SCC File No. 38463

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

C.M. CALLOW INC.

APPELLANT
(Respondent)

- and -

TAMMY ZOLLINGER, CONDOMINIUM MANAGEMENT GROUP, CARLETON CONDOMINIUM CORPORATION NO. 703, CARLETON CONDOMINIUM CORPORATION NO.726, CARLETON CONDOMINIUM CORPORATION NO. 742, CARLETON CONDOMINIUM CORPORATION NO. 765, CARLETON CONDOMINIUM CORPORATION NO. 783, CARLETON CONDOMINIUM CORPORATION NO. 791, CARLETON CONDOMINIUM CORPORATION NO. 806, CARLETON CONDOMINIUM CORPORATION NO. 826, CARLETON CONDOMINIUM CORPORATION NO. 839, CARLETON CONDOMINIUM CORPORATION NO. 877

RESPONDENTS
(Appellants)

- and -

CANADIAN FEDERATION OF INDEPENDENT BUSINESS, CANADIAN CHAMBER OF COMMERCE,

INTERVENERS

FACTUM OF THE RESPONDENTS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. OVERVIEW

1. The Appellant seeks to expand the scope of the duty of honest performance to require disclosure of a party's intention to terminate a contract.

2. The winter contract at issue in this appeal contained a clause allowing Baycrest to terminate on 10 days notice. Baycrest decided to terminate the winter agreement in the spring of 2013 but did not notify Callow of its intention to do so until September 2013.

3. Following an 8-day trial, the trial judge found that Baycrest had breached its duty of honest performance of contract by (i) withholding the fact that they intended to terminate the winter contract, and (ii) continuing to represent to Callow that the winter contract was not in danger of non-renewal.

4. The Respondents appealed.

5. Before the Court of Appeal, Callow acknowledged that Baycrest was not contractually required to disclose its decision to terminate the contract prior to the 10-day notice period specified in the winter contract, and that the failure to provide notice on a more timely basis was not in and of itself evidence of bad faith.

6. With respect to the trial judge's second finding of dishonesty, the Court of Appeal noted that, while communications between the parties may have led Callow to believe that there would be a new contract, those communications concerned a future contract that had not yet been negotiated. The communications were not directly related to the performance of the winter contract then in force.

7. Before this Court, Callow seeks to expand the scope of the duty of honest performance to require disclosure of a party's intention to terminate a contract. Such an expansion is not warranted having regard to the good faith principle.

8. Moreover, expanding *Bhasin* in this manner would constitute much more than an incremental development of the common law; it would fundamentally transform the law of contracts by requiring disclosure of an intention to terminate a contract and by imposing on all contracting parties obligations generally reserved to fiduciaries or to contracts requiring the utmost good faith, such as insurance contracts.

9. Finally, recognizing a new or expanded duty in this case would significantly undermine the balance struck in *Bhasin* between the organizing principle of good faith contractual performance, and the principles of freedom of contract and commercial certainty. That balance requires a "clear distinction" between a failure to disclose a material fact and active dishonesty.

2. SUMMARY OF KEY FACTS

10. The key facts are simple and not in dispute.

11. The Respondents (Defendants) are ten residential condominium corporations [collectively "**Baycrest**"], their property manager, and the firm managing them. Baycrest is managed by Condominium Management Group ["**CMG**"] and its designated property manager, Tammy Zollinger.[1]

12. Each of the condominium corporations has its own board of directors, responsible for the management of its affairs. The ten corporations formed a Joint Use Committee ["**JUC**"] consisting of a representative of each corporation. The JUC makes decisions regarding the shared assets of the corporations.[2]

13. The Appellant (Plaintiff), C.M. Callow Inc. ["**Callow**"], performed summer and winter maintenance services for Baycrest. Christopher Callow ["**Mr. Callow**"] is the sole principal of Callow.

14. Callow entered into a 2-year *winter* maintenance contract in April 2012. The contract ran from November 1, 2012 to April 30, 2014. Callow also entered into a separate *summer* maintenance contract that ran from May 1, 2012 to October 31, 2013.[3]

15. The winter contract contained a provision for early termination on 10 days' notice.[4] Although not reproduced in the trial reasons, the provision provided as follows:

> If the Contractor fails to give satisfactory service to the Corporation in accordance with the terms of this Agreement and the specifications and general conditions attached hereto or if for any other reason the Contractor's services are no longer required for the whole or part of the property covered by this Agreement, then the Corporation may terminate this contract upon giving ten (10) days' notice in writing to the Contractor, and upon such

[1] Reasons for Decision of Justice O'Bonsawin dated November 27, 2018, Appellant's Record ("**AR**"), V. I, Tab 1 ["**Trial Decision**"] at para 1.
[2] *Ibid* at para 2.
[3] *Ibid* at para 3.
[4] *Ibid* at para 24.

> termination, all obligations of the Contractor shall cease and the Corporation shall pay the Contractor any monies due to it up to the date of such terminations.[5]

16. In March or April 2013, the JUC decided to terminate the winter contract.[6] Baycrest waited until September 12, 2013 to provide Callow with the notice of termination,[7] so as not to jeopardize Callow's performance of the *summer* contract.[8]

17. The interpretation of the winter contract and Baycrest's ability to rely on the termination clause were not disputed at trial.[9] The trial turned on what occurred between the spring of 2013, when the decision to terminate was made, and September 2013, when it was communicated to Callow.

18. During the summer of 2013, Callow performed extra summer work (referred to as "freebie work") in the hope that this would incentivize Baycrest to *renew* his contract for another 2 years.[10] Callow valued this "freebie work" at $5,000 plus HST.[11] The trial judge, however, found that Callow did not provide evidence to support these expenses.[12]

19. During this time, Callow had casual communications with two individual JUC members about the prospects of *renewal* of the summer and winter contracts for a further two (2) years.[13] These individuals were aware that Callow was performing "freebie work" and they knew that Callow was under the impression that his contracts were likely to be renewed.[14]

20. As set out above, Baycrest terminated the winter contract in September 2013.[15]

3. THE DECISION OF THE TRIAL JUDGE

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[5] Agreement for Winter Maintenance Services dated April 2012 (emphasis added), AR, V. III, Tab B, at 10.
[6] Trial Decision, AR, V. I, Tab 1 at paras 37-38, 51.
[7] *Ibid* at para 4, 49.
[8] *Ibid* at para 65; Transcripts of Evidence of K. Campbell, AR, V. II, Tab 21 at pp 139-140, 143-144, 147, 152-153; Transcripts of Evidence of J. Peixoto, AR, V. II, Tab 22 at pp 160-161, 172; Transcripts of Evidence of T. Zollinger, AR, V. II, Tab 25 at 190, Respondent's Record ("**RR**"), Tab 1, at 27-28.
[9] Opening Submissions for the Appellant at trial at p 5, RR, Tab 1; Reasons for Decision of the Court of Appeal dated November 9, 2018 ["**Court of Appeal Decision**"], AR, V. I, Tab 3 at para 14.
[10] Trial Decision, AR, V. I, Tab 1 at para 42.
[11] *Ibid* at paras 42-44.
[12] *Ibid* at para 82.
[13] *Ibid* at para 40.
[14] *Ibid* at paras 41, 43.
[15] Trial Decision at para 4.

21. The trial judge addressed the two following issues:

i. Were the defendants in breach of contract by terminating Callow's winter contract pursuant to s. 9 of the contract?

ii. If the defendants were in breach of contract, what are Callow's damages?[16]

22. Citing *Bhasin,*[17] the trial judge ruled that "this is not a simple contract interpretation case."[18] She held that parties to a contract have a duty to act honestly in performing their contractual obligations. After referring to the franchising and employment law contexts, where the duty of good faith has been held to require more than mere honest contractual performance,[19] she concluded that the Defendants acted in bad faith by:

i. Withholding the fact that they intended to terminate the winter contract to ensure Callow performed the summer contract; and

ii. Continuing to represent that the winter contract was not in danger despite their knowledge that Callow was doing "freebie work" to bolster the chances of renewing the winter contract.[20]

23. The trial judge did not identify what representations she was referring to. She nonetheless held that a "minimum standard of honesty" would have required the Respondents to (i) address the alleged performance issues, (ii) provide prompt notice, or (iii) refrain from any representations in anticipation of the 10-day notice period.[21]

24. None of these obligations appear in the contract.

25. Having concluded that the Defendants had breached the minimum standard of honesty, the trial judge awarded Callow the value of the balance of the contract *plus* its costs to perform the contract.[22]

26. The trial judge did *not* find that the decision to terminate the contract was made in bad faith. While she concluded that Callow's services were not below standard, she accepted the Defendants'

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[16] *Ibid.* at para 6.
[17] *Bhasin v. Hrynew*, 2014 SCC 71 ["***Bhasin***"].
[18] Trial Decision at para 58.
[19] *Ibid* at paras 63-64.
[20] *Ibid* at para 65.
[21] *Ibid* at para 67.
[22] Trial Decision at para 83.

evidence that there were challenges with the snow removal and complaints about Callow's services.[23] It was the decision to delay the communication of the termination that she found to have been in bad faith.[24]

4. THE DECISION OF THE COURT OF APPEAL

27. As set out above, the interpretation of the winter contract and Baycrest's ability to rely on the termination clause were not disputed at trial. On appeal, Callow acknowledged that the Respondents were not contractually required to disclose that they had decided to terminate the contract prior to the 10-day formal notice period specified in the winter contract, and that the failure to provide notice earlier was not in and of itself evidence of bad faith.[25]

28. Referring to paragraph 73 of *Bhasin*, the Court of Appeal concluded that there is no unilateral duty to disclose information relevant to termination.[26]

29. While the Court of Appeal noted that communications between the parties may have led Mr. Callow to believe that there would be a new winter contract, those communications related to a future contract that had yet to be negotiated or entered into. They did not concern matters directly linked to the performance of the *winter* contract then in effect.[27]

30. The Court of Appeal considered that, while the findings of the trial judge might suggest a failure to act honourably, they did not rise to the high level required to establish a breach of the duty of honest performance.[28]

31. In the view of the Court of Appeal, the trial judge's decision that the minimum standard of honesty included a requirement to address performance issues, provide prompt notice, or refrain from representations in anticipation of the notice period had the effect of substantially modifying the Respondents' right to terminate the contract – a key term of the contract. This goes beyond what the duty of honest performance requires or permits.[29]

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[23] Trial Decision at paras 29, 31, 55.
[24] Trial Decision at paras. 66, 69.
[25] Court of Appeal Decision at para 14.
[26] *Ibid* at para 17.
[27] *Ibid* at paras 17–18.
[28] *Ibid* at para 16.
[29] Court of Appeal Decision at para 19.

