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

REPLY FACTUM OF THE RESPONDENTS

(Pursuant to the Order of Abella J. dated November 5, 2019 and
Rule 42 of the Rules of the Supreme Court of Canada)

GOWLING WLG (CANADA) LLP
2600-160 Elgin Street
Ottawa, ON K1R 0B3

Rodrigo Escayola
Tel: 613-783-8684
Fax: 613-788-3622
Email: rod.escayola@gowlingwlg.com

Anne Tardif
Tel: 613-786-0203
Fax: 613-788-3523
Email: anne.tardif@gowlingwlg.com

David Plotkin
Tel: 613-786-0238
Fax: 613-788-4482
Email: david.plotkin@gowlingwlg,com

Counsel for the Respondents

MCCARTHY TÉTRAULT LLP
Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Brandon Kain
Adam Goldenberg
Miriam Vale Peters

Tel: 416-601-8200
Fax: 416- 868-0673
Email: bkain@mccarthy.ca

Counsel for the Apellant

KMH LAWYERS
2323 Riverside Drive
Suite B0001
Ottawa, ON K1H 8L5

Miriam Vale Peters

Tel: 613-733-3209
Fax: 613-523-2924
E-mail: mvp@kmhlawyers.com

Ottawa Agent for Counsel for the Appellant

Blake, Cassels & Graydon LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

Catherine Beagan Flood
Nicole Henderson
Christopher DiMatteo
Tel: 416-863-2269
Fax: 416-863-2653
Email: cbe@blakes.com

Counsel for the Intervener, Canadian Federation of Independent Business

Blake, Cassels & Graydon LLP
340 Albert Street
Suite 1750, Constitution Square
Ottawa, ON K1R 7Y6

Alexandra Kozlov
Tel: 613) 788-2245
Fax: 613) 788-2247
Email: alexandra.kozlov@blakes.com

Ottawa Agent for Counsel for the Intervener, Canadian Federation of Independent Business

Torys LLP
3000 - 79 Wellington Street West
TD Centre, South Tower
Toronto, ON M5K 1N2

Jeremy Opolsky
Winston Gee
Tel: 416-865-8117
Fax 416-865-7380
Email: jopolsky@torys.com

Counsel for the Intervener, Canadian Chamber of Commerce

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PARTS I & II – OVERVIEW & RESPONDENTS' POSITION IN RESPONSE TO THE SUBMISSIONS MADE BY THE INTERVENERS

1. In response to the facta filed by the Canadian Federation of Independent Business ("CFIB") and the Canadian Chamber of Commerce ("CCC"), the Respondents submit that the term "active non-disclosure" is unhelpful in defining what constitutes active dishonesty in the performance of a contract.

2. The Respondents agree with the CFIB that a half-truth may constitute a lie giving rise to a breach of the duty of honest performance of contract. The Respondents submit, however, that the three remaining examples of "active non-disclosure" outlined by the CFIB are of limited assistance in defining the duty of honest performance of contract. More specifically, the Respondents submit that:

a. Active concealment of a fact is a technical term of art that does not assist in defining the duty of honest performance of contract.

b. Silence can constitute a misrepresentation only where there is a duty to speak.

c. The duty to correct a material representation that the defendant knows has become untrue only applies where the contract includes an express obligation to negotiate in good faith.

PART III – ARGUMENT

1. "Active Non-Disclosure" will only Breach the Duty of Honest Performance of Contract where it is Dishonest, i.e. a lie

3. The Respondents submit that the expression "active non-disclosure" is unhelpful in defining the boundaries of what constitutes apctive dishonesty in the performance of a contract. Both interveners reject a duty of material disclosure. They say that non-disclosure will only breach the duty of honest performance of contract where it is active, and where it misleads the other party (CCC) or constitutes a misrepresentation (CFIB). The difficulty is that not all misrepresentations are dishonest; some are innocent and some are negligent. It is for this reason that the CCC submits that in order for active non-disclosure to be dishonest within the meaning of *Bhasin*, there must be a deliberate effort to mislead.

4. The Merriam-Webster dictionary defines "dishonest" as, *inter alia*, "characterized by lack of truth."[1] Something which is not true is, by definition, untrue or false. The Collins Dictionary defines it as "not honest or fair; deceiving or fraudulent," and also as "not honest; lying, cheating."[2] Thus,

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[1] "Dishonest", online: *The Merriam-Webster.com Dictionary* <www.merriam-webster.com/dictionary/dishonest#learn-more>, accessed on November 21, 2019.
[2] "Dishonest", online: *Collins English Dictionary* <www.collinsdictionary.com/dictionary/english/dishonest>, accessed on November 21, 2019.

dishonesty necessarily implies a false statement (which is known to be false, otherwise it is a mistake), a lie, or deceit.

