COURT FILE NUMBER	2401-05179
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ALPHABOW ENERGY LTD.
DOCUMENT	**RESPONSE BRIEF OF MEGLOBAL CANADA ULC**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**DLA PIPER (CANADA) LLP** 2700, 10220 – 103 Avenue NW Edmonton, Alberta T5J 0K4 **Attention: Jerritt Pawlyk / Anthony Mersich / Isaac Belland** Phone: 780.429.6835 / 403.766.8819 / 780.429.6818 Fax: 780.670.4329 Email: jerritt.pawlyk@ca.dlapiper.com / anthony.mersich@ca.dlapiper.com / isaac.belland@ca.dlapiper.com File No.: 103704-00007

Commercial List Chambers Application
Scheduled for the 12th day of August, 2025
before the Honourable Justice Armstrong

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I. INTRODUCTION

1. MEGlobal Canada ULC ("**MEGlobal**") submits this Response Brief in opposition to AlphaBow Energy Ltd.'s ("**AlphaBow**") application filed June 17, 2025 (the "**Application**"). AlphaBow seeks the following relief, all of which MEGlobal opposes:

   (a) To amend certain portions of the subscription agreement (the "**Subscription Agreement**" and such amendments being the "**Proposed Amendments**") between AlphaBow and 2628071 Alberta Ltd. ("**2628071**" or the "**Purchaser**"), in respect of the transaction approved by the Transaction Approval and Reverse Vesting Order granted by the Honourable Justice P.R. Jeffrey on December 19, 2024 (the "**RVO**" and such transaction being the "**RVO Transaction**"); and

   (b) To declare that the CO_2 Stream Purchase and Sale Agreement dated December 1, 2004, as amended (the "**CO_2 Agreement**"), together with the Ground Lease dated February 1, 2005 (scheduled to the CO_2 Agreement), will be retained by the Purchaser under the RVO Transaction (as amended by the Proposed Amendments) free and clear of any liabilities, claims and encumbrances other than the Retained Liabilities defined in the Subscription Agreement (the "**Liability Extinguishing Relief**"); and

   (c) To declare that the CO_2 Agreement is valid and binding upon its counterparties.

2. MEGlobal opposes AlphaBow's Application because the relief AlphaBow seeks alters the nature of the RVO Transaction to MEGlobal's detriment.

3. Through the Proposed Amendments, AlphaBow and the Purchaser seek to include the disclaimed CO_2 Agreement which was a contract for the supply of carbon dioxide ("**CO_2**") between MEGlobal as a seller and AlphaBow as a buyer, as a "Retained Contract" under the Subscription Agreement. In addition, they seek a declaration that all claims relating to the disclaimed CO_2 Agreement, including MEGlobal's claim against AlphaBow in these proceedings (which exceeds $10,000,000.00) shall be extinguished for no consideration. The collective result of this relief, if granted, would require MEGlobal to honour the terms of a disclaimed agreement while having its proof of claim relating to the same disclaimed agreement nullified.

4. The Proposed Amendments are impermissible as a result of the doctrine of *functus officio*. The Subscription Agreement and the RVO Transaction were approved by this Honourable Court pursuant to the RVO based on the facts and representations submitted before Justice Jeffrey at the

RVO Application. AlphaBow cannot now be permitted to revise the RVO to incorporate terms that it wishes it had obtained at first instance.

5. The relief sought by AlphaBow is also a collateral attack on the claims process order granted in these proceedings on September 20, 2024 (the "**Claims Process Order**"). Under the terms of the Claims Process Order, the Monitor is charged with evaluating the claims of AlphaBow's creditors. MEGlobal submitted its proof of claim in accordance with the terms of the Claims Process Order, and its proof of claim was not disallowed or revised by the Monitor. Neither AlphaBow nor the Purchaser are entitled to directly contest the quantum of MEGlobal's claim. Rather, any revision or disallowance of MEGlobal's proof of claim must be conducted in accordance with the Claims Process Order.

6. The various legal counterparties to the CO_2 Agreement have been involved in insolvency proceedings in some manner for roughly the last ten years. MEGlobal does not want that futile and commercially unreasonable pattern to continue. MEGlobal requests that the CO_2 Agreement remain disclaimed so that MEGlobal can move forward to contract with a financially viable and reliable counterparty of its choosing.

7. Capitalized terms used herein have the same meaning as in the affidavit of Rocco Schurink, sworn August 5th, 2025 (the "**Schurink Affidavit**"), unless otherwise defined.

II. FACTS

A. The disclaimed CO_2 Agreement

8. The disclaimed CO_2 Agreement was originally executed on December 1, 2004, and has been amended by three amending agreements dated January 1, 2019, December 1, 2019 and January 1, 2020.[1] Pursuant to the terms of the disclaimed CO_2 Agreement, as amended, MEGlobal had agreed to sell and deliver CO_2 gas to AlphaBow from MEGlobal's Prentiss site which is located near Red Deer, Alberta (the "**Facilities**"); and AlphaBow had agreed to purchase, take and receive such CO_2 gas.[2]

[1] Schurink Affidavit at paras 16-19.
[2] *Ibid.*

9. MEGlobal Canada Inc. was one of the original parties to the CO_2 Agreement which then became MEGlobal in 2015 through amalgamation; AlphaBow was not an original party to the CO_2 Agreement having acquired its interest in the CO_2 Agreement by way of various assignments.[3]

10. The Ground Lease dated February 1, 2005, which formed a part of the CO_2 Agreement as a schedule thereto, provided AlphaBow with approximately one hectare of land at the Prentiss site where AlphaBow's equipment is currently located.[4]

11. The term of the disclaimed CO_2 Agreement, as amended, would have expired on December 31, 2028, unless it had been extended in accordance with its terms.[5] Importantly, if AlphaBow's Application is granted, MEGlobal will provide the required two-year notice to AlphaBow and the Purchaser to terminate the CO_2 Agreement as of December 31, 2028 in accordance with Section 12.1 of the CO_2 Agreement.[6]

B. The MEGlobal Claim in these CCAA proceedings

12. MEGlobal asserts a claim against AlphaBow in the amount of $10,293,055.20 as at October 23, 2024 (the "**MEGlobal Claim**"),[7] the details of which are discussed further below.

13. The process for AlphaBow's creditors to submit their claims for adjudication in these CCAA proceedings is set out in the Claims Process Order. This process was designed to provide clarity with respect to cure costs for any potential purchasers interested in submitting a bid in AlphaBow's sale and investment solicitation process (the "**SISP**").[8]

14. Under the Claims Process Order, the deadline for AlphaBow's creditors to submit their proofs of claim was October 23, 2024 (the "**Claims Bar Date**").[9] Any proof of claim that was received by the Monitor by the Claims Bar Date would be reviewed by the Monitor, with AlphaBow's assistance, to the extent necessary for the completion of a transaction under the SISP or the distribution of proceeds. The Monitor would then accept the amount set out in the proof of claim,

[3] *Ibid* at para 18.
[4] *Ibid* at para 20.
[5] *Ibid* at para 22.
[6] *Ibid* at para 51.
[7] *Ibid* at para 25.
[8] Monitor's Third Report, dated September 13, 2024, at para 6.0.1.
[9] Claims Process Order at para 2(g).

or it would revise or disallow the amount claimed by sending such claimant a Notice of Revision or Disallowance (as defined in the Claims Process Order).[10]

15. MEGlobal and Alberta & Orient Glycol Company ULC ("**A&O**") submitted the MEGlobal Claim in accordance with the terms of the Claims Process Order on October 23, 2024, prior to the expiry of the Claims Bar Date.[11] MEGlobal has never received any notice that the MEGlobal Claim was revised or disallowed. As a result, MEGlobal understands that the MEGlobal Claim amount is valid and has been accepted.[12]

16. The foundation of the MEGlobal Claim rests on five distinct categories of obligations that AlphaBow has failed to satisfy. The first and largest component stems from AlphaBow's take-or-pay obligations. When AlphaBow failed to take deliveries, it triggered a contractual obligation to pay $20 per tonne for volumes not taken.'[13]

17. Second, beyond the Failure to Take charges, AlphaBow owes MEGlobal for actual CO_2 that was delivered and accepted. These unpaid CO_2 sales invoices cover deliveries that AlphaBow received and used in its operations and never paid for. The pricing for these deliveries varied based on prevailing oil prices, ranging from $2.50 to $12.50 per tonne as specified in the CO_2 Agreement.[14]

18. Third, the disclaimed CO_2 Agreement structure included provisions for greenhouse gas credits. AlphaBow received the benefit of these arrangements but failed to pay the associated invoices.[15]

19. Fourth, interest on these overdue amounts has accumulated at the contractual rate of prime plus 2%. The interest calculation covers the period from when each invoice became due through April 26, 2024, the date of AlphaBow's CCAA filing.[16]

20. Fifth and finally, the MEGlobal Claim includes unpaid Ground Lease obligations. These amounts represent unpaid rent from 2018 through April 26, 2024, with annual escalation according to the Ground Lease terms.[17]

[10] Claims Process Order at para 19.
[11] Schurink Affidavit at para 25.
[12] *Ibid* at para 29.
[13] *Ibid* at para 26.
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*

21. The total MEGlobal Claim of $10,293,055.20 is divided between pre-filing amounts of $6,700,734.11 and post-filing amounts of $3,592,321.09. All amounts are detailed in a summary of AlphaBow's account prepared from MEGlobal's accounting records.[18]

C. The Purchaser's treatment of the CO_2 Agreement

22. On December 9, 2024, AlphaBow's counsel circulated materials for an application scheduled for December 19, 2024 before Justice Jeffrey (the "**Sale Approval Application**"), at which AlphaBow sought approval of a number of transactions. Among those transactions were:

    (a) The RVO Transaction; and

    (b) An asset sale to 2628069 Alberta Ltd. ("**2628069**") in respect of various of AlphaBow's assets (the "**2628069 Asset Sale**").

23. At that time, 2628069 (which is an affiliate of the Purchaser under the RVO Transaction) proposed to take an assignment of the CO_2 Agreement pursuant to the 2628069 Asset Sale; not through the RVO Transaction.[19]

24. Subsequent to receiving AlphaBow's application materials for the Sale Approval Application, on December 16, 2024, counsel for MEGlobal, Jerritt Pawlyk of DLA Piper (Canada) LLP ("**Mr. Pawlyk**"), contacted counsel for 2628069, David Mann of Bluerock Law ("**Mr. Mann**"), to inquire as to when and how the Cure Costs for the CO_2 Agreement (being the MEGlobal Claim) would be satisfied.[20]

25. On December 18, 2024, Mr. Mann advised Mr. Pawlyk that the CO_2 Agreement would be disclaimed and removed from the asset purchase agreement schedules.[21]

26. On December 19, 2024, Justice Jeffrey approved both the RVO Transaction[22] and the 2628069 Asset Sale.[23] Neither of these transactions included the CO_2 Agreement.

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[18] *Ibid* at paras 26-27.
[19] Seventh Affidavit of Ben Li, sworn December 9, 2024 at Exhibit A, Appendix 16 (pages 463-67 of pdf document).
[20] Schurink Affidavit at para 32.
[21] *Ibid* at para 33.
[22] Transaction Approval and Reverse Vesting Order granted by Justice Jeffrey on December 19, 2024.
[23] Order (Sales Approval and Vesting) granted by Justice Jeffrey on December 19, 2024.

27. Mr. Mann subsequently confirmed on December 24, 2024 that the CO_2 Agreement had been disclaimed.[24]

28. Mr. Mann is also counsel to the Purchaser.

D. 2025 Communications with Purchaser

29. Contrary to AlphaBow's or the Purchaser's assertions, there were no material ongoing negotiations between the Purchaser and MEGlobal regarding a new CO_2 supply agreement following the Sale Approval Application on December 19, 2024.

30. In fact, no negotiations ever took place between MEGlobal and the Purchaser regarding entering into a new CO_2 supply agreement. Instead, in January 2025, representatives from MEGlobal had two short video conference calls with representatives from Cascade Capture Ltd. ("**Cascade**") to discuss the possibility of entering into a new CO_2 supply arrangement and stressed the requirement for further financial vetting of Cascade before proceeding any further with Cascade (the "**January 8 and 23, 2025 Calls**").[25] As such, MEGlobal provided Cascade with the contact information for MEGlobal's financial team. Cascade was to be the nominee of 2628069 under the new CO_2 supply agreement. As noted above, 2628069 is an affiliate of the Purchaser, and had originally intended to take an assignment of the CO_2 Agreement pursuant to the 2628069 Asset Sale until Mr. Pawlyk raised the issue of Cure Costs and the MEGlobal Claim.

31. During a January 27, 2025 introductory video conference call with members of MEGlobal's internal finance team, Tony Kinnon, on behalf of Cascade, presented a brief overview of Cascade's and the Purchaser's ownership structure and its business plan (the "**January 27, 2025 Call**").[26] The ownership structure was complex, and difficult to follow. Accordingly, MEGlobal asked the Purchaser at the January 27, 2025 Call to prepare a chart summarizing the ownership structure. In addition, MEGlobal advised Cascade that it had concerns regarding its ability to satisfy its financial obligations under a CO_2 supply agreement.

32. Following the January 27, 2025 Call, Cascade provided MEGlobal with some supplementary information regarding Cascade's ownership structure; however, this information was not sufficient to allay MEGlobal's concerns regarding Cascade. On February 11, 2025, representatives from

[24] Schurink Affidavit at para 37.
[25] *Ibid* at paras 40-41.
[26] *Ibid* at para 42.

MEGlobal met internally to discuss whether to engage with Cascade regarding a new CO_2 supply arrangement. At that meeting, MEGlobal determined that it would not engage with Cascade any further.[27]

33. MEGlobal has not had any further calls with Cascade or any other affiliate of the Purchaser regarding a new CO_2 supply agreement.[28]

E. The Purchaser changes its mind

34. On April 8, 2025, Mr. Pawlyk wrote to AlphaBow's counsel demanding, among other things, that AlphaBow remove its equipment still situated at the Prentiss site.[29] Notably, AlphaBow has not paid any rent owing under the Ground Lease throughout these CCAA proceedings.[30]

35. On June 18, 2025, MEGlobal was made aware, for the first time, that the Purchaser intended to retain the disclaimed CO_2 Agreement as part of the RVO Transaction.

III. ISSUES

36. MEGlobal respectfully submits that the sole issue for the Court to determine is whether the Proposed Amendments and Liability Extinguishing Relief should be permitted.

37. For the reasons provided below, MEGlobal submits that this Court should deny the requested relief.

IV. ARGUMENT

A. The Proposed Amendments are not permissible

38. AlphaBow seeks the Court's assistance, in essence, to secure a more favourable transaction for the Purchaser than what was approved by Justice Jeffrey at the Sale Approval Application by disguising the Proposed Amendments as a mere clarification of the Subscription Agreement.

39. Contrary to AlphaBow's assertions, the Proposed Amendments are not clarifications of the circumstances in which Cure Costs will and will not be paid for Retained Contracts (each as defined in the Subscription Agreement).[31] Rather, the Proposed Amendments substantially narrow the

[27] *Ibid* at paras 44-45.
[28] *Ibid* at para 48.
[29] *Ibid* at para 46.
[30] *Ibid* at para 26(b).
[31] Applicant's Brief at para 20.

circumstances under which the Purchaser would be required to pay Cure Costs in respect of a Retained Contract, and specifically they create an explicit carve-out for any amounts claimed by MEGlobal.

40. Further, the Liability Extinguishing Relief materially alters how the MEGlobal Claim is treated as compared to how it would be treated under the RVO. Accordingly, the Liability Extinguishing Relief has the effect of altering the terms of the RVO itself.

41. Once an order is entered or is otherwise perfected, the court which granted the order is *functus* and the court may not set aside or alter the order, even if there is a change in circumstances or if it appears wholly wrong.[32] The appropriate recourse is to appeal the order.[33]

42. The period to apply for leave to appeal in respect of an order issued under the CCAA is 21 days from the time the order is rendered.[34] This period expired on January 9, 2025, without any application for leave to appeal having been filed.[35]

43. The doctrine of *functus officio* is subject to certain limited exceptions, being: (i) the express exceptions set out in the *Rules.*[36] (ii) where there has been a slip in drawing up the judgment or order, and (iii) where there has been an error in expressing the manifest intention of the court.[37] None of these exceptions apply to the Proposed Amendments or the Liability Extinguishing Relief. In contrast, the relief sought by AlphaBow is an attempt to renegotiate the terms of the RVO Transaction after that transaction has already been approved by the Court.

The Rules do not authorize the Proposed Amendments

44. AlphaBow relies on Rule 9.15(4) of the *Rules of Court* and the broad discretion afforded to the court under section 11 of the CCAA as authority for approval of the Proposed Amendments.[38]

45. Section 9.15(4) of the *Rules of Court* provides as follows (underline added):

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[32] *First Calgary Financial Credit Union Ltd. v Inspired Luxury Homes Inc.*, 2014 ABQB 787 at para 12 [***First Calgary***].
[33] *Locarno Investments Limited v Industrial Mortgage*, 1967 CanLII 551 (BCCA) at para 3.
[34] CCAA s. 14(2).
[35] Applicant's Brief at para 16.
[36] *First Calgary* at para 14.
[37] *Iverson v Westfair Foods Ltd.*, 1998 ABCA 337 at para 65.
[38] Applicant's Brief at paras 7-8.

> 9.15(4) The Court may set aside, vary or discharge an interlocutory order
>
> (a) because information arose or was discovered after the order was made,
>
> (b) with the agreement of every party, or
>
> (c) on other grounds that the Court considers just.

46. The RVO is not an interlocutory order, but is a final order, since it finally determines the rights of the parties.[39] Canadian courts have held that sale approval orders are final orders.[40] Rule 9.15(4) is therefore inapplicable in the circumstances and cannot support varying the RVO or the Subscription Agreement to incorporate the Proposed Amendments or the Liability Extinguishing Relief.

The Proposed Amendments are not appropriate

47. With respect to CCAA s. 11, the broad discretion provided under this section is not unlimited. It is constrained by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances".[41]

48. In *Canada North*, the Supreme Court of Canada gave the following guidance for determining whether a court should exercise the broad discretion provided by CCAA s. 11 (citations omitted):

> Keeping in mind the centrality of judicial discretion in the CCAA regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence. The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the CCAA. For instance, given that the purpose of the CCAA is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize"[42]

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[39] *First Calgary* at para 30.
[40] Donald JM Brown, *Civil Appeals*, loose-leaf (2025 release), online: Thomson Reuters ProView at § 3:41.
[41] *Canada v Canada North Group Inc.*, 2021 SCC 30 at para 21 [***Canada North***].
[42] *Canada North* at para 21.

49. In the matter at hand, none of the criteria supporting the exercise of the Court's discretion – appropriateness, good faith, and due diligence – validate granting the relief sought by AlphaBow.

50. Whether an order is "appropriate in the circumstances" is assessed by considering whether the order would advance the policy and remedial objectives of the CCAA.[43]

51. Historically, the CCAA's remedial objectives have been to promote corporate reorganizations by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs.[44] More recently, so-called "liquidating CCAAs" (such as the present proceeding) have been held as being "not necessarily inconsistent with the remedial objectives of the CCAA" on the basis that liquidation "may be a means to raise capital to facilitate a restructuring, eliminate further loss for creditors or focus on the solvent operations of the business."[45]

52. None of these objectives are achieved through the Proposed Amendments or the Liability Extinguishing Relief.

53. The Proposed Amendments and the Liability Extinguishing Relief do not facilitate AlphaBow's survival. They do not raise capital to facilitate a restructuring. They do not allow for AlphaBow to focus on the solvent aspects of its business. They do not eliminate further loss for AlphaBow's creditors. To the contrary, the Proposed Amendments and Liability Extinguishing Relief exacerbate MEGlobal's losses since they would require MEGlobal to continue to supply CO_2 under the disclaimed CO_2 Agreement while the MEGlobal Claim would be extinguished for no consideration. Accordingly, the relief sought by AlphaBow is not "appropriate" within the context of CCAA s. 11.

54. The Purchaser agreed to proceed with the RVO Transaction in its existing form upon satisfaction of the mutual and purchaser's conditions set out at sections 4.2 and 4.3 of the Subscription Agreement. None of those conditions permit the Purchaser to unwind or terminate the RVO Transaction at this point. The Purchaser is therefore bound to complete the RVO Transaction whether or not the Proposed Amendments are approved, and as a result, neither the Proposed Amendments nor the Liability Extinguishing Relief assist in advancing the RVO Transaction.

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[43] *Ibid.*
[44] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para 18.
[45] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para 45.

55. Further, the term of the disclaimed CO_2 Agreement would have expired on December 31, 2028. Even if assuming, *arguendo*, that this Court should approve the Proposed Amendments, MEGlobal is lawfully entitled to opt-out of any extension of the CO_2 Agreement by providing at least two years' notice to AlphaBow. MEGlobal has already advised the Purchaser (who will be AlphaBow's sole shareholder after the RVO Transaction closes) that it will exercise this right and terminate effective December 31, 2028.[46] As a result, the economic benefits that the Purchaser claims it will experience over the next 30-40 years are illusory, and will not transpire under the terms of the CO_2 Agreement.[47] This further supports MEGlobal's position that the relief sought by AlphaBow does not further the remedial purpose of the CCAA.

The Purchaser has not proceeded with due diligence

56. Initially, the Purchaser sought to retain the CO_2 Agreement through its affiliate, 2628069, pursuant to the 2628069 Asset Sale, not the RVO.[48] However, once 2628069 was alerted to the fact that it would be required to pay the MEGlobal Claim as a Cure Cost, 2628069, through its counsel, advised MEGlobal's Counsel that the CO_2 Agreement would be disclaimed.[49]

57. There have been no material negotiations or discussions regarding a new CO_2 supply agreement (to replace the disclaimed CO_2 Agreement) either with the Purchaser or any of its affiliates.

58. The Purchaser only advised MEGlobal that it was interested in retaining the disclaimed CO_2 Agreement in June of this year, and only after MEGlobal had demanded that AlphaBow remove its equipment from MEGlobal's Prentiss site.[50]

59. The Purchaser has given no credible explanation for its delay in informing MEGlobal of its intent to negotiate a new CO_2 agreement. The Purchaser has not been duly diligent in advising MEGlobal that it wished to revise the Subscription Agreement to include the disclaimed CO_2 Agreement among the Retained Contracts, and accordingly, the relief sought by AlphaBow should not be granted.

[46] Schurink Affidavit at para 51.
[47] Eleventh Affidavit of Ben Li, sworn June 17, 2025 at Exhibit F.
[48] Schurink Affidavit at para 30.
[49] *Ibid* at para 33.
[50] *Ibid* at para 46.

The Purchaser has not acted in good faith

60. Interested parties participating in restructuring proceedings are required to act in good faith with respect to those proceedings. The *Bankruptcy and Insolvency Act*[51] ("**BIA**") and the CCAA were amended in 2019 to codify the pre-existing duty of good faith imposed upon interested parties in insolvency proceedings. The debtor and the court officer already have obligations to act in good faith, thus these amendments were aimed at imposing the same obligation on creditors and other parties participating in proceedings under the BIA.[52]

61. The provisions in each of the BIA and the CCAA are identical, and provide as follows:

> **Good faith**
>
> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

62. The language of this section of the CCAA makes clear that the duty of good faith applies to all interested parties in insolvency proceedings, not just the debtor company. Accordingly, the Purchaser is an interested party, along with AlphaBow, and therefore is required to act in good faith in respect of these CCAA Proceedings.

63. Although there is no statutory definition of good faith under either the BIA or CCAA, recent case law has drawn upon the common law doctrine of good faith in contract performance, as set out by the Supreme Court of Canada's decisions in *Bhasin v Hrynew*[53] and *C.M. Callow Inc. v Zollinger*[54] in order to inform the scope of the duty of good faith in insolvency proceedings.

