

Case In Point

Supreme Court of Canada Considers Duty of Good Faith Performance of Contracts

Date: December 21, 2020

In one of its final decisions of 2020, [C.M. Callow Inc. v. Zollinger](#), the Supreme Court of Canada held that parties to any and all contracts (which would include employment contracts) cannot lie or otherwise knowingly deceive each other about matters directly linked to the performance of the contract. This type of deceptive conduct is a breach of the duty of good faith performance of contracts.

Background

A condominium corporation (Baycrest) entered into a 2 year winter maintenance contract with C.M. Callow (Callow) (the “Winter Contract”). The parties also had a separate summer maintenance contract (the “Summer Contract”). Pursuant to the terms of the Winter Contract, Baycrest could terminate the agreement by providing Callow with 10 days’ written notice or if Callow provided unsatisfactory service.

Baycrest decided to terminate the Winter Contract but did not tell Callow about that decision for several months. In that time, and to Baycrest’s knowledge, Callow performed work above and beyond that required by the Summer Contract in hopes that Baycrest would renew the Winter Contract, and board member owners of Baycrest falsely represented to Callow that the Winter Contract would be extended or renewed.[\[1\]](#)

Lower Court Decisions

Callow brought a claim for breach of contract against Baycrest, alleging that Baycrest acted in bad faith. The trial judge found that the organizing principle of good faith performance and the duty of honest performance were engaged; that Baycrest had actively deceived Callow by, among other things, letting Callow do extra work over and above the Summer Contract while withholding from Callow its decision not to renew the Winter Contract.[\[2\]](#) The trial judge awarded damages to Callow equal to the balance owing on the Winter Contract.

The Ontario Court of Appeal found that the trial judge erred by improperly expanding the duty of honest performance in a manner that went beyond the terms of the Winter Contract. While the Court acknowledged Baycrest’s conduct was not honourable, it found that it failed to rise to the high level required to establish a breach of the duty of honest performance. Baycrest was free to

terminate the Winter Contract with Callow provided only that Baycrest informed him of their intention to do so and gave the required notice. That is all that Callow bargained for, and it was not entitled to more.

At the Supreme Court

Majority Reasons

The majority of the Supreme Court found in favour of Callow and provided significant elaboration on the duty of good faith performance of contracts, which has evolved since the duty was first articulated by the Court in *Bhasin v. Hrynew*. The majority held that the duty of honest performance in contract, which is part of the overarching duty of good faith and which applies to *all contracts*, requires that contracting parties not lie or otherwise knowingly deceive each other about matters directly linked to the performance of the contract.

Whether a party has acted dishonestly is a fact-specific analysis and it can include lies, half-truths, omissions, and silence. The majority noted that the duty of honest performance does not equate to a positive obligation of disclosure, but may include a duty to correct a false impression which the party itself created.

In the case of Baycrest and Callow, the majority of the Court found that Baycrest's conduct^[3] breached the duty of honesty on a matter directly linked to the performance of the Winter Contract:

[37] ... If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early. This is what the trial judge found. Simply said, Baycrest's alleged deception was directly linked to this contract because its exercise of the termination clause in this contract was dishonest.

Concurring Reasons

Justices Moldaver, Brown and Rowe JJ delivered joint concurring reasons, which advocated for the Court to simply apply the principles articulated in *Bhasin*. In doing so, these justices found that Baycrest's conduct could not be fairly regarded as "innocent non-disclosure." As such, the trial judge's decision should be upheld and Callow should be awarded damages equal to the loss he suffered in relying on Baycrest's misleading representations about the security of the Winter Contract. These justices found that the majority's decision unnecessarily expanded upon the duty to act honestly and obfuscated the Court's guidance in *Bhasin*.

Dissenting Reasons

In dissenting reasons, Justice Côté found that Baycrest had no contractual obligation to notify

Callow more than 10 days in advance of its intention to terminate the contract and, on the evidence before the Court, Baycrest had not dishonestly caused or contributed to Callow's erroneous assumption that the Winter Contract would be renewed, writing:

[205] In the context of a right to terminate a contract without cause, a party that intends to end an agreement does not have to convey hints in order to alert his counterparty that their business relationship is in danger. No duty of disclosure should mean no duty of disclosure.

[206] A party's awareness of his counterparty's mistaken belief will therefore not, in itself, trigger an obligation to speak unless the party has taken positive action that materially contributed to that belief. The active conduct and the mistaken belief must both pertain to contractual performance; otherwise, it could hardly be said that one has "knowingly misle[d] [the] other about matters directly linked to the performance of the contract" (*Bhasin*, at para. 73). [...]

Conclusion

The *Callow* decision constitutes a significant elaboration on the duty of good faith performance of contracts. It is an important decision for employers to bear in mind as they are regularly faced with, and will likely continue to face, arguments and claims in litigation based on the duty of good faith.

[1] [Trial Decision](#) at para. 7.

[2] It is notable that the trial judge made a number of credibility findings adverse to Bayview and where the evidence of the parties conflicted, preferred the evidence of Callows. See [Trial Decision](#) paras. 9-16.

[3] Evidence of Baycrest's conduct included, *inter alia*, emails between Baycrest directors acknowledging that Callows had expressly advised them that he was performing 'freebie' summer work on the understanding that his Winter Contract would be renewed and oral representations by Baycrest to Callows that the Winter Contract would be renewed. See paras. 43-50 of the [Trial Decision](#).