2. With the Exception of Half-Truths, the Alleged Categories of Active Non-Disclosure Identified by the CFIB do not Breach the Duty of Honest Performance of Contract

5. The CFIB submits that non-disclosure is "active" when (i) the defendant states a half-truth; (ii) the non-disclosure is coupled with efforts by the defendant to conceal the truth; (iii) the non-disclosure is accompanied by other positive steps on the part of the defendant that rendered the non-disclosure misleading, or (iv) the defendant fails to correct a representation that has become untrue over time.

6. The Respondents have already addressed, in their factum, when a half-truth constitutes a lie giving rise to a breach of the duty of honest performance of contract. Thus, there is no dispute that a half-truth can constitute a lie, as recognized by the CFIB at paragraph 17 of their factum. The Respondents submit, however, that the remaining three circumstances outlined by the CFIB are of limited assistance in defining the duty of honest performance of contract.

(a) Concealment of the Truth

7. For the reasons set out below, concealment is a term of art that does not apply in this case and is of limited assistance in defining the boundaries of the duty of honest performance of contract.

8. The CFIB relies on a case involving a real estate transaction for the proposition that active concealment of a fact – that is, any act done with intent to prevent a fact from being discovered – is equivalent to a positive statement that the fact does not exist.[3] In the law of real estate transactions, however, "concealment" is a term of art; it does not apply in other contexts. Concealment, which is distinct from non-disclosure, requires a positive step to hide a *defect in the land*, coupled with an intention to withhold knowledge of the defect from the purchaser. If a defect is concealed in this manner, it is

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[3] *Alevizos v. Nirula*, 2003 MBCA 148 at para 27, citing *Leeson v. Darlow et al*., 1926 CanLII 407 (ONCA), [1926] 4 DLR 415 at 432 (Ont. S.C., App. Div.). At paragraph 31, the Court in *Alevizos* states that silence can constitute active concealment. It refers to the decision in *Mohammed v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 16384 (FC), [1997] 3 FC 299. However, the Court in that case based its decision on the fact that immigration claimants owe a positive duty of candour on all material facts which denote a change in circumstances since the issuance of the visa. Thus, silence can constitute dishonesty only where there is a duty to speak.

treated the same way as a representation that the defect does not exist. Thus, concealment amounts to fraud.[4] There is good reason for this, since concealment of a defect prevents its discovery by a plaintiff exercising due diligence and undermines the principle of *caveat emptor*. By contrast, the non-disclosure of a defect in the premises is generally not actionable unless there is a covenant in the contract that the defect does not exist.[5]

9. The second case the CFIB relies on for this proposition is *Sidhu Estate v Bains*.[6] In that case, the Court held that Bains' silence was confirmation of the misinformation that Bhandar passed on to Sidhu in his presence. This aspect of the case must be considered in light of this Court's more recent decision in *Bruno Appliance and Furniture, Inc. v. Hryniak*.[7] While the evidence in that case clearly demonstrated that Hryniak was aware of the fraud and may in fact have benefited from it, the critical issue according to this Court was whether Hryniak had *perpetrated* the fraud by inducing Bruno Appliance to contribute US$1 million to a non-existent investment scheme. The only way in which Hryniak might have been said to perpetrate the fraud is if the statements were attributable to him, for example if the speakers were his agents or his unwitting dupes.[8] His knowledge of the fraud was insufficient to attract liability.

10. Finally, the Respondents reject any comparison to the law of fraudulent concealment, which, as noted by the CFIB, requires the plaintiff to demonstrate that the defendant acted unconscionably. The duty of honest performance of contract requires a minimum standard of honesty, nothing more.

(b) Positive Steps that Mislead the Plaintiff

11. The CFIB relies on the doctrine of estoppel to suggest that where a defendant takes positive steps to mislead the plaintiff, it may be held to have breached the duty of honest performance of contract. The case law it relies on, however, fails to establish such a broad proposition.

