

An obligation to negotiate a lease in good faith?

Effective negotiation is an integral part of coming to terms on all types of agreements. Depending on the negotiating power of the parties, it typically involves some give and take from both sides to reach an agreement that is mutually acceptable and enforceable. However, in conducting negotiations, what are the obligations of each party? There are some key differences and some recent case law that is important to be aware of. This quiz will test your knowledge.



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- 1** A lease provides that the landlord is responsible for shovelling and removing all snow from a shopping centre. Does the landlord have to perform this obligation in good faith?

(A) Yes
(B) No
(C) It depends
- 2** Outside of a strictly leasing context, in situations where a contract is not yet in place, are there instances where parties are required to negotiate a contract in good faith?

(A) Yes
(B) No
(C) It depends
- 3** In negotiating a lease, is a landlord required to tell a prospective tenant whether it has received any offers for the premises and provide details of those offers? For example, is a landlord required to mention that it has received no offers in the last six months and that the last one it did receive offered rent of \$10 per square foot while the landlord was asking \$30 per square foot?

(A) Yes
(B) No
(C) Maybe
- 4** The Supreme Court of Canada's recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*, means it will be easier to appeal a trial judge's interpretation of a contract.

(A) True
(B) False

1 (A) Yes. In *Bhasin v. Hrynew*, the Supreme Court of Canada recently established a general common law duty to perform contractual obligations honestly based on the general organizing principle of good faith in contractual performance. As a result, in the performance of all contracts (including leases) parties must be honest, candid, and not knowingly mislead each other in regards to their contractual obligations. A breach of the duty of contractual honesty supports a damages claim. As a manifestation of the general organizing principle of good faith, the duty of contractual honesty is not a rigid rule, but rather a concept that is contextually understood. While this duty operates independent of the intentions of the parties and cannot be excluded by contract, parties can determine its scope and content. However, the duty does not require one party to subordinate their interests to the other party.

2 (A) Yes. Some special relationships have been found to give rise to a duty to negotiate in good faith. These include: employment contracts, relationships between franchisor and franchisee or insurer and insured, fiduciary relationships contracts, classic tendering situations, and specific cases relating to some requests for proposal.

3 (C) Maybe. The Ontario Superior Court in *SCM Insurance Services v. Medisys Corporate Health LP*, recently found that despite there not being an express covenant between the parties to negotiate in good faith, the court implied such an obligation as “a necessary corollary” due to one party’s waiver of its restrictive covenant on the condition that it have the first opportunity to negotiate for the purchase of a business that another party was buying. In the

court’s view, the parties must have intended that the obligation to offer to sell the business from one party to another be an enforceable obligation. That being said, while the scope of this obligation required the seller to act reasonably in negotiating a possible sale, it did not obligate the seller to agree to whatever price or other terms the buyer considered reasonable. The court held that no breach had occurred on the basis that the seller’s position with respect to the terms of the sale was not unreasonable. However, based on this case it could be argued, for example, that despite an offer to lease not stating that the parties are required to negotiate the subsequent lease in good faith, doing so is nevertheless a “necessary corollary” of signing the offer.

4 (B) False. In *Sattva*, the Supreme Court of Canada made clear that in cases of contractual interpretation (such as leases), deference is owed to the trial judge’s decision. Practically speaking, this means that if a judge determines that the facts of a particular situation give rise to a duty to negotiate in good faith, barring a particularly egregious error on the judge’s part, this determination generally cannot be appealed to a higher court. While this has the benefit of providing greater certainty at an earlier stage in the legal proceedings, it will be of little comfort to the party who is found to have not negotiated in good faith and has no avenue to appeal that outcome.

YOUR RANKING?

- **One correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three correct:** *very well done, but not perfect*
- **Four correct:** *perfect*

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