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[51] RSC 1985, c B-3.
[52] The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition § 1:68. Requirement to Act in Good Faith.
[53] 2014 SCC 71.
[54] 2020 SCC 45.

64. In that regard, Justice Mah in *CWB Maxium Financial Inc v 2026998 Alberta Ltd*[55] conducted a thorough analysis of the existing case law that had addressed the duty of good faith in considering the application of the duty in the context of BIA s. 4.2 (which is identical to CCAA s. 18.6).

65. Justice Mah summarized his analysis by providing several observations about the application of the duty of good faith in insolvency proceedings. Those that are relevant to this Application are as follows:[56]

(a) Interested persons in proceedings under the BIA [or CCAA] are statutorily required to act in good faith with respect to those proceedings.

(b) Further, since there is no statutory definition of "good faith", the common law relating to the organizing principle of good faith in contractual performance may be used to inform the good faith requirement in section 4.2 of the BIA [CCAA s. 18.6]….

(c) The duty of good faith, [for contractual counterparties], requires the parties not to lie to or mislead the other with respect to the status of the [contract]. It does not impose a duty of loyalty or disclosure, or require the subordination of one's own interests to the other, and falls short of a fiduciary duty.

(d) Whether dishonesty has occurred in a given case is fact-specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence.

(e) The conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the BIA [or CCAA].

66. The summary provided by Justice Mah in *CWB Maxium* is consistent with the comments from Justice Romaine in *Bellatrix Exploration Ltd* (Re)[57], where she cited an article authored by Dr. Janis Sarra with approval, noting that (underline added):

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; <u>where parties act capriciously and arbitrarily</u>; or where they lie

[55] 2021 ABQB 137 [***CWB Maxium***].
[56] *CWB Maxium* at 59.
[57] *2020 ABQB 809* [***Bellatrix***].

> or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.[58]

67. In both *Bellatrix* and *CWB Maxium*, the courts noted that misleading another party about matters relating to insolvency can amount to a breach of good faith. Further, in *CWB Maxium*, relying on *Callow*, the court noted that misleading another party by means of omission or silence can also amount to a breach of the duty of good faith.[59]

68. Although not in an insolvency context, the Supreme Court of Canada has held that good faith requires more than the absence of bad faith.[60]

69. In the matter at hand, 2628069 (which is an affiliate of the Purchaser) advised MEGlobal's Counsel, through counsel prior to the Sale Approval Application, that it intended to disclaim the CO_2 Agreement.[61] Through counsel, the Purchaser confirmed to MEGlobal following the Sale Approval Application that it had disclaimed the CO_2 Agreement, and instead, it intended to attempt to negotiate a new contract for the supply of CO_2.[62] AlphaBow's counsel was copied on these correspondences confirming that the CO_2 Agreement had been disclaimed, and did not dispute or correct the assertion that the CO_2 Agreement had been disclaimed.

70. MEGlobal was led to believe that the CO_2 Agreement had been disclaimed, including during the period in which Cascade (an affiliate of the Purchaser) spoke to MEGlobal about the potential for a long-term new CO_2 supply arrangement. The Purchaser's sudden "about-face" on this issue demonstrates that the Purchaser was not honest, candid or forthright when it advised MEGlobal that the CO_2 Agreement was being disclaimed. Therefore, the Purchaser acted in bad faith.

71. Due to the Purchaser's bad faith conduct, it cannot ask this Court to exercise broad discretion under CCAA s. 11 to approve amending the Subscription Agreement to allow the Purchaser to retain a contract that has (according to the Purchaser and its affiliates) already been disclaimed.

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[58] *Bellatrix* at para 105.
[59] *CWB Maxium* at para 53.
[60] *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at para 110.
[61] Schurink Affidavit at para 33.
[62] *Ibid* at paras 34, 40-41.

B. Cure Costs are owing under the RVO

AlphaBow collaterally attacks the Claims Process Order and the RVO

72. "Cure Costs" are a defined term in the Subscription Agreement, and pursuant to that definition, the amount of all Cure Costs in respect of any Retained Contract is to be determined by the Claims Process Order.

73. In an attempt to circumvent the Purchaser's obligation to pay Cure Costs in respect of the CO_2 Agreement, AlphaBow advances irrelevant arguments based on the improper application of CCAA s. 11.3, and a baseless claim that it experienced a *force majeure* event. These submissions have no merit and should be disregarded.

74. CCAA s. 11.3 does not apply when determining the quantum of the MEGlobal Claim, since the Claims Process Order defines how a creditor's claim is characterized and quantified. In that regard, the Claims Process Order provides the following broad and inclusive definitions that are applicable to the MEGlobal Claim:

(a) "Claim" means "any right or claim of any Person that may be asserted ... against [AlphaBow]… in connection with any indebtedness, liability or obligation of any kind whatsoever… including without limitation … by reason of breach of contract or other agreement…"[63]

(b) "Cure Cost"[64] means "with respect to any Assumed Contract, being all of [AlphaBow's] monetary defaults which are required to be paid or which become or which become payable in the future to remedy all of [AlphaBow's] monetary defaults under such Assumed Contract or required to secure a counterparty's or any other necessary Person's consent to the assignment of such Assumed Contract pursuant to its terms…"[65]

(c) "Cure Cost Claim" means "a Claim in respect of a Cure Cost."[66]

[63] Claims Process Order at para 2(e).
[64] Notably, the definition of "Cure Cost" in the Claims Process Order matches the existing definition provided in the Subscription Agreement that was approved in the RVO.
[65] Claims Process Order at para 2(k).
[66] Claims Process Order at para 2(l).

75. None of these definitions either (a) refer to CCAA s. 11.3, or (b) exclude monetary defaults arising by reason of AlphaBow's insolvency. Accordingly, CCAA s. 11.3 simply has no application to the assessment or adjudication of the MEGlobal Claim.

76. In addition, the *force majeure* provision of the disclaimed CO_2 Agreement does not apply in these circumstances. The disclaimed CO_2 Agreement defines "Force Majeure" as follows (emphasis added):

> "**Force Majeure**" means, in relation to a Party, any occurrence, condition, situation, or threat thereof that renders the Party unable to perform its obligations under this Agreement; **provided that (i) such occurrence, condition, situation or threat thereof is not under or within the control of the Party claiming such inability**; (ii) such Party could not have prevented or avoided the effects of such occurrence, condition, situation or threat thereof by the exercise of reasonable diligence; (iii) in the case Buyer is claiming relief, any occurrence, condition, situation or threat thereof related to the capacity of the CO_2 Collection Equipment, the CO_2 System or the Buyer Installed On Site Equipment or the ability of underground formations attributable the Oil Properties to receive CO_2 may not constitute Force Majeure; and **(iv) in the case of either Party, lack of finances or economic hardship may not constitute Force Majeure**;

77. AlphaBow speaks out of both sides of its mouth regarding the impact of its insolvency on the MEGlobal Claim. On the one hand, it argues that Cure Costs are not payable in respect of the CO_2 Agreement since the Cure Costs allegedly arise from AlphaBow's insolvency, which are exempted pursuant to CCAA s. 11.3.[67] Simultaneously, on the other hand, AlphaBow claims that Section 11.1 of the CO_2 Agreement relieves AlphaBow from its obligation to pay Cure Costs since it has allegedly suffered a *force majeure* event,[68] even though the CO_2 Agreement expressly provides that a *force majeure* event cannot arise from a party's lack of finances or economic hardship.

78. Both of AlphaBow's arguments on this issue are without merit, and in any event, neither AlphaBow nor the Purchaser are entitled to directly challenge the quantum of the MEGlobal Claim. The MEGlobal Claim can only be determined by the Monitor in accordance with the process set out in the Claims Process Order.

[67] Applicant's Brief at paras 23, 32.
[68] Applicant's Brief at para 34.

79. In that regard, MEGlobal submitted its proof of claim to the Monitor prior to the Claims Bar Date in accordance with the Claims Process Order.[69] Paragraph 19 of the Claims Process Order provides that claims will be adjudicated as follows (emphasis added):

> 19. The Monitor, with the assistance of the Applicant, shall to the extent necessary for the completion of a transaction or distribution of proceeds review all applicable Proofs of Claim, if any, received by the Claims Bar Date and subsequent adjustments as set out in the immediately preceding paragraph, **and shall accept the amount of each Claim set out therein for, or shall revise or reject the amount of each Claim by sending such Claimant a Notice of Revision or Disallowance.** The Monitor and the Applicant may attempt to consensually resolve the classification or amount of any asserted Claim with the Claimant prior to accepting, revising or disallowing such Claim.

80. MEGlobal has not received a Notice of Revision or Disallowance. Accordingly, MEGlobal understands that the MEGlobal Claim was accepted.[70]

81. Further, paragraph 21 of the RVO crystalizes the quantum of the MEGlobal Claim, as follows (emphasis added):

> 21. Any party asserting an entitlement to Cure Costs (as defined in the Sale Agreement), whose claim has not been barred pursuant to the Claims Process Order shall have **10 days from the issuance of this Order** to make an adjustment to the Cure Cost Claim **failing which the amount set out in the Proof of Claim will be deemed final**, subject only to such revisions or disallowance as determined by the Monitor or the Court in accordance with the Claims Process Order.

82. The RVO was pronounced on December 19, 2024. As a result, the quantum of the MEGlobal Claim crystalized as a final amount on December 30, 2024, unless the MEGlobal Claim is revised or disallowed by the Monitor or the Court in accordance with the Claims Process Order.

[69] Schurink Affidavit at para 25.
[70] *Ibid* at para 29.

83. AlphaBow's failure to follow the process set out in the Claims Process Order constitutes a collateral attack against the Claims Process Order and the RVO and is an abuse of process. Accordingly, AlphaBow's submissions on these issues should be rejected.

Razor Energy Corp is inapplicable

84. AlphaBow also relies on *Razor Energy Corp, Razor Holdings Gp Corp., and Blade Energy Services Corp (Re)*[71] as authority that cure costs need not be paid in respect to contracts where no counterparty consent is required for assignment of the rights under those contracts, and asserts that based on the court's reasons in *Razor*, Cure Costs ought not be paid to cure the MEGlobal Claim.[72]

85. *Razor*, however, is completely inapplicable to the relief sought by AlphaBow. In *Razor*, the court was asked to determine whether the circumstances and equities before it validated approving a transaction by way of a reverse vesting order. In this Application, AlphaBow is asking the Court to vary the terms of the RVO *that has already been granted and where AlphaBow has already advised the Court that Cure Costs would be assumed.*

86. During the Sale Approval Application before Justice Jeffrey AlphaBow's counsel stated as follows (emphasis added):

> MS. CAMERON: -- under the subscription agreement which, I'm sure you've seen it's a touchy issue on some reverse vesting order matters **and this one, cure costs are being assumed**. So what we anticipate is that with the proceeds from the various transactions that will likely go towards the priority claimants, which we understand to primarily be made up of the Alberta Energy Regulator for their various levies and fees
>
> THE COURT: Okay.
>
> MS. CAMERON: -- as well as municipal tax arrears.[73]

87. Notwithstanding the fact that AlphaBow advised the Court at the Sale Approval Application that Cure Costs for Retained Contracts would be assumed, AlphaBow takes the position that it should

[71] 2025 ABKB 30 [***Razor***].
[72] Applicant's Brief at para 26.
[73] Transcript of Application before Justice Jeffrey 5:29-38.

not be required to do so apparently on the erroneous belief that if AlphaBow was seeking this relief at first instance, it would not need to obtain MEGlobal's consent to assign its rights under the CO_2 Agreement.[74] This is also wrong.

88. Section 13.12 of the disclaimed CO_2 Agreement provided for a broad prohibition of the assignment of the rights and obligations without the prior written consent of the other party. This prohibition is subject to four narrow exceptions which are described at Sections 13.12(a) - (d) of the disclaimed CO_2 Agreement. AlphaBow claims that two of the exceptions apply. These Sections are reproduced below for reference (underline added):

> **13.12 Assignment**
>
> Neither this Agreement nor any of the rights and obligations hereunder shall be assignable by either Party without the prior written consent of the other Party, which consent may not be unreasonably withheld; provided, however, that a Party may assign this Agreement and the rights hereunder to:
>
> (a) an Affiliate thereof <u>provided that no such assignment shall release the assigning Party from the performance of its obligations hereunder</u>;
>
> …
>
> (d) in the circumstances of a bona fide disposition by Buyer of its entire interest in the CO_2 System, Downstream Equipment and the Ground Lease and by Buyer and each of its Affiliates of all Oil Properties to a single acquiror, to the acquiring Person,
>
> provided however that
>
> (e) in the circumstances described in Section 13.12(c) and (d), <u>the non-assigning Party is satisfied, acting reasonably, with the financial capability, creditworthiness, business reputation and operating practices of the proposed assignee, both current and historical</u>;

89. Neither of the exceptions at Sections 13.12(a) nor 13.12(d) apply to the present circumstances.

[74] Applicant's Brief at para 25.

90. The Proposed Amendments and the Liability Extinguishing Relief would extinguish any obligation for AlphaBow or the Purchaser to pay the MEGlobal Claim, which violates one of the pre-conditions set out in Section 13.12(a), since it releases AlphaBow from its obligations under the CO_2 Agreement. As a result, Section 13.12(a) is inoperative for the purposes of exempting AlphaBow from first obtaining MEGlobal's consent to assign the CO_2 Agreement to an Affiliate such as the Purchaser.

91. Further, Section 13.12(d) cannot apply in the present circumstances because MEGlobal is not satisfied with the Purchaser's current and historical financial capability, creditworthiness, business reputation and operating practices given that the Purchaser was only incorporated in July 2024, and that there is an overlap between the Purchaser's management and that of AlphaBow's.[75]

92. Accordingly, under the terms of the CO_2 Agreement, MEGlobal's consent would be required for AlphaBow to assign its rights and obligations under the CO_2 Agreement to the Purchaser, and therefore, Cure Costs have to be paid in order to affect such an assignment in an insolvency proceeding.

C. MEGlobal is prejudiced

93. MEGlobal will be prejudiced if the Proposed Amendments are approved. Specifically:[76]

(a) MEGlobal will be forced into a commercial relationship with an entity that does not meet MEGlobal's creditworthiness requirements or the requirements for assignment under Section 13.12(e) of the CO_2 Agreement;

(b) MEGlobal's claim of over $10 million, which was properly filed in accordance with the Claims Process Order and never revised or disallowed by the Monitor, will be extinguished without payment;

(c) MEGlobal will bear ongoing operational and financial risks from a counterparty it has determined lacks adequate financial capability for the limited period until the CO_2 Agreement terminates on December 31, 2028; and

[75] Schurink Affidavit at para 50.
[76] *Ibid* at para 53.

(d) MEGlobal will be forced to continue hosting AlphaBow's equipment on MEGlobal's Prentiss site despite being owed $98,963.00 in unpaid Ground Lease obligations.

94. Had the CO_2 Agreement been assigned pursuant to the Asset Transaction, as was originally contemplated by the Purchaser, the Court would have considered, among other things, the factors set out at CCAA s. 11.3(3) when determining whether to approve the assignment, which are as follows (underline added):

> **Factors to be considered**
>
> (3) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed assignment;
>
> (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
>
> (c) whether it would be appropriate to assign the rights and obligations to that person.

95. MEGlobal has serious concerns that the Purchaser would not be able to perform the obligations under the CO_2 Agreement. Specifically, some of the Purchaser's management appears to have also been management at AlphaBow,[77] and the Purchaser clearly does not have the financial capacity to be able to satisfy the obligations under the CO_2 Agreement.[78]

96. The various legal counterparties to the disclaimed CO_2 Agreement for the last ten years have been involved in insolvency proceedings in some manner.[79] MEGlobal does not want that futile and commercially unreasonable pattern to continue. MEGlobal requests that the CO_2 Agreement remain disclaimed so that MEGlobal can move forward to contract with a financially viable and reliable counterparty of its choosing.

V. CONCLUSION

97. AlphaBow and the Purchaser are attempting to attack this Court's RVO approved nearly eight months ago, in order to extract further benefits at MEGlobal's expense. In doing so, they ask this

[77] *Ibid* at para 50.
[78] *Ibid* at paras 43-45.
[79] *Ibid* at para 23.

Honourable Court to violate the doctrine of *functus officio*, and collaterally attack the process for adjudicating the claims of AlphaBow's creditors established under the Claims Process Order.

98. The relief sought by AlphaBow does not advance the remedial objectives of the CCAA. If AlphaBow's Application is not granted, the RVO Transaction will close in accordance with the terms that were originally approved at the Sale Approval Application, subject to any amendments that have been subsequently approved.

99. AlphaBow's Application, if granted, would seriously prejudice and harm MEGlobal, since it would force MEGlobal to continue a contractual relationship for a further three years with an entity that does not meet MEGlobal's creditworthiness requirements, and would extinguish the MEGlobal Claim for no consideration.

100. The various legal counterparties to the CO_2 Agreement for roughly the last ten years have been involved in insolvency proceedings in some manner. MEGlobal understood that this futile and commercially unreasonable pattern had come to an end when the Purchaser's counsel advised that the CO_2 Agreement was being disclaimed in December 2024. The Purchaser should not be permitted, more than eight months later, to make an "about-face" and succeed in a contrary position.

101. MEGlobal respectfully requests that AlphaBow's Application be denied, and that costs be awarded in favour of MEGlobal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 6th day of August, 2025.

DLA PIPER (CANADA) LLP

Per:

Jerritt Pawlyk
Counsel to MEGlobal Canada ULC

VI. TABLE OF AUTHORITIES

CASES

1. *First Calgary Financial Credit Union Limited v Inspired Luxury Homes Inc.*, 2014 ABQB 787.
2. *Locarno Investments Limited v Industrial Mortgage*, 1967 CanLII 551 (BC CA).
3. *Iverson v Westfair Foods Ltd.*, 1998 ABCA 337.
4. *Canada v Canada North Group Inc.*, 2021 SCC 30.
5. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60.
6. *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10.
7. *Bhasin v Hrynew*, 2014 SCC 71.
8. *C.M. Callow Inc. v Zollinger*, 2020 SCC 45.
9. *CWB Maxium Financial Inc v 2026998 Alberta Ltd.*, 2021 ABQB 137.
10. *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809.
11. *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39.
12. *Razor Energy Corp, Razor Holdings Gp Corp., and Blade Energy Services Corp (Re)*, 2025 ABKB 30.

SECONDARY SOURCES

13. Donald JM Brown, *Civil Appeals*, loose-leaf (2025 release), online: Thomson Reuters ProView at § 3:41.
14. The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition § 1:68: Requirement to Act in Good Faith.

2014 ABQB 787
Alberta Court of Queen's Bench

First Calgary Financial Credit Union Ltd. v. Inspired Luxury Homes Inc.

2014 CarswellAlta 2603, 2014 ABQB 787, [2015] A.W.L.D. 943, [2015] A.W.L.D. 946, 249 A.C.W.S. (3d) 428, 608 A.R. 173, 62 C.P.C. (7th) 375, 9 Alta. L.R. (6th) 313

First Calgary Financial Credit Union Limited, Applicant/ Appellant and Inspired Luxury Homes Inc., Respondent

Corina Dario J.

Heard: March 10, 2014
Judgment: December 30, 2014
Docket: Calgary 1101-15628

Counsel: R. Van Dorp, for Applicant / Appellant
M. Hoornaert, for Respondent

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Property

Headnote

Civil practice and procedure --- Practice on appeal — Time to appeal — Extension of time — Grounds for extension

Applicant's counsel made mistake under master's order during disposition of proceeds from sale of properties to third encumbrances on title — With respect to counsel's mistake, master declined to revisit his order to correct error — Applicant appealed master's order — Applicant brought application for extension of time to appeal — Application dismissed — Under extension test, applicant must demonstrate that it had ongoing intention to appeal, that delay could be explained by special circumstances and that appeal had reasonable prospect of success — There was lack of ongoing intention to appeal given conscious decision not to appeal and to instead seek order for return of tax arrears; right to appeal and intention to appeal did not co-exist — Three month delay was on longer end of spectrum, but any prejudice in terms of cost and money could have been remedied by appellate court — On basis of new evidence that could have helped establish applicant's claim that order should have been reversed, there was reasonable prospect of success on appeal.

Civil practice and procedure --- Judgments and orders — Amending or varying — After judgment entered — Miscellaneous

Applicant's counsel made mistake under master's order during disposition of proceeds from sale of properties to third encumbrances on title — With respect to counsel's mistake, master declined to revisit his order to correct error — Applicant appealed master's order — Applicant brought application for extension of time to appeal — Application dismissed — Rule 9.12 of Alberta Rules of Court allows courts to amend final orders to correct mere technical, clerical or drafting errors in their orders; it does not apply if order correctly set out what court decided — Order did not contain slip or error of manifest intent, rather it accurately expressed intentions — Mistake in question was that of counsel, not of courts.

APPLICATION to grant extension of time to appeal Master's order.

***Corina Dario J.*:**

I. Introduction

1 These appeals by First Calgary Financial Credit Union Limited ("*First Calgary*") relate to a mistake made by First Calgary's counsel, Leon Brener Law ("*LBL*"), in the disposition of proceeds from the sale of properties to the third encumbrancers on title, David and Janet Kowal (the "*Kowals*"). This disposition was made pursuant to an order of Master Laycock rendered on May 15, 2013 (the "*May 2013 Order*") directing payment of the balance of the proceeds to the respondents, the Kowals. Upon

III. Issues:

1) Did Master Laycock err in finding that he was *functus* in his decision on August 27, 2013?

2) Should the Court extend the time to appeal Master Laycock's May 2013 Order for payment of the balance of the proceeds to the Kowals?

3) If granted the extension of time, does the Appellant succeed in its appeal of the Master's May, 2013 Order?

IV. The Parties

11 First Calgary was the applicant in the sale and distribution proceedings before Masters Hanebury and Laycock. Once the tax non-payment mistake was discovered, however, LBL appeared before Master Laycock on its own behalf regarding repayment by the Kowals. For simplicity, in the *functus* analysis, First Calgary and LBL are treated together as the "*Appellant*." First Calgary and LBL are treated as separate parties in assessing whether to grant the appeal of the May 2013 Order, and specifically in the related issue of whether to grant the extension of time to appeal.

V. Issue 1: Did Master Laycock err in finding that he was functus in his decision on August 27, 2013?

A. The Law on the Doctrine of Functus

12 Once an order is entered or is otherwise perfected, the court which passed the order is *functus* and the court may not set aside or alter the order. Otherwise phrased, once any order of the court is entered, the court has no jurisdiction to revisit that order, even if there is a change in circumstances or if it appears wholly wrong (see *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.) at para 76).

13 The Supreme Court explained the rationale behind this rule in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 (S.C.C.) [*Doucet-Boudreau*] at para 79. The purpose of the *functus* principle is to ensure that there is finality of judgments from courts which are subject to appeal. They went on to say at para 79:

> ... if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal.

14 There are some exceptions to this general principle that have become codified in the *Rules*. The Appellant relies on the exceptions set out in rules 9.14 and 9.15(4) of the *Rules*:

> 9.14 On application, the Court may, after a judgment or order has been entered, make any further or other order that is required, if
>
> (a) doing so does not require the original judgment or order to be varied, and
>
> (b) the further or other order is needed to provide a remedy to which a party is entitled in connection with the judgment or order.
>
> 9.15(4) The Court may set aside, vary or discharge an interlocutory order
>
> (a) because information arose or was discovered after the order was made,
>
> (b) with the agreement of every party, or
>
> (c) on other grounds that the Court considers just.