12. In fact, the first decision the CFIB relies on stands for precisely the opposite principle. In *General Teamsters, Local Union No. 362 v. Consolidated Fastfrate Inc.*[9], the Court confirmed that estoppel by representation can arise from silence "where a party is under a duty to speak."[10] The Court found that

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[4] *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72 at para 59.
[5] *Ibid* at para 60.
[6] 1996 CanLII 3332 (BCCA).
[7] 2014 SCC 8, [2014] 1 SCR 126 at para 29.
[8] *Ibid* at para 27.
[9] 2008 ABQB 230.
[10] *Ibid* at para 55.

the Union had a duty to inform its member of the requirements of the Collective Agreement and that it failed to do so. The Court referred to this Court's decision in *Ryan v Moore*: "… an estoppel by representation cannot arise from silence unless a party is under a duty to speak. Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a disclosure, or take steps, the omission of which is relied upon as creating an estoppel."[11]

13. The second case on which the CFIB relies is that of *Voyager Petroleums Ltd. v. Vanguard Petroleums Ltd*.[12] The issue in that case was whether estoppel by acquiescence was made out. As noted by Nigel Bankes, "[e]stoppel by acquiescence […] is characterized by an implied rather than an express representation and as a result the courts have jealously guarded access to this form of estoppel through an arcane set of rules known as the five probanda of Willmott v Barber."[13] Those probanda were set out in *Voyager*: (i) the plaintiff must have made a mistake as to his legal rights; (ii) the plaintiff must have expended some money or done some act on the faith of his mistaken belief; (iii) the defendant must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (iv) the defendant must know of the plaintiff's mistaken belief of his rights; and (v) the defendant must have encouraged the plaintiff's expenditure or in other acts, either directly or by abstaining from asserting his legal right. Where all these elements exist, "there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but […] nothing short of this will do."[14]

14. Because of these arcane rules, estoppel by acquiescence is of limited assistance in defining a simple and clear duty to perform one's contractual obligations honestly.

(c) Failure to Correct a Representation that Became Untrue

15. The failure to correct a material representation that has become untrue may constitute fraud where, in the context of negotiations, the speaker knows the representation has become untrue but, by failing to correct it, continues to induce the plaintiff to enter into a contract.[15] This principle has limited

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[11] *Ryan v. Moore*, [2005] 2 SCR 53, 2005 SCC 38 at para 76.
[12] 17 Alta LR (2d) 212 (Q.B.) ["***Voyager***"].
[13] Nigel Bankes, "Cowper-Smith and the Law of Proprietary Estoppel: Implications for the Oil and Gas Lease?" (January 10, 2018), online (blog): *The University of Calgary Faculty of Law Blog* <ablawg.ca/2018/01/10/cowper-smith-and-the-law-of-proprietary-estoppel-implications-for-the-oil-and-gas-lease/>.
[14] *Voyager* at para 47 (emphasis added).
[15] *TD Bank v. Leigh Instruments Ltd. (Trustee of)*, 1998 CanLII 14806 at para 499 (ONSC), affirmed, 1999 CanLII 3778 (ONCA), citing *Brownlie v. Campbell* (1880), 5 App. Cas. 925 at 950 (UKHL).

application to the performance of a contract that has already been entered into, unless the contract includes an express obligation to negotiate in good faith.

16. The CFIB relies primarily on the decision in *KRM Construction Ltd. v. British Columbia Railway Company*.[16] In the course of negotiations, the defendant made a material representation that was true at the time it was made but later became untrue, and the defendant knew it. Moreover, the representation remained material and it induced the plaintiff to enter into the contract and release. In the circumstances, the Court found that the defendant had a duty to correct it. Professor Buckwold shares this view:

> One negotiating party should not be required to disclose to the other its intentions or even facts material to the negotiation 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*.[17]

17. It is unclear whether the second case the CFIB relies on for this proposition actually supports it. The plaintiff in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*.[18] was successful in seeking rectification of a written contract, on the basis of a prior verbal agreement. As explained by this Court, the defendant had fraudulently misrepresented the written document as accurately reflecting the prior oral agreement, and had substituted 110 "feet" for "yards" in describing the width of land which the plaintiff had an option to acquire. When the plaintiff sought to exercise the option, the defendant insisted on the written terms, despite knowing they did not reflect the prior verbal agreement. The defendant was enriched as a result, as he stood to become the sole owner of the optioned land.[19]

18. Most lawyers would readily identify such actions as constituting sharp practice. The defendant had engaged in sharp practice with a view to obtaining sole ownership of the optioned land, something that he had not bargained for in the oral agreement. As set out in the Respondents' factum, this is precisely the sort of mischief that the good faith principle seeks to correct.

19. With the exception of half-truths, the three other examples of "active non-disclosure" identified by the CFIB are therefore of limited assistance in defining the duty of honest performance of contract.

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[16] 1982 CanLII 488 at paras 53 and 57 (BCCA). The defendant was not found liable for fraud or misrepresentation in the other cases cited at footnote 39 of the CFIB's factum.
[17] 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, ABOA Tab 56 at 14 (emphasis added).
[18] *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 SCR 678, 2002 SCC 19 (CanLII).
[19] *Ibid* at para 52.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd 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

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