo North are owned by First Nations, meaning some of the First Nations communities stood to benefit by the contract being awarded to one of these carriers.

Remote ended up awarding Wilderness a three-year contract, making it the "Primary Vendor for Air Delivery" for five First Nations communities. Wasaya was not selected as a vendor.

After Remote's decision, several First Nations communities passed Band Council Resolutions (BCR) supporting Wasaya and opposing Wilderness' involvement in delivering fuel. Wasaya also

directed its owner communities to issue BCRs prohibiting carriers other than Wasaya from delivering fuel (at para 10).

When Remote expressed concern to Wilderness that Wilderness might not be able to deliver fuel to the communities, Wilderness assured Remote that delivery would not be an issue, as the airports it used were not located on First Nations land and therefore not subject to the BCRs. Regardless, Remote replaced Wilderness with Wasaya as the primary vendor for most of the communities. This was done despite Wilderness being ready, willing, and able to perform its contractual obligations.

In 2017, Wilderness claimed against Remote for breach of contract and against Wasaya for inducing that breach.

Ontario Superior Court of Justice Decision

In the trial decision, *1401380 Ontario Ltd v Wasaya Airways LP, 14101380 Ontario Ltd v Remotes One Remote Communities*, 2024 ONSC 4701 (*Wilderness* Trial), the trial judge found that Remote had breached the contract in several ways. She found that the contract did allow Remote to cancel purchase orders and use other vendors when necessary, but not to terminate Wilderness' services altogether when Wilderness was ready, willing and able to perform its obligations. For that reason, Remote had breached the contract by terminating Wilderness as the primary vendor for the communities in question. With regard to the duty of good faith, the judge found that Remote had not breached its duty of honest performance, but that it had breached its duty to exercise its discretion in good faith (*Wilderness* Trial at paras 179, 181).

On the limitation of liability clause, which limited Remote's liability to $50,000 for any contractual breach, the judge found that the clause was ambiguous and did not make commercial sense, and that it was not intended to limit liability for the complete removal of Wilderness as primary vendor (*Wilderness* Trial at para 127). For these reasons, she did not apply the clause to limit Remote's liability.

Ontario Court of Appeal Decision

The Ontario Court of Appeal upheld the trial judge's findings of liability but disagreed on the applicability of the limitation of liability clause.

The Court agreed that Remote had breached the obligation to use Wilderness as the vendor of first resort. It also found that the contractual discretion granted to Remote must be interpreted in a manner consistent with its purpose (at para 36).

In this case, the cancellation clause in the contract states as follows:

> (a) The Purchaser shall have the right, which may be exercised at any time, and from time to time, to cancel any undelivered portion of the Work, without any costs, interest, or penalties to the Purchaser…

Interpreting the clause in the way argued by Remote – to give Remote the ability to exercise its discretion to cut Wilderness out of the contract – would be inconsistent with the purpose of the clause, which is to allow Remote to do what was necessary to provide the services. Remote had the discretion to reduce Wilderness' orders and to bring in other carriers, if necessary, but not to completely cancel the contract (at para 36).

The Court of Appeal found the limitation of liability clause to be clear on its face, and not ambiguous, as the trial judge had found (at para 43). It therefore found the clause applicable to the damages award, including damages for breaching the duty of good faith. As for limiting damages for breach of good faith, the Court said that parties cannot exclude the duty of good faith, but they are permitted to limit the scope of liability for breach of the duty (at para 47). The limitation of liability clause here neither excluded liability, which would have been tantamount to contracting out of the duty itself, nor compromised the operation of the "minimum core" of the duty (at para 48, quoting *Bhasin v Hrynew*, 2014 SCC 71 (CanLII) (*Bhasin*) at para 77).

Commentary

The Duty to Exercise Discretion in Good Faith

In *Bhasin*, the Supreme Court of Canada (SCC) recognised that contractual performance is governed by the organising principle of good faith. The duty requires that parties perform their contractual duties "honestly and reasonably and not capriciously or arbitrarily" (*Bhasin* at para 63) and have "appropriate regard to the legitimate contractual interests of the contracting partner" (*Bhasin* at para 65).