15 Master Laycock's May 2013 Order was entered and perfected. In the current case, Master Laycock can only revisit the order if one of the limited exceptions listed in the above rules exists. If not, he is *functus* in relation to this order.

25 As such, rule 9.14 could not give Master Laycock authority to grant the relief sought by the Appellant. The *functus* principle precludes the variation of the order, and the conditions of the limited exception to this principle as stated in rule 9.14 are not met. Master Laycock correctly determined that rule 9.14 has no application in these circumstances.

D. Does Rule 9.15(4) Apply to the Case at Bar?

26 The Appellant also relies upon rule 9.15(4), which states that the court has authority to revisit an interlocutory order because, *inter alia*, new information arose or was discovered after the order is made. If the requirements of rule 9.15 are met, which includes the condition that the order is interlocutory, the court may revisit the order.

27 There is little judicial interpretation of this rule. The Court discussed rule 9.15(4) in *Foley-Cornish v. Nabors Drilling Ltd.*, 2013 ABQB 186 (Alta. Q.B.), albeit in a substantially different fact scenario. In that case, the Court dismissed the application to vary an interlocutory order made in a personal injury trial, citing principles of contract law. Speaking in general terms, however, the Court interpreted rule 9.15(4) to allow the courts "broad discretion in determining whether to set aside interlocutory orders" (*ibid* at para 14).

28 If Master Laycock's May 2013 Order is interlocutory, rule 9.15(4) could apply, and the Master would then not be *functus*. Whether the order would be varied on this basis would depend on whether the new information justifies a variation. If Master Laycock's May 2013 Order is final, however, rule 9.15(4) does not apply and the Appellant's *functus* appeal fails. The determination of whether Master Laycock's May 2013 Order is interlocutory or final is central to this appeal.

i) Was Master Laycock's Order Interlocutory or Final?

29 Having canvassed the law on this issue, one thing is certain: the ability to distinguish between final and interlocutory orders "continues to bedevil counsel and the courts" (*Laurentian Plaza Corp. v. Martin* (1992), 7 O.R. (3d) 111 (Ont. C.A.), at 116, cited in *Alberta Treasury Branches v. Leahy*, 1999 ABQB 185 (Alta. Q.B.) at para 21). The tests to determine this difference might appear relatively straightforward, but their application in practice remains difficult. On the facts of this case, however, it is clear that the May 2013 Order is final.

30 While there have been different tests to determine whether an order is final or interlocutory, the "order approach" appears to be the dominant approach in Canadian law (see *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 120 (B.C. C.A.)). This approach was first enunciated in *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547 (Eng. C.A.):

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

31 Conversely, the most widely accepted definition for determining when an order is "interlocutory" is found in *Jowitt's Dictionary of English Law*:

> A proceeding in an action is said to be interlocutory when it is incidental to the principal object of the action, namely, the judgment. Thus, interlocutory applications in an action include all steps taken for the purpose of assisting either party in the prosecution of his case, whether before or after final judgment; or of protecting or otherwise dealing with the subject-matter of the action before the rights of the parties are finally determined; or of executing the judgment when obtained (D Burke, ed, Jowitt's Dictionary of English Law, 2d ed (London: Sweet & Maxwell Ltd, 1977) vol 1 at 999).

32 There are some theoretical difficulties with the application of these tests. For instance, as described by Kent J in *Proprietary Industries Inc. v. Workum*, 2005 ABQB 472 (Alta. Q.B.) at para 6:

> As many judges have said in other cases, in a narrow sense, all orders dispose of the rights of parties. An order requiring someone to appear to be examined pursuant to the discovery rules disposes of the rights of the parties: for one party, he is

1967 CarswellBC 24
British Columbia Court of Appeal

Locarno Investments Ltd. v. Industrial Mortgage & Finance Corp.

1967 CarswellBC 24, 59 W.W.R. 293, 61 D.L.R. (2d) 16

Locarno Investments Limited (Plaintiff) Respondent v. Industrial Mortgage and Finance Corporation Limited et al (Defendants) Appellants

Tysoe, Lord and Maclean, JJ.A.

Judgment: February 14, 1967

Counsel: *S. S. Tufts*, for defendant, appellant.
R. C. Twining, for plaintiff, respondent.

Subject: Corporate and Commercial

Headnote

Mortgages --- Sale — Practice and procedure — Jurisdiction of court

Mortgages — Foreclosure Action — Entry of Order Nisi — Application for Order for Sale — Powers of Court.

Following a foreclosure action an order *nisi* was pronounced in favour of respondent and duly entered; thereafter appellant launched a motion for an order for sale and for other incidental relief. Nemetz, J. refused the application, following *Griffin v. Jorgensen* (1964) 49 W.W.R. 191, 1964 Can Abr 818 (B.C.).

It was *held* that the appeal must be dismissed; it was rightly held in *Griffin v. Jorgensen, supra*, that an order *nisi* in a foreclosure action is the judgment of the court to which the order absolute is merely ancillary; once an order *nisi* has been entered it cannot, otherwise than by way of appeal, be altered or varied, with certain exceptions which have no application to the case at bar; the order of sale sought by appellant would constitute a substantial variation of the order *nisi*, which the court lacked jurisdiction to make. By sec. 48 of the *Chancery Procedure Amendment Act*, 1852, 15 & 16 Vict., ch. 86, the court may order a sale in lieu of ordering foreclosure of the equity of redemption, but the section confers no power to direct a sale after an order *nisi* for foreclosure has been granted: *Woolley v. Colman* (1882) 21 Ch D 169, 51 LJ Ch 854; *Union Bank of London v. Ingram* (1882) 20 Ch D 463, 51 LJ Ch 508, applied; *Griffin v. Jorgensen, supra*, approved.

The judgment of the court was delivered by *Tysoe, J.A.*:

1 This action was brought by the plaintiff respondent for foreclosure of a mortgage on real property given by the defendant Industrial Mortgage and Finance Corporation Limited, the appellant herein. After a trial lasting several days judgment was given in favour of the respondent on April 27, 1966, and an order *nisi* in usual form was granted. The judgment provided for taking of accounts, a redemption period of three months and that in default of payment within that period of time the appellant and certain other defendants be absolutely debarred and forever foreclosed of and from any and all right, title and interest and equity of redemption of, in and to the mortgaged lands and premises. This judgment was duly entered on May 16, 1966.

2 On August 4, 1966, the appellant launched a motion for an order that the mortgaged lands and premises be offered for sale at a gross sale price of not less than $175,000 and that the time for redemption fixed by the judgment aforementioned be extended for such period as might be necessary to enable the lands and premises to be so dealt with. The appellant's motion came on for hearing before Nemetz, J. who dismissed it. It appears from the learned judge's bench notes that he followed a judgment of our brother McFarlane, delivered when he was a member of the supreme court of British Columbia, in *Griffin v. Jorgensen* (1964) 49 W.W.R. 191, wherein he held that an order for sale may not be made in a foreclosure action upon an interlocutory motion after order *nisi* for foreclosure. From that dismissal the appellant has appealed to this court. McFarlane, J., as he then was, pointed out in his judgment at p. 192 that:

It must be observed that the order *nisi* in such action is the judgment of the court. The order absolute, which under our practice is made by a judge in chambers, is really ancillary or supplemental to the judgment of the court, i.e., the order *nisi*.

3 It is the general rule that, except by way of appeal, no court or judge has power to rehear, review, alter or vary a judgment or order after it has been entered: See 22 *Halsbury*, 3rd ed., p. 785, par. 1665.

4 The text of *Halsbury* indicates that there are certain limited exceptions to the general rule. For instance, clerical mistakes in judgments or orders, or errors arising from any accidental slip or omission can be corrected under M.R. 315 of the Supreme Court Rules and error in expressing the manifest intention of the court can be remedied.

5 It is plain that an order for sale of the mortgaged property made on the appellant's motion would constitute a very substantial alteration and variance of the judgment granting an order *nisi*. It would completely change the nature of the relief given. It could not be said to be a supplemental order made for the purpose of assisting the working out of the judgment. How then does the appellant escape the operation of the general rule?

6 The power of the court to direct a sale of mortgaged property in an action for foreclosure of the equity of redemption is contained in *Chancery Procedure Amendment Act*, 1852, 15 & 16 Vict., ch. 86, sec. 48, which is to be found in *Miscellaneous Act*, RSBC, 1913, ch. 86, at p. 238. The section is as follows:

[1st July 1852.]

It shall be lawful for the Court in any Suit for the Foreclosure of the Equity of Redemption in any mortgaged Property, upon the Request of the Mortgagee, or of any subsequent Incumbrancer, or of the Mortgagor, or any Person claiming under them respectively, to direct a Sale of such Property, instead of a Foreclosure of such Equity of Redemption, on such Terms as the Court may think fit to direct, and if the Court shall so think fit, without previously determining the Priorities of Incumbrances, or giving the usual or any Time to redeem; provided that if such Request shall be made by any such subsequent Tncumbrancer, or by the Mortgagor, or by any Person claiming under them respectively, the Court shall not direct any such Sale, without the Consent of the Mortgagee or the Persons claiming under him, unless the Party making such Request shall deposit in Court a reasonable Sum of Money to be fixed by the Court, for the Purposes of securing the Performance of such Terms as the Court may think fit to impose on the Party making such Request.

7 This section was referred to by this court in *Miller v. Crown Life Insur. Co.* (1958) 26 W.W.R. 279. Until the right to a judicial sale was introduced by this statute the only relief that the courts afforded a mortgagee was foreclosure: *Bell and Dunn Mortgages of Real Estate*, 1899, pp. 149-50.

8 The only submission made by the appellant that requires consideration was that the provision of sec. 48 give the court power to direct a sale even though it had previously granted an order *nisi* for foreclosure which had been duly entered. For this proposition the appellant relied on *Miller v. Crown Life Insur. Co., supra*, and *Laslett v. Cliffe* (1854) 23 LT (OS) 167, 65 ER 400. It was not suggested that the appellant had brought itself within any other recognized exceptions to the general rule set out earlier in this judgment.

9 The *Miller* case does not assist the appellant. In that case this court directed a sale but the report does not indicate whether or not the application for a sale followed upon an order *nisi* for foreclosure. What is even more important is that there is no indication that the court gave any consideration to the question that faces us or that that question was raised.

10 The *Laslett* case was decided after *Girdlestone v. Lavender* (1852) 20 LT (OS) 176, 68 ER 788, in which Turner, V.-C. had to consider the effect of sec. 48. The application in *Girdlestone* was one by the plaintiff, the mortgagee, for an order for sale, notwithstanding the fact that a decree for foreclosure had previously been made. Turner, V.-C. said that he could not make an order which would supersede the decree and that sec. 48 did not extend to a case where a decree for foreclosure had already been made.

1998 ABCA 337
Alberta Court of Appeal

Iverson v. Westfair Foods Ltd.

1998 CarswellAlta 954, 1998 ABCA 337, [1998] A.J. No. 1145, [1999] 4 W.W.R. 659, 166 D.L.R. (4th) 448, 183 W.A.C. 322, 223 A.R. 322, 41 B.L.R. (2d) 83, 67 Alta. L.R. (3d) 148, 83 A.C.W.S. (3d) 392

In The Matter of Westfair Foods Ltd.

In The Matter of a Petition for a Declaration of the Rights Attached to Westfair Foods Ltd. Class A and Common Shares

Westfair Foods Ltd., Respondent (Petitioner) and Dr. Donald Watt, Remington Energy Ltd., Royston S. Baay and Baay Land Consultants Ltd., (Respondents) and Douglas Wright, Appellant (Respondent) and John H. Clark, et al., Intervenors

-In The Matter of Section 35(2)(b), 207, 214(1)(a), 241(1), 241(2)(c), 241(3)(f), 242(4) and 248 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44

Donald Richard Jepson, Executor of the Estate of Edith Maude Jepson, deceased, and Donald Richard Jepson, (Applicants) and Westfair Foods Ltd., Respondent

Rodney L. Iverson, Patricia J. Iverson, and Rodney L. Iverson Profit Sharing Plan, Applicants/Respondents and Westfair Foods Ltd., Respondent/Appellant

Irving, O'Leary, Russell JJ.A.

Heard: October 9 and 10, 1996
Judgment: October 26, 1998 *
Docket: Calgary Appeal 96-16257, 96-16504

Proceedings: affirming (1996), 38 Alta. L.R. (3d) 331 (Alta. Q.B.)

Counsel: *D.R. O'Connor, Q.C.* and *F.R. Foran, Q.C.*, for the Respondent (Westfair).
D.A. McDermott, Q.C., for the Appellant (Wright).
L.R. Duncan, Q.C. and *Sean S. Smyth*, for the Intervenors (Clark et al).
J. Crawford, Q.C., for Class A shareholders (not parties to the appeal).

Subject: Civil Practice and Procedure; Corporate and Commercial

Headnote

Corporations --- Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief — Order for purchase of shares

Shareholders obtained order requiring corporation to purchase their shares — Judge who made order subsequently made second order which interpreted first order as requiring shareholder to sell their shares — Shareholders appealed second order — Appeal allowed — Original order did not require forced sale of shares — Original order was not binding on subsequent shareholders.

Practice --- Judgments and orders — Amending or varying — After judgment entered — General

Shareholders obtained order requiring corporation to purchase their shares — Judge who made order subsequently made second order which interpreted first order as requiring shareholder to sell their shares — Shareholders appealed second order — Appeal allowed — Judge lacked jurisdiction to amend own order after it was entered.

In 1990, shareholders of preferred shares in a corporation obtained an order declaring that the corporation's dividend policy was oppressive towards them. As a remedy, the order provided that the shares were to be purchased by the corporation at a value to be determined by a court-appointed accountant. However, the order did not expressly provide that the shareholders were required

59 It is important to bear in mind that this appeal dealt only with the instructions to the court expert appointed to determine share value. The appropriate remedy was not in issue; that had been decided.

60 In the result, this decision did not direct that any value be attributed to compulsory taking or to the potential benefit to Westfair from acquisition of the Class A shares. The Court did, however, assume a forced sale and it appears that the Chambers Judge had also done so. This approach was clearly a reflection of the approach taken by Counsel for the Class A shareholders in the valuation proceedings before the Chambers Judge and again before this Court. Counsel were mistaken when they assumed that the 1990 Order compelled the sale of all the Class A shares to Westfair. The misinterpretation of the 1990 Order may have been due, in part at least, to the fact that lead counsel for the Class A shareholders changed before the commencement of the valuation proceedings.

61 In our view, the position taken by Counsel for the Class A shareholders in the valuation proceedings cannot be determinative of the meaning of the 1990 Order. The conduct of Westfair has been equally inconsistent. It conducted itself in a manner consistent with the 1990 Order directing it to purchase the shares without conferring a right to force the shareholders to sell. It took no steps consistent only with its present argument. At best its conduct was equivocal. The mistaken position adopted by Counsel for the shareholders may have misled Westfair into thinking it had realized an unexpected dividend - the right to force surrender of the Class A shares, something Westfair had sought for years. In our view, Westfair was not prejudiced by this.

62 In their written submission to the Supreme Court of Canada on the application for leave to appeal Côté, J.A.'s judgment, counsel for the shareholders again advanced the proposition that the 1990 Order was a compulsory taking and recited the fact that the Chambers Judge had referred to it as an "expropriation" in his reasons for the February 7, 1992 Order. As in this Court, Counsel for the shareholders submitted that Westfair and Kelly, Douglas would benefit from execution of the 1990 Order as the Class A shares would be extinguished, a goal actively sought by them for years. They submitted that Westfair could reasonably be expected to pay a premium for this benefit.

Functus Officio

63 In our view the 1995 Order was fundamentally different than the 1990 Order. The earlier Order directed Westfair to purchase the Class A shares. It did not expressly compel the shareholders to sell their shares to Westfair. A direction to Westfair to purchase the shares does not necessarily imply an obligation on the shareholders to sell. The Order under appeal forces all Class A shareholders to sell their shares to Westfair.

64 The 1990 Order was appealed to this Court where the remedy ordered by the Chambers Judge was confirmed. Nothing in the judgment of this Court can be interpreted as varying the remedy prescribed by the 1990 Order. It is clear from his judgment that Kerans, J.A. assumed a compulsory purchase but not a forced sale. Leave to appeal the judgment of this Court to the Supreme Court of Canada was denied.

65 The 1990 Order was a final order with respect to the remedy directed. In our view, the Chambers Judge was *functus officio* in that respect and had no jurisdiction to direct in the 1995 Order that the Class A shareholders sell their shares to Westfair. The general rule is that a final judgment or order cannot be set aside or varied by the judge who made it, or by a judge of the same court, after it has been drawn up and entered. There are two exceptions: (I) where there has been a slip in drawing up the judgment or order, and (ii) where there has been an error in expressing the manifest intention of the court: *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.), Rule 339. It follows that a judge has no jurisdiction to interpret his own order after it has been drawn up and entered: *Canada West Tree Fruits Ltd. v. T.G. Bright & Co.*, [1990] 6 W.W.R. 89 (B.C. C.A.), leave to appeal to the Supreme Court of Canada denied. [[1991] 2 W.W.R. lxvii (S.C.C.)]

66 We conclude, therefore, that the Chambers Judge had no jurisdiction to make that part of the 1995 Order which purported to compel all Class A shareholders to sell their shares to Westfair.

2021 SCC 30, 2021 CSC 30
Supreme Court of Canada

Canada v. Canada North Group Inc.

2021 CarswellAlta 1781, 2021 CarswellAlta 1780, 2021 SCC 30, 2021 CSC 30, [2021] 10 W.W.R. 1, [2021] 2 S.C.R. 571, [2021] 2 R.C.S. 571, [2021] 5 C.T.C. 111, [2021] A.W.L.D. 3408, [2021] A.W.L.D. 3521, [2021] S.C.J. No. 30, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 333 A.C.W.S. (3d) 23, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1, EYB 2021-397318

Her Majesty The Queen in Right of Canada (Appellant) and Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada (Respondents) and Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: December 1, 2020
Judgment: July 28, 2021
Docket: 38871

Proceedings: affirming *Canada v. Canada North Group Inc.* (2019), *(*sub nom. *The Queen v. Canada North Group Inc.)* 2019 D.T.C. 5111, 11 P.P.S.A.C. (4th) 157, [2019] 12 W.W.R. 635, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 2019 ABCA 314, 2019 CarswellAlta 1815, 95 B.L.R. (5th) 222, Frederica Schutz J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.); affirming *Canada North Group Inc (Companies' Creditors Arrangement Act)* (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, [2018] 2 W.W.R. 731, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, J.E. Topolniski J. (Alta. Q.B.)

Counsel: Michael Taylor, Louis L'Heureux, for Appellant
Darren R. Bieganek, Q.C., Brad Angove, for Respondents, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as Monitor
Jeffrey Oliver, Mary I. A. Buttery, Q.C., for Respondent, Business Development Bank of Canada
Kelly J. Bourassa, for Intervener, Insolvency Institute of Canada
Randal Van de Mosselaer, for Intervener, Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Estates and Trusts; Income Tax (Federal); Insolvency; Tax — Miscellaneous

Headnote

Tax --- Income tax — Special rules — Bankruptcy — Corporations

In debtors' restructuring proceedings under Companies' Creditors Arrangement Act (CCAA), court granted "super-priority" or priming charges in favour of interim financier and others — Motion by Canada Revenue Agency (CRA) for order that such court-ordered interests did not take priority over statutory deemed trusts for unremitted source deductions was dismissed on basis that CCAA allowed court to rank priority charges necessary for restructuring ahead of CRA's interest — Crown's appeal was dismissed — Crown appealed — Appeal dismissed — CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, even those protected by deemed trusts, and financing was critical aspect of CCAA regime premised on restructuring to preserve debtors' greater value as going concerns — Most important feature of CCAA was broad discretionary power vested in supervising court by s. 11 — Preservation by s. 37(2) of CCAA of deemed trusts created by s. 227(4.1) of Income Tax Act (ITA) does not modify their characteristics — Section 227(4.1) of ITA does not establish proprietary interest because Crown's claim does not attach to any specific asset — Deemed removal of property from debtor's estate does not prevent judge from ordering super priority — There was no conflict between CCAA and ITA, as deemed

and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 42, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

21 The most important feature of the *CCAA* — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "[o]n the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

22 On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

23 In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

24 As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

25 In *Sun Indalex Finance, LLC v. United Steelworkers*2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), to protect employee pensions. Justice Deschamps wrote for a unanimous Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

26 Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was necessary if the company was to remain a going concern (para. 59). Justice

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 CSC 60, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1 S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing

15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

2014 SCC 71, 2014 CSC 71
Supreme Court of Canada

Bhasin v. Hrynew

2014 CarswellAlta 2046, 2014 CarswellAlta 2047, 2014 SCC 71, 2014 CSC 71, [2014] 11 W.W.R. 641, [2014] 3 S.C.R. 494, [2014] A.W.L.D. 4738, [2014] A.W.L.D. 4740, [2014] A.W.L.D. 4828, [2014] A.W.L.D. 4829, [2014] S.C.J. No. 71, 20 C.C.E.L. (4th) 1, 245 A.C.W.S. (3d) 832, 27 B.L.R. (5th) 1, 379 D.L.R. (4th) 385, 464 N.R. 254, 4 Alta. L.R. (6th) 219, 584 A.R. 6, 623 W.A.C. 6, J.E. 2014-1992

Harish Bhasin, carrying on business as Bhasin & Associates, Appellant and Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited), Respondents

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: February 12, 2014
Judgment: November 13, 2014
Docket: 35380

Proceedings: reversing in part *Bhasin v. Hrynew* (2013), [2013] 11 W.W.R. 459, 84 Alta. L.R. (5th) 68, 12 B.L.R. (5th) 175, 567 W.A.C. 28, 544 A.R. 28, 2013 CarswellAlta 822, 2013 ABCA 98, 362 D.L.R. (4th) 18, Jean Côté J.A., Marina Paperny J.A., R. Paul Belzil J. (Alta. C.A.); reversing *Bhasin v. Hrynew* (2011), [2012] 9 W.W.R. 728, 96 B.L.R. (4th) 73, 2011 ABQB 637, 2011 CarswellAlta 1905, A.B. Moen J. (Alta. Q.B.)

Counsel: Neil Finkelstein, Brandon Kain, John McCamus, Stephen Moreau, for Appellant
Eli S. Lederman, Jon Laxer, Constanza Pauchulo, for Respondents

Subject: Civil Practice and Procedure; Contracts; Torts

Headnote

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contracts --- Remedies for breach — Damages — Miscellaneous

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.s enrolment directors — C Corp. outlined its plans to Commission and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge's assessment of damages was varied to $87,000 plus interest — C Corp. was liable for damages calculated on basis of what B's economic position would have been had C Corp. fulfilled its duty — While trial judge did not assess damages on that basis, given different findings in relation to liability, trial judge made findings that permitted current Court to do so — These findings permitted damages to be assessed on basis that if C Corp. had performed contract honestly, B would have been able to retain value of his business rather than see it, in effect, expropriated and turned over to H — It was clear from findings of trial judge and from record that value of business around time of non renewal was $87,000.

Torts --- Inducing breach of contract — Elements of tort

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Torts --- Conspiracy — Nature and elements of tort — Miscellaneous

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its

exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contrats --- Exécution ou défaut d'exécution — Obligation d'exécuter — Exécution acceptable — Obligation d'exécuter de bonne foi

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Contrats --- Réparation du défaut — Dommages-intérêts — Divers

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial, chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt — Société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation — Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire — Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H — Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

Délits civils --- Incitation à violer un contrat — Éléments constitutifs du délit

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Délits civils --- complot — Nature et éléments constitutifs du délit — Divers

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

C Corp. was in the business of selling education savings plans to investors, through contracts with enrolment directors. B and H were enrolment directors, and were competitors. An enrolment director's agreement governed the relationship between C Corp. and B. C Corp. appointed H as the provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors. C Corp. outlined its plans to the Commission, and they included B working for H's agency. When B refused to allow H to audit his records, C Corp. threatened to terminate the agreement. C Corp. gave notice of non renewal under the agreement.