PART II – RESPONDENTS' POSITION ON THE ISSUES IDENTIFIED BY THE APPELLANT

32. With respect to the two issues raised by the Appellant, the Respondent submits that:

i. Baycrest's decision not to disclose its intention to terminate the winter contract prior to the 10-day notice period did not breach the duty of honest performance of contract or any other duty imposed by law;

ii. In the event of a breach, Callow is not entitled to damages representing its lost profit over the balance of the contract, because Baycrest had a contractual right to terminate on 10 days' notice.

PART III – ARGUMENT

1. BAYCREST DID NOT BREACH THE DUTY OF HONEST PERFORMANCE OF CONTRACT OR ANY OTHER DUTY IMPOSED BY LAW

33. Callow argues that Baycrest's withholding of its intention to terminate the winter contract constitutes "active non-disclosure," which it argues constitutes a breach of the duty of honest performance of contract and an abuse of its contractual discretion. In the alternative, Callow invites this Court to recognize a new obligation of disclosure of material facts.

34. There is no juristic reason to expand the scope of the duty of honest performance or to recognize a new duty requiring disclosure of a party's intention to terminate the contract. Baycrest's argument proceeds as follows:

i. The organizing principle of good faith is a *general* principle that manifests in *specific* existing rules necessary to achieve a just result, having regard to the competing principles of freedom of contract and commercial certainty.

ii. New rules will only be recognized where necessary to provide a just result and where they: (i) constitute an incremental development of the common law; (ii) are consistent with the structure of the common law of contract; and (iii) give due weight to the importance of private ordering and certainty in commercial affairs.

iii. The duty requiring the good faith exercise of contractual discretion does not arise in this case.

iv. Baycrest did not breach the duty of honest performance of contract by withholding its intention to terminate the contract.

v. There is no juristic reason to expand the duty of honest performance of contract, or to recognize a duty of material disclosure.

A. The Organizing Principle of Good Faith is a General Principle that Manifests in Specific Existing Rules

35. The organizing principle of good faith is a *general* principle that manifests in *specific* rules. As expressly recognized by this Court in *Bhasin*, the principle is not a free-standing rule and is therefore insufficient to ground a cause of action.[30] As the common law has developed, courts have weighed this principle against other recognized principles, such as the principle of freedom of contract,[31] in order to develop specific rules that govern contractual performance. The specific weight to be accorded to the principle of good faith may be different in different situations. As a result, different situations may call for the application of different rules.[32]

36. Thus, this Court has recognized that "good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various *rules* in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance" (emphasis added).[33] In *Bhasin*, this Court went on to explain that this principle is not limited to contractual performance. It also underpins rules and doctrines at the stage of contract formation. For instance, the principle is manifest in the doctrine of unconscionability, which is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other. It is also apparent when terms are implied by law to redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts. Finally, it underpins statutory duties of good faith and fair dealing in franchise legislation and good faith bargaining in labour law.[34]

37. Turning back to contractual performance, this Court noted, in *Bhasin*, three types of situations in which a duty of good faith performance of some kind has been found to exist at common law: (1) where

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[30] *Bhasin* at para 64.
[31] Andrea M Bolieiro, "Bhasin v Hrynew and the principle of good faith in contracts: Moving towards a modern view of commercial relationships" (2015) 33:4 Adv J 23 ["**Bolieiro**"], Respondents' Book of Authorities ("**RBOA"**), Tab 1 at 24.
[32] *Bhasin* at para 64.
[33] *Ibid* at para 63.
[34] *Bhasin* at paras 43-46.

the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties.[35]

38. Apart from these types of situations in which a duty of good faith arises, the common law has also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.[36] Examples include (i) an implied term of good faith governing the manner of termination in *employment* contracts; (ii) the duty of good faith, which requires an insurer to deal with its insured's claim fairly; and (iii) an implied obligation of fair dealing in the tendering context.[37]

39. What emerges from this Court's reasons in *Bhasin* is, first, that the principle is not new. It already informs the various rules that the common law has recognized with respect to good faith contractual performance, not to mention a number of rules respecting contract formation and the implication of terms by law. Second, the principle is not a *rule*. The distinction between principles and rules is fundamental. A principle (as opposed to a rule) does not dictate results. It justifies results. As observed by Andrea Bolieiro, principles "are weighed against other principles to help judges come to the right result: the result that does justice between the parties in each case."[38] Thus, in cases such as this, the principle of good faith performance of contracts is weighed against the principles of freedom of contract and commercial certainty in determining the just result.[39] This is not one of these cases, however.

40. This case is not one of the situations or relationships in which the common law has previously recognized a duty of good faith performance of contract. Generally, claims of good faith will not succeed if they do not fall within the existing rules or doctrines.[40] However, in limited circumstances, new rules may be recognized where necessary to achieve a just result.

B. New Rules should be Recognized only when Incremental and Consistent with the Structure of the Common Law, and when they have Due Regard for Commercial Certainty

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[35] *Ibid* at para 47 (citing McCamus, John D. The Law of Contracts, 2nd ed. Toronto: Irwin Law, 2012, pp 840-856, "**RBOA**", Tab 4.
[36] *Bhasin* at para 53.
[37] *Ibid* at paras 54-56.
[38] Bolieiro at 29.
[39] *Ibid* at 24.
[40] *Bhasin* at para 66.

41. A new rule may be recognized to achieve a just result provided that: (i) it constitutes an incremental development of the common law; (ii) it is consistent with the structure of the common law of contract; and (iii) it gives due weight to the importance of private ordering and commercial certainty.[41]

42. Notwithstanding the clear direction from this Court, courts below have diverged on whether claimants, in order to succeed, must generally fall within one of the recognized situations or relationships in which the law already requires good faith performance of some kind. Certain trial courts have concluded that the organizing principle of good faith is "already manifest in our law of contract and … generally, issues relating to the good faith principle in contract law will continue to be dealt with as they have been in the existing law."[42] Other courts, however, have applied the organizing principle of good faith performance, without identifying a pre-existing doctrine or rule, and without articulating a new one. One such example is the recent decision of the Ontario Court of Appeal in *Mohamed v. Information Systems Architects Inc*., discussed in section 1(c).[43]

43. This has resulted in uncertainty and in an increase in litigation, without achieving the intended purpose of securing more just results. For this reason, Baycrest submits that this Court should expressly recognize that while the list of good faith obligations (or rules) is not closed, new obligations will only be recognized in the circumstances set out above. It is anticipated that such new rules will be rare.[44]

44. As Geoff Hall commented in 2015, approximately a year after this Court rendered its decision in *Bhasin*, there is a price to suggesting that the list of instances in which specific rules require some form of good faith performance is not closed. That price "is more litigation and some uncertainty until the new principle is fully worked out in the case law."[45] Hall foresaw that litigants would press the limits of the newly recognized organizing principle, and that the burden of interpreting the organizing principle would primarily fall on appellate courts.

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[41] *Ibid*.

[42] *Kramer's Technical Services Inc v Eco-Industrial Business Park Inc*, 2015 ABQB 59 at para 35; see also Shannon Kathleen O'Byrne and Ronnie Cohen, "The Contractual Principle of Good Faith and the Duty of Honesty in Bhasin v. Hrynew", 53 Alta L. Rev. 1 [**"O'Byrne and Cohen**"] , RBOA, Tab 3, at 11.

[43] 2018 ONCA 428.

[44] Bolieiro at 29 (suggests in this respect that "[t]he principle's power to spawn new duties is limited to unique cases where failing to do so will cause an injustice.").

[45] Geoff R. Hall, "Bhasin v. Hrynew: Towards an Organizing Principle of Good Faith in Contract Law" (2015) 30 Banking & Fin. L. Rev. 335 at 336, ABOA Tab 34

45. Hall was correct: between January 23, 2014, when the Supreme Court of Canada released its decision in *Bhasin*, and October 6, 2015 – a period of 20.5 months – *Bhasin* was considered in no fewer than 85 reported decisions across Canada.[46] Notwithstanding this large number of reported decisions, *Bhasin*'s impact on the outcome in these cases has been, as contemplated by this Court, incremental. Bradley Berg and Mike Maodus reviewed the 49 reported decisions from Ontario (trial and appellate level) and the eight appellate-level reported decisions from the other provinces. Of those 49 decisions, a clear breach of the Bhasin duty of good faith was found in only five cases with final verdicts. Three of those cases concerned employment and real estate contracts and were decided largely on the basis of the pre-existing good-faith doctrines.[47]

46. The remaining two decisions concerned relationships and situations for which there was no pre-existing statutory or common law duty of good faith. However, given their particular facts, Berg and Maodus consider that even these two cases probably would have been decided the same way before *Bhasin*. Moreover, the defendants in one of these decisions, *Lavrijsen Campgrounds v. Reville*,[48] ("*Lavrijsen*") appear to have been found liable for breaching a representation; recourse to the then-novel duty of honest performance of contract was not required to achieve a just result.

47. Since the fall 2015, the courts of appeal have heard a number of cases in which parties have alleged a breach of the duty of good faith or otherwise invoked the principle of good faith contractual performance. Leaving aside the Ontario Court of Appeal's decision *Mohamed*, the appellate courts have for the most part rejected such claims.[49] A clear articulation of when new duties will be recognized will provide much needed commercial certainty, reduce the amount of litigation, and provide a principled and

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[46] Bradley Berg & Mike Maodus, "Bhasin Anniversary: You Gotta Have Faith?" (21 October 2015), online: Blake, Cassels & Graydon LLP <https://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=2206>.

[47] *Antunes v Limen Structures Ltd.*, 2015 ONSC 2163, affirmed on appeal, 2016 ONCA 509; *Bray v Canadian College of Massage and Hydrotherapy*, 2015 CanLII 3452 (ONSCSM); *Business Development Insurance Ltd v Caledon Mayfield Estates Inc*, 2015 ONSC 1978, affirmed on appeal, 2015 ONCA 864.

[48] 2015 ONSC 103 ["***Lavrijsen***"]. The other decision that Berg and Maodus identified is the Ontario Small Claims Court decision in *Valles v Advantagewon Inc*, 2015 CanLII 29533 (ON SCSM).

