

Civil Litigation

Requirements of honesty in contractual performance can go further than just prohibiting lies: SCC

By Ian Burns

(December 18, 2020, 4:34 PM EST) -- The Supreme Court has ruled a breach of the duty of honesty in contracts can involve both direct action or inaction, in a decision which sided with a property maintenance company that argued a condominium group had acted in bad faith when it terminated an agreement for work during the winter. But a lawyer involved in the case says the decision adds uncertainty to contractual relationships because it requires a party to an agreement to put weight on what is on another person's mind.

In 2012 Baycrest, a group of 10 condominium corporations in Ottawa, signed a two-year winter maintenance contract, and a separate summer maintenance contract, with C.M. Callow Inc. The winter agreement had a clause which said Baycrest was entitled to terminate the agreement by giving 10 days' written notice. In 2013, Baycrest decided to end the agreement due to complaints about the contractor's performance but chose not to inform Callow of its decision at the time. Throughout the spring and summer of that year, Callow had discussions with Baycrest and came away thinking its work had been good and it was going to get a two-year renewal of the winter contract, leading to it performing extra maintenance work in the summer at no charge as an incentive.

But Baycrest informed Callow of its decision to terminate the winter maintenance agreement in September 2013, leading Callow to take it to court by claiming breach of contract. The Ontario Superior Court of Justice sided with Callow and ruled Baycrest had acted in bad faith, but the Ontario Court of Appeal overturned that decision by saying the trial judge improperly expanded the duty of honest performance (*C.M. Callow Inc. v. Zollinger* 2018 ONCA 896).



Justice Nicholas Kasirer

That duty, as outlined in *Bhasin v. Hrynew* 2014 SCC 71, requires that parties to a contract must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. But Justice Nicholas Kasirer held "the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of 'misleading' one's counterparty... will in some circumstances capture forms of silence or omissions."

"One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct," he wrote in *C.M. Callow Inc. v. Zollinger* 2020 SCC 45, which was decided Dec. 18.

Justice Kasirer held Baycrest knowingly misled Callow in the way it exercised the winter maintenance agreement, and this wrongful exercise of the termination clause amounted to a breach of contract.

“Even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days’ notice, the right had to be exercised in keeping with the duty to act honestly — i.e., Baycrest could not lie or otherwise knowingly mislead Callow about matters directly linked to the performance of the contract,” he wrote. “Having failed to correct Callow’s misapprehension that arose due to these false representations, Baycrest breached its duty of good faith in the exercise of its right of termination.”

The Quebec civil law framework of abuse of rights helps to focus the analysis of whether the common law duty of honest performance has been breached, Justice Kasirer wrote. Under the *Civil Code of Quebec*, no right can be exercised with the intent of injuring another and all parties must conduct themselves in good faith both at the time an obligation in a contract arises and at the time it is performed or extinguished.

“Authorities from Quebec serve as persuasive authority and comparison between the common law and civil law as they evolve in Canada is a particularly useful and familiar exercise for the court,” he wrote. “Like in the Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to the requirements of good faith. The direct link exists when the party performs their obligation or exercises their right under the contract dishonestly.”



Justice Russell Brown

Justice Kasirer was joined by Chief Justice Richard Wagner and Justices Rosalie Silberman Abella, Andromache Karakatsanis and Sheilah Martin in his decision. Justice Russell Brown, who was joined by Michael Moldaver and Malcolm Rowe, agreed with his colleagues’ opinion that Baycrest had breached the duty of honesty but disagreed with their drawing on concepts from Quebec civil law. Doing this departs from the court’s accepted practice in respect of comparative legal analysis, he wrote.

“Rather than permissibly drawing inspiration or comfort from the civil law in filling a gap in the common law or in modifying it, the majority’s approach, I say respectfully, risks subsuming the common law’s already-established and distinct conception of good faith into the civil law’s conception,” he wrote. “And to the extent it does so, it confuses matters significantly, the majority’s assurances to the contrary notwithstanding.”

Courts should draw on external legal concepts only where domestic law does not provide an answer or where it is necessary to modify or otherwise develop an existing legal rule, Justice Brown wrote. He added there is a rich law in the context of misrepresentation accepting that sometimes silence or half-truths amount to a statement.

“Here, no gaps are to be filled, and no domestic common law requires development (or even ‘clarification’),” he wrote. “Rather, in service of what the majority describes as a ‘dialogue’ between the civil law and common law, it uses the civil law device of abuse of right to drive an analysis which, I repeat, is neither necessary to decide this appeal, nor helpful in its obscuring of the law.”



Justice Suzanne Côté

And Justice Suzanne Côté dissented, arguing Callow's recourse cannot be based on a breach of the duty of honest performance. She also disagreed with the majority's decision to draw on the *Civil Code of Quebec*.

"[Baycrest's conduct] may not be laudable, but it does not fall within the category of active dishonesty prohibited by the contractual duty of honest performance," she wrote. "There were no outright lies. Regardless of how its conduct is characterized, Baycrest had no obligation to correct Callow's mistaken belief."

Brandon Kain of McCarthy Tétrault, who was counsel for Callow, said the decision "in most respects" really applies what was already known from *Bhasin* — that you are not allowed to simply lie or otherwise knowingly mislead a party when dealing with a contract.

"What I think this case does is provide greater guidance and clarification in how you classify behaviour as falling within the scope of active dishonesty," he said. "And it really aligns the legal definition of dishonesty in this context with the way we all think about dishonesty in ordinary life — which is that things can be done dishonestly not only when someone engages in a direct, positive lie to you but also when they perform a series of acts that they know led you believe something and they deliberately decide not to correct that false impression."

That opinion was not shared by Rodrigue Escayola of Gowlings, who served as counsel for Baycrest. He said the decision was troubling in that it was bringing a great deal of uncertainty to contractual relationships "because now we need to put weight on what is in your mind."

"At what point do I suddenly have to show my cards if in your mind you have reached a conclusion that is not based on what I have done?" he asked. "If I am going to use a termination clause or exercise any sort of unfettered powers in a contract I can't lie or actively mislead I'm good with those two, but now I also have to disabuse you of your own personal understanding of a situation if my silence bolters any misconceptions you might have."

But Kain said the decision aligns the concept of dishonesty in contracts with the way courts have understood the concept in areas such as estoppel.

"I think this alignment promotes commercial certainty, because if you were to have one definition of dishonesty in this context and a second in other contexts then it would be difficult to know exactly what your obligations are," he said. "I think that could create more confusion."

Photo of Justice Nicholas Kasirer by SCC Collection

Photo of Justice Russell Brown by Andrew Balfour Photography

Photo of Justice Suzanne Côté by Philippe Landreville

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