At the expiry of the contract term, B lost value in his business in his assembled workforce. The majority of B's sales agents were successfully solicited by H's agency.

B's action against C Corp. and H was allowed. The trial judge found C Corp. was in breach of the implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy. The Court of Appeal allowed the appeal and dismissed B's action. B appealed.

Held: The appeal was allowed in part.

Per Cromwell J. (McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring): The appeal with respect to C Corp. was allowed, and the appeal with respect to H was dismissed. The trial judge's assessment of damages was varied to $87,000 plus interest. The objection to C Corp.'s conduct did not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith, namely a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations. Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

The trial judge did not make a reversible error by adjudicating the issue of good faith. C Corp. breached the agreement when it failed to act honestly with B in exercising the non renewal clause. The trial judge's findings amply supported the conclusion that C Corp. acted dishonestly with B throughout the period leading up to its exercise of the non renewal clause, both with respect to its own intentions and with respect to H's role as PTO. The caims against H were rightly dismissed. The Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

C Corp. was liable for damages calculated on the basis of what B's economic position would have been had C Corp. fulfilled its duty. While the trial judge did not assess damages on that basis, given the different findings in relation to liability, the trial judge made findings that permitted the current Court to do so. These findings permitted damages to be assessed on the basis that if C Corp. had performed the contract honestly, B would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to H. It was clear from the findings of the trial judge and from the record that the value of the business around the time of non renewal was $87,000.

La société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions. B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre. La relation entre la société C et B était régie par une entente relative au directeur des souscriptions. La société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C. La société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H. Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente. La société C a donné à B un préavis de non-renouvellement conformément à l'entente. À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise. La majorité de ses représentants des ventes ont été recrutés par l'agence de H.

L'action déposée par B à l'encontre de la société C et H a été accueillie. La juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil. La Cour d'appel a accueilli l'appel et a rejeté l'action de B. B a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli en partie.

Cromwell, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Le pourvoi relatif à la société C a été accueilli, le pourvoi relatif à H a été rejeté. L'appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt. Le reproche à l'égard de la conduite de la société C ne cadrait dans aucune des situations ou des relations à l'égard desquelles les obligations de bonne foi ont trouvé application. Il convient de reconnaître une nouvelle obligation en common law qui s'applique à tous les contrats en tant que manifestation du principe directeur général de bonne foi, soit une obligation d'exécution honnête qui oblige les parties à faire preuve d'honnêteté l'une envers l'autre dans le cadre de l'exécution de leurs obligations contractuelles. En vertu de cette nouvelle obligation générale d'honnêteté applicable à l'exécution des contrats, les parties ne doivent pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat.

La juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi. La société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement. Les motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP. Les demandes contre H ont été à juste titre rejetées. La Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.
La société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation. Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire. Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H. Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

APPEAL by plaintiff from judgment reported at *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), allowing appeal from decision by trial judge allowing plaintiff's action for damages.

POURVOI formé par la partie demanderesse à l'encontre d'un jugement publié à *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), ayant accueilli l'appel interjeté à l'encontre de la décision de la juge de première instance d'accueillir l'action en dommages-intérêts de la partie demanderesse.

Cromwell J. **(McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 The key issues on this appeal come down to two, straightforward questions: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result.

II. Facts and Judicial History

Overview and Issues

2 The appellant, Mr. Bhasin, through his business Bhasin & Associates, was an enrollment director for Canadian American Financial Corp. ("Can-Am") beginning in 1989. The relationship between Mr. Bhasin and Can-Am soured in 1999 and ultimately Can-Am decided not to renew the dealership agreement with him. The litigation leading to this appeal ensued.

3 Can-Am markets education savings plans ("ESPs") to investors through retail dealers, known as enrollment directors, such as Mr. Bhasin. It pays the enrollment directors compensation and bonuses for selling ESPs. The enrollment directors are in effect small business owners and the success of their businesses depends on them building a sales force. It took Mr. Bhasin approximately 10 years to build his sales force, but his business thrived and Can-Am gave him numerous awards and prizes recognizing him as one of their top enrollment directors in Canada: 2011 ABQB 637, 544 A.R. 28 (Alta. Q.B.), at paras. 51, 238 and 474.

4 An enrollment director's agreement that took effect in 1998 governed the relationship between Can-Am and Mr. Bhasin. (That Agreement replaced a previous agreement of an indefinite term that had governed their relationship since the outset in 1989.) The Agreement was a commercial dealership agreement, not a franchise agreement. There was no franchise fee and it was not covered by the statutory duty of fair dealing such as that provided for in s. 7 of the *Franchises Act*, R.S.A. 2000, c. F-23.

5 That said, there were some features of the 1998 Agreement that are similar to provisions typically found in franchise agreements. Mr. Bhasin was obliged to sell Can-Am investment products exclusively and owed it a fiduciary duty. Can-Am owned the client lists, was responsible for branding and implemented central policies that applied to all enrollment directors: see cls. 4.1, 5.2, 5.3 and 4.7. Mr. Bhasin could not sell, transfer, or merge his operation without Can-Am's consent, which was not to be withheld unreasonably: see cls. 4.5 and 11.4.

6 The term of the contract was three years. Clauses 8.3 and 8.4 allowed termination on short notice for misconduct or other cause. Clause 3.3 — the provision at the centre of this case — provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

7 Mr. Hrynew, one of the respondents and another enrollment director, was a competitor of Mr. Bhasin and there was considerable animosity between them: trial reasons, at para. 461. The trial judge found, in effect, that Mr. Hrynew pressured Can-Am not to renew its Agreement with Mr. Bhasin and that Can-Am dealt dishonestly with Mr. Bhasin and ultimately gave in to that pressure.

8 When Mr. Hrynew moved his agency to Can-Am from one of its competitors many years before the events in question, Can-Am promised him that he would be given consideration for mergers that would take place and he in fact merged with other agencies in Calgary after joining Can-Am: trial reasons, at para. 238. He was in a strong position with Can-Am because he had the largest agency in Alberta and a good working relationship with the Alberta Securities Commission which regulated Can-Am's business: para. 284.

9 Mr. Hrynew wanted to capture Mr. Bhasin's lucrative niche market around which he had built his business: trial reasons, at para. 303. Mr. Hrynew personally approached Mr. Bhasin to propose a merger of their agencies on numerous occasions: para. 238. He also actively encouraged Can-Am to force the merger and made "veiled threats" that he would leave if no merger took place: para. 282; see also paras. 251 and 287. The trial judge found that the proposed "merger" was in effect a hostile takeover of Mr. Bhasin's agency by Mr. Hrynew: para. 240. Mr. Bhasin steadfastly refused to participate in such a merger: para. 247.

10 The Alberta Securities Commission raised concerns about compliance issues among Can-Am's enrollment directors. In late 1999, the Commission required Can-Am to appoint a single provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws: trial reasons, at paras. 149, 152 and 160. Can-Am appointed Mr. Hrynew to that position in September of that year. The role required him to conduct audits of Can-Am's enrollment directors. Mr. Bhasin and Mr. Hon, another enrollment director, objected to having Mr. Hrynew, a competitor, review their confidential business records: paras. 189-196.

11 Can-Am became worried that the Commission might revoke its licence and, in 1999 and 2000, it had many discussions with the Commission about compliance. During those discussions, it was clear that Can-Am was considering a restructuring of its agencies in Alberta that involved Mr. Bhasin. In June 2000, Can-Am outlined its plans to the Commission and they included Mr. Bhasin working for Mr. Hrynew's agency. The trial judge found that this plan had been formulated before June 2000: trial reasons, at para. 256. None of this was known by Mr. Bhasin: paras. 243-46.

12 In fact, Can-Am repeatedly misled Mr. Bhasin by telling him that Mr. Hrynew, as PTO, was under an obligation to treat the information confidentially and that the Commission had rejected a proposal to have an outside PTO, neither of which was true: trial reasons at para. 195. It also responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a "done deal": para. 247. When Mr. Bhasin continued to refuse to allow Mr. Hrynew to audit his records, Can-Am threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement: paras. 207-11.

13 At the expiry of the contract term, Mr. Bhasin lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by Mr. Hrynew's agency. Mr. Bhasin was obliged to take less remunerative work with one of Can-Am's competitors.

14 Mr. Bhasin sued Can-Am and Mr. Hrynew. Moen J. in the Alberta Court of Queen's Bench found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The court held that the corporate respondent was in breach of the implied term of good faith, Mr. Hrynew had intentionally induced breach of contract, and the respondents were liable for civil conspiracy.

15 The trial judge found that Can-Am acted dishonestly with Mr. Bhasin throughout the events leading up to the non-renewal: it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Mr. Hrynew to bring about a new corporate structure with Hrynew's being the main agency in Alberta. The trial judge also found that, had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency": para. 258.

16 The Alberta Court of Appeal allowed the respondents' appeal and dismissed Mr. Bhasin's lawsuit. The court found his pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause: *Bhasin v. Hrynew*, 2013 ABCA 98, 84 Alta. L.R. (5th) 68 (Alta. C.A.).

17 The appeal raises four issues:

(a) Did Mr. Bhasin properly plead breach of the duty of good faith?

(b) Did Can-Am owe Mr. Bhasin a duty of good faith? If so, did it breach that duty?

(c) Are the respondents liable for the torts of inducing breach of contract or civil conspiracy?

(d) If there was a breach, what is the appropriate measure of damages?

III. Analysis

A. Did Mr. Bhasin Properly Plead Breach of the Duty of Good Faith?

18 The Court of Appeal held that Mr. Bhasin had not properly pleaded the good faith issue and that the trial judge had therefore erred in considering it. Mr. Bhasin contests this conclusion, while the respondents support it. I agree with Mr. Bhasin.

19 The allegations in the statement of claim clearly put the questions of improper purpose and dishonesty in issue. These facts are sufficient to put Can-Am's good faith in issue. The question of whether this conduct amounted to a breach of the duty of good faith is a legal conclusion that did not need to be pleaded separately. The defendants did not move to strike the pleadings or seek particulars of the allegation of wrongful termination in the statement of claim. Good faith was a live issue that was fully canvassed in a lengthy trial: A.F., at paras. 92-94. Written submissions by both parties at trial referred to the good faith issue and even in his opening at trial, Mr. Bhasin's counsel raised the issue of good faith.

20 The trial judge held that any deficiency in the pleadings did not cause prejudice to the respondents: paras. 23 and 48. This is an assessment she was uniquely positioned to make and her conclusion ought to be treated with deference on appeal. The good faith issue was fully argued in and addressed by the Court of Appeal and has been fully argued on the merits in this Court.

21 In my view, the trial judge did not make a reversible error by adjudicating the issue of good faith and we should address the merits of that issue.

B. Did Can-Am Owe Mr. Bhasin a Duty of Good Faith?

(1) Decisions and Positions of the Parties

(a) Decisions

22 The trial judge accepted Mr. Bhasin's position that there was a duty of good faith in this case and that it had been breached. In brief, her reasoning was as follows.

23 First, the trial judge decided that the 1998 Agreement was a type of agreement which as a matter of law requires good faith performance. She recognized that the 1998 Agreement did not fall within any of the existing categories of contract, such as employment, insurance and franchise agreements, which have been held to require good faith performance. She concluded, however, that the Agreement was analogous to a franchise or employment contract, and so by analogy to these cases, she implied a term of good faith performance as a matter of law. The contract was not balanced from its inception and the relationship placed the enrollment director in a position of inherent and predictable vulnerability: paras. 67-86.

24 Second and in the alternative, the trial judge held that a term of good faith performance should be implied based on the intentions of the parties in order to give business efficacy to the agreement. She concluded that "[w]hen one considers the whole of the relationship ... it is clear that the parties had to operate in good faith and there was a requirement of fairness between them. In other words, good faith was necessary to give business efficacy to the whole 1998 Agreement": para. 101.

25 The 1998 Agreement contained an "entire agreement clause" stating that there were no "agreements, express, implied or statutory, other than expressly set out" in it: cl. 11.2. The trial judge held, however, that this clause did not preclude the implication of a duty of good faith. The parties, she reasoned, cannot rely on exclusion clauses to avoid contractual obligations where there is an imbalance of power and that courts refuse to let parties shelter under entire agreement clauses where it would be unjust or inequitable to do so: paras. 116-18.

26 Turning to the issue of breach, the trial judge found that Can-Am had breached the agreement, first by requiring Mr. Bhasin to submit to an audit by Mr. Hrynew and to provide the latter with access to his business records, and second by exercising the non-renewal clause in a dishonest and misleading manner and for an improper purpose. The non-renewal clause was not intended to permit Can-Am to force a merger of the Bhasin and Hrynew agencies, but that was the purpose for which Can-Am exercised this power: para. 261. The trial judge also found both respondents liable for unlawful means conspiracy and found Mr. Hrynew liable for inducing Can-Am's breach of its contract with Mr. Bhasin.

27 The Court of Appeal reversed and held that there had been no breach of contract. The duty of good faith in employment contracts could not be extended by analogy to other types of contract. In any event, the duty of good faith in the employment context is limited to the manner of termination and does not include reasons for non-renewal: C.A. reasons, at paras. 27 and 31. Nor was this a circumstance in which a term could be implied because it was so obvious it was not thought necessary to mention or was necessary to make the contract work: para. 32. Even if there were an implied duty of good faith in this case, the impugned conduct concerned the non-renewal of a contract, which occurs on expiry, unlike a termination clause: para. 31.

28 Moreover, the Court of Appeal held that a term cannot be implied where it goes against an express term of the contract. Here, the parties did not intend a perpetual contract, since they included a term allowing either party to unilaterally trigger its expiration prior to the end of each three-year term. The trial judge's approach was inconsistent with the non-renewal provision of the contract. The motive for triggering expiration was not restricted under the Agreement. The implication of a term of good faith also violated the entire agreement clause. The court held that the evidence of assurances given by Can-Am as to how the non-renewal power would be exercised fell afoul of the parol evidence rule and should not have been considered. Since the Court of Appeal held there was no breach of contract, the basis for the claims in unlawful means conspiracy and inducing breach of contract also disappeared.

(b) Positions of the Parties

29 Mr. Bhasin advances two related positions on appeal. His broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power without regard for that objective: A.F., at para. 51. This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations. Mr. Bhasin contends that common law in Canada is increasingly isolated as other jurisdictions embrace a greater role for good faith in contract law: A.F., at paras. 27-32. The recognition of a general duty of good faith would constitute an incremental advance in the law, given the numerous specific situations that already give rise to a duty of good faith. Mr. Bhasin relies on the findings of the trial judge that the respondents improperly and dishonestly used its non-renewal right to compel Mr. Bhasin to merge with his competitor. Mr. Bhasin contends that the respondents had no legitimate business reason for not renewing the contract. He also says that the entire agreement clause should be construed narrowly, and that express language is needed for such a clause to derogate from a duty of good faith: A.F., at para. 83.

30 Mr. Bhasin's second position, emphasized in oral argument, is that the Court should at least recognize a duty of honest performance of contractual obligations: transcript, at pp. 8, 10 and 24. Mr. Bhasin relies on the trial judge's findings that Can-Am acted dishonestly towards Mr. Bhasin throughout the period leading up to the non-renewal. It repeatedly lied to him about the nature of the organizational changes required by the Alberta Securities Commission, the nature of the audits that were to be carried out by Mr. Hrynew, and was dishonest about its intention to force him out: trial reasons, at paras. 195, 221, 246-47 and 267.

31 Unsurprisingly, the respondents see things very differently. While they accept that good faith plays a role in Canadian contract law, they submit that this role is much more modest than Mr. Bhasin suggests. They say that such a duty arises only in certain classes of contract, such as employment contracts, and in contracts involving discretionary powers: R.F., at para. 52. In the employment context, the duty applies only to the manner in which a contract is terminated. The contract in this case was negotiated between commercial parties to whom the policy considerations underlying employment law doctrine do not apply. Mr. Bhasin is alleging a right to a perpetual, or at least indefinite, contract with the respondents. The contract in this case could not be said to be discretionary, because it provided simply that on six months notice either party could terminate the Agreement. The respondents submit that there is no ambiguity in the wording of the non-renewal clause of the contract and so there is no basis for implying other terms or for relying on extrinsic evidence of the parties' intentions. The entire agreement clause specifically precluded the implication of any terms other than the express terms of the contract.

(2) Analysis

(a) Overview

32 The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze": Ontario Law Reform Commission ("OLRC"), *Report on Amendment of the Law of Contract* (1987), at p. 169. This approach is out of step with the civil law of Quebec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties.

33 In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge 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. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

34 In my view, taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

(b) Good Faith as a General Organizing Principle

(i) Background

35 The doctrine of good faith traces its history to Roman law and found acceptance in earlier English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634 (Eng. Ch.), at p. 138, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (Australia H.C.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113 (Eng. K.B.), "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith": p. 157. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162 (Eng. K.B.), at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts: see also *Herbert v. Mercantile Fire Insurance Co.* (1878), 43 U.C.Q.B. 384 (Ont. Q.B.); R. Powell, "Good Faith in Contracts" (1956), 9 Curr. Legal Probs. 16.

36 However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), at para. 1-039; W. P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commerical Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984), 125, at p. 148.

37 This Court has not examined whether there is a general duty of good faith contractual performance. However, there has been an active debate in other courts and among scholars for decades over whether there is, or should be, a general or "stand-alone" duty of good faith in the performance of contracts. Canadian courts have reached different conclusions on this point.

38 Some suggest that there is a general duty of good faith: *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (N.S. T.D.), aff'd on narrower grounds (1992), 112 N.S.R. (2d) 180 (N.S. C.A.); *McDonald's Restaurants of Canada Ltd. v. British Columbia* (1997), 29 B.C.L.R. (3d) 303 (B.C. C.A.), at para. 99; *Crawford v. New Brunswick (Agricultural Development Board)* (1997), 192 N.B.R. (2d) 68 (N.B. C.A.), at paras. 7-8. They see a broad role for good faith as an implied term in all contracts that establishes minimum standards of acceptable commercial behaviour. As Kelly J. put it in *Gateway Realty*, at para. 38:

> The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" — a conduct that is contrary to community standards of honesty, reasonableness or fairness.

39 Other courts are of the view that there exists no such general duty of good faith in all contracts: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.), at para. 54; *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (Alta. C.A.), at paras. 15-19, *per* Kerans J.A., *dubitante*; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15 (Ont. C.A.), at para. 131; see G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 338-46. The detractors of such a general duty of good faith have accepted a limited role for good faith in certain contexts but have held that it would create commercial uncertainty and

undermine freedom of contract to recognize a general duty of good faith that would permit courts to interfere with the express terms of a contract.

40 This Court ought to develop the common law to keep in step with the "dynamic and evolving fabric of our society" where it can do so in an incremental fashion and where the ramifications of the development are "not incapable of assessment": *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 670; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), at para. 93; see also *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at pp. 760-64; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 85; *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, 2002 SCC 8, [2002] 1 S.C.R. 156 (S.C.C.); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.); *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.), at para. 46. This is even more appropriate where, as here, what is contemplated is not the reversal of some settled rule, but a development directed to bringing greater certainty and coherence to a complex and troublesome area of the common law.

41 As I see it, the developments that I propose are desirable as a result of several considerations. First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States: see, e.g., Hall, at p. 347. While the developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and will bring the law closer to what reasonable commercial parties would expect it to be.

(ii) Survey of the Current State of the Common Law

42 Anglo-Canadian common law has developed a number of rules and doctrines that call upon the notion of good faith in contractual dealings; it is a concept that underlies many elements of modern contract law: S. M. Waddams, *The Law of Contracts* (2010), at para. 550; J. D. McCamus *The Law of Contracts* (2nd ed. 2012), at pp. 835-38; OLRC, at p. 165; Belobaba, at pp. 75-76; J. F. O'Connor, *Good Faith in English Law* (1990), at pp. 17-49; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev.* 433. The approach, not unfairly, has been characterized as developing "piecemeal solutions in response to demonstrated problems": *Interfoto Library Ltd. v. Stiletto Visual Programmes Ltd.* (1987), [1989] 1 Q.B. 433 (Eng. C.A.), at p. 439, *per* Bingham L.J. (as he then was). Thus we see, for example, that good faith notions have been applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships. It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability, and plays a role in interpreting and implying contractual terms. The difficulty with this "piecemeal" approach, however, is that it often fails to take a consistent or principled approach to similar problems. A brief review of the current landscape of good faith will show the extent to which this is the case.

43 Considerations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other: G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 329-30; E. Peden, "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005), 21 *J.C.L.* 226; Belobaba, at p. 86; S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 J.C.L. 55.

44 Good faith also plays a role in the law of implied terms, particularly with respect to terms implied by law. Terms implied by law redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), at p. 457, *per* McLachlin J.; see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), *per* McLachlin J., concurring. The implication of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions by filling in gaps in the written agreement of the parties: *Chitty on Contracts*, at para. 1-051. In *Mesa Operating*, the Alberta Court of Appeal implied a term that a power of pooling properties for the purpose of determining royalty payments be exercised reasonably. The court implied this term in order to give effect to the intentions of the parties rather than as a requirement of good faith, but Kerans J.A. stated that "[t]he rule that governs here can, therefore, be expressed much more narrowly than to speak of good

faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith": para. 22. Many other examples may be found in Waddams, *The Law of Contracts*, at paras. 499-506.

45 Considerations of good faith are also apparent in contract interpretation: *Chitty on Contracts*, at para. 1-050; Hall, at p. 347. The primary object of contractual interpretation is of course to give effect to the intentions of the parties at the time of contract formation. However, considerations of good faith inform this process. Parties may generally be assumed to intend certain minimum standards of conduct. Further, as Lord Reid observed in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235 (U.K. H.L.), at p. 251, "[t]he more unreasonable the result the more unlikely it is that the parties can have intended it". As A. Swan and J. Adamski put it, the duty of good faith "is not an externally imposed requirement but inheres in the parties' relation": *Canadian Contract Law* (3rd ed. 2012), at §§ 8.134 to 8.146.

46 Good faith also appears in numerous contexts in a more explicit form. The concept of "good faith" is used in hundreds of statutes across Canada, including statutory duties of good faith and fair dealing in franchise legislation and good faith bargaining in labour law: S. K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 *Can. Bar Rev.* 70, at p. 71.

47 There have been many attempts to bring a measure of coherence to this piecemeal accretion of appeals to good faith: see, among many others, McCamus, at pp. 835-68; S. K. O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007), 86 *Can. Bar. Rev.* 193, at pp. 196-204; Waddams, *The Law of Contracts*, at paras. 494-508; R. S. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 Va. L. Rev. 195; S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980), 94 *Harv. L. Rev.* 369. By way of example, Professor McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: (1) where 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 (pp. 840-56; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43 (Ont. C.A.), at paras. 49-50).