[49] See, for example, *Moulton Contracting Ltd v British Columbia*, 2015 BCCA 89; *Larizza v Royal Bank of Canada*, 2018 ONCA 632; *McDonald v Brookfield Asset Management Inc*, 2016 ABCA 375; *Styles v Alberta Investment Management Corp*, 2017 ABCA 1; *Greater Vancouver Sewerage and Drainage District v Wastech Services Ltd*, 2019 BCCA 66; *Atos IT Solutions v Sapient Canada Inc*, 2018 ONCA 374.

coherent framework for appeal courts in considering when and how to apply the organizing principle of good faith to new situations and relationships.

C. The Duty Requiring Good Faith Exercise of Contractual Discretion does not Arise in this Case

48. Callow argues that Baycrest abused its contractual discretion in terminating the winter contract in the way it did. There are three difficulties with this argument. First, just as in *Bhasin*, no damages flow from this breach. We address this point in section 2(b) of the factum.

49. Second, this argument was not advanced in the courts below, is not supported by the findings of fact of the trial judge, and contradicts concessions made before the Court of Appeal. As set out above, the trial judge did *not* find that the decision to terminate the contract was made in bad faith. Baycrest's ability to rely on the termination clause was not disputed at trial. Moreover, Callow acknowledged before the Court of Appeal that Baycrest was not contractually required to disclose that they had decided to terminate the contract prior to the 10-day formal notice period specified in the winter contract, and that the failure to provide notice earlier was not in and of itself evidence of bad faith.[50]

50. Third, although the courts have previously recognized a duty of good faith in relation to the exercise of certain termination rights, these do not apply to the exercise of an unqualified right of termination. While Baycrest submits that, for the above reasons, this issue does not arise on the facts of this case, we nonetheless propose a coherent framework for addressing the application of the duty of good faith to contractual rights of termination.

51. We begin by explaining why the application of the good faith principle varies according to the type of termination right at issue. Next, we propose a coherent framework for the application of the good faith principle to three types of rights. Whereas the organizing principle of good faith performance may justify limits on rights to terminate for breach and upon a non-breach event, its application to termination for convenience clauses is extremely limited.

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[50] Court of Appeal Decision at para 14.

(i) The application of the good faith principle must vary according to the type of right at issue

52. Wayne Courtney, in an article dealing with the English and Australian experience, explains that there are two key reasons why the application of the good faith principle must vary according to the type of right at issue:

> The first is that rights to terminate are conferred by different methods and for different reasons. The mere fact that the counterparty can be affected by the exercise of the right is only one factor; the interests of the terminating party are also relevant. This calls for consideration of the purpose of the right, whether it was 'purchased', and the circumstances in which it must be exercised.[51]

53. Except where the contract is unconscionable, it is not the role of the courts to second-guess the adequacy of the bargain struck by the parties. Many contracts will attach different consequences to the exercise of rights to terminate for cause and to terminate without cause. The latter usually comes at a greater cost, with the terminating party having to compensate the counterparty for costs and expenses incurred up to the point of termination.[52] The winter contract at issue in this case required Baycrest to pay to Callow any monies due to it up to the date of termination.[53]

(ii) A coherent framework for the application of the good faith principle to contractual termination rights

54. There are three types of termination rights: termination for breach, termination upon some other contingency, and termination for convenience (as in this case). We address each in turn.

Termination for breach

55. In applying good faith restrictions to the exercise of a right of termination for breach, courts should consider: the seriousness of the breach that triggered the right, compliance with any procedures to exercise the right, and any limitations on the exercise of the right and remedies therefor.[54]

56. The first relevant consideration is the seriousness of the breach. Professor Courtney explains that the principles of contractual interpretation may ensure that a liberally worded clause permitting termination for "any breach" is interpreted to exclude trivial breaches, in order to avoid a commercial

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[51] Wayne Courtney, "Good Faith and Termination: The English and Australian Experience", 2019 1-1 Journal of Commonwealth Law 1, 2019 CanLIIDocs 1764, ["**Courtney**"], ABOA, Tab 57 at 23.
[52] *Ibid* at 8.
[53] Winter contract at clause 9, AR, V. III, Tab B, at 10.
[54] Courtney, RBOA, Tab 2 at 15 (Although we refer to the seriousness of the breach that triggered the right, Professor Courtney refers more generally to the events that triggered the right).

absurdity.[55] He refers to the seminal case of *The Antaios*,[56] a case involving a time charter that permitted the owners to withdraw the vessel for non-payment or "on any breach of this charter party." Lord Diplock held that "any breach" meant any repudiatory breach. While the common law already provides a right of termination for repudiatory breach, the clause also permitted the owner to terminate for non-payment of fees. The concern that termination could be triggered by a trivial breach – a commercial absurdity - was thus addressed through construction. At the same time, because the clause went beyond the rights granted by the common law, the Court's construction did not result in redundancy.

57. A more liberal approach may be taken, however, where a termination clause requires notice and an opportunity to cure an identified breach. This is the second consideration in the framework proposed above (compliance with any procedures to exercise the right). Since this process offers some protection against opportunistic termination, the clause is more likely to be interpreted as applying to any breach.[57]

58. The third consideration is whether there should be any limitations on the exercise of the right. Before recognizing a new limitation, however, it is worth keeping in mind that the good faith principle already manifests in the doctrine of relief from forfeiture. That doctrine may restrict a party's ability to terminate for the counterparty's breach. The courts only exercise their jurisdiction to provide relief from forfeiture sparingly.[58] The doctrine of good faith should not be used to undermine the structure of the common law and render the doctrine of relief from forfeiture meaningless, by providing a convenient route around it.[59]

59. Leaving aside relief from forfeiture, the common law has consistently recognized that a party cannot take advantage of the existence of a state of things which he himself produced.[60] Thus, the

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[55] *Kentucky Fried chicken Canada v Scotts Food services Inc*, 1998 CanLII 4427 (ON CA) at para 27; *Ventas Inc v Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 at para 50.
[56] Courtney, RBOA, Tab 2 at 15 (referring to *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)*, [1985] AC 191). RR, Tab 6.
[57] *Ibid*.
[58] *Ontario (Attorney General) v 8477 Darlington Crescent*, 2011 ONCA 363 at para 87; *1497777 Ontario Inc v Leon's Furniture Ltd* (2003), 67 O.R. (3d) 206 at paras 67-69, 92, 2003 CanLII 50106 (ON CA).
[59] Courtney, RBOA, Tab 2 at 14 (Courtney makes this point in relation to Australian and English law).
[60] McCamus, John D. The Law of Contracts, 2nd ed. Toronto: Irwin Law, 2012, pp 840-856, Appellant Book of Authorities RBOA, Tab 4.

exercise of the right will be constrained where the terminating party contrived or contributed to the counterparty's breach, upon which it relies to terminate.[61]

60. The more difficult question – which does not arise on this appeal - concerns the relevance of the terminating party's motive in terminating the contract. Should the good faith principle constrain the exercise of the right where the terminating party has an ulterior or collateral motive? This Court cautioned in *Bhasin* that "the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties."[62] Moreover, a party is entitled to pursue its own legitimate interests and to act to its commercial advantage.[63] At the very least, "[t]he happy coincidence of genuine dissatisfaction with breach and a desire to terminate for other commercial reasons [should] not amount to bad faith."[64]

Termination contingent upon a non-breach event

61. Turning next to rights of termination triggered by an event other than a breach, the common law is clear that a former party cannot take advantage of its own default to procure cancellation of the contract. Conversely, if the contract is conditional upon an event then, in accordance with the usual principles of construction or implication, a duty may be cast upon one or both parties to make reasonable efforts to procure satisfaction of the condition.[65]

62. Courts are consistently more willing to control the exercise of termination rights contingent upon a non-breach event. By way of example, a contract may contain a right to terminate that depends upon one party's satisfaction as to a particular matter relating to the contract. In such circumstances, courts have had little difficulty imposing minimum requirements.[66] One such example is *Marshall v. Bernard Place Corp*.[67] The case involved an agreement of purchase and sale that was conditional "upon the inspection of the Property by a home inspector of the Purchaser's choice and receipt of a report

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[61] *Ibid* at 17. Professor Courtney explains that while Anglo-Australian law traditionally eschewed any general limitation of good faith or reasonableness on the exercise of a contractual termination right, certain Australian courts have imposed good faith restrictions on the exercise of a right to terminate for breach.

[62] *Bhasin* at para 70.
[63] *Ibid*.
[64] Courtney, RBOA, Tab 2 at 17–18.
[65] Courtney, RBOA, Tab 2 at 19.
[66] *Ibid* at 19–20.
[67] 2002 CanLII 24835, ABOA Tab 17.

satisfactory to him in his sole and absolute discretion."[68] The Court of Appeal noted that the inspection reported identified objective deficiencies on which the purchasers were entitled to and did base the exercise of their discretion under the inspection condition.[69]

Termination for Convenience

63. By contrast to the above two types of termination rights, the application of the good faith principle to constrain the exercise of a right to terminate for convenience is extremely limited.

64. Professor Courtney explains that termination for convenience clauses have been used for a long time in procurement contracts with the US federal government. Their original purpose was to avoid surplus acquisition overrunning the cessation of a war effort. Usage of the clauses spread and they became a regular feature of government procurement for both civilian and military objectives. Notwithstanding its initial *raison d'être*, the standard clause was not limited to a decrease in the need for the item purchased. It was, nonetheless, subject to restrictions against bad faith or abuse of discretion, although the restrictions on its use have evolved over time.[70]

65. By contrast to the American experience, however, English judges have been consistently reluctant to impose a good faith limitation on a right to terminate without cause.[71] In *Reda v Flag Ltd*, the Privy Council upheld the employer's decision to terminate without cause. The argument that the employer's decision was motivated by a collateral purpose (to avoid granting the employees stock options in the future) was rejected. In this context, Lord Millett said, "there is no such thing as a "collateral" or improper purpose; a power to dismiss without cause is a power to dismiss for any cause or none."[72] Professor Courtney suggests, however, that some limitation may be recognized if the purpose is to thwart the employee's receipt of benefits already earned or accrued, or which the employer envisages ought to be paid for termination on a different ground.

