

## BUSINESS LITIGATION AND INTERNATIONAL

FEBRUARY 2021

### IN THIS ISSUE

*This article is required reading for all those who represent companies which enter into contracts in Canada. It describes an important Supreme Court of Canada decision that expands the duty of honesty in contractual performance in Canada.*

## Supreme Court of Canada Expands Duty of Honest Contractual Performance

### ABOUT THE AUTHORS



**Steven Rosenhek** is one of Canada's leading litigation lawyers. He has extensive experience in complex commercial cases, major national and international class actions, commercial arbitrations, product liability, life sciences, and antitrust matters. Steven is widely recognized for his skills as a senior trial and appellate lawyer before all levels of Court in Canada, and a wide range of administrative and regulatory bodies. Steven acts in high-stakes commercial litigation cases and defends significant class actions, claims and regulatory proceedings, including matters across multiple international jurisdictions. He serves as national litigation counsel to major national and international manufacturers, distributors, and a wide array of other businesses. Steven's expertise as a leading Canadian litigator has been recognized by the *Canadian Legal Expert Directory*, *Benchmark Canada*, *Who's Who Legal*, *The Legal 500 (Canada)* and *Best Lawyers in Canada*. He can be reached at [srosenhek@fasken.com](mailto:srosenhek@fasken.com).



**David Ziegler** has a broad civil litigation and arbitration practice, with a focus on complex commercial and financial disputes, international arbitration, and securities class actions. David regularly represents clients across a wide range of industries, including mining, rail, professional services, insurance, banking and finance, and construction. David also has expertise both in managing e-Discovery projects using modern processing tools and handling matters requiring urgent and extraordinary relief, including injunctions. David is actively engaged in pro bono work, and formerly regularly volunteered as a Duty Counsel at the Toronto Small Claims Court, providing assistance to unrepresented litigants as part of the Pro Bono Law Ontario Duty Counsel Project. Prior to joining the firm, David practiced in New York as an associate with Morrison & Foerster LLP. While there, David gained experience in securities litigation and general commercial disputes, as well as in the representation of individuals in NY state and U.S. federal government investigations. He can be reached at [dziegler@fasken.com](mailto:dziegler@fasken.com).

*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

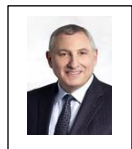
## ABOUT THE COMMITTEES

The **Business Litigation Committee** consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust issues, trade secrets and intellectual property, unfair competition and business defamation and disparagement. The Business Litigation Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. Among the committee's planned activities are newsletters, publications, sponsorship of internal CLEs, and Webinars. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org).



**Kyle Miller**  
**Vice Chair of Publications**  
Butler Snow LLP  
[Kyle.miller@butlersnow.com](mailto:Kyle.miller@butlersnow.com)

The **International Committee** is the core international group in IADC and serves those members who have an interest in transnational or international legal matters including transactions, litigation, and arbitration. Thus any member, whether in the USA or abroad, who does cases with a foreign element (inbound or outbound) will find involvement in this committee extremely useful. Many of the members of the committee are from outside the USA, and this provides a rich mix of experiences and expertise as well as great networking opportunities. The International Committee also organizes European, South American, and Asian Regional Meetings and contributes to the International Corporate Counsel College. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



**Glen Zakaib**  
**Vice Chair of North America Visibility and Publications**  
Borden Ladner Gervais LLP  
[gzakaib@blg.com](mailto:gzakaib@blg.com)

In 2014, the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, recognized a new common law contractual duty: specifically, the duty of honest performance. The duty requires that parties not lie or otherwise knowingly mislead each other about matters directly linked to the performance of their contract.

Six years later, the Supreme Court has now issued a new decision, in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, which expands the scope of that duty. Notably, the Supreme Court established that the duty of honest performance not only prohibits overt lies, but also can prohibit “half-truths, omissions, and even silence, depending on the circumstances”.<sup>1</sup>

### **Background**

The case involved a dispute between the respondent, a group of condominium corporations (“**Baycrest**”), and the appellant, C.M. Callow Inc. (“**Callow**”), regarding a two-year winter maintenance contract (the “**Contract**”) and separate summer maintenance contract, both executed in 2012. The Contract stipulated that Baycrest was entitled to terminate the Contract if Callow failed to provide satisfactory service in accordance with its terms. The Contract also permitted Baycrest to terminate the Contract if Callow’s services were not required for any other reason upon 10 days’ written notice.

In early 2013, Baycrest made the decision to terminate the Contract, but chose not to contemporaneously inform Callow of its decision. Throughout the spring and summer of 2013, Callow and Baycrest discussed the renewal of the Contract in 2014. Those discussions left Callow with the impression that the Contract was likely to be renewed and that Baycrest was satisfied with its services.

In September 2013, shortly before Callow would have begun its winter work pursuant to the Contract, Baycrest informed Callow of its decision to terminate the Contract. Callow subsequently filed a claim for breach of contract, alleging that Baycrest exercised the termination clause in the Contract contrary to the requirements of good faith set forth in *Bhasin*, and in particular the duty to perform a contract honestly.