48 While these types of cases overlap to some extent, they provide a useful analytical tool to appreciate the current state of the law on the duty of good faith. They also reveal some of the lack of coherence in the current approach. It is often unclear whether a good faith obligation is being imposed as a matter of law, as a matter of implication or as a matter of interpretation. Professor McCamus notes:

> Although the line between the two types of implication is difficult to draw, it may be realistic to assume that implied duties of good faith are likely, on occasion at least, to slide into the category of legal incidents rather than mere presumed intentions. Certainly, it would be difficult to defend the implication of terms on each of the cases considered here on the basis of the traditional business efficiency or officious bystander test. In the control of contractual discretion cases, for example, it may be more realistic to suggest that the implied limitation on the exercise of the discretion is intended to give effect to the "reasonable expectations of the parties." [pp. 865-66]

49 The first type of situation (contracts requiring the cooperation of the parties to achieve the objects of the contract) is reflected in the jurisprudence of this Court. In *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 (S.C.C.), the parties to a real estate transaction failed to specify in the purchase-sale agreement which party was to be responsible for obtaining planning permission for a subdivision of the property. By law, the vendor was the only party capable of obtaining such permission. The Court held that the vendor was under an obligation to use reasonable efforts to secure the permission, or as Dickson J. put it, "[t]he vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale": p. 1084. It is not completely clear whether this duty was imposed as a matter of law or was implied based on the parties' intentions: see p. 1083; see also *Gateway Realty* and *CivicLife.com*.

50 *Mitsui & Co. (Canada) Ltd. v. Royal Bank*, [1995] 2 S.C.R. 187 (S.C.C.), is an example of the second type of situation (exercise of contractual discretion). The lease of a helicopter included an option to buy at the "reasonable fair market value of the helicopter as established by Lessor": para. 2. This Court held, at para. 34, that, "[c]learly, the lessor is not in a position, by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the

reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option." The Court did not discuss the basis for implying the term, but suggested that in the absence of a reasonableness requirement, the option would be a mere agreement to agree and thus would be unenforceable, which means that the implication of the term was necessary to give business efficacy to the agreement.

51 This Court's decision in *Freedman v. Mason*, [1958] S.C.R. 483 (S.C.C.), falls in the third type of situation in which a duty of good faith arises (where a contractual power is used to evade a contractual duty). In that case, the vendor in a real estate transaction regretted the bargain he had made. He then sought to repudiate the contract by failing to convey title in fee simple because he claimed his wife would not provide a bar of dower. The issue was whether he could take advantage of a clause permitting him to repudiate the transaction in the event that he was "unable or unwilling" to remove this defect in title even though he had made no efforts to do so by trying to obtain the bar of dower. Judson J. held that the clause did not "enable a person to repudiate a contract for a cause which he himself has brought about" or permit "a capricious or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner": p. 487.

52 The jurisprudence is not always very clear about the source of the good faith obligations found in these cases. The categories of terms implied as a matter of law, terms implied as a matter of intention and terms arising as a matter of interpretation sometimes are blurred or even ignored, resulting in uncertainty and a lack of coherence at the level of principle.

53 Apart from these types of situations in which a duty of good faith arises, common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.

54 For example, this court confirmed that there is a duty of good faith in the employment context in *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.). Mr. Keays was diagnosed with chronic fatigue syndrome and was frequently absent from work. Honda grew concerned with the frequency of the absences. It ordered Mr. Keays to undergo an examination by a doctor chosen by the employer, required him to provide a doctor's note for any absences, and discouraged him from retaining outside counsel. The majority held that in all employment contracts there was an implied term of good faith governing the manner of termination. In particular, the employer should not engage in conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" when dismissing an employee: para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 98. Good faith in this context did 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: *Wallace*, at para. 76.

55 This Court has also affirmed the duty of good faith which requires an insurer to deal with its insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim and to the decision whether or not to pay it: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.), at para. 63, citing *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29. The breach of this duty may support an award of punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.). This duty of good faith is also reciprocal: the insurer must not act in bad faith when dealing with a claim, which is typically made by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy (para. 83, citing *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Alta. Q.B.), at paras. 84-85, *per* Murray J.).

56 This Court has also recognized that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids: *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), at para. 88; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.); *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 58-59; A. C. McNeely, *Canadian Law of Competitive Bidding and Procurement* (2010), at pp. 245-54.

57 Developments in the United Kingdom and Australia point to enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine. Good faith in contract performance has received increasing prominence in English law, despite its "traditional ... hostility" to the concept: *Yam Seng Pte Ltd. v. International Trade Corp Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.), at para. 123, citing E. McKendrick, *Contract Law* (9th ed. 2011), at pp. 221-22; see also *Chitty on Contracts*, at para. 1-039. In *Yam Seng*, Leggatt J. held that a number of specific duties embodying good faith can be implied according to the presumed intentions of the parties according to the traditional approach for implying terms: para. 131. Leggatt J. identified a number of these implied duties, including honesty, fidelity to the parties' bargain, cooperation, and fair dealing: paras. 135-50. Leggatt J. stated that "[a] paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust": para. 135; see D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract'" (2014), 77 *Mod. L. Rev.* 475. The Court of Appeal considered the *Yam Seng* decision in *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (Eng. C.A.) (BAILII), where it confirmed that good faith was not a general principle of English law, but that it could be an implied term in certain categories of cases: paras. 105 and 150.

58 Australian courts have also moved towards a greater role for good faith in contract performance: *Cheshire and Fifoot's Law of Contract*, (9th Australian ed. 2008), at 10.43 to 10.47. The duty of good faith in its modern form was recognized by Priestley J.A. in *Renard Constructions (ME) Pty. Ltd. v. Canada (Minister of Public Works)* (1992), 26 N.S.W.L.R. 234 (New South Wales C.A.). There is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances. The duty of good faith can be implied as a matter of law or as a matter of fact, although the cases are not always clear on the basis on which the term is being implied. Australian courts have taken a broad view of what constitutes good faith: see, e.g., *Burger King Corp. v. Hungry Jacks 's Pty Ltd.*, [2001] NSWCA 187 (New South Wales C.A.) (AustLII). The law of good faith performance in Australia is still developing and remains unsettled: E. Peden, "Good faith in the performance of contract law" (2004), 42: 9 *L.S.J.* 64, at p. 64. However, it is clear that the duty of good faith requires adherence to standards of honest conduct: A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev.* 66, at p. 76; *Burger King*, at paras. 171 and 189.

(iii) The Way Forward

59 This selective survey supports the view that Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear: Belobaba; O'Byrne, "Good Faith in Contractual Performance", at p. 95; B. J. Reiter, "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev.* 705, at pp. 711-12. It also shows that in Canada, as well as in the United Kingdom and Australia, there is increasing attention to the notion of good faith, particularly in the area of contractual performance. Opponents of any general obligation of good faith prefer the traditional, organic development of solutions to address particular problems as they arise: see, e.g., M. G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385; D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435, at pp. 436 and 440. However, foreclosing some incremental development of the law at the level of principle would go beyond what prudent caution requires and evidence an almost "perverted pride" — to use Swan's term — in the law's failings.

60 Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24.

61 The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev.* 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev.* 55,

at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law. & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev.* 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

62 I conclude from this review that enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations.

(iv) Towards an Organizing Principle of Good Faith

63 The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

64 As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229 (S.C.C.), at p. 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544 (S.C.C.), at para. 124; R. M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law* (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way.

65 The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

66 This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

67 This approach is consistent with that taken in the case of unjust enrichment. McLachlin J. (as she then was) outlined the approach in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at pp. 786 and 788:

> This case presents the Court with the difficult task of mediating between, if not resolving, the conflicting views of the proper scope of the doctrine of unjust enrichment. It is my conclusion that we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery ....
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> . . . . .
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> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

68 The flexible approach that was 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": p. 788. In that case, this Court further developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what I propose to do with regards to the organizing principle of good faith.

69 The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at § 1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

70 The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

71 Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

(v) Should There Be a New Duty?

72 In my view, the objection to Can-Am's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. The relationship between Can-Am and Mr. Bhasin was not an employment or franchise relationship. Classifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation. After all, a party almost always has some amount of discretion in how to perform a contract. It would also be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.

73 In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

74 There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see *Mesa Operating*, at paras. 15-19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

75 Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it: see *CivicLife.com*, at para. 52.

76 It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties, because they are thought to interfere with freedom of contract: see *Gateway Realty*, *per* Kelly J.; O'Byrne, "Good Faith in Contractual Performance", at p. 95; Farnsworth, at 677-78. As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.

77 That said, I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements. The approach I outline here is similar in principle to that in § 1-302(b) of the U.C.C. (2012):

> The obligations of good faith, diligence, reasonableness and care ... may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.

78 Certainly, any modification of the duty of honest performance would need to be in express terms. A generically worded entire agreement clause such as cl. 11.2 of the Agreement does not indicate any intention of the parties to depart from the basic tenets of honest performance: see *GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd.*, [2003] FCA 50 (Australia C.A.) (AustLII), at para. 922, *per* Finn J.; see also O'Byrne, "Good Faith in Contractual Performance", at p. 96.

79 Two arguments are typically raised against an increased role for a duty of good faith in the law of contract: see Bridge, Clark, and Peden, "When Common Law Triumphs Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability". The first is that "good faith" is an inherently unclear concept that will permit *ad hoc* judicial moralism to undermine the certainty of commercial transactions. The second is that imposing a duty of good faith is inconsistent with the basic principle of freedom of contract. I do not have to decide here whether or not these points are valid in relation to a broad, generalized duty of good faith. However, they carry no weight in relation to adopting a rule of honest performance.

80 Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

81 Any interference by the duty of honest performance with freedom of contract is more theoretical than real. It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations.

82 Those who fear that this modest step would create uncertainty or impede freedom of contract may take comfort from experience of the civil law of Quebec and the common and statute law of many jurisdictions in the United States.

83 The *Civil Code of Québec* recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: see arts. 6, 7 and 1375. While this is not the place to expound in detail on good faith in the Quebec civil law, it is worth noting that good faith is seen as having two main aspects. The first is the subjective aspect, which is concerned with the state of mind of the actor, and addresses conduct that is, for example, malicious or intentional. The second is the objective aspect which is concerned with whether conduct is unacceptable according to the standards of reasonable people. As J.-L. Baudouin and P.-G. Jobin explain, [TRANSLATION] "a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of conduct that are generally accepted in society": *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 132. The notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract: *ibid.*, at para. 161; *Banque de Montréal c. Ng*, [1989] 2 S.C.R. 429 (S.C.C.), at p. 436.

84 In the United States, § 1-304 of the U.C.C. provides that "[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." The U.C.C. has been enacted by legislation in all 50 states. While the provisions of the U.C.C. apply only to commercial contracts, § 205 of the *Restatement (Second) of Contracts* (1981) provides for a general duty of good faith in all contracts. This provision of the *Restatement* has been followed by courts in the vast majority of states. The notion of "good faith" in the *Restatement* substantially followed the definition proposed by Robert Summers in an influential article, where he proposed that "good faith" is best understood as an "excluder" of various categories of bad faith conduct: p. 206; see § 205, comment a. The general definition of "good faith" in the U.C.C. is also quite broad, encompassing honesty and adherence to "reasonable commercial standards": § 1-201(b)(20). This definition was originally limited to "honesty in fact", that is, a duty of honesty in performance, and was only later expanded: A. D. Miller and R. Perry, "Good Faith Performance" (2013), 98 *Iowa L. Rev.* 689, at pp. 719-20. Honesty in performance is also a key component of "good faith" under the *Restatement*: § 205, comments a and d.

85 Experience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability: see, e.g., J. Pineau, "La discrétion judiciaire a-t-elle fait des ravages en matière contractuelle?", in *La réforme du Code civil, cinq ans plus tard* (1998), 141. It is also worth noting that in both the United States and Quebec, judicial developments preceded legislative action in codifying good faith. In the United States, courts had recognized the existence of a general duty of good faith before the promulgation of the U.C.C.: see, e.g., *Kirke La Shelle Co. v. Armstrong Co.* (1933), 263 N.Y. 79 (U.S. N.Y. Ct. App. 1933). Similarly, though there was no express provision of "good faith" in the *Civil Code of Lower Canada*, the Court implied such a general duty from more specific provisions of the *Code*: see *Banque canadienne nationale c. Soucisse*, [1981] 2 S.C.R. 339 (S.C.C.); *Banque nationale du Canada c. Houle*, [1990] 3 S.C.R. 122 (S.C.C.); *Québec (Commission hydroélectrique) c. Banque de Montréal*, [1992] 2 S.C.R. 554 (S.C.C.). The duty of good faith was subsequently included in the revisions leading to the enactment of the *Civil Code of Québec*.

86 The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts: *Whiten*. But 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.

87 This distinction explains the result reached by the court in *United Roasters Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (U.S. C.A. 4th Cir. 1981). The terminating party had decided in advance of the required notice period that it was going to terminate the contract. The court held that no disclosure of this intention was required other than what was stipulated in the notice requirement. The court stated:

> ... there is very little to be said in favor of a rule of law that good faith requires one possessing a right of termination to inform the other party promptly of any decision to exercise the right. A tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do. [pp. 989-90]

United Roasters makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract.

88 The duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel, but it is not subsumed by them. 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: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.), at para. 5; *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.); Waddams, *The Law of Contracts*, at paras. 195-203; B. MacDougall, *Estoppel* (2012), at pp. 142-44. 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 and breach of it supports a claim for damages according to the contractual rather than the tortious measure: see, e.g., *Parna v. G. & S. Properties Ltd.* (1970), [1971] S.C.R. 306 (S.C.C.), cited with approval in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 19.

89 Mr. Bhasin, supported b many judicial and academic authorities, has argued for wholesale adoption of a more expansive duty of good faith in contrast to the modest, incremental change that I propose: A.F., at para. 51; Summers, at p. 206; Belobaba; *Gateway Realty*. In many of its manifestations, good faith requires more than honesty on the part of a contracting party. For example, in *Dynamic Transport*, this Court held that good faith in the context of that contract required a party to take reasonable steps to obtain the planning permission that was a condition precedent to a sale of property. In other cases, the courts have required that discretionary powers not be exercised in a manner that is "capricious" or "arbitrary": *Mason, at p. 487*; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.), at p. 7. In other contexts, this Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts: *Wallace*, at para. 76.

90 It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr. Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para. 32. 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.

91 I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (U.S. N.J. Sup. Ct. 1972), aff'd, 07 A.2d 598 (U.S. N.J. Sup. Ct. 1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (U.S. Pa. S.C. 1978), at pp. 741-42. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*,

580 F. Supp. 1173 (U.S. Dist. Ct. D. Mass. 1984), at p. 1184; *Pitney-Bowes Inc. v. Mestre* (1981), 517 F. Supp. 52 (U.S. Dist. Ct. S.D. Fla. 1981), cert. denied, 464 U.S. 893 (U.S. Sup. Ct. 1983).

92 I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.

93 A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

(3) Application

94 The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.

95 The immediate dispute in this case centred on the non-renewal clause contained in cl. 3.3 of the 1998 Agreement which Mr. Bhasin entered into in November 1998. It provided that the Agreement was for a three-year term and would be automatically renewed unless one of the parties gave notice to the contrary at least six months before the end of the initial or any renewed term:

3.3 The term of this Agreement shall be for a period of three years from the date hereof (the "Initial Term") and thereafter shall be automatically renewed for successive three year periods (a "Renewal Term"), subject to earlier termination as provided for in section 8 hereof, unless either [Can-Am] or the Enrollment Director notifies the other in writing at least six months prior to expiry of the Initial Term or any Renewal Term that the notifying party desires expiry of the Agreement, in which event the Agreement shall expire at the end of such Initial Term or Renewal Term, as applicable.

96 The factual matrix in which the judge made her finding of dishonest performance is complicated and I will only outline it in very broad terms in order to put that finding in context. There were two main interrelated story lines.

97 The first concerns Mr. Hrynew's persistent attempts to take over Mr. Bhasin's market through a merger — in effect a takeover by him of Mr. Bhasin's agency. The second concerns the difficulties, beginning in early April 1999, that Can-Am was having with the Alberta Securities Commission, which regulated its business and its enrollment directors in Alberta. The Commission insisted that Can-Am appoint a full-time employee to be a PTO responsible for compliance with Alberta securities law. Can-Am ultimately appointed Mr. Hrynew, with the result that he would audit his competitor agencies, including Mr. Bhasin's, and therefore have access to their confidential business information. Mr. Bhasin's refusal to allow Mr. Hrynew access to this information led to the final confrontation with Can-Am and its giving notice of non-renewal in May 2001. Can-Am, for its part, wanted to force a merger of the Bhasin agency under the Hrynew agency, effectively giving Mr. Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

98 The trial judge concluded that Can-Am acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to Mr. Hrynew's role as PTO. Her detailed findings amply support this overall conclusion.

99 By early 2000, Can-Am was considering a significant reorganization of its activities in Alberta; by June of that year, it sent an organizational chart to the Commission showing that Mr. Bhasin's agency was to be merged under Mr. Hrynew's. But it had said nothing of this to Mr. Bhasin: trial reasons, at paras. 167-68. The trial judge found that these representations made by Can-Am to the Commission were clearly false if, as she concluded, they intended to refer to Mr. Bhasin: para. 246. She also found that Can-Am, by June 2000, was fearful that the Commission was going to pull its licence in Alberta and that it was prepared to do whatever it could to forestall that possibility. "However, it was not dealing honestly with [Mr.] Bhasin about the realities of the situation as [it] saw them": para. 246.

100 In August 2000, Mr. Bhasin first heard of Can-Am's merger plans for him during a meeting with Can-Am's regional vice-president. But when questioned about Can-Am's intentions with respect to the merger, the official "equivocated" and did not tell him the truth that from Can-Am's perspective this was a "done deal". The trial judge concluded that the official was "not honest with [Mr.] Bhasin" at that meeting: para. 247.

101 When Mr. Bhasin complained about Mr. Hrynew's conflict of interest in being both auditor and competitor, Can-Am in effect blamed the Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was not truthful. Can-Am failed to mention that it had proposed to appoint a non-resident of Alberta who was clearly not qualified according to the Commission's criteria or that it had decided to appoint Mr. Hrynew even though he did not meet the Commission's criteria either: trial reasons, at paras. 195 and 221. It also misrepresented — repeatedly — to Mr. Bhasin that Mr. 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. Can-Am did not even finalize its PTO contract with Mr. Hrynew until March 2001 and, notwithstanding its assurances to Mr. Bhasin, it failed to include such a provision in the contract: paras. 190-221. As the trial judge found, Can-Am "could not possibly have missed this honestly in the PTO agreement, given that [Mr. Bhasin's] very protests about [Mr.] Hrynew's appointment as PTO were about confidentiality and segregation of activities": para. 221. The judge also found that Can-Am repeated these "lies" about Mr. Hrynew's supposed obligations of confidentiality even after the PTO agreement, without these protections, had been signed: para. 204.

102 Can-Am pushed on with the requirement that Mr. Hrynew audit Mr. 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 Mr. Hrynew's agency: trial reasons, at para. 198.

103 As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause.

C. Liability for Civil Conspiracy and Inducing Breach of Contract

104 In light of this conclusion, I agree with the Court of Appeal's rejection of Mr. Bhasin's claims based on the torts of inducing breach of contract and unlawful means conspiracy.

105 The trial judge specifically found that Mr. Hrynew did not encourage Can-Am to act dishonestly in its dealings with Mr. Bhasin and that Can-Am's dishonest conduct was not fairly attributable to Mr. Hrynew: paras. 271 and 287. It follows that Mr. Hrynew did not induce Can-Am's breach of its contractual duty of honest performance.

106 The trial judge dismissed the claim for conspiracy to injure and there is no basis to interfere with that finding. However, the trial judge held the respondents liable for unlawful means conspiracy, with the unlawful means being the breach of contract and inducing breach of contract: para. 326. Because, in light of my conclusions, the only relevant breach of contract in this case is the breach of the duty of honest performance and there was no inducement of breach of contract, the only relevant unlawful means pertained to Can-Am alone and not Mr. Hrynew. Accordingly, there can be no liability for civil conspiracy: see *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427 (Ont. C.A.), at para. 43.

107 I therefore agree with the result reached by the Court of Appeal that there could be no liability for inducing breach of contract or unlawful means conspiracy: para. 36. It follows that the claims against Mr. Hrynew were rightly dismissed.

D. What Is the Appropriate Measure of Damages?

108 I have concluded that Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal. It is therefore liable for damages calculated on the basis of what Mr. Bhasin's economic position would have been had Can-Am fulfilled that duty. While the trial judge did not assess damages on that basis given her different findings in relation to liability, she made findings that permit this Court to do so.

109 The trial judge specifically held that but for Can-Am's dishonesty, Mr. Bhasin could have acted so as to "retain the value in his agency": paras. 258-59. In reaching this conclusion, the trial judge was well aware of the difficulties that Mr. Bhasin would have in selling his business given the "almost absolute controls" that Can-Am had on enrollment directors and that it owned the "book of business": para. 402. She also heard evidence and made findings about what the value of the business was, taking these limitations into account. These findings, in my view, permit us to assess damages on the basis that if Can-Am had performed the contract honestly, Mr. Bhasin would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew.

110 It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. The defendant's expert at trial valued Mr. Bhasin's business as of 2001 (the time of non-renewal) as approximately $87,000. While there is some confusion in the record about the date of evaluation and the relevance of discount rates, I am persuaded that the trial judge found that the business was worth $87,000 at the time that the Agreement expired and that she made this finding fully alive to the difficulties standing in the way of a sale of the business given the contractual arrangements between Can-Am and its enrollment directors: see, e.g., para. 451. In addition, we have had no suggestion in argument that this figure should be reassessed. In fact, the defendants, as appellants before the Court of Appeal, submitted to that court that if damages were payable, they should be assessed at the value of the business at the time of the expiry of the Agreement and noted that the trial judge had accepted the evidence of their expert witness, Mr. Bailey, that the value was $87,000.

111 I conclude therefore that Mr. Bhasin is entitled to damages in the amount of $87,000.

IV. Disposition

112 I would allow the appeal with respect to Can-Am and dismiss the appeal with respect to Mr. Hrynew. I would vary the trial judge's assessment of damages to $87,000 plus interest. Mr. Bhasin should have his costs throughout as against Can-Am. There should be no costs at any level in favour of or against Mr. Hrynew.

Appeal allowed in part.

Pourvoi accueilli en partie.

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2020 SCC 45, 2020 CSC 45
Supreme Court of Canada

C.M. Callow Inc. v. Zollinger

2020 CarswellOnt 18468, 2020 CarswellOnt 18469, 2020 SCC 45, 2020 CSC 45, [2020] 3 S.C.R. 908, [2020] S.C.J. No. 45, 10 B.L.R. (6th) 1, 325 A.C.W.S. (3d) 201, 452 D.L.R. (4th) 44

C.M. Callow Inc. (Appellant) 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 and Carleton Condominium Corporation No. 877 (Respondents) and Canadian Federation of Independent Business and Canadian Chamber of Commerce (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: December 6, 2019
Judgment: December 18, 2020
Docket: 38463

Proceedings: reversing *CM Callow Inc. v. Zollinger* (2018), 86 B.L.R. (5th) 53, 429 D.L.R. (4th) 704, 2018 ONCA 896, 2018 CarswellOnt 18697, Gary T. Trotte J.A., Grant Huscroft J.A., P. Lauwers J.A. (Ont. C.A.); reversing *C.M. Callow Inc. v. Tammy Zollinger et al.* (2017), 2017 CarswellOnt 18587, 2017 ONSC 7095, M. O'Bonsawin J. (Ont. S.C.J.)