66. Such an approach is entirely consistent with the Canadian experience. In *Styles v Alberta Investment Management Corp.*,[73] the Alberta Court of Appeal upheld an employer's termination without cause. The employee was only eligible for bonuses under a Long-Term Incentive Plan ("LTIP") if he was actively employed on the LTIP payout date. The employee was terminated without cause before that

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[68] *Ibid* at para 4.
[69] *Ibid* at para 32.
[70] Courtney, RBOA, Tab 2 at 20–21.
[71] *Ibid*.
[72] Courtney, RBOA, Tab 2 at 21 (referring to [2002] UKPC 38, [2002] IRLR 747).
[73] 2017 ABCA 1 ["***Styles***"].

date. The Court of Appeal held that the common law allows employees and employers to terminate with reasonable notice. This Court had previously confirmed in *Bhasin* that good faith "[does] not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce."[74]

67. The Court held that the terms of the LTIP were clear, and that the plaintiff had not earned a bonus because he was no longer employed on the vesting date.[75] This was not merely a question of semantics. The employee's compensation included both an Annual Incentive Plan, which generated bonuses that were earned and payable in each year, and the LTIP, which was more complex. Each year the participating employees would be given a "grant" expressed in dollars, although the amount was not payable as such. The Plan was designed to measure long-term performance of the investment. Under the formula in place, the "grant" for any year would be adjusted up or down in the future three years based on the fund's compound rate of return and a "performance factor" (which involved a separate calculation). At the end of each four-year cycle the participant's bonus would be calculated based on the previous four annual "grants," as adjusted under the formula. It followed that no bonus became payable under the LTIP for at least four years. It was only at that time that the adjusted value of the annual "grants" could be calculated, and the bonus formula applied.[76]

68. *Bhasin* suggests that, generally, there should be no restrictions on the exercise of a right of termination for convenience. As recognized by Professor Courtney, contracts for a notional fixed term with a right to terminate for convenience sooner (such as the winter contract at issue in this case), and those for a fixed term with automatic renewal unless a party elects against it (such as the contract at issue in *Bhasin*), are substantially equivalent. This Court in *Bhasin* refused to impose any restrictions on the non-renewal (which had the effect of bringing the contractual relationship to an end).[77] Indeed, Professors O'Byrne and Cohen explain that "Can-Am's motive not to renew could not be scrutinized since, by operation of the contract, Can-Am (and Bhasin for that matter) was entirely entitled not to renew whether for good, bad, or indifferent reasons."[78] Applying that logic to this case, there is no coherent reason to impose restrictions on the termination for convenience clause in the winter contract (which had the effect of bringing the contractual relationship to an end).

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[74] *Bhasin* at para 54.
[75] *Styles* at para 54.
[76] *Ibid* at para 5.
[77] *Bhasin* at para 90.
[78] O'Byrne and Cohen, RBOA, Tab 3 at 13.

69. This is not to say that the good faith principle will *never* restrict the exercise of a right to terminate for convenience. As set out above, Professor Courtney suggests that the situation may be different where the termination has the effect of depriving the counterparty of benefits that have been already earned. He goes on to suggest that promissory estoppel may play a role in appropriate circumstances.[79] This may explain the result in *Mohamed v Information Systems Architects Inc.*

70. In that case, the plaintiff's consulting contract was terminated on the basis that he had a criminal record, even though he had disclosed his record and complied with all security check requirements prior to signing the contract. The Court of Appeal held that although the defendant had a facially unfettered right to terminate the contract, it was required to exercise it in good faith. Because the plaintiff disclosed his criminal record to the defendant before signing the contract and complied with all the requirements of the security check, the defendant's reliance on the criminal record to terminate the contract one month later was not a good faith exercise of its rights under the termination clause.[80]

71. Unfortunately, the Ontario Court of Appeal did not explain whether it was relying on a pre-existing good faith rule nor did it articulate a new one. It would appear, however, that the requirements to establish estoppel by convention — a communicated shared assumption between the parties that the plaintiff's criminal record was acceptable to the defendant, the plaintiff's reliance on that shared assumption in entering into the contract, to his detriment — were met. The only difficulty is the uncertainty about whether estoppel can found an independent cause of action. This is of no moment, however. This Court borrowed from the doctrine of estoppel in defining the new duty of honest performance of contract. In doing so, it expressly rejected this uncertainty.[81] There is no reason why a similar approach should not apply to the recognition of new good faith rules, where warranted.

72. By contrast to rights to terminate for breach or upon a non-breach event, the application of the good faith principle to constrain the exercise of a right to terminate for convenience is extremely limited. While it may apply in rare cases to prevent an employee from losing earned benefits, or to guard against detrimental reliance where the requirements of estoppel are met, no such concern arises in this case. As a result, there is no juristic reason for applying the good faith principle in this case. As in *Bhasin*, Baycrest's right to bring the contractual relationship to an end on ten days' notice was unqualified and unconstrained. Its exercise of that right thus cannot constitute an abuse of contractual discretion.

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[79] Courtney at p 23, ABOA, Tab 57.
[80] *Mohamed* at para 19.
[81] *Bhasin* at para 88.

D. Baycrest did not Breach the Duty of Honest Performance of Contract

73. Active deception requires (i) dishonesty that is (ii) directly connected to the performance of a contract. We address each requirement in turn, before applying them to the facts of this case.

(i) Active dishonesty requires a lie

74. *Bhasin* recognized a new duty of honest performance of contract. As explained by this Court:

i. It is a simple requirement not to lie or mislead the other party about one's contractual performance.[82]

ii. It does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract.[83]

iii. It is a modest, incremental step.[84]

iv. It is a minimum standard of honest contractual performance and, like the doctrine of unconscionability, imposes limits on the freedom of contract.[85]

v. It interferes very little with freedom of contract.[86]

vi. It is clear and easy to apply.[87]

vii. It does not require a party to disclose material facts.[88]

viii. A clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.[89]

75. This "clear distinction" is what makes the duty "simple", "modest", "minimal", and "easy to apply". It ensures that the new duty: (i) is incremental; (ii) is consistent with the structure of the common law of contracts, which does not require the disclosure of an intention to terminate a contract and does not impose disclosure obligations outside of relational contracts or contracts of utmost good faith; and (iii) gives "due weight" to the importance of certainty in commercial affairs. As set out above, these are

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[82] *Ibid.* at para 73.
[83] *Ibid*.
[84] *Ibid*.
[85] *Ibid* at para 74.
[86] *Ibid* at para 76.
[87] *Ibid* at para 80.
[88] *Ibid* at para 86.
[89] *Ibid*.

the requirements for recognizing a new rule or duty arising from the organizing principle of good faith contractual performance.

76. The only way to maintain the "clear distinction" that is so critical to the Court's adoption of a new duty of honest performance of contract is to recognize that "active dishonesty" requires a lie. A lie may consist of:

i. A false statement, pronounced with the knowledge that it is false;

ii. A statement that conveys only part of the truth (a half-truth) and that is made with the knowledge that it is misleading; or

iii. A half-truth that the person later learns has misled the other side, in which case the statement will be considered a lie if it is not promptly corrected.

77. Thus, the third type of lie may trigger a duty to disclose information that a party could otherwise keep to itself. If, however, there is no duty to disclose certain facts, then deliberately withholding those facts cannot constitute active deception. As recognized by the Superior Court in *Empire Communities Ltd. v. H.M.Q.*:

> If … the defendants were not obliged to disclose the claims or lawsuit under the agreement between the parties …, the intention of the defendants is irrelevant. Apart from the duty not to lie, *Bhasin* does not create contractual obligations or replace the existing law. As to the (possibly) new duty not to lie or knowingly misrepresent; absent a duty to disclose, the defendants' silence can be neither. If one does not have a positive obligation to disclose certain facts, then silence as to those facts is neither dishonest nor a misrepresentation.[90]

78. The facts giving rise to a finding of dishonesty in *Bhasin* are instructive in defining the type of conduct that rises to this level. The Supreme Court took issue with Can-Am's failure to disclose certain information to Mr. Bhasin but, unlike in this case, Can-Am's failure to disclose was coupled with repeated and outright lies:

i. When questioned about Can-Am's intentions to merge Bhasin's agency under Hrynew's Agency, Can-Am "equivocated" and did not tell him the truth that from

[90] *Empire Communities Ltd. v. H.M.Q.*, 2015 ONSC 4355 ["***Empire***"] at para 27.

Can-Am's perspective this was a "done deal".[91] This equivocation, when coupled with Can-Am's repeated lies, as set out below, constituted dishonesty.

ii. Can-Am had appointed Hrynew as its compliance officer, with the result that he would audit Bhasin's agency and thus have access to his confidential business information. When Bhasin complained about this conflict of interest, Can-Am blamed the Alberta Securities Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was untrue, i.e. a lie.[92]

iii. Can-Am also repeatedly told Bhasin that Hrynew was bound by duties of confidentiality and segregation of activities in the course of an audit, when in fact there was no such requirement. When Can-Am later finalized its PTO contract with Hrynew, it failed to include any confidentiality provisions. Yet, Can-Am repeated these lies about Hrynew's supposed obligations of confidentiality.[93]

79. Equivocation, in and of itself, does not constitute active deception. To hold otherwise is to undermine the "clear distinction" emphasized by this Court in *Bhasin*. The effect of this is three-fold: (i) it would replace the "modest and incremental" change intended in *Bhasin* with a leap; (ii) it would introduce structural inconsistency into the law of contracts, which does not require the disclosure of an intention to terminate and which only imposes disclosure obligations on parties to relational contracts or contracts of utmost good faith; and (iii) it would risk significant commercial uncertainty.

80. The contrary interpretation – that equivocation in response to a direct question can, without more, constitute dishonesty – should be discarded. Professor Buckwold, whose article the Appellant relies on in its factum,[94] concludes in this respect that:

> While there may be a gap between the court's expression of the duty of honesty and its application to the facts, we should emphasize the former. People who have contracted to negotiate in good faith should not be required to disclose their intentions … or … motive

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[91] *Bhasin* at para 100.

[92] *Bhasin* at paras 101-102; Can-Am continued to require that Hrynew audit Bhasin's agency as if it were required to do so by the Commission even though it had arranged to have one of its employees conduct the audit of Hrynew's agency.

[93] *Bhasin* at para 101.

[94] Appellant's factum at para 53.

> ... However, those who actively lie about their intentions may be in breach of the duty and accordingly liable in damages.[95] [emphasis added]

81. At paragraph 65 of its factum, Callow cites four cases that it alleges have confirmed that the duty of honest performance of contract can extend to non-disclosure. Upon review, however, they fail to provide any jurisprudential support for that proposition. The first, *RPC Limited Partnership v SNC-Lavalin ATP Inc.*,[96] is a pleadings case and is therefore of limited assistance. Moreover, the plaintiff in that case, RPC, alleged that SNC had told them a half-truth that they knew to be misleading. This would constitute a lie according to the framework proposed above.