The trial judge determined that Baycrest actively deceived Callow from the time the decision to terminate was made and until September 2013, and that Baycrest acted in bad faith by withholding information to ensure Callow performed work pursuant to the summer maintenance contract. The Ontario Court of Appeal overturned this decision. The court disagreed with the trial judge’s decision to expand the duty of honest performance beyond the terms of the Contract, and found that any deception by Baycrest merely related to a new contract not yet in existence, namely a renewal of the Contract.

---

<sup>1</sup> *Callow*, at para. 91.

### **The Decision**

With only one dissent<sup>2</sup>, the Supreme Court set aside the decision of the Ontario Court of Appeal and found that the duty to act honestly in performance of the contract precluded the active deception by Baycrest by which it knowingly misled Callow into believing that the Contract would not be terminated.

At the outset of its decision, the Supreme Court reiterated the general organizing principle of good faith established in *Bhasin*, which meant that “parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily”.<sup>3</sup> The Supreme Court also reiterated that the duty of honesty applies to all contracts as a matter of contractual doctrine, and means “simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.”<sup>4</sup>

The Supreme Court thereafter noted that it disagreed with the Court of Appeal on two main points, namely, (1) whether the alleged dishonesty was related to the renewal of the Contract or the performance of the Contract (the Supreme Court determined that it was the latter) and (2) whether Baycrest’s actions amounted to a breach of the duty of honest performance (the Supreme Court determined that they did).<sup>5</sup>

It is the latter subject that has the greatest impact on parties to a contract, and potential contract disputes, going forward. In its discussion of the subject, the Supreme Court commented that whether or a not a party has knowingly misled its counterparty requires a highly fact-specific determination, and that it can “include lies, half-truths, omissions, and even silence, depending on the circumstances.”<sup>6</sup>

The Supreme Court agreed with the trial judge that Baycrest intentionally withheld information about its intent to terminate the Contract, and knew that such silence, when combined with its active communications over the prior months, left Callow under the false impression that Baycrest was satisfied with its performance and that it would likely renew the Contract. The Supreme Court ultimately found that Baycrest breached its contractual duty of honest performance by failing to correct Callow’s misapprehension thereafter.<sup>7</sup>

### **Key Takeaways**

The decision in *Callow*, and in particular its expansion of the duty of honest performance to prohibit half-truths, omissions, or silence, under certain circumstances, and not merely overt dishonesty, will require parties to a contract to tread very carefully when engaging with counterparties when termination, contract renewal, or other material matters, are at issue.

---

<sup>2</sup> By Justice Côté. The primary decision was issued by a five-member majority, with three judges concurring.

<sup>3</sup> *Bhasin*, at para. 63.

<sup>4</sup> *Ibid.*, at para. 73.

<sup>5</sup> *Callow*, at paras. 37-38.

<sup>6</sup> *Ibid.*, at para. 91.

<sup>7</sup> *Ibid.*, at paras. 99-101.

Although the contours of the duty will undoubtedly continue to be explored, until further clarification is offered by the courts, parties would do well to consider what misapprehensions might result from any and all discussions with counterparties about such topics.

### Past Business Litigation Committee Newsletters

Visit the Committee's newsletter archive online at [www.iadclaw.org](http://www.iadclaw.org) to read other articles published by the Committee. Prior articles include:

OCTOBER 2020

[Vermont Court Rules That Commercial Landlord Cannot be Liable for Injury to Retail Tenant's Invitee Involving Tenant's Operations on Premises](#)

Walter Judge

SEPTEMBER 2020

[Getting the 'Drift': Maryland Adopts Daubert Standard](#)

Andrew Gendron and Emily Kelley

JULY 2020

[Potential Investment Litigation and Arbitration Trends Arising out of the COVID-19 Financial Crisis: Two Products that will Likely be the Subject of Claims](#)

John Beach, Jack Pringle, and Lyndey Bryant

JUNE 2020

[Potential Investment Litigation and Arbitration Trends Arising out of the Coronavirus Financial Crisis: The Effect of Some Recent Legal Holdings](#)

John Beach, Jack Pringle and Lyndey R.Z. Bryant

APRIL 2020

[Vermont Supreme Court Recognizes Exception to the Economic Loss Rule](#)

Walter Judge

### Past International Committee Newsletters

Visit the Committee's newsletter archive online at [www.iadclaw.org](http://www.iadclaw.org) to read other articles published by the Committee. Prior articles include:

AUGUST 2017

[CETA \(EU-Canada Comprehensive Economic and Trade Agreement\): Is There any Justified Reason to Move from Arbitrators to Judges in the Resolution of Disputes System?](#)

Manuel P. Barrocas

JUNE 2017

[Digitalization and Automatization and Their Impact on the Global Labor Market](#)

Gerlind Wisskirchen

NOVEMBER 2016

[International Conflicts of Service](#)

Stacey Hsu and Daniel Reisler

AUGUST 2016

[Independence Day](#)

Bill Perry

MARCH 2016

[Intellectual Property in Ukraine after the Association Agreement: On the Way to an Effective Level of Regulation](#)

Maria Orlyk and Oleksandra Kondratenko

MAY 2015

[Cyber Security for International Lawyers](#)

Bob Craig and Norman Comstock