Counsel: Brandon Kain, Adam Goldenberg, Vivian Ntiri, Miriam Vale Peters, for Appellant
Anne Tardif, Rodrigue Escayola, David Plotkin, for Respondents
Catherine Beagan Flood, Nicole Henderson, for Intervener, Canadian Federation of Independent Business
Jeremy Opolsky, Winston Gee, for Intervener, Canadian Chamber of Commerce

Subject: Civil Practice and Procedure; Contracts; Property

Headnote

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith

In 2012, group of condominium corporations ("B Inc.") entered into two-year winter maintenance contract and separate summer maintenance contract with C Inc. — Pursuant to contract, B Inc. was entitled to terminate contract if C Inc. failed to give satisfactory service in accordance with its terms, and if for any other reason, C Inc.'s services were no longer required, B Inc. could terminate contract upon giving 10 days' written notice — In early 2013, B Inc. decided to terminate contract but chose not to inform C Inc. of its decision and based on discussions, C Inc. was under impression that it would get two-year renewal of contract — As result, during summer of 2013, C Inc. performed work above and beyond summer maintenance contract, at no charge, as incentive for renewal — After B Inc. informed C Inc. of its decision to terminate winter maintenance agreement, C Inc. brought action for breach of contract, alleging bad faith — In allowing action, trial judge awarded damages and ruled that B Inc. breached its contractual duty of honest performance by acting in bad faith — B Inc. successfully appealed, Court of Appeal holding that trial judge erred by improperly expanding duty of honest performance beyond terms of winter maintenance agreement, and C Inc. appealed — Appeal allowed — Organizing principle of good faith recognized in Bhasin v. Hrynew was not free-standing rule, but instead manifested itself through existing good faith doctrines — In this appeal, applicable good faith doctrine was duty of honesty in contractual performance — Duty to act honestly in performance of contract precluded active deception — B Inc. breached its duty by knowingly misleading C Inc. into believing winter maintenance agreement

would not be terminated — By exercising termination clause dishonestly, it breached duty of honesty on matter directly linked to performance of contract, even if 10-day notice period was satisfied and irrespective of motive for termination.

Contracts --- Remedies for breach — Damages — Contract for service or repair

Dishonesty — In 2012, group of condominium corporations ("B Inc.") entered into two-year winter maintenance contract and separate summer maintenance contract with C Inc. — Pursuant to contract, B Inc. was entitled to terminate contract if C Inc. failed to give satisfactory service in accordance with its terms, and if for any other reason, C Inc.'s services were no longer required, B Inc. could terminate contract upon giving 10 days' written notice — In early 2013, B Inc. decided to terminate contract but chose not to inform C Inc. of its decision and based on discussions, C Inc. was under impression that it would get two-year renewal of contract — As result, during summer of 2013, C Inc. performed work above and beyond summer maintenance contract, at no charge, as incentive for renewal — After B Inc. informed C Inc. of its decision to terminate winter maintenance agreement, C Inc. brought action for breach of contract, alleging bad faith — In allowing action, trial judge awarded damages and ruled that B Inc. breached its contractual duty of honest performance by acting in bad faith — B Inc. successfully appealed, Court of Appeal holding that trial judge erred by improperly expanding duty of honest performance beyond terms of winter maintenance agreement, and C Inc. appealed — Appeal allowed — Duty of honest performance attracted damages according to ordinary contractual measure — Its breach was not tort, and basing damages in this case on reliance interest would set this contractual breach apart from ordinary measure of contractual damages, and it would also depart from measure as it was applied in Bhasin v. Hrynew — Ordinary approach was to award contractual damages corresponding to expectation interest — That was, damages should put injured party in position that it would have been in had duty been performed.

Contracts --- Performance or breach — Breach — Miscellaneous

In 2012, group of condominium corporations ("B Inc.") entered into two-year winter maintenance contract and separate summer maintenance contract with C Inc. — Pursuant to contract, B Inc. was entitled to terminate contract if C Inc. failed to give satisfactory service in accordance with its terms, and if for any other reason, C Inc.'s services were no longer required, B Inc. could terminate contract upon giving 10 days' written notice — In early 2013, B Inc. decided to terminate contract but chose not to inform C Inc. of its decision and based on discussions, C Inc. was under impression that it would get two-year renewal of contract — As result, during summer of 2013, C Inc. performed work above and beyond summer maintenance contract, at no charge, as incentive for renewal — After B Inc. informed C Inc. of its decision to terminate winter maintenance agreement, C Inc. brought action for breach of contract, alleging bad faith — In allowing action, trial judge awarded damages and ruled that B Inc. breached its contractual duty of honest performance by acting in bad faith — B Inc. successfully appealed, Court of Appeal holding that trial judge erred by improperly expanding duty of honest performance beyond terms of winter maintenance agreement, and C Inc. appealed — Appeal allowed — Duty of honest performance was contract law doctrine, not tort, and therefore nexus with contractual relationship was required — Breach must be directly linked to performance of contract — Framework for abuse of rights in Quebec was useful to illustrate required direct link between dishonesty and performance from Bhasin v. Hrynew — Authorities from Quebec serve as persuasive authority, and comparison between common law and civil law as they evolve in Canada was particularly useful and familiar exercise for court — Like in Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to requirements of good faith — While duty of honest performance had similarities with civil fraud and estoppel, it was not subsumed by them.

Contrats --- Exécution ou défaut d'exécution — Obligation d'exécuter — Exécution acceptable — Obligation d'exécuter de bonne foi

En 2012, un groupe d'associations condominiales (« B Inc. ») a conclu un contrat d'entretien hivernal de deux ans et un contrat distinct d'entretien estival avec C Inc. — En vertu du contrat, B Inc. avait le droit de résilier ce contrat si C Inc. ne rendait pas un service satisfaisant, conformément aux dispositions du contrat, et si, pour quelque autre raison que ce soit, les services de C Inc. n'étaient plus requis, B Inc. pouvait résilier le contrat en donnant un préavis écrit de 10 jours — Au début de 2013, B Inc. a décidé de résilier le contrat d'entretien hivernal mais a choisi de ne pas informer C Inc. de sa décision, et sur la base de discussions avec B Inc., C Inc. croyait qu'elle allait probablement obtenir un renouvellement de deux ans du contrat — Conséquemment, pendant l'été 2013, C Inc. a exécuté des travaux à titre gratuit qui dépassaient ce qui était prévu dans le contrat d'entretien estival afin d'inciter B Inc. à renouveler le contrat — Après que B Inc. ait informé C Inc. de sa décision de résilier le contrat d'entretien hivernal, C Inc. a déposé une action en violation de contrat, soutenant que B Inc.avait agi de mauvaise foi — Juge de première instance a accueilli l'action, accordé des dommages-intérêts et estimé que B Inc. avait manqué à son obligation contractuelle d'exécution honnête en agissant de mauvaise foi — Appel interjeté par B Inc. a été accueilli, la Cour d'appel

estimant que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal, et C Inc. a formé un pourvoi — Pourvoi accueilli — Principe directeur d'exécution de bonne foi reconnu dans l'arrêt Bhasin c. Hrynew n'est pas une règle autonome, mais se manifeste plutôt par les doctrines existantes en matière de bonne foi — Dans le présent pourvoi, la doctrine de la bonne foi applicable était celle de l'obligation d'honnêteté en matière d'exécution des contrats — Obligation d'agir honnêtement dans l'exécution du contrat empêchait de se livrer à une tromperie active — B Inc. a manqué à son obligation en induisant intentionnellement C Inc. en erreur, l'amenant ainsi à croire que le contrat d'entretien hivernal ne serait pas résilié — En se prévalant malhonnêtement de la clause de résiliation, B Inc. a manqué à l'obligation d'honnêteté au sujet d'une question directement liée à l'exécution du contrat, même si le délai de préavis de 10 jours a été respecté et sans égard aux raisons ayant motivé la résiliation.

Contrats --- Réparation du défaut — Dommages-intérêts — Contrat de service ou de réparation

Malhonnêteté — En 2012, un groupe d'associations condominiales (« B Inc. ») a conclu un contrat d'entretien hivernal de deux ans et un contrat distinct d'entretien estival avec C Inc. — En vertu du contrat, B Inc. avait le droit de résilier ce contrat si C Inc. ne rendait pas un service satisfaisant, conformément aux dispositions du contrat, et si, pour quelque autre raison que ce soit, les services de C Inc. n'étaient plus requis, B Inc. pouvait résilier le contrat en donnant un préavis écrit de 10 jours — Au début de 2013, B Inc. a décidé de résilier le contrat d'entretien hivernal mais a choisi de ne pas informer C Inc. de sa décision, et sur la base de discussions avec B Inc., C Inc. croyait qu'elle allait probablement obtenir un renouvellement de deux ans du contrat — Conséquemment, pendant l'été 2013, C Inc. a exécuté des travaux à titre gratuit qui dépassaient ce qui était prévu dans le contrat d'entretien estival afin d'inciter B Inc. à renouveler le contrat — Après que B Inc. ait informé C Inc. de sa décision de résilier le contrat d'entretien hivernal, C Inc. a déposé une action en violation de contrat, soutenant que B Inc. avait agi de mauvaise foi — Juge de première instance a accueilli l'action, accordé des dommages-intérêts et estimé que B Inc. avait manqué à son obligation contractuelle d'exécution honnête en agissant de mauvaise foi — Appel interjeté par B Inc. a été accueilli, la Cour d'appel estimant que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal, et C Inc. a formé un pourvoi — Pourvoi accueilli — Obligation d'exécution honnête donnait lieu à des dommages-intérêts suivant ce qui est habituellement accordé en matière contractuelle — Fait de manquer à cette obligation ne constituait pas un délit civil et, en l'espèce, fonder l'octroi de dommages-intérêts sur un intérêt reposant sur un élément de fiabilité écarterait cette atteinte contractuelle de ce qui est habituellement accordé en matière contractuelle et des principes établis dans l'arrêt Bhasin c. Hrynew — D'ordinaire, on accordait en matière contractuelle des dommages-intérêts correspondant à la perte du profit escompté — Cela signifiait que les dommages-intérêts devaient placer la partie lésée dans la situation où elle se serait trouvée s'il avait été satisfait à l'obligation contractuelle.

Contrats --- Exécution ou défaut d'exécution — Défaut d'exécution — Divers

En 2012, un groupe d'associations condominiales (« B Inc. ») a conclu un contrat d'entretien hivernal de deux ans et un contrat distinct d'entretien estival avec C Inc. — En vertu du contrat, B Inc. avait le droit de résilier ce contrat si C Inc. ne rendait pas un service satisfaisant, conformément aux dispositions du contrat, et si, pour quelque autre raison que ce soit, les services de C Inc. n'étaient plus requis, B Inc. pouvait résilier le contrat en donnant un préavis écrit de 10 jours — Au début de 2013, B Inc. a décidé de résilier le contrat d'entretien hivernal mais a choisi de ne pas informer C Inc. de sa décision, et sur la base de discussions avec B Inc., C Inc. croyait qu'elle allait probablement obtenir un renouvellement de deux ans du contrat — Conséquemment, pendant l'été 2013, C Inc. a exécuté des travaux à titre gratuit qui dépassaient ce qui était prévu dans le contrat d'entretien estival afin d'inciter B Inc. à renouveler le contrat — Après que B Inc. ait informé C Inc. de sa décision de résilier le contrat d'entretien hivernal, C Inc. a déposé une action en violation de contrat, soutenant que B Inc. avait agi de mauvaise foi — Juge de première instance a accueilli l'action, accordé des dommages-intérêts et estimé que B Inc. avait manqué à son obligation contractuelle d'exécution honnête en agissant de mauvaise foi — Appel interjeté par B Inc. a été accueilli, la Cour d'appel estimant que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal, et C Inc. a formé un pourvoi — Pourvoi accueilli — Obligation d'exécution honnête était une doctrine du droit des contrats, y manquer ne constituait pas un délit civil et, par conséquent, il devait y avoir un lien avec la relation contractuelle — Manquement doit être directement lié à l'exécution du contrat — Cadre d'analyse de l'abus de droit au Québec était utile afin d'illustrer le lien direct exigé entre la malhonnêteté et l'exécution dont il était question dans l'arrêt Bhasin c. Hrynew — Sources québécoises servaient d'autorités persuasives, et la comparaison entre la common law et le droit civil, au fil de leur évolution au Canada, était un exercice particulièrement utile pour la Cour — Tout comme en droit civil québécois, aucun droit contractuel ne peut être exercé malhonnêtement, ce qui reviendrait à contrevenir

aux exigences de la bonne foi — Obligation d'exécution honnête offrait des similitudes avec la fraude civile et la préclusion, sans toutefois être subsumée sous ces notions.

In 2012, a group of condominium corporations ("B Inc.") entered into a two-year winter maintenance contract and a separate summer maintenance contract with C Inc. Pursuant to clause 9 of the winter maintenance contract, B Inc. was entitled to terminate that agreement if C Inc. failed to give satisfactory service in accordance with its terms. Clause 9 also provided that if, for any other reason, C Inc.'s services were no longer required, B Inc. could terminate the contract upon giving 10 days' written notice.

In early 2013, B Inc. decided to terminate the winter maintenance agreement but chose not to inform C Inc. of its decision at that time. Following discussions with B Inc., C Inc. thought that it was likely to get a two-year renewal of the contract, and during the summer of 2013, C Inc. performed work above and beyond the summer maintenance contract, at no charge, as an incentive for renewal.

B Inc. informed C Inc. of its decision to terminate the winter maintenance agreement in September 2013. C Inc. successfully brought an action for breach of contract, alleging bad faith. In allowing the action, the trial judge awarded damages and ruled that B Inc. breached its contractual duty of honest performance by acting in bad faith, specifically by failing to tell C Inc. that it intended to terminate the winter contract and by representing to C Inc. that the winter contract would be renewed.

B Inc. appealed. The Court of Appeal set aside the judgment, holding that the trial judge erred by improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. C Inc. appealed.

Held: The appeal was allowed.

Per Kasirer J. (Wagner C.J.C., Abella, Karakatsanis, Martin JJ. concurring): The dispute turned on the way B Inc. exercised the termination clause. In this appeal, the applicable good faith doctrine was the duty of honesty in contractual performance. The duty to act honestly in the performance of the contract precluded active deception. B Inc. breached its duty by knowingly misleading C Inc. into believing the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied and irrespective of the motive for termination.

The organizing principle of good faith recognized in Bhasin v. Hrynew was not a free-standing rule, but instead manifested itself through existing good faith doctrines. Insofar as the organizing principle in Bhasin spoke to a related idea that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily, this principle, unlike Quebec law, was not a free-standing rule but rather a standard that underpinned and manifested itself in more specific doctrines. The duty of honest performance was a contract law doctrine, not a tort, and therefore a nexus with the contractual relationship was required. A breach must be directly linked to the performance of the contract. The required direct link between dishonesty and performance from Bhasin was made plain, by way of simple comparison, when one considered how the framework for abuse of rights in Quebec connected the manner in which a contractual right was exercised to the requirements of good faith. Specifically, the direct link existed when the party performed their obligation or exercised their right under the contract dishonestly. When read together, arts. 6, 7 and 1375 of the Civil Code of Québec pointed to this connection by providing that no contractual right may be exercised abusively without violating the requirements of good faith.

It was unnecessary to answer C Inc.'s argument that, irrespective of the question of honesty, B Inc. breached a duty to exercise a discretionary power in good faith. Nor was it necessary to extend Bhasin to recognize a new duty of good faith relating to what C Inc. had described as "active non-disclosure" of information germane to performance.

Per Brown J. (concurring) (Moldaver, Rowe JJ. concurring): Disposing of the present appeal was a simple matter of applying the decision in Bhasin. C Inc.'s claim should be resolved by applying only the duty of honest performance. As a universally applicable minimum standard, all contracts must be performed honestly. Contracting parties may therefore not lie to, or otherwise knowingly mislead, each other about matters directly linked to performance. The majority's reliance on the civilian doctrine of abuse of a right distorts the analysis in Bhasin and elided the distinction between honest performance and good faith in the exercise of a contractual discretion.

Per Côté J. (dissenting): The appeal should be dismissed. C Inc.'s recourse could not be based on a breach of the duty of honest performance. Although B Inc.'s conduct may not have been laudable, it did not fall within the category of active dishonesty prohibited by that duty. The obligations flowing from the duty of honest performance were negative obligations. Extending the duty beyond that scope would detract from certainty in commercial dealings. Therefore, silence could not be considered dishonest within the meaning of Bhasin unless there was a positive obligation to speak. The trial judge's understanding of "active

dishonesty" was tainted by an error of law because she did not consider the principle that, in order to amount to a breach of the duty of honest performance, any active dishonesty had to be directly linked to the performance of the contract as per Bhasin.

En 2012, un groupe d'associations condominiales (« B Inc. ») a conclu un contrat d'entretien hivernal de deux ans et un contrat distinct d'entretien estival avec C Inc. En vertu de la clause 9 du contrat d'entretien hivernal, B Inc. avait le droit de résilier ce contrat si C Inc. ne rendait pas un service satisfaisant, conformément aux dispositions du contrat. La clause 9 prévoyait également que si, pour quelque autre raison que ce soit, les services de C Inc. n'étaient plus requis, B Inc. pouvait résilier le contrat en donnant un préavis écrit de 10 jours.

Au début de 2013, B Inc. a décidé de résilier le contrat d'entretien hivernal mais a choisi de ne pas informer C Inc. de sa décision à ce moment-là. À la suite de discussions avec B Inc., C Inc. croyait qu'elle allait probablement obtenir un renouvellement de deux ans du contrat d'entretien hivernal et pendant l'été 2013, C Inc. a exécuté des travaux à titre gratuit qui dépassaient ce qui était prévu dans le contrat d'entretien estival afin d'inciter B Inc. à renouveler le contrat.

B Inc. a informé C Inc. de sa décision de résilier le contrat d'entretien hivernal en septembre 2013. C Inc. a déposé une action alléguant une violation de contrat, soutenant que B Inc. avait agi de mauvaise foi. La juge de première instance a accueilli l'action, accordé des dommages-intérêts et estimé que B Inc. avait manqué à son obligation contractuelle d'exécution honnête en agissant de mauvaise foi, tout particulièrement en n'informant pas C Inc. de son intention de mettre fin au contrat d'entretien hivernal et en laissant entendre que le contrat était susceptible d'être renouvelé.

B Inc. a interjeté appel. La Cour d'appel a annulé le jugement, estimant que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal. C Inc. a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Kasirer, J. (Wagner, J.C.C., Abella, Karakatsanis, Martin, JJ., souscrivant à son opinion) : Le débat portait sur la façon dont B Inc. a exercé la clause de résiliation. Dans le présent pourvoi, la doctrine de la bonne foi applicable était celle de l'obligation d'honnêteté en matière d'exécution des contrats. L'obligation d'agir honnêtement dans l'exécution du contrat empêchait de se livrer à une tromperie active. B Inc. a manqué à son obligation en induisant intentionnellement C Inc. en erreur, l'amenant ainsi à croire que le contrat d'entretien hivernal ne serait pas résilié. En se prévalant malhonnêtement de la clause de résiliation, B Inc. a manqué à l'obligation d'honnêteté au sujet d'une question directement liée à l'exécution du contrat, même si le délai de préavis de 10 jours a été respecté et sans égard aux raisons ayant motivé la résiliation.

Le principe directeur d'exécution de bonne foi reconnu dans l'arrêt Bhasin c. Hrynew n'est pas une règle autonome, mais se manifeste plutôt par les doctrines existantes en matière de bonne foi. Bien que le principe directeur visé par l'arrêt Bhasin traduise l'idée connexe que les parties doivent de façon générale exécuter leurs obligations contractuelles de manière honnête et raisonnable, et non de façon abusive ou arbitraire, ce principe, à la différence du droit québécois, n'était pas une règle autonome, mais plutôt une norme qui sous-tendait des règles plus particulières et s'y manifestait.

L'obligation d'exécution honnête était une doctrine du droit des contrats, y manquer ne constituait pas un délit civil et, par conséquent, il devait y avoir un lien avec la relation contractuelle. Un manquement doit être directement lié à l'exécution du contrat. Le lien direct exigé entre la malhonnêteté et l'exécution dont il était question dans l'arrêt Bhasin était clairement mis en évidence, par voie de simple comparaison, lorsque l'on considérait comment le cadre d'analyse de l'abus de droit au Québec liait la manière dont un droit contractuel était exercé aux exigences de la bonne foi. Plus précisément, le lien direct existait lorsqu'une partie s'acquittait de son obligation ou exerçait son droit prévu au contrat de façon malhonnête. Lus ensemble, les art. 6, 7 et 1375 du Code civil du Québec mettaient ce lien en exergue en prévoyant qu'aucun droit contractuel ne peut être exercé de façon abusive sans violer les exigences de la bonne foi.

Il était inutile de répondre à l'argument de C Inc. selon lequel, sans égard à la question d'honnêteté, B Inc. avait manqué à une obligation d'exercer un pouvoir discrétionnaire de bonne foi. Il n'était pas non plus nécessaire d'étendre la teneur de l'arrêt Bhasin pour reconnaître une nouvelle obligation d'agir de bonne foi liée à ce que C Inc. a décrit comme étant une « non-divulgation active » d'information ayant trait à l'exécution.

Brown, J. (souscrivant à l'opinion des juges majoritaires) (Moldaver, Rowe, JJ., souscrivant à son opinion) : Pour disposer du présent pourvoi, il suffisait d'appliquer l'arrêt Bhasin. La demande de C Inc. devrait être résolue en appliquant uniquement l'obligation d'exécution honnête. Selon la norme minimale universelle applicable, tous les contrats doivent être exécutés de manière honnête. Les parties contractantes ne doivent donc pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat. Le fait que les juges majoritaires se fondent sur la notion d'abus de

droit en droit civil faussait l'analyse décrite dans l'arrêt Bhasin et gommait la distinction entre l'exécution honnête et la bonne foi dans l'exercice d'un pouvoir discrétionnaire contractuel.
Côté, J. (dissidente) : Le pourvoi devrait être rejeté. Le recours de C inc. ne saurait être fondé sur un manquement à l'obligation d'exécution honnête. Bien que la conduite de B Inc. n'ait pas été louable, elle ne tombait pas dans la catégorie de la conduite malhonnête prohibée par l'obligation contractuelle d'exécution honnête. Les obligations découlant de l'exécution honnête sont négatives. Étendre davantage la portée de l'obligation d'exécution honnête écarterait la stabilité des opérations commerciales. Par conséquent, le silence ne saurait être considéré comme malhonnête au sens de l'arrêt Bhasin, à moins qu'il n'y ait une obligation positive de parler. L'analyse de la « tromperie active » par la juge de première instance relevait d'une compréhension erronée du droit puisqu'elle n'a accordé aucune considération au principe que, pour constituer un manquement à l'obligation d'exécution honnête, la tromperie active doit être, selon l'arrêt Bhasin, directement liée à l'exécution du contrat.

APPEAL by contractor from judgment reported at *CM Callow Inc. v. Zollinger* (2018), 2018 ONCA 896, 2018 CarswellOnt 18697, 429 D.L.R. (4th) 704, 86 B.L.R. (5th) 53 (Ont. C.A.), setting aside trial judgment and holding that trial judge erred by improperly expanding duty of honest performance beyond terms of winter maintenance agreement.

POURVOI formé par un entrepreneur à l'encontre d'un jugement publié à *CM Callow Inc. v. Zollinger* (2018), 2018 ONCA 896, 2018 CarswellOnt 18697, 429 D.L.R. (4th) 704, 86 B.L.R. (5th) 53 (Ont. C.A.), ayant annulé le jugement rendu par la juge de première instance et ayant conclu que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête au-delà des modalités d'un contrat d'entretien hivernal.

Kasirer J. **(Wagner C.J.C., Abella, Karakatsanis, Martin JJ. concurring):**

I. Introduction

1 This appeal concerns a clause in a commercial winter maintenance agreement that permitted the clients to terminate the contract unilaterally, without cause, upon giving the contractor 10 days' notice. The dispute does not turn on whether the clause represented a fair bargain between the parties. There is also no issue about the meaning of the termination clause. The dispute turns rather on the manner in which the respondents (collectively "Baycrest") exercised the termination clause. Acknowledging that 10 days' notice was given the appellant, C.M. Callow Inc. ("Callow"), argues that Baycrest exercised the termination clause contrary to the requirements of good faith set forth by this Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.), in particular the duty to perform the contract honestly.