82. The appellant was the successful bidder following a Request for Proposals for a construction subcontract. SNC was the engineer, procuring authority and general contractor. RPC alleged that SNC represented the site would be available by the start date. RPC's proposal, which SNC accepted, contemplated sequential construction proceeding from south to north. At a bid clarification meeting, SNC confirmed it would provide access to all structures as part of the access plan and clarified that it might not be able to provide continuous access. As explained by the Alberta Court of Appeal:

> The appellant asks a trial court to find that SNC knew at [the bid clarification meeting] that it "could not" provide access to the site in a manner consistent with the sequential south to north construction plan the appellant proposed and SNC accepted.[97]

83. The remaining cases similarly do *not* say that *Bhasin* can extend to non-disclosure. In the second case, *Energy Fundamentals Group Inc. v. Veresen Inc*.,[98] the Court implied a term requiring Veresen to disclose confidential financial information to Energy Fundamentals Group Inc., so that it could determine whether to exercise its option right. The Court of Appeal emphasized that the term was implied based on the business efficacy/officious bystander test, and not based on the doctrine of good faith.

84. The third case is *Lavrijsen*, in which the defendants provided inadequate and misleading disclosure. The case concerned an agreement to sell and purchase shares in an operator of a campground. The initial offer required the seller to disclose to the purchaser the amounts of prepaid camper rentals

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[95] Tamara Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of Bhasin v. Hrynew and the Organizing Principle of Good Faith in Common Law Canada" (2016) 58:1 Can Community LJ 1, at 14. ["**Buckwold**"], ABOA, Tab 56.
[96] 2018 ABCA 423 ["***RPC***"].
[97] *RPC* at para 21.
[98] 2015 ONCA 514 ["***Veresen***"].

and deposits, and provided that these would be credited to the purchaser at closing.[99] The warranty in the final agreement of purchase and sale, however, was limited to prepaid deposits.

85. Notwithstanding that the agreement was silent with respect to prepaid rentals, the purchasers requested information concerning deposits and prepaid rentals from the vendors.[100] The information provided by the vendors in response was inadequate, in that it was impossible to ascertain on its face the amount of prepaid deposits and rentals that the vendors had in hand.[101] The purchaser's lawyer concluded that only the deposits were paid in advance, and that there were no prepaid rentals. An adjustment was made upon closing for prepaid deposits. No adjustment was made for prepaid rentals, on the mistaken belief that were none.[102]

86. Even if the vendors had not initially set out to deceive the purchasers, the inadequacy of the information provided should have become clear when the closing adjustments were prepared. Indeed, the prepaid deposits and rentals as of closing totaled $119,231.00, and only $45,375.00 was credited to the purchasers. Whatever their original intentions, when the opportunity arose, the vendors selectively disclosed partial information and actively withheld important information concerning prepaid rentals,[103] in order to keep the approximately $75,000 difference. The selective disclosure of partial information (a half-truth), when coupled with the withholding of material information, constituted a lie. If the vendors knew the half-truth was misleading when they disclosed information about prepaid deposits, then it was the second type of lie in the framework proposed above. If they only realized the half-truth was misleading when the closing adjustments were prepared (in which case they failed to correct it), then it is the third type of lie in the proposed framework. Either way, however, it is a lie.

87. The final case is a small claims court decision whose reasoning is, with respect, of limited assistance in addressing the issues before the Court. As explained by the Appellant, the skating club allowed the instructor to register skaters notwithstanding that they intended to terminate her contract. The club did so, however:

> … in a cynical effort to get rid of Ms. Baier but hold on to as many of her 30 students as possible, by arranging things so that those students would have arranged their (and their parents') schedules

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[99] *Lavrijsen* at para 2.
[100] *Ibid* at para 4.
[101] *Ibid* at para 5.
[102] *Lavrijsen* at para 6.
[103] *Ibid* at paras 13, 16.

> and paid their fees before they found out that their chosen base coach would not be eligible to fulfill her undertakings to them because of a decision made by the club alone…
>
> … Then they insinuated in communications with the parents of her skaters that she was worse than she was…[104]

88. The skating club thus not only withheld its intention to terminate the contract, they devised a scheme to try to take from the instructor as many of her students as possible. There is no similar allegation in this case.

89. In addition to these four cases, the Appellant refers to a number of decisions at footnote 131 of their factum, which they say also confirm that *Bhasin* can extend to non-disclosure. With respect, many of these cases were not decided on the basis of a duty of good faith or honest performance of contract. The majority involved fraud allegations or allegations of breaches of express contractual obligations.[105]

90. The Appellant further argues that American courts have found bad faith performance in situations similar to this one, where one party misled the other in exercising a termination right by remaining silent while the latter performed work for it.[106] It cites four decisions for this proposition, all of which arise in the procurement context, in which even in Canadian law, broader duties of good faith have been recognized. Moreover, only two of the four cases cited involve the fact pattern Callow describes. The

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[104] *Baier v Kitchener-Waterloo Skating Club*, 2019 CanLII 31632 at paras 151, 154 (ON SCSM) [“***Baier***”].

[105] *Directcash ATM Management Partnership v Maurice’s Gas & Convenience Inc*, 2015 NBCA 36 at para 7; *Gemeinhardt v Babic*, 2016 ONSC 4707 at paras 11, 366, 374 and 376; *Gladu v Robineau Estate*, 2017 ONSC 37 at paras 323, 332 and 340; *Geophysical Service Inc v Devon ARL Corp*, 2017 ABQB 463 at paras 21, 26, 42 and 49. Two of the remaining cases resulted in the dismissal of a motion for summary judgment without a determination of the underlying claim (*Canaccord Genuity Corp v Pilot*, 2015 ONCA 716 at para 6; *Matthew Sloboda Professional Corp v Vincent Cairo Professional Corp*, 2018 ABCA 405 at paras 13 and 20), and one arose in the employment (relational) context (*Jonasson v Nexen Energy ULC*, 2018 ABQB 598.). Only the remaining two cases involve allegations of material non-disclosure. One involved a plaintiff who entered into a settlement without disclosing that she had issued a Statement of Claim for damages (*Faber v First View Properties Inc*, 2018 ONSC 4332 at paras 53–54). The other was an application for an interlocutory injunction against a landlord who allegedly verbally agreed to renew the tenant’s lease, and then said nothing to the tenant while it found and entered into a lease with a new tenant (*Osteria Da Luc Inc v 1850546 Ontario Inc*, 2015 ONSC 5606).

[106] Appellant’s factum at para 64.

issue in these two cases, however, was that the defendant permitted the plaintiff to continue working, only to later take the position that the work was non-compliant and rely on that non-compliance as grounds for termination.[107] By contrast, in this case Callow admitted to performing freebie work that he was not required to do under the terms of either the winter or the summer contract, and to doing so of his own initiative without expectation of payment.[108] As a result, these American cases are of limited assistance in addressing the issues before the Court.

91. The Appellant argues that the dishonesty in this case is "especially acute"[109] insofar as it occurred in a long-term contract of mutual cooperation as opposed to a mere transactional exchange With respect, the suggestion that the winter contract is relational must be rejected by this Court. Not only is it unsupported by the findings of the trial judge, it is also fundamentally inconsistent with this Court's decision in *Churchill Falls (Labrador) Corp. v. Hydro-Québec*.[110] The long-term (65 years), interdependent nature of the contractual relationship in that case did not imply a relationship of cooperation between the parties.[111] This is even more the case here. Indeed, the Appellant has failed to identify any obligations that the contract has left undefined, and it is not the role of this Court to interpret the agreement at issue.

92. This Court's reasons in *Bhasin* support a much higher standard for a finding of dishonesty than that articulated by the Appellant. At paragraph 88, this Court explained that the duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel. While this Court noted that the duty was not subsumed by these doctrines, the distinctions it identified had nothing to do with the nature of the representation required to ground liability or equitable relief.[112] This Court in

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[107] *Malone v U.S.*, 849 F.2d 1441, 1445-1446 (Fed. Cir. 1988); *Peach State Roofing, Inc v Kirlin Builders, LLC*, 2018 WL 3097326, *33-35 (D. Ala. 2018).
[108] Transcript of Evidence of C. Callow, AR, V. II, Tab 18 at 80 (emphasis added).
[109] Appellant's factum at para 68.
[110] [2018] 3 SCR 101, 2018 SCC 46.
[111] *Ibid* at para 71.
[112] *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8, [2014] 1 SCR 126 ["***Bruno***"] (Unlike promissory estoppel and estoppel by representation, the contractual duty of honest performance does not require that the defendant intend that his or her representation be relied on and it is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action. As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on. We note, however, that this Court did not include an intent

Bruno Appliance, Inc. v. Hryniak emphasized that the fact that Hryniak was aware of the fraud, and may in fact have benefited from the fraud, was insufficient to establish fraud. In order to make out a claim for fraud, Hryniak had to *perpetrate* the fraud by making a false representation that induced Bruno Appliance to contribute US$1 million to a non-existent investment scheme.[113] Certain commentators have also equated the type of dishonesty contemplated in *Bhasin* with fraud. Professors O'Byrne and Cohen have noted that the line between dishonesty and fraud can be difficult to draw and that, in a number of cases at least, the dishonest conduct complained of would sound in contract and in tort.[114]

93. This Court in *Bhasin* also analogized the duty of honest performance of contract to the doctrine of estoppel. In *Maracle v. Travellers Indemnity Co. of Canada*, this Court suggested that in order for estoppel to apply, a promise must be unambiguous.[115] Equivocation is insufficient to ground a claim in estoppel and it should not suffice to constitute active dishonesty.

94. Consistent with this high standard for dishonesty, not every exaggeration will rise to the level of a lie. By way of example, in a British Columbia case involving agreements to develop a rural property, the Court concluded that the plaintiff's exaggeration of his previous experience with property development was not dishonest within the meaning of *Bhasin*.[116] It did not rise to the level of a lie.

(ii) The lie must be directly connected to the performance of the contract

95. In order to constitute a breach of the duty of honest performance, the dishonesty must also be "directly connected" to the performance of the contract.

96. Once again, the facts in *Bhasin* are instructive. The Supreme Court concluded that Can-Am's dishonesty was directly and intimately connected to Can-Am's performance of the Agreement.[117] There

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that the false statement be relied on as an element of the tort of deceit in *Bruno Appliance and Furniture, Inc v Hryniak*).