This principle applies in four situations, one of which is applicable to the scenario in this decision: where one contracting party has discretionary powers under the contract (*Bhasin* at para 47). This situation was developed in a later case, *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 45 (CanLII) (*Wastech*), where the issue centered around the duty to exercise contractual discretion in good faith. There, the SCC had to determine the constraints imposed on the holder of this discretion (*Wastech* at para 59).

In *Wastech*, the SCC articulated several factors required in the exercise of discretion in good faith, including that parties exercise their discretion in a manner consistent with the purposes for which it was granted in the contract (*Wastech* at para 63). This does not mean that the discretion cannot be exercised in a way that is disadvantageous to the other contracting party, or that is contrary to their interest, but it does mean that this must be a choice "within the range permitted by the purpose of the clause" (*Wastech* at para 106).

Returning to the case involving Wilderness and Remote, the Court of Appeal found that the purpose of the provision in this contract was to ensure the reliable and safe delivery of fuel to remote First Nations communities. To fulfill that purpose, Remote had the discretion to cancel some purchase orders to address changing fuel requirements, but that discretion did not extend to replacing Wilderness entirely, as that would be inconsistent with that clause (at paras 35, 36).

Limitation of Liability and Damages for Breach of the Duty of Good Faith

In recognising the organising principle of good faith, the SCC also made it clear that parties cannot contract out of it. In *Wastech*, the SCC held that the duty to exercise contractual discretion in good faith, like the duty of honest performance – two duties it placed on the "same footing" (*Wastech* at para 94)) - "is not an implied term, but a general doctrine of contract law that operates irrespective of the intentions of the parties… [duties that are] obligatory in all contracts" (*Wastech* at para 94). And courts have struck down clauses that purport to exclude liability for breach of this duty (see for example, *Berscheid v Government of Manitoba*, 2022 MBCA 12 (CanLII) at para 56 and *Canlanka Ventures Ltd v Capital Direct Lending Corp*, 2021 ABCA 115 (CanLII) at paras 14, 27-28).

At the same time, the SCC has emphasised that these duties are not static across all contracts, but that the contracting parties may set out what the duties entail. In *Bhasin*, the SCC said that parties may "influenc[e] the scope of honest performance in a particular context" and "relax the requirements of the doctrine so long as they respect its minimum core requirements" (*Bhasin* at para 77). Similarly, in *Wastech*, the Court explained that the "content of the duty is guided by the will of the parties as expressed in their contract" (*Wastech* at paras 95, 93).

The issue in this decision raises an interesting conceptual question: on what basis can parties limit the consequences of breaching a duty they cannot contract out of? In *Bhasin*, the Court was clearly referring to the ability of parties to vary the content, the substance, of the duty. For example, in discussing the duty of honesty, it distinguished between longer term, relational contracts and transactional exchanges (*Bhasin* at para 60). But was the Court also referring to limits on liability for breaching this duty, which is not the same as varying its substance? In other words, does the language in *Bhasin* capture both, such that limiting liability also falls within "relaxing the requirements" of the doctrine. Or, on a stricter interpretation, does such a limitation effectively amount to an impermissible exclusion of the duty?

Although the SCC has not directly addressed this question, the language in *Bhasin* and *Wastech* is arguably broad enough to encompass both substantive and remedial variation. "Relaxing the requirements" of the duty while preserving its "minimum core" could be understood to encompass not only variation of the substance, but also limitations on its liability for breach. The SCC's analogy of *Bhasin* to § 1-302(b) of the Uniform Commercial Code (2012), which permits parties to "determine the standards by which the performance of these obligations are to be measured" (*Bhasin* at para 77), is likewise open to either interpretation.

The relevant language in the SCC's decisions should also be interpreted in light of an important distinction: the duty of good faith continues to exist and to govern the parties' conduct even where liability for its breach is limited by the contract. The SCC was concerned with excluding the duty in substance, which would effectively occur if liability for its breach were excluded. The same result does not arise from limiting liability.

Of course, an overly onerous limitation of liability clause would raise different concerns, though these would likely be addressed by the framework governing exclusion clauses more generally, as

set out in *Tercon Contracts Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII).

This post may be cited as: Jassmine Girgis, "Limiting Contractual Liability for Breaching the Duty of Good Faith" (24 February 2026), online: ABlawg, http://ablawg.ca/wp-content/uploads/2026/02/ Blog_JG_ContractualDuty.pdf