2 In *Bhasin*, Cromwell J. recognized a general organizing principle of good faith, which means that "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (para. 63). This organizing principle, he explained, "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations" (para. 64). The organizing principle of good faith manifests itself through "existing doctrines" addressing "the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance" (para. 66).

3 In this appeal, the applicable good faith doctrine is the duty of honesty in contractual performance. As Cromwell J. explained in *Bhasin*, at para. 73, 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". Callow says Baycrest's failure to exercise its right to terminate in keeping with the mandatory duty of honest performance amounted to a breach of contract. It points to the trial judge's findings that Baycrest withheld the information that the contract was in danger of termination. Baycrest then continued to represent that the contract was not in danger and knowingly declined to correct the false impression it had created and under which Callow was operating. This dishonesty continued for several months, "in anticipation of the notice period" wrote the trial judge and, claims Callow, resulted in it foregoing the opportunity to bid on other winter contracts and thereby justifies an award of damages (2017 ONSC 7095 (Ont. S.C.J.), at para. 67 (CanLII)).

4 Baycrest, for its part, recalling that Cromwell J. explicitly stated in *Bhasin* that the duty of honest performance does not amount to a duty to disclose, argues that its silence did not constitute dishonesty. It also says the alleged dishonesty was not

connected to the contract in place at the time because, in its submission, the impugned communications related to the possibility of a future contract not yet executed. The Court of Appeal agreed and overturned the trial judge's decision (2018 ONCA 896, 429 D.L.R. (4th) 704 (Ont. C.A.)).

5 I respectfully disagree with the Court of Appeal on whether the manner in which the termination clause was exercised ran afoul of the minimum standard of honesty. The duty to act honestly in the performance of the contract precludes active deception. Baycrest breached its duty by knowingly misleading Callow into believing the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied and irrespective of their motive for termination. For the reasons that follow, I would allow the appeal and restore the judgment of the Ontario Superior Court of Justice.

II. Background

6 Baycrest includes 10 condominium corporations managed by Condominium Management Group and a designated property manager. Each corporation has its own board of directors to manage its affairs and, collectively, they established a Joint Use Committee ("JUC"). The JUC makes decisions regarding the joint and shared assets of the condominiums. In 2010, the condominium corporations entered into a two-year winter maintenance agreement with Callow, a corporation owned and operated by Christopher Callow. Pursuant to the terms of the agreement, Callow provided winter services, including snow removal, to the condominium corporations.

7 At the conclusion of the two-year term in 2012, the corporations entered into two new agreements with Callow. Joseph Peixoto — president of one of the condominium corporations, and representative on the JUC — negotiated the main pricing terms with Mr. Callow for the renewal of the winter maintenance contract, which also added a separate summer maintenance services contract.

8 At issue in this appeal is the winter maintenance agreement, which had a new two-winter term from November 1, 2012 to April 30, 2014. Pursuant to clause 9, the corporations were entitled to terminate the winter maintenance agreement if Callow failed to give satisfactory service in accordance with the terms of this Agreement. Moreover, clause 9 provided that "if for any other reason [Callow's] services are no longer required for the whole or part of the property covered by this Agreement, then the [condominium corporations] may terminate this contract upon giving ten (10) days' notice in writing to [Callow]" (A.R., vol. III, at p. 10).

9 During the first winter of the two-winter term, there were complaints from occupants of various condominiums, many of which related to snow removal from individual parking stalls. In January 2013, Mr. Callow attended a JUC meeting to address the concerns. The minutes reflected the positive nature of this meeting, recording that "[t]he Committee confirmed that [Callow] has been diligent in addressing this issue as best as could be expected considering the nature of the storms recently experienced" (A.R., vol. III, at p. 35). After the meeting, the property manager at the time also sent a follow-up email to the JUC members: "I know that your Board has been generally satisfied with the snow removal — so there is nothing outstanding to report here" (p. 39).

10 A few months later — still in the first year of the agreement — respondent Tammy Zollinger became the property manager. About three weeks after Ms. Zollinger's arrival, another JUC meeting was held, this time without Mr. Callow present. During the meeting, Ms. Zollinger advised the JUC to terminate the winter maintenance agreement with Callow "due to poor workmanship in the 2012-13 winter" (A.R., vol. III, at p. 43). The minutes went on to indicate that Ms. Zollinger had reviewed the contract and advised the JUC members that they could terminate the contract with Callow with no financial penalty. Ms. Zollinger further advised that she would get quotes from other snow removal contractors. The JUC voted to terminate the winter maintenance agreement shortly thereafter, "in either March or April" of 2013 (trial reasons, at para. 51). Baycrest chose not to inform Mr. Callow of its decision to terminate the winter maintenance agreement at that time.

11 Although only one winter of the two-winter term had been completed, Callow began discussions throughout the spring and summer of 2013 with Baycrest regarding a renewal of the winter maintenance agreement. Specifically, Mr. Callow had various

exchanges with two condominium corporations' board members, one of whom was Mr. Peixoto. Following these conversations, wrote the trial judge, "Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and they were satisfied with his services" (para. 41).

12 Meanwhile, Callow continued to fulfill its obligations under the winter and summer maintenance agreements including, pursuant to the latter arrangement, finishing "spring cleanup", cutting grass on a weekly basis and conducting garbage pick-up. Furthermore, during the summer of 2013, Callow "performed work above and beyond [its] summer maintenance services contract" (para. 42), even doing what Mr. Callow described as some "freebie" work, which he hoped would act as an incentive for Baycrest to renew the winter maintenance agreement at the end of the upcoming winter.

13 Conversations between Callow and Mr. Peixoto continued into July 2013, at which time Callow decided to improve the appearance of two gardens. In an email dated July 17, 2013, Mr. Peixoto wrote to another condominium corporation board member regarding this "freebie" work, writing in part: "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 as well and he is under the impression we're keeping him for winter again. I didn't say a word to him cuz I don't wanna get involved but I did tell [Ms. Zollinger] that [Mr. Callow] thinks we're keeping him for winter" (A.R., vol. III, at p. 73).

14 Baycrest did not inform Callow about the decision to terminate the winter maintenance agreement until September 12, 2013. At that point, Ms. Zollinger advised Callow by way of email "that Baycrest will not be requiring your services for the winter contract for the 2013/2014 season, as per section 9 of the contract, Baycrest needs to provide the contractor with 10 days' notice" (A.R., vol. III, at p. 49).

15 Callow consequently filed a statement of claim for breach of contract, alleging that Baycrest acted in bad faith by accepting free services while knowing Callow was offering them in order to maintain their future contractual relationship. Moreover, Callow alleged that Baycrest knew or ought to have known that Callow would not seek other winter maintenance contracts in reliance on the representations that Callow was providing satisfactory service and the contract would not be prematurely terminated. Accordingly, "[a]s a result of these misrepresentations and/or bad faith conduct, [Mr. Callow on behalf of Callow] did not bid on other tenders for winter maintenance contracts. [Baycrest is] now liable for Callow's damages for loss of opportunity" (A.R., vol. I, p. 45, at para. 30). Finally, Callow alleged that Baycrest was unjustly enriched by the free services it provided in the summer of 2013.

16 Callow sought damages in the amount of $81,383.68 for breach of contract, an amount equivalent to the one year remaining on the winter maintenance agreement, damages for intentional interference with contractual relations, inducing breach of contract, and negligent misrepresentation. It also asked for damages in the amount of $5,000.00 for unjust enrichment, an amount equivalent to the "freebie" work, and pre- and post-judgment interest and costs on a substantial indemnity basis.

III. Prior Decisions

A. Ontario Superior Court of Justice (O'Bonsawin J.)

17 In her review of the circumstances of the dispute, the trial judge commented on the testimony of several key witnesses, concluding that Mr. Callow was a credible witness. In contrast, she found that Baycrest's witnesses — including a former property manager, as well as Ms. Zollinger and Mr. Peixoto — had "provided many exaggerations, over-statements and constantly provided comments contrary to the written evidence" (para. 11). The trial judge thus preferred Mr. Callow's version of events to that of Baycrest.

18 At trial, Baycrest advanced two main submissions. First, it argued that, as a matter of simple contractual interpretation, clause 9 clearly and unambiguously states that it could terminate the contract for any reason by providing Callow with 10 days' notice in writing. Second, even though no cause had to be shown to invoke clause 9, Baycrest nonetheless argued that the evidence before the trial judge demonstrated that Callow's level of service did not comply with the contractual specifications and was not to its complete satisfaction.

19 The trial judge dismissed both arguments. First, she found that Callow's work met the requisite standard. While there were complaints about Callow's work, she observed that "a significant portion related to the clearing of parking stalls, which was the fault of owners/tenants who did not move their vehicles". "Was the quality of Callow's work below standard?" asked the trial judge, "The evidence leads me", she wrote, "to answer no" (para. 55).

20 Second, the trial judge held that this was not a simple contractual interpretation case. In her view, the organizing principle of good faith performance and the duty of honest performance were engaged. The trial judge explained that, as Cromwell J. noted in *Bhasin*, the duty of honest performance should not be confused with a duty of disclosure. "However," she wrote, "contracting parties must be able to rely on a minimum standard of honesty" to ensure "that parties will have a fair opportunity to protect their interests if the contract does not work out" (para. 60, citing *Bhasin*, at para. 86). For the purposes of drawing a distinction between the failure to disclose a material fact and active dishonesty, the trial judge observed that "[u]nless there is active deception, there is no unilateral duty to disclose information before the notice period" (para. 61).

21 The trial judge was satisfied that Baycrest "actively deceived" Callow from the time the termination decision was made in March or April 2013 to the time when notice was given on September 12, 2013. Specifically, she found that Baycrest "acted in bad faith by (1) withholding the information to ensure Callow performed the summer maintenance services contract; and (2) continuing to represent that the contract was not in danger despite [Baycrest's] knowledge that Callow was taking on extra tasks to bolster the chances of renewing the winter maintenance services contract" (para. 65). Given the active communications between the parties during the summer of 2013, "which deceived Callow", the trial judge "[did] not accept [Baycrest's] argument that no duty was owed to disclose the decision to terminate the contract before the notice" (para. 66). "The minimum standard of honesty", she concluded, "would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (para. 67).

22 The trial judge tied Baycrest's dishonesty to the way in which it delayed invocation of the 10-day notice period set out in clause 9, while it actively deceived Callow that the contract was not in jeopardy. Her reasons relied upon, by analogy, the law recognizing a duty to exercise good faith in the manner of dismissal when terminating an employee. She noted that Baycrest "intentionally withheld the information in bad faith" (para. 69). She expressly acknowledged that exercising a termination clause is not, in itself, evidence of a breach of good faith. However, in this case, Baycrest deliberately deceived Callow about termination, which was a breach of the duty of honest performance.

23 By reason of this contractual breach, the trial judge awarded damages to Callow, in order to place it in the same position as if the breach had not occurred. These damages amounted to $64,306.96, a sum equivalent to the value of the winter maintenance agreement for one year, minus expenses that Callow would typically incur; a further amount of $14,835.14, representing the value of one year of a lease of equipment that Callow would not have leased if it had known the winter maintenance was to be terminated; and $1,600.00 for the final invoice for the summer work, which Baycrest had failed to pay to Callow. Costs were awarded to Callow.

24 The trial judge was also satisfied that Baycrest was unjustly enriched due to the "freebie" work performed by Callow during the summer of 2013. She declined, however, to award damages for the unjust enrichment since Callow failed to provide evidence of its expenses.

B. Court of Appeal for Ontario (Lauwers, Huscroft and Trotter JJ.A.)

25 Baycrest appealed, arguing that the trial judge erred in two respects. First, it alleged she erred by improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. Second, it argued the trial judge erred in assessing damages.

26 The Court of Appeal unanimously agreed with Baycrest on the first point, and set aside the judgment at first instance. The Court of Appeal recognized, as the trial judge had found, that the "[d]irectors of two of the condominium corporations and members of the JUC were aware that Mr. Callow was performing 'freebie' work, and knew he was under the impression that the contracts were likely to be renewed" (para. 5). Nonetheless, the court stressed that *Bhasin* was a modest, incremental

step, and good faith is to be applied in a manner so as to avoid commercial uncertainty. As such, the duty of honesty "does not impose a duty of loyalty or of disclosure or to require a party to forego advantages flowing from the contract" (para. 12, citing *Bhasin*, at para. 73).

27 The Court of Appeal further emphasized that Callow had made two concessions in its factum. First, Callow acknowledged that Baycrest was not contractually required to disclose its decision to terminate the winter maintenance agreement prior to the 10-day notice period. Second, Callow acknowledged that the failure to provide notice on a more timely basis was not, in and of itself, evidence of bad faith. Because there is "no unilateral duty to disclose information relevant to termination", the court reasoned Baycrest "[was] free to terminate the winter contract with [Callow] provided only that [it] informed him of [its] intention to do so and gave the required notice. That is all that [Callow] bargained for, and all that he was entitled to" (para. 17). While the trial judge's findings "may well suggest a failure to act honourably," the Court of Appeal expressed its view that the findings "do not rise to the high level required to establish a breach of the duty of honest performance" (para. 16).

28 In any event, the Court of Appeal said that any deception in the communications during the summer of 2013 related to a new contract not yet in existence, namely the renewal that Callow hoped to negotiate. Accordingly, in its view, any deception could not be said to be directly linked to the performance of the winter contract (para. 18).

29 Given the Court of Appeal's conclusion, it did not address damages.

IV. Analysis

A. Overview of the Appeal

30 This appeal presents this Court with an opportunity to clarify what constitutes a breach of the duty of honest performance where it manifests itself in connection with the exercise of a seemingly unfettered, unilateral termination clause. Pointing to what it calls Baycrest's active deception in the exercise of the clause, Callow says this conduct was a breach of the duty of honest performance recognized in *Bhasin*.

31 Before this Court, Callow does not dispute the meaning of clause 9. Nor does Callow's argument on appeal concern the adequacy of the bargain struck with Baycrest or whether the termination was unjustified. Callow is not saying, for instance, that it should have been afforded more notice because the 10-day period was unfair in the circumstances. I recognize that, at trial, there was some question as to whether the termination was fitting given Callow's work record. Indeed, the trial judge found in Callow's favour on this point, concluding that it had provided satisfactory services. But the suggestions that Callow was terminated for some improper purpose or motive, or even that the termination was unreasonable, need not be determined on this appeal. The narrow question addressed here is whether Baycrest failed to satisfy its duty not to lie or knowingly deceive Callow about matters directly linked to the performance of the winter maintenance agreement, specifically by exercising the termination clause as it did.

32 In the present circumstances, Callow says Baycrest misled Mr. Callow about the possible renewal of the winter maintenance agreement and, as a result, it knowingly deceived him into thinking it was satisfied with Callow's performance of the agreement then in force for the upcoming winter season. Callow says it mistakenly inferred, as a consequence of this dishonesty, that there was no danger of the existing winter contract being terminated pursuant to clause 9 of the contract. This, Callow submits, was to the full knowledge of Baycrest, who failed to correct its false impression which amounted to a breach of the duty of honest performance. In short, Callow says this deceitful conduct meant the exercise of the termination clause was wrongful in that it was breached even if, strictly speaking, the required notice was given. This should give rise, claims Callow, to compensatory damages on the ordinary measure as the trial judge had ordered: damages for lost profits, wasted expenditures and an unpaid invoice.

33 In addition to the duty of honest performance, Callow invokes a free-standing duty to exercise contractual discretionary powers in good faith, which, it argues, Cromwell J. also recognized in *Bhasin* and which would justify the same award in damages. Furthermore, in the event the Court disagrees that there has been a breach of one or another of those existing duties,

Callow submits, alternatively, that this Court should recognize a new duty of good faith, which would prohibit "active non-disclosure".

34 In answer, Baycrest notes the concessions made by Callow before the Court of Appeal, specifically that clause 9 on its face did not require it to give more notice. Baycrest agrees with the Court of Appeal that whatever communications took place between the parties, those communications concerned a future contract and were not directly related to the performance of the winter contract then in force. The agreement granted Baycrest an unqualified right to terminate the contract on notice for any reason, which is precisely what occurred. Recalling that the duty to act honestly in performance is not a duty of disclosure and does not impose a duty of loyalty akin to that of a fiduciary, Baycrest says that Callow seeks to have it subvert its own interest by requiring it to inform Callow of its intention to end the winter maintenance agreement before the stipulated 10 days' notice. The Court of Appeal was thus correct in concluding that the bargain struck by the parties entitled Baycrest to end the contract as it did. In a similar vein, with respect to the duty to exercise discretionary powers in good faith, Baycrest says that because it respected the terms of the contract, the issue of abuse of contractual discretion does not arise on the facts of this case.

35 In any event, Baycrest emphasizes the conclusion reached by the Court of Appeal that any discussions in the spring and summer of 2013 that may have misled Callow were connected to pre-contractual negotiations. Thus, any dishonesty cannot be said to be directly linked to the performance of the winter maintenance agreement.

36 The appeal should be allowed. I respectfully disagree with the Court of Appeal on two main points.

37 First, *Bhasin* is clear that 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". According to the Court of Appeal, any dishonesty was about a renewal, which was in turn connected to pre-contractual negotiations to which the duty as stated in *Bhasin* does not apply. I respectfully disagree. In my view, the Court of Appeal may have erroneously framed the trial judge's findings at paragraph 6, writing that she found that Baycrest had represented "that the winter contract was not in danger *of non-renewal*" (emphasis added). Referring instead to the ongoing winter services agreement, the trial judge had found Baycrest misrepresented "that the contract was not in danger despite [Baycrest's] knowledge that Callow was taking on extra tasks to bolster the chances of renewing the winter maintenance services contract" (para. 65). In determining whether dishonesty is connected to a given contract, the relevant question is generally whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly. As I understand it, the trial judge's finding was that the dishonesty in this case was related not to a future contract but to the termination of the winter maintenance agreement. If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early. This is what the trial judge found. Simply said, Baycrest's alleged deception was directly linked to this contract because its exercise of the termination clause in this contract was dishonest.

38 Second, the Court of Appeal erred when it concluded that the trial judge's findings did not amount to a breach of the duty of honest performance. While the duty of honest performance is not to be equated with a positive obligation of disclosure, this too does not exhaust the question as to whether Baycrest's conduct constituted, as a breach of the duty of honesty, a wrongful exercise of the termination clause. Baycrest may not have had a free-standing obligation to disclose its intention to terminate the contract before the mandated 10 days' notice, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. In circumstances where a party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct the false impression created through its own actions.

39 In light of these points, it is my view that this is not a simple contractual interpretation case bearing on the meaning to be given to clause 9. Nor is this a case involving passive failure to disclose a material fact. Instead, as recognized by the Court of Appeal, "[n]ot only did [Baycrest] fail to inform [Callow] of [its] decision to terminate, ... [it] *actively deceived* Callow as to [its] intentions and accepted the 'freebie' work [it] performed, in the knowledge that this extra work was performed with the intention/hope of persuading [Baycrest] to award [Callow] additional contracts once the present contracts expired" (para. 15

(emphasis added)). While Baycrest was not required to subvert its legitimate contractual interests to those of Callow in respect of the existing winter services agreement, it could not, as it did, "undermine those interests in bad faith" (*Bhasin*, at para. 65).

40 For the reasons that follow, this dispute can be resolved on the basis of the first ground of appeal relating to the duty of honest performance. Baycrest knowingly misled Callow in the manner in which it exercised clause 9 of the agreement and this wrongful exercise of the termination clause amounts to a breach of contract under *Bhasin*. In the circumstances, I find it unnecessary to answer Callow's argument that, irrespective of the question of honesty, Baycrest breached a duty to exercise a discretionary power in good faith. Nor is it necessary to extend *Bhasin* to recognize a new duty of good faith relating to what Callow has described as "active non-disclosure" of information germane to performance.

B. The Duty of Honest Performance

(1) The Dishonesty Is Directly Linked to the Performance of the Contract

41 I turn first to Callow's submission that the Court of Appeal erred in concluding that the dishonesty was not connected to the contract "then in effect" (C.A. reasons, at para. 18). As I will endeavour to explain, while Baycrest had the right to terminate, it breached the duty of honest performance in exercising the right as it did.

42 Callow relies on the duty of honest performance in contract formulated in *Bhasin*. This duty, which applies to all contracts, "requires the parties to be honest with each other in relation to the performance of their contractual obligations" (para. 93). While this formulation of the duty refers explicitly to the performance of contractual obligations, it applies, of course, both to the performance of one's obligations and to the exercise of one's rights under the contract. Cromwell J. concluded, at paragraphs 94 and 103, that the finding that the non-renewal clause had been exercised dishonestly made out a breach of the duty:

> The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.
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> . . . . .
>
> As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause. [Emphasis added.]

This same framework for analysis applies to this appeal. The trial judge here made a clear finding of fact that Baycrest acted dishonestly toward Callow by representing that the contract was not in danger even though a decision to terminate the contract had already been made (paras. 65 and 67). There is no basis to interfere with that finding on appeal. As I will explain, it follows that Baycrest deceived Callow and thereby breached its duty of honest performance.

43 I begin by recognizing the debate as to the extent to which good faith, beyond the duty of honesty, should substantively constrain a right to terminate, in particular one found in a contract (see, e.g., W. Courtney, "Good Faith and Termination: The English and Australian Experience" (2019), 1 *Journal of Commonwealth Law* 185, at p. 189; M. Bridge, "The Exercise of Contractual Discretion" (2019), 135 *L.Q.R.* 227, at p. 247). For some, the right to terminate is in the nature of an "absolute right" insulated from judicial oversight, unlike the exercise of contractual discretion (see E. Peel, *The Law of Contract* (15th ed. 2020), at para. 18-088). To this end, I recall that Cromwell J. observed that "[c]lassifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation" (*Bhasin*, at para. 72). I need not and do not seek to resolve this debate in this case. I emphasize that Cromwell J. himself recognized that, regardless of this debate, the non-renewal clause could not be exercised dishonestly (para. 94). Whatever the full range of circumstances to which good faith is relevant to contract law in common law Canada, it is beyond question that the duty of honesty is germane to the performance of this contract, in particular to the way in which the unilateral right to terminate for convenience set forth in clause 9 was exercised.

44 As a further preliminary matter, I recall that the organizing principle of good faith recognized by Cromwell J. is not a free-standing rule, but instead manifests itself through existing good faith doctrines, and that this list may be incrementally expanded where appropriate. In this case, Callow invokes two existing doctrines: the duty of honest performance and the duty to exercise discretionary powers in good faith. In my view, properly understood, the duty to act honestly about matters directly linked to the performance of the contract — the exercise of the termination clause — is sufficient to dispose of this appeal. No expansion of the law set forth in *Bhasin* is necessary to find in favour of Callow. Rather, this appeal provides an opportunity to illustrate this existing doctrine that, I say respectfully, was misconstrued by the Court of Appeal.

45 While these two existing doctrines are indeed distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. Cromwell J. explained that good faith contractual performance is a shared "requirement of justice" that underpins and informs the various rules recognized by the common law on obligations of good faith contractual performance (*Bhasin*, at para. 64). The organizing principle of good faith was intended to correct the "piecemeal" approach to good faith in the common law, which too often failed to take a consistent or principled approach to similar problems and, instead, develop the law in this area in a "coherent and principled way" (paras. 59 and 64).

46 By insisting upon the thread that ties the good faith doctrines together — expressed through the organizing principle — courts will put an end to the very piecemeal and incoherent development of good faith doctrine in the common law against which Cromwell J. sought to guard. While the duty of honest performance might bear some resemblance to the law of misrepresentation, for example, in a way that good faith in other settings may not, *Bhasin* encourages us to examine how other existing good faith doctrines, distinct but nonetheless connected, can be used as helpful analytical tools in understanding how the relatively new duty of honest performance operates in practice.