[113] *Bruno* at paras 24, 29.

[114] **O'Byrne and Cohen**, RBOA, Tab 3, at 11 (Somewhat confusingly, the authors distinguish fraud from dishonesty on the basis that a failure to disclose a material fact may not amount to fraud).

[115] *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 SCR 50 at 57, citing McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 SCR 641 at p 647 (We note that the promise can be inferred from the circumstances).

[116] *Ficocelli v Henderson*, 2016 BCSC 2295 at para 158, order varied on consent on appeal, *Ficocelli v Henderson*, 2018 BCCA 475.

[117] *Bhasin* at para 103.

would appear to be little dispute that Can-Am's dishonesty relating to the requirement of an audit by Hrynew and its intention to merge the two agencies was directly related to its performance of the contract. Indeed, Bhasin had agreed pursuant to the contract to follow Can-Am's administrative procedures, policies and systems; as a result, Can-Am had the right to impose policies and procedures to ensure compliance with provincial securities legislation. In addition, the contract provided Can-Am with the right to audit Bhasin's agency.[118]

97. What is less clear is the extent to which this dishonesty can be said to relate to Can-Am's exercise of the non-renewal clause. When Bhasin continued to refuse to allow Hrynew to audit his records, Can-Am gave notice of non-renewal.[119] The trial judge held that it was unreasonable for Can-Am to exercise the non-renewal clause because of Bhasin's failure to submit to an audit by his competitor, and that doing so constituted bad faith.[120] This Court expressly declined to consider this issue:

> it is unnecessary to decide whether reliance on a discretionary power [to provide notice of non-renewal] to achieve a purpose extraneous to the contract [i.e., to force a merger of Bhasin's agency with Hrynew's] and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.[121]

98. This Court nonetheless considered that Can-Am's dishonesty was directly related to the exercise of the non-renewal clause. But the only "dishonesty" relates to Can-Am's motive in exercising it (to force a merger of Bhasin's agency with Hrynew's). Professors O'Byrne and Cohen rightly note that Can-Am's motive not to renew could not be scrutinized since, by operation of the contract, Can-Am was entirely entitled not to renew whether for good, bad, or indifferent reasons.[122] Indeed, reading in a good faith requirement for non-renewal was, in the words of Justice Cromwell, "the principal difficulty in the trial judge's reasoning…"[123]

99. The decision in *0856464 B.C. Ltd. v. TimberWest Forest Corp.*[124] illustrates why this view of "honesty" is problematic. At issue were five-year timber harvesting contracts. The rate for the first year was set out in the contract and there was a clause requiring the parties to negotiate the rates for subsequent

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[118] Decision of the trial judge, *Bhasin (Bhasin & Associates) v Hrynew*, 2011 ABQB 637 ["Bhasin Trial Decision"] at paras 137–138.
[119] *Bhasin* at paras 12, 26.
[120] Bhasin Trial Decision at para 234.
[121] *Bhasin* at para 90.
[122] O'Byrne and Cohen, RBOA, Tab 3, at 13.
[123] *Bhasin* at para 90.
[124] 2014 BCSC 2433 ["***TimberWest***"]

years in good faith. If they failed to reach agreement, either party could terminate. The Court ultimately found that TimberWest had deliberately adopted a negotiating strategy designed to fail, in order to avail itself of the right to terminate. TimberWest's motive was to put an end to the contracts in order to subdivide them and reduce its costs.

100. The Court prefaced its conclusion on the question of whether TimberWest was in breach of the express requirement to negotiate in good faith with the statement that,

> The key question in determining whether the defendant negotiated in good faith is whether the execution of that strategy [to reduce costs through subdivision of the logging contracts] was the dominant motivation for the defendant in its negotiation strategy with [the plaintiffs], or merely an incidental motive or an ancillary consideration.[125]

101. The Court concluded that TimberWest's conduct was not in good faith because, among other things, it was "not honest given that rather than pursuing a course of conduct that was in its best interests in continuing the agreement, it was pursuing a conflicting strategy which strategy required eviscerating the agreement to succeed."[126]

102. As recognized by Professor Buckwold, on whose article the Appellant relies, these statements suggest that a negotiating party who hides or obfuscates their intention or motive has violated the duty of honest performance, even if they have not actively lied. Again, as recognized by Professor Buckwold, this is contrary to the description of the duty in *Bhasin*. A party should not be required to disclose its intentions or material facts relevant to the performance of the contract, except where the facts in question contradict or substantially qualify an understanding on the part of the other *that was knowingly created by the first.*[127]

103. Given that the driving force behind this Court's decision in *Bhasin* was a concern for coherence, the fundamental requirement of honesty should be the same whether or not embedded in a broader duty of good faith, though the broader duty may require more than honesty.

104. This Court's suggestion in *Bhasin* that Can-Am's dishonesty was directly related to the non-renewal clause also risks expanding the duty of good faith into pre-contractual negotiations. This is clearly unintended, as the principle is referred to as one requiring good faith *performance*. Before a contract can be performed, it must be negotiated and concluded. Moreover, it would undermine the

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[125] *TimberWest* at para 294.
[126] *Ibid* at para 308.
[127] Buckwold, ABOA Tab 56 at 14.

structure of the common law, which imposes strict requirements for setting aside an unfair bargain through the doctrine of unconscionability.[128]

105. As a result, it is necessary for this Court to affirm that pre-contractual dishonesty will *not* trigger liability under *Bhasin*.

(iii) Application of the law to the facts of this case

106. The trial judge in this case did not find that Baycrest lied. Rather, she concluded at paragraph 65 that the Respondents "actively deceived Callow." At paragraph 66, she explained that "[t]here were active communications between the parties… which deceived Callow." This is a reference to *casual discussions* that Mr. Callow had with two of the ten directors on the JUC, Mr. Peixoto and Mr. Campbell. Those discussions occurred during the summer of 2013 and concerned the possibility of a contract renewal. The trial judge explained that:

> [40] During the spring and summer of 2013, Callow […] was in discussions with the condominium corporations' board members to renew the contract for the following summer and also the winter maintenance services contract for a further two years. At this time, Callow had only completed year one of a two-year contract. The contract was supposed to remain in place for the winter of 2013-2014. [emphasis added]

107. During his examination in chief, Mr. Callow testified as follows with respect to these discussions:

> A. … I was in discussion with some of the board members that I saw throughout the property about doing a contract, like renewing the contract for the following summer and the following winters for another two-year term after this one expired …
>
> Q. Now is probably a good time to – well tell me about these discussions. Let's hear what discussions you were having.
>
> A. Mostly with Joe [Peixoto], we discussed it, and he said "yeah, it looks good, I'm sure they'll be up for it, let me talk to them."
>
> Q. Up for what?
>
> A. A two-year renewal.
>
> Q. All right. Anyone else?

[128] For a recent articulation of the test for unconscionability, see *Heller v Uber Technologies Inc*, 2019 ONCA 1 at para 60, leave to appeal granted, 2019 CanLII 45261 (SCC). The appeals were heard on November 6, 2019 and judgment was reserved.

> A. Kyle Campbell I ran into once or twice on site and we had discussions as well too.
>
> Q. Okay, and what as your impression of – of – I mean I suppose you already answered…
>
> A. That I was likely going to be getting a two-year renewal, there was no reason not to, they were satisfied with the service, they were happy with it.[129]

108. These casual discussions pertaining to the possibility of a contract renewal do not rise to the level of a lie. Callow sought out two JUC directors that he saw "throughout the property" for information on the likelihood that his contracts would be renewed. He was clearly unsure about the likelihood of renewal and was doing "freebie" work in order to convince the Respondents to renew the contracts. He sought out information about his chances at obtaining new contracts outside official channels and then relied on these informal and unauthorized communications to argue that he was misled by the Respondents with respect to the likelihood of renewal.

109. Perhaps for this reason, the trial judge did not expressly refer to this testimony in her reasons. She relied instead on an email exchange between Mr. Peixoto and Mr. Callow to conclude that Mr. Peixoto misled Mr. Callow:

> [47] On July 16, 2013, there were e-mails between Mr. Callow and Mr. Peixoto. Mr. Callow decided to improve the appearance of the two gardens. Mr. Peixoto replied that he saw Callow's staff working and thanked Mr. Callow… Mr. Peixoto led Mr. Callow to believe that all was fine with the winter and summer maintenance services contracts and that the former was interested in a future extension of Callow's contracts.

110. The problem is that the emails do not support the conclusion that Mr. Peixoto misled Mr. Callow on this or with respect to future contracts. Relevant portions of the email exchange between Mr. Callow and Mr. Peixoto are reproduced below:

> **From:** Chris Callow <chris@cmcallow.com>
> **To:** Joseph . <jcub00@yahoo.ca>
> **Sent:** Wednesday, June 12, 2013 6:00:05 PM
> **Subject:** Re: Printer pick up Baycrest
>
> When you get a chance take a look at the back garden near 877 and me know what you think.
>
> […]

[129] Transcript of Evidence of C. Callow, AR, V.II, Tab18 at 67–68 (emphasis added).

Joseph . <jcub00@yahoo.ca> Wed, Jun 12, 2013 at 9:45 PM
Reply-To: "Joseph ." <jcub00@yahoo.ca>
To: Chris Callow <chris@cmcallow.com>

Ok I will check it out tomorrow for sure. Thank you Chris for doing this and I really like the new cos you guys laid at the front island as well. Worked out well with all the rain we've been getting. It looks great. Thanks again!![130]

Thu, Jun 13, 2013 at 11:59 AM

Joseph. <jcub00@yahoo.ca> wrote:

Hi Chris, I wanna thank you for doing a nice job with that garden you planted at the back. It looks really nice. Thanks again for doing that!

From: Chris Callow <chris@cmcallow.com>
To: Joseph . <jcub00@yahoo.ca>
Sent: Thursday, June 13, 2013 4:31:21 PM
Subject: Re: Garden in front of Block 17

Thanks Joe let the other boards know we did this as a freeby if you would.

From: Joseph . <jcub00@yahoo.ca>
To: Chris Callow <chris@cmcallow.com>
Sent: Thursday, June 13, 2013 7:27:11 PM
Subject: Re: Garden in front of Block 17

Of course I will. I think it's great what you did Chris. We have a JUC committee meeting coming up at some point this summer and I will make sure they all know as well.[131]

Chris Callow <chris@cmcallow.com> Tue, Jul 16, 2013 at 7:27 PM
To: Joe P jcub00@yahoo.ca

Hey Joe I decided to go ahead and do the mulch as it was needed pretty bad I managed to find a large supply of it close by. I hope you like as and as before I'm doing this at no cost to you guys.
Most of it is done but there are a few more spots that need some I should have it all taken care of next week.
Stay cool
Chris

Joseph . <jcub00@yahoo.ca> Tue, Jul 16, 2013 at 7:36 PM

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[130] E-mail correspondence between J. Peixoto and C. Callow re: Printer pick up Baycrest, AR, V. III, Tab K, at 60.
[131] E-mail correspondence between J. Peixoto and C. Callow re: Garden in front of Block, AR, V. III, Tab L, at 65.

> Reply-To: "Joseph ." <jcub@yahoo.ca>
> To: Chris Callow chris@cmcallow.com
>
> I saw your guys working yesterday and today and doing the mulch. Thank you very much Chris. I think it looks awesome and I know you didn't have to do it and that you're doing it for free so thank you! I'm going to send out an email right now to all the JUC members so they know what you're doing cuz I am sure none of them know this. [132]

111. The emails confirm that the only thing the parties discussed were the freebies and the summer work. They did not discuss the winter contract and they did not discuss renewing either the winter or the summer contract.

112. Not only did any discussions about a potential contract renewal not rise to the level of a lie, they did not relate to the performance of the winter contract. The duty of honest performance does not apply at the pre-contractual stage[133] (in this case, the discussions about the new contracts Mr. Callow was hoping to secure); it applies only to the performance of an existing contract. There is good reason for this: there is nothing inherently unlawful or unfair about accepting a contractor's incentives offered in the hopes of securing a new contract or the renewal of an existing contract.

113. Mr. Callow also confirmed that the parties' discussions in the summer of 2013, such as they were, had nothing to do with the winter contract that was then in place:

> A. He - I - I'm trying to remember the conversation, it's quite some time ago, but he lead me to believe that everything is fine, and that yes, we - we're absolutely interested in extending the contract for a future couple of years. We weren't even talking about the current one.
>
> Q. You weren't talking about the current one to contract?
>
> A. No, because as far as I'm concerned, everything was fine, he said everything was fine and there was no issues.[134]

114. The trial judge's primary concern was the fact that Callow was performing freebies while under the misapprehension that he was "likely to get a two-year renewal contract," and that at least two members of the JUC knew this.[135] This led her to conclude that Baycrest acted in bad faith when they withheld information about their decision to terminate the winter contract. In doing so, she failed to

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[132] E-mail correspondence between J. Peixoto and C. Callow re: mulch, AR, V. III, Tab N, at 71.
[133] *Okanagan Equestrian Society v North Okanagan (Regional District)*, 2018 BCSC 800 at para 252; *The Power Limited Partnership v OEFC*, 2016 ONSC 4415 at para 71; see also *Bhasin* at para 71.
[134] Transcript of Evidence of C. Callow, AR, V. II, Tab 18 at 80 (emphasis added).
[135] Trial Decision at para 41.

consider what the defendants actually *said* to Mr. Callow and whether they were responsible for creating his misapprehension in the first place. On this, she wrote:

> [48] On July 17, 2013, there were e-mails between Mr. Peixoto and Mr. Campbell. […] They were both aware that this was "freebie" work performed by Callow and "no corporation is paying for this." Mr. Campbell e-mailed Mr. Peixoto on July 17, 2013, regarding the "freebie" work: "Yeah, I was talking to [Callow] about it last week and he was mentioning he was going to do that. He's basically doing this to try and make sure we keep him for summer grounds, which is fine by me." Mr. Peixoto then responds: "I figured as much. It's nice he's doing it but I am sure it's an attempt at us keeping him. Btw, I was talking to him last week and he is under the impression we're keeping him for winter again. ***I didn't say a word*** cuz I don't wanna get involved but I did tell Tammy that Callow thinks we're keeping him for winter."[136] [emphasis and footnote added]

115. When examined on the freebies, Mr. Callow testified that no one asked him for the freebies and that he told no one he was doing the work to secure the renewal of the contracts. In fact, he admitted that no one promised him that his contract would be renewed (with or without freebies), and that his belief that the contract would be renewed was based on his "impression:"

> Q. So, all this work that you're claiming in that e-mail that you're doing or you're going to do...
>
> A. Mm-hmm.
>
> Q. ...is it correct that no one at Baycrest including the Property Manager instructed you do that work?
>
> A. Yes.
>
> Q. And you did this from – from your own initiative?
>
> A. Yes.
>
> Q. Did you tell anyone at that time that you were doing this work because you were under the impression that your summer and winter contracts were being extended or renewed?
>
> A. I was under the impression that my contracts were going to be renewed for another couple of years and I was doing this additional work as a show of good faith to try and improve the appearance of the property as well as an incentive to gain a future renewal.
>
> Q. So, as an incentive to obtain a future renewal.

[136] Emails between J. Peixoto and K. Campbell re CM Callow - Summer Grounds dated July 17, 2013, AR, V. III, Tab O at 73.

> A. Mm-hmm.
>
> Q. So, I just want to understand, in that period of time, are you under the impression that your contract, "yes, my contract is being renewed" or are you doing this in the hope that your contract is going to be renewed to use your word, as an incentive.
>
> A. Probably the best way to say I was under the impression it was likely to be renewed however, I was hopeful that it was being it.
>
> Q. Okay. And did you tell Joe, Tammy or anyone else at Baycrest "I'm doing this work because you know, I – I understand on my contracts are going to be renewed"?
>
> A. No, I did not use those specific words.[137]

116. The trial judge's emphasis on Baycrest's intentions in withholding their decision to terminate the contract is particularly evident at paragraph 69 of her reasons:

> [69] To counter Bhasin, CMG [the Appellants] argue that in *Nlogic v. Microtherapy Inc.*, 2017 ONSC 722 (CanLII), 277 A.C.W.S. (3d) 304, at para. 44, the Court found that the Applicant had not misled the other party with respect to its intentions about the future of their contractual relationship by failing to disclose its intention to terminate the contractual relationship. As in Callow's case, the contract did not stipulate that disclosure was required in the termination clause. However, *Nlogic* can be distinguished from Callow's case because the internal communications in *Nlogic* did not mention plans to withhold the information. In Callow's case, the evidence is clear that CMG intentionally withheld the information in bad faith. [emphasis added]

117. As set out above, however, in the absence of a duty to disclose, the failure to do so cannot constitute bad faith. A party should not be required to disclose its intentions or material facts relevant to the performance of the contract, except where the facts in question contradict or substantially qualify an understanding on the part of the other that was knowingly created by the first.

E. There is no Juristic Reason to Expand the Duty of Honest Performance of Contract or to Recognize a Duty of Material Disclosure

118. There is no juristic reason to expand the duty of honest performance of contract or to recognize a new duty of material disclosure. In considering whether an expanded or new duty is necessary to

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[137] Transcript of Evidence of C. Callow, AR, V. II, Tab 20 at 110–111 (our emphasis).

provide a just result, regard must first be had to the organizing principle of good faith contractual performance. It is the principle, weighed against competing principles of freedom of contract and contractual certainty, that provides justification for the result.

119. This Court, in *Bhasin*, noted that its approach in recognizing an organizing principle of good faith was consistent with that taken in the case of unjust enrichment in *Peel (Regional Municipality) v. Canada*.[138] According to this Court, the flexible approach taken in *Peel* recognizes that "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain."[139]

120. What lies at the heart of the organizing principle of good faith? The Court in *Bhasin* did not answer this question, except by reference to the specific content of the duties previously recognized at law (including the duty of honest performance of contract). And yet, the identification of an 'animating concern' or 'mischief' may provide persuasive justification and meaningful direction for the incremental development of the law with respect to good faith.

121. *Lavrijsen* is a useful illustration of the kind of sharp practice that has generally attracted the application of the principle of good faith, whether through the doctrine of fraud, a pre-existing duty of good faith, the duty of honest performance of contract, or even the doctrine of unconscionability.

122. The holding in *Lavrijsen* can be summarized as follows: a party who engages in sharp practice in order to obtain an advantage or benefit *that she did not bargain for* (in that case, the retention of the prepaid rentals) shall not be permitted to justify its behavior through strict compliance with the agreement.[140] *Baier v Kitchener-Waterloo Skating Club* is another example; the skating club engaged in sharp practice in order to take away as many of the instructor's students as possible. *Bhasin* is yet another

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[138] 1992 CanLII 21 (SCC), [1992] 3 SCR 762, at 786, 788 ["***Peel***"].
[139] *Bhasin* at para 68, citing *Peel* at 788.
[140] Mathew Tapia, "The Good Faith Doctrine: A Positive Duty to Disclose would Protect the Reasonable Expectations of Parties during Contract Performance", (2016) 96:2 U Det Mercy L Rev 291, ABOA, Tab 44 at 320 (In this article, Tapia discusses the duty of good faith in terms of protecting against sharp practice. Although Mr. Tapia argues in favour of a duty to disclose, a concern about sharp practice does not require a duty of disclosure in Canadian common law).

example. Can-Am had not bargained for the right to force a merger between competing agencies, or to effectively expropriate Bhasin's business for the benefit of Hrynew.

123. These cases provide a useful description of the mischief that the organizing principle of good faith contractual performance seeks to address. It provides justification for any incremental applications of the principle and an ascertainable standard of what the duty requires in specific circumstances. Indeed, most lawyers will be familiar with the concept of sharp practice, as the rules that govern lawyers' conduct in most provinces expressly prohibit lawyers from engaging in it.[141]

124. In this case, Baycrest did not engage in sharp practice. Even if it did, however, it did not do so to obtain for itself a benefit for which it had not bargained: it had bargained for performance of the summer contract, and it had bargained for a right of termination of the *winter* contract on 10 days' notice.

125. For this reason, a new rule is unnecessary. A new duty of material disclosure would also:

i. constitute a leap – as opposed to an incremental development of the law – by contradicting the common law rule that parties are not required to disclose an intention to terminate a contract;

ii. undermine the fundamental distinction between relational contracts and contracts of the utmost good faith, where disclosure may be required, and non-relational commercial contracts;

iii. undermine the distinction between contractual duties and those arising in a fiduciary relationship; and

iv. fail to give due regard to freedom of contract where a party contracts for an unqualified right of termination.

126. A duty of material disclosure is unnecessary to prevent sharp practice and achieve a just result in this case. Moreover, it would significantly alter the common law, undermine the structure of the common law of contracts, and unduly limit freedom of contract and contractual certainty.

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[141] See, for example, The Law Society of Ontario, *Rules of Professional Conduct* (1 October 2014; amendments current to February 28, 2019), online <lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-7>, Rule 7.2-2.

2. CALLOW IS NOT ENTITLED TO ANY DAMAGES FOR THE ALLEGED BREACH

A. The Standard of Review is Correctness

127. Baycrest submits that, even if this court maintains the finding of a breach of the obligation of honest contractual performance, the trial judge erred in fixing the *quantum* of damages.

128. A trial judge's determination of damages is a question of mixed fact and law and the appellants must generally show that the trial judge committed a palpable and overriding error. However, where the determination of damages involves extricable questions of law, those questions are subject to review on correctness.[142]

129. The proper approach to be taken by an appellate court in reviewing damages is as follows:

> It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the trial judge had made an error of principle of law, or misapprehended the evidence […] or it could be shown there was no evidence on which the trial judge could have reached his or her conclusion […] or the trial judge failed to consider relevant factors in the assessment of damages, or considered irrelevant factors, or otherwise, in the result, made "a palpably incorrect" or "wholly erroneous" assessment of the damages […] Where one or more of these conditions are met, however, the appellate court is obliged to interfere.[143]

130. The trial judge erred in her assessment of damages by (i) awarding Callow its expected profits over the full balance of the contract; (ii) awarding both the loss of profit *and* expenses incurred; and (3) misapprehending the evidence relating to its expenses.[144] The Court of Appeal did not need to consider damages, as it concluded that Baycrest had not breached the contract.[145] In the event this Court concludes that Baycrest breached its duty of honest performance of contract or some other duty imposed by law, the question that arises is what damages, if any, flow from that breach.

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[142] *Saramia Crescent General Partner Inc v Delco Wire and Cable Limited*, 2018 ONCA 519 ["***Saramia***"] at para 28.
[143] *Ibid* at para 29, citing *Naylor Group Inc v Ellis-Don Construction Ltd.*, 2001 SCC 58 at para 80.
[144] The Court of Appeal did not find it necessary to consider the issue of damages, given its conclusion on liability.
[145] Appeal Decision at para 9.

B. Callow is not Entitled to its Expected Profits over the Full Balance of the Contract

131. The trial judge proceeded on the premise that, "[d]ue to the breach of contract, Callow is entitled to be placed in the same position as if the breach had not occurred."[146] She did not, however, consider what that position would be. Instead, she simply awarded Callow the value of the balance of the contract.

132. In so doing, she fell into the same error as the trial judge in *Bhasin*, who awarded damages as though the contract had been renewed. This Court criticized this approach, as the parties did not intend or presume a perpetual contract. To the contrary, either party could cause it to expire on any third anniversary.[147] Similarly, the winter contract permitted Baycrest to terminate on 10 days' notice, which is not disputed.

133. This Court in *Bhasin* explained that "[i]t is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith." The reason for this was that a broader duty would not have assisted Bhasin. After all, the contract was subject to non-renewal. The Court explained that:

> Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.[148] [emphasis added]

134. In *Hamilton v. Open Window Bakery*, this Court explained that where a contract might be performed in several ways, the Court must adopt the mode that is the least profitable to the plaintiff, and the least burdensome or onerous to the defendant. The non-breaching party need *not* be restored to the position it would likely have been in but for the breach but rather to the position it would have been in had the contract been performed.[149]

135. The Appellant alleges that the Respondents failed to plead or to argue this point at trial. At paragraph 11 of their Statement of Defence, the Respondents plead that:

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[146] Trial Decision at para 79.
[147] *Bhasin* at para 90.
[148] *Ibid.*
[149] *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9 ["***Hamilton***"] at paras 11, 20.

> … the Condominium Corporations could terminate the Agreement upon giving ten (10) days' notice in writing to Callow, and upon such termination, all obligations of Callow would cease and the Condominium Corporations would only pay Callow any monies due to it up to the date of such termination…[150]

136. While the Respondents did not expressly quote *Hamilton v Open Window Bakery* at trial, they did rely on *Bhasin*, in which this Court explained that Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in that case would have meant simply not renewing the contract.[151] This is the principle established in *Hamilton v Open Window Bakery*.

137. Trial counsel for the Respondents argued in written submissions at the close of trial that upon termination, Baycrest's sole obligation was to pay whatever monies were due to it up to the date of termination. Trial Counsel argued that as of September 12, 2013, no monies were owed to Callow pursuant to the Agreement.[152] In oral submissions, trial counsel further argued that there was no contractual clause or provision for liquidated damages that would entitle Callow to damages in the event of early termination.[153] As a result, the Respondents submit that the issue is properly before this Court.

138. The defendant in *Hamilton* was found liable for breach of contract. However, the contract provided the defendant with the right to terminate the contract on three months' notice. The Court concluded that the early termination clause constituted both the minimum guaranteed benefits under the contract and the defendant's maximum exposure for damages. [154]

139. This approach has been followed by the Ontario Court of Appeal in *Agribrands Purina Canada Inc. v. Kasamekas.*[155] In that case, the Ontario Court of Appeal concluded that the trial judge had erred in law in basing his quantification of damages for breach of contract on the premise that Purina's contract with the defendant would have continued indefinitely, but for the breach. This was the "very sort of [hypothetical] inquiry that [*Hamilton v Open Window Bakery*] says should not be done in approaching breach of contract damages where there are alternate modes of performing the contract."[156] The contract in *Agribrands* gave Purina an unconditional right to cancel the contract on 60 days' notice, which was

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[150] Statement of Defence at para 11, AR, Vol I, Tab 8, p 57.
[151] *Bhasin* at para 90.
[152] Written Submissions of the Respondents at trial, RR, Tab 5.
[153] Proceedings at Trial Volume 1-A, RR, V.1, Tab 1.
[154] *Hamilton* at paras 11, 20; see also *Agribrands Purina Canada Inc v Kasamekas*, 2011 ONCA 460 at paras 47-50 ("***Agribrands***"); *Bhasin* at para 90; *Styles* at para 58.
[155] Agribrands.
[156] *Ibid* at para 49.

the least burdensome mode of performance for Purina and thus constituted its maximum exposure for damages for breach of contract.

140. *Bhasin* did not alter this approach. In *Atos IT Solutions v. Sapient Canada Inc.*, the Ontario Court of Appeal concluded that "*Bhasin* did not purport to alter the existing principles concerning the proper measure of expectation damages in the event of a breach of contract."[157] In *Atos*, the plaintiff argued that *Bhasin* had overtaken *Agribrands* and that "the minimum performance principle should be read in light of the over-arching duty of good faith recognized in *Bhasin.*" It proposed that the minimum performance principle should not apply because the defendant failed to act in good faith when it terminated the subcontract.[158]

141. The Court of Appeal rejected this submission and noted that *Bhasin* suggests "that the minimum performance principle operates in conjunction with the general organizing principle of good faith."[159] The Court of Appeal concluded that "[t]he termination for convenience clause effectively defined the upper limit of Sapient's liability for damages…"[160]

142. The contract in this case also provides for alternative modes of performance. Baycrest's least burdensome mode of performance, and its maximum exposure to damages, was to terminate on ten days' notice. Upon such termination, Callow is only entitled to be paid "any monies due to it up to the date of such termination." For this reason, a broader duty – including one requiring material disclosure – would not assist Callow. If Callow wanted to secure itself the benefits associated with a particular mode of performance, it should have contracted for only that mode of performance.[161]

143. The Appellant argues at paragraph 96 of its factum that *Hamilton* imposes restrictions on contractual damages, which apply only to Baycrest. They say that these restrictions do not apply to Ms. Zollinger and CMG, whom they are allege are liable in tort for inducing Baycrest to breach their contract with Callow. The problem with this submission is that the trial judge made no such finding. She found

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[157] *Atos IT Solutions v Sapient Canada Inc*, 2018 ONCA 374 ["***Atos***"] at para 47; leave to appeal to SCC dismissed, 2019 CanLII 21184 (SCC).
[158] *Ibid* at para 43.
[159] *Ibid* at paras 45, 48.
[160] *Ibid* at para 42.
[161] *Saville Holdings Inc v Suzuki Canada Inc*, [1995] OJ No 2280 at para 48, RBOA, Tab 5.

the Respondents liable only for breach of contract,[162] and the Appellants did not cross-appeal her judgment. As a result, they are precluded from advancing this argument now.

C. Callow is not Entitled to its Expenses in addition to its Lost Profits

144. The trial judge further erred by awarding Callow, in addition to his lost profits, expenses incurred for the lease of a front-end loader. In so doing, the trial judge overcompensated Callow and put him in a better position than he would have been had he performed the contract. Quite simply, to award Callow the cost of rental equipment in addition to his expected profits is to double-count his damages.[163] The contract provided that Callow was responsible to supply all equipment at his cost.[164] For that reason, the award of $14,835.14 for this expense should be set aside.

D. The Trial Judge Misapprehended the Evidence with respect to Callow's Expenses

145. Finally, the trial judge found that Callow paid approximately twenty percent (20%) in expenses and assessed his expected profits on that basis.[165] The sole evidence tendered at trial was that Callow's expenses were $20,000, not twenty percent (20%).[166] The trial judge misapprehended the evidence in this respect and, at a minimum, her damages award should be amended accordingly.

PART IV – SUBMISSION ON COSTS

146. The Respondents respectfully request costs of the appeal and of all proceedings below.

PART V – ORDER SOUGHT

147. The Respondents respectfully request that the appeal be dismissed with costs in this Court and in all courts below.

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[162] Trial Decision at para 76.
[163] *Ticketnet corp v Air Canada (1997)*, 1997 CanLII 1471 at para 93 (ON CA).
[164] Winter Contract, AR, V.III., Tab B, at clause 7.
[165] Trial Decision at para 80.
[166] Transcripts of evidence of C. Callow,RR, Tab 2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of November, 2019.

Rodrigo Escayola
Anne Tardif
David Plotkin
Gowling WLG (CANADA) LLP
Counsel for the Respondents

PART VI – SUBMISSIONS ON CONFIDENTIALITY INFORMATION

N/A

PART VII – TABLE OF AUTHORITIES & LEGISLATION

Case Law:	**Paragraph References:**
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