47 The specific legal doctrines derived from the organizing principle rest on a "requirement of justice" that a contracting party, like Baycrest here in respect of the contractual duty of honest performance, have appropriate regard to the legitimate contractual interests of their counterparty (*Bhasin*, at paras. 63-64). It need not, according to *Bhasin*, subvert its own interests to those of Callow by acting as a fiduciary or in a selfless manner that would confer a benefit on Callow. To be sure, this requirement of justice reflects the notion that the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract. But by the same token, those rights and obligations must be exercised and performed, as stated by the organizing principle, honestly and reasonably and not capriciously or arbitrarily where recognized by law. This requirement of justice, rooted in a contractual ideal of corrective justice, ties the existing doctrines of good faith, including the duty to act honestly, together. The duty of honest performance is but an exemplification of this ideal. Here, based on its failure to perform clause 9 honestly, Baycrest committed a breach of contract, a civil wrong, for which it has to answer.

48 When, in *Bhasin*, Cromwell J. recognized a duty to act honestly in the performance of contracts, he explained that this duty "should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance" (para. 74). Characterizing this new duty as a matter of contractual doctrine was appropriate, Cromwell J. wrote, "since parties will rarely expect that their contracts permit dishonest performance of their obligations" (para. 76). The duty therefore applies even where — as in our case — the parties have expressly provided for the modalities of termination given that the duty of good faith "operates irrespective of the intentions of the parties" (para. 74). No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith.

49 Cromwell J.'s choice of language is telling. It is not enough to say that, temporally speaking, dishonesty occurred while both parties were performing their obligations under the contract; rather, the dishonest or misleading conduct must be directly linked to performance. Otherwise, there would simply be a duty not to tell a lie, with little to limit the potentially wide scope of liability.

50 The duty of honest performance is a contract law doctrine, setting it apart from other areas of the law that address the legal consequences of deceit with which it may share certain similarities. One could imagine analyzing the facts giving rise to a duty of honest performance claim through the lens of other existing legal doctrines, such as fraudulent misrepresentation giving rise to rescission of the contract or the tort of civil fraud (see, e.g., B. MacDougall, *Misrepresentation* (2016), at §1.144-1.145).

However, in *Bhasin*, Cromwell J. wrote explicitly that while the duty of honest performance has similarities with civil fraud and estoppel "it is not subsumed by them" (para. 88). For instance, unlike estoppel and civil fraud, the duty of honest performance does not require a defendant to intend that the plaintiff rely on their representation or false statement. Cromwell J. explicitly defined the duty as a new and distinct doctrine of contract law, not giving rise to tort liability or tort damages but rather resulting in a breach of contract when violated (paras. 72-74, 90, 93 and 103). We are not asked by the parties to depart from this approach.

51 In light of *Bhasin*, then, how is the duty of honest performance appropriately limited? The breach must be directly linked to the performance of the contract. Cromwell J. observed a contractual breach because Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause" (para. 94). He pointed, in particular, to the trial judge's conclusion that Can-Am "acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause" (para. 98; see also para. 103). Accordingly, it is a link to the performance of obligations under a contract, or to the exercise of rights set forth therein, that controls the scope of the duty. In a comment on *Bhasin*, Professor McCamus underscored this connection: "Cromwell J was of the view that the new duty of honesty could be breached in the context of the exercise of a right of non-renewal. That was the holding in *Bhasin*" ("The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law" (2015), 32 *J.C.L.* 103, at p. 115). While the abuse of discretion was not the basis of the damages awarded in *Bhasin*, the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing, at least in circumstances like ours, on the wrongful exercise of a contractual prerogative.

52 Importantly, Callow does not seek to bar Baycrest from exercising the termination clause here; like in *Bhasin*, it only seeks damages flowing from the fact that the clause was exercised dishonestly. In other words, Callow's argument, properly framed, is that Baycrest could not exercise clause 9 in a manner that breached the duty of honesty, however absolute that right appeared on its face.

53 Good faith is thus not relied upon here to provide, by implication, a new contractual term or a guide to interpretation of language that was somehow an unclear statement of parties' intent. Instead, the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right because the duty, irrespective of the intention of the parties, applies to the performance of all contracts and, by extension, to all contractual obligations and rights. This means, simply, that instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest.

54 The issue, then, is not whether the clause was properly interpreted, or whether the bargain itself is inadequate. Moreover, what is important is not the failure to act honestly in the abstract but whether Baycrest failed to act honestly in exercising clause 9. Stated simply, no contractual right can be exercised in a dishonest manner because, pursuant to *Bhasin*, that would be contrary to an imperative requirement of good faith, i.e. not to lie or knowingly deceive one's counterparty in a matter directly linked to the performance of the contract.

55 This argument invites this Court to explain if and how Baycrest wrongfully exercised the termination clause, quite apart from any notice requirement. I would add that this focus on the *manner* in which the termination right was exercised should not be confused with *whether* the right could be exercised. Callow does not allege that Baycrest did not have the right to terminate the agreement — this entitlement to do so on 10 days' notice, pursuant to clause 9, is not at issue here. However, according to Callow, that right was exercised dishonestly, in breach of the duty in *Bhasin*, obliging Baycrest to pay damages as a consequence of its behaviour. Accordingly, I would draw the same distinction made by Cromwell J. in *Bhasin* regarding the exercise of the non-renewal clause at issue in that case: Can-Am acted dishonestly towards Mr. Bhasin in exercising the non-renewal clause as it did, and was liable for damages as a result, but it was not precluded from exercising its prerogative not to renew the contract.

56 In service of its argument that Baycrest breached the duty of honest performance in its exercise of clause 9 of the contract, Callow points to references in *Bhasin* to Quebec law (at paras. 32, 35, 41, 44, 82 and 85) and in particular to Cromwell J.'s reference to the theory of the abuse of contractual rights set forth in arts. 6, 7 and 1375 of the *Civil Code of Québec* ("*C.C.Q.*" or "*Civil Code*") (para. 83). Callow observes that the requirement not to abuse contractual rights is recognized as a feature of good faith performance in Quebec. It submits that the allusion to the doctrine of abuse of rights was an indication of the

requirements of good faith in *Bhasin* and argues that the same framework can usefully illustrate how the common law duty of honesty constrains the termination clause in this case.

57 I agree that looking to Quebec law is useful here. The direct link between the dishonest conduct and the exercise of clause 9 was not properly identified by the Court of Appeal in this case and Quebec law helps illustrate the requirement that there be such a link from *Bhasin*. In my view, Baycrest's dishonest conduct is not a wrong independent of the termination clause but a breach of contract that, properly understood, manifested itself upon the exercise of clause 9. Through that direct link between the dishonesty and the exercise of the clause, the conduct is understood as contrary to the requirements of good faith. This emerges more plainly when considered in light of the civilian doctrine of contractual good faith alluded to in *Bhasin*, specifically the fact that, in Quebec "[t]he notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract" (para. 83). Thus, like in Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to the requirements of good faith. Properly raised by Cromwell J., this framework for connecting the exercise of a contractual clause and the requirements of good faith is helpful to illustrate, for the common law, the link made in *Bhasin* that the Court of Appeal failed to identify here.

58 Mindful no doubt of its unique vantage point which offers an occasion to observe developments in both the common law and the civil law in its work, this Court has often drawn on this country's bijural environment to inform its decisions, principally in private law appeals. While this practice has varied over time and has been most prevalent in civil law cases in which common law authorities are considered, the influence of bijuralism is not and need not be confined to appeals from Quebec or to matters relating to federal legislation (see J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada* (2007), at pp. 7-22). In its modern jurisprudence, this Court has recognized the value of looking to legal sources from Quebec in common law appeals, and has often observed how these sources resolve similar legal issues to those faced by the common law (see, e.g., *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), at pp. 1143-44; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855 (S.C.C.), at para. 138; see also *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3 (S.C.C.), at para. 41). Used in this way, authorities from Quebec do not, of course, bind this Court in its disposition of a private law appeal from a common law province, but rather serve as persuasive authority, in particular, by shedding light on how the jurisdictionally applicable rules work. In my respectful view, it is uncontroversial that, when done carefully, sources of law may be used in this way (*Farber c. Royal Trust Co.* (1996), [1997] 1 S.C.R. 846 (S.C.C.), at para. 32, citing J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975), 53 *Can. Bar Rev.* 715, at p. 726). As Robert J. Sharpe put it, writing extra-judicially, judges "should strive to maintain the coherence and integrity of the law as defined by the binding authorities, using persuasive authority to elaborate and flesh out its basic structure" (*Good Judgment: Making Judicial Decisions* (2018), at pp. 171-72).

59 This does not mean the appropriate use of these sources is limited to cases where there is a gap in the law of the jurisdiction in which the appeal originates, in the sense that there is no answer to the legal problem in that law, or where a court contemplates modifying an existing rule. Respectfully said, I am aware of no authority of this Court supporting so restrictive an approach and note that, while unresolved, there are serious debates in both the common law and the civil law as to what exactly a "gap" in the law might be (see, e.g., J. Gardner, "Concerning Permissive Sources and Gaps" (1988), 8 *Oxford J. Leg. Stud.* 457; J. E. C. Brierley, "Quebec's 'Common Laws' (*Droits communs*): How Many Are There?", in E. Caparros et al., eds., *Mélanges Louis-Philippe Pigeon* (1989), 109). Taking this approach would unduly inhibit the ability of this Court to understand the law better in reference to how comparable problems are addressed elsewhere in Canada. It would be wrong to disregard potentially helpful material in this way merely because of its origin.

60 In private law, comparison between the common law and civil law as they evolve in Canada is a particularly useful and familiar exercise for this Court. This exercise of comparison between legal traditions for the purposes of "explanation" and "illustration" has been described as "worthwhile", "useful" and "helpful" (*Farber*, at para. 32 and 35; *Barrette c. Ciment du St-Laurent inc.*, 2008 SCC 64, [2008] 3 S.C.R. 392 (S.C.C.), at para. 76; *Norsk*, at p. 1174, per Stevenson J. (concurring)). Principles from the common law or the civil law may serve as a "source of inspiration" for the other, precisely because these "two legal communities have the same broad social values" (*Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214 (S.C.C.), at para. 38). The common law and the civil law are not the only legal traditions relevant to the

work of the Court; yet, the opportunity for dialogue between these legal traditions is arguably a special mandate for this Court given the breadth and responsibilities of its bijural jurisdiction. This opportunity has been underscored in scholarly commentary, including in the field of good faith performance of contracts (e.g., L. LeBel and P.-L. Le Saunier, "L'interaction du droit civil et de la common law à la Cour suprême du Canada" (2006), 47 *C. de D.* 179, at p. 206; R. Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019), 1 *Journal of Commonwealth Law* 83).

61 Writing extra-judicially, LeBel J. has observed that this exercise is part of the function of this Court, as a national appellate court, adding that [TRANSLATION] "because it has the ability to do so today, thanks to its institutional resources, the Supreme Court now assumes the symbolic responsibility of embracing a culture of dialogue between the two major legal traditions" ("Les cultures de la Cour suprême du Canada: vers l'émergence d'une culture dialogique?", in J.-F. Gaudreault-DesBiens et al., eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (2009), 1, at p. 7). This Court's unique institutional capacity as the apex court of common law and civil law appeals in Canada allows it to engage in dialogue that makes it "more than a court of appeal for each of the provinces" (F. Allard, *The Supreme Court of Canada and its Impact on the Expression of Bijuralism* (2001), at p. 21). The opportunity for dialogue presents itself specifically in the context of the common law good faith doctrines. Pointing to the writing of LeBel J. and to how Quebec sources were deployed in *Bhasin*, one comparative law scholar wrote recently that while the distinctiveness of Canada's legal traditions must be "maintained and jealously protected, [this] need not prevent [them] from learning from [one another]" (R. Jukier, "The Legacy of Justice Louis LeBel: The Civilian Tradition and Procedural Law" (2015), 70 *S.C.L.R.* (2d) 27, at p. 45). Professor Waddams has remarked that the reference to Quebec law in *Bhasin* is an "invitation" to consider civil law concepts, including abuse of rights, in the development of the common law relating to good faith (see "Unfairness and Good Faith in Contract Law: A New Approach" (2017), 80 *S.C.L.R.* (2d) 309, at pp. 330-31). This would be consistent with a broader pattern of "more pronounced reciprocal influence between traditions as comparative analysis becomes increasingly prominent in [this Court's] judgments" (Allard, at p. 22).

62 Indeed, this Court has undertaken this exercise in some common law and civil law appeals in which good faith principles are engaged, including *Bhasin* itself (see also *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, [2015] 1 S.C.R. 500 (S.C.C.), at para. 30; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at paras. 75 and 96, citing *Farber*). Cromwell J. pointed to the comfort that can be drawn from the experience of the civil law of Quebec, for example, by those common lawyers who fear that a new duty of honest performance would "create uncertainty or impede freedom of contract" (*Bhasin*, at para. 82). Cromwell J. also pointed to substantive points of comparison in support of his analysis on the similarity between implied terms in the common law and good faith in Quebec as well as on the fact that good faith in Quebec law also includes a requirement of honesty in performing contracts (paras. 44 and 83). Strikingly, in one recent Quebec example that is especially relevant here, Gascon J., writing for a majority of this Court, quoted *Bhasin* on the degree to which the organizing principle of good faith exemplifies the notion that a contracting party should have "appropriate regard" to the legitimate contractual interests of their counterparty. He noted that "[t]his statement applies equally to the duty of good faith in Quebec civil law" (*Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101 (S.C.C.), at para. 117). I note this only as an instance of accepted judicial reasoning in this field, where comparisons are rightly said to be difficult. A majority of the Court nevertheless invoked a leading common law authority on good faith to illuminate the civil law's distinct treatment as both helpful and persuasive.

63 In the same way, I draw on Quebec civil law in this appeal to illustrate what it means for dishonesty to be directly linked to contractual performance. As I will explain, the civil law framework of abuse of rights helps to focus the analysis of whether the common law duty of honest performance has been breached on what might be called the wrongful exercise of a contractual right.

64 This appeal makes plain a need for clarification on the question of when dishonesty is directly linked to the performance of a contract. The Court of Appeal recognized the duty of honest performance, but concluded that the communications at issue were not directly linked to performance of the existing contract: "Communications between the parties may have led Mr. Callow to believe that there would be a new contract, but those communications did not preclude [Baycrest] from exercising their right to terminate the winter contract then in effect" (para. 18). The Court's reasons also conclude that Baycrest could exercise the termination clause "provided only that [it] informed him of [its] intention to do so and gave the required notice. That is all [Callow] bargained for, and all that [it] was entitled to" (para. 17). The Court of Appeal apparently did not consider that the

manner in which the termination right was exercised amounted to a breach of the duty to act honestly. This was, for the trial judge in the present appeal, the matter directly linked to the performance of the contract in the dispute with Callow.

65 These diverging conclusions in this case are unsurprising given that this Court recognized the duty of honest performance as a "new" good faith doctrine relatively recently (*Bhasin*, at para. 93). Nevertheless, the reasons in *Bhasin* indicate how the required connection between the dishonesty and performance is made manifest. When Cromwell J. summarized the new duty, he suggested that it required honesty "about matters directly linked to the performance of the contract" and, later, "in relation to the performance of their contractual obligations" (paras. 73 and 92). But this latter formulation does not of course comprehensively describe the required link, not least of all because it speaks of honesty in the performance of an obligation, and says nothing about the exercise of a right. Yet, in applying the duty to the facts in *Bhasin*, this Court concluded that there was a breach of the duty on the basis of the trial judge's finding that Can-Am acted dishonestly in the exercise of the non-renewal clause (paras. 94 and 103).

66 Further, I note that while the duty of honest performance has similarities with the pre-existing common law doctrines of civil fraud and estoppel, these doctrines do not assist in our analysis of the required link to the performance of the contract. The duty of honest performance is a contract law doctrine (*Bhasin*, at para. 74). It is not a tort. It is its nature as a contract law doctrine that gives rise to the requirement of a nexus with the contractual relationship. While other areas of the law involving dishonesty may be useful to understand what it means to be dishonest, they provide no obvious assistance in determining what is and is not directly linked to the performance of a contract.

67 In my view, the required direct link between dishonesty and performance from *Bhasin* is made plain, by way of simple comparison, when one considers how the framework for abuse of rights in Quebec connects the manner in which a contractual right is exercised to the requirements of good faith. Specifically, the direct link exists when the party performs their obligation or exercises their right under the contract dishonestly. When read together, arts. 6, 7 and 1375 *C.C.Q.* point to this connection by providing that no contractual right may be exercised abusively without violating the requirements of good faith. Article 7 in particular provides "[n]o right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith." While the substantive content of this article is not relevant to the common law analysis, the framework is illustrative. This article shows how the requirements of good faith can be tied to the exercise of a right, including a right under a contract. It is the exercise of the right that is scrutinized to assess whether the action has been contrary to good faith.

68 Under the civil law framework of abuse of rights, it is no answer to say that, because a right is unfettered on its face, it is insulated from review as to the manner in which it was exercised. Moreover, the doctrine of abuse of right does not preclude the holder from exercising the contractual right in question. As Professors Jobin and Vézina have written on abuse of contractual rights in Quebec, [TRANSLATION] "[t]he doctrine of abuse of right does not lead to the negation of the right as such; rather, it addresses the use made of the right by its holder" (J.-L. Baudouin and P.-G. Jobin, *Les* obligations (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 156). It has been said that good faith in the civil law has a [TRANSLATION] "*limiting function*" in directing standards of ethical conduct to which parties must conform, as a matter of imperative law, when performing the contract: [TRANSLATION] "It [i.e. the limiting function of good faith] thus seeks to sanction a party's improper conduct in the exercise of the party's contractual prerogatives." (M. A. Grégoire, *Liberté, responsabilité et utilité: la bonne foi comme instrument de justice* (2010), at p. 225). That is what is at stake here: whether the ethical standard expressed in the common law duty to act honestly in performance, as a manifestation of the organizing principle of good faith recognized in *Bhasin*, limits the manner in which Baycrest can exercise its right to terminate the winter maintenance agreement. By focusing attention on the exercise of a particular right under a particular contract, a direct link to the performance of that contract is helpfully drawn.

69 Thus, in *Banque nationale du Canada c. Houle*, [1990] 3 S.C.R. 122 (S.C.C.) — a Quebec case cited in *Bhasin*, at para. 85 — the contracting party's right to demand repayment of the loan, as stipulated in the contract, was upheld (p. 169). The "abuse of right" identified by the Court was the manner in which the right was exercised. This is, as I have noted, broadly similar to *Bhasin*. There, Can-Am had a contractual right of non-renewal, but Can-Am nonetheless exercised that right in a dishonest manner, and thus breached the duty of honest performance (para. 94). This was a wrongful exercise of the right in that it was exercised contrary to the mandatory requirement of good faith performance.

70 There are special reasons, of course, to be cautious in undertaking the comparative exercise to which Callow invites us here. One is that there are important differences between the civilian treatment of abuse of contractual rights and the current state of the common law. The *Civil Code* provides that no right may be exercised with the intent to injure another or in an excessive and unreasonable manner and therefore contrary to the requirements of good faith requiring that parties conduct themselves in good faith, in particular at the time an obligation is performed. Insofar as the organizing principle in *Bhasin* speaks to a related idea that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily, this principle, unlike Quebec law, is not a free-standing rule but rather a standard that underpins and manifests itself in more specific doctrines. Further, in *Bhasin* positive law was only formally extended by recognizing a general duty of honesty in contractual performance.

71 An additional reason is the common law's fabled reluctance to embrace the standard associated with the civilian idea of "abuse of rights", including abuse of contractual rights, a doctrine to which *Bhasin* alluded in para. 83 (see, e.g., the survey in H. C. Gutteridge, "Abuse of Rights" (1933), 5 *Cambridge L.J.* 22, at pp. 22 and 30-31). [1] Mindful of this, Cromwell J. recalled the "fundamental commitments of the common law of contract" to the "freedom of contracting parties to pursue their individual self-interest" and — importantly to the theory of abuse of rights — that the organizing principle he recognized "should not be used as a pretext for scrutinizing the motives of contracting parties" (para. 70). Others have observed that the civilian conception of legal rights — *droits subjectifs* in the French tradition — are conceptually different from "rights" in the common law, or even that the preoccupation with the "social" dimension of limits to rights, as opposed to a purely "economic" aspect of a freely-negotiated bargain, is peculiar to the civil law (see, e.g., F. H. Lawson, *Negligence in the Civil Law* (1950), at pp. 15-20). Still others have observed the differing techniques for the genesis of new rules of law according to the common law and civil law methods (see, e.g., P. Daly, "La bonne foi et la common law: l'arrêt *Bhasin c Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 89, at pp. 101-2). One should not lose sight of the fact that, as intellectual and historical traditions, the common law and the civil law represent, in many respects, distinctive ways of knowing the law.

72 It is true that LeBel J., writing extra-judicially prior to this Court's decision in *Bhasin*, in which he concurred, noted that in the dialogue between the common law and the civil law in this Court's jurisprudence, good faith offered an example of [TRANSLATION] "coexistence" rather than "convergence" or "divergence" (LeBel, at pp. 12-15). Yet as he noted, comparison in this field that respects the "intellectual integrity" of distinctive traditions remains a viable part of the dialogue between common law and the civil law at this Court (p. 15). While the requirements of honest contractual performance in the two legal traditions may be rooted in distinct histories, they have come together to address similar issues, at least in the context of dishonest performance (*Bhasin*, at para. 83). The civil law provides a useful analytical guide to illustrating the relatively recent common law duty. Two reasons in particular underlie the usefulness of the comparative exercise here.

73 First, I stress that I do not rely on the civil law here for the specific rules that would govern a similar claim in Quebec. Rather, within the constraints imposed on this Court by the precedent in *Bhasin* and the wider common law context, I draw on abuse of rights as a framework to understand the common law duty of honest performance. Second, there is no serious concern here that looking to Quebec law will throw the common law into a state of uncertainty. As Cromwell J. did in *Bhasin*, this Court can take comfort from the experience of Quebec to allay fears that applying this general framework of wrongful exercise of rights will result in commercial uncertainty or inappropriately constrain freedom of contract. Notwithstanding their differences, the common law and the civil law in Quebec share, in respect of good faith, some of the "same broad social values" that justify comparison generally (*Bou Malhab*, at para. 38). As noted, this Court pointed to a shared concern for the proper compass of good faith in that it "does not require acting to serve [the other contracting party's] interests in all cases" and both anchor remedies in corrective, not distributive justice (*Churchill Falls*, at para. 117, citing *Bhasin*, at para. 65). As Professor Moore wrote, prior to his appointment as a judge [TRANSLATION] "the value of individual autonomy, and the fear that good faith is an imprecise concept, are not exclusive to the common law. They are discussed at length in civil law commentary and jurisprudence" ("Brèves remarques spontanées sur l'arrêt *Bhasin c Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 81, at p. 84). For these reasons, it is not inappropriate to illustrate the duty of honest performance using the framework of the wrongful exercise of a right. Dishonesty is directly linked to the performance of a given contract where it can be said that the exercise of a right or the performance of an obligation under that contract has been dishonest.

74 Applying *Bhasin* to this case, and drawing on the illustration provided by the Quebec civil law sources Cromwell J. himself cites, I am of the respectful view that the Court of Appeal erred when it concluded that the dishonesty here was only about a future contract. Properly understood, the alleged dishonesty in this case was directly linked to the performance of the contract because Baycrest's exercise of the termination right provided to it under the contract was dishonest.

75 The termination right was exercised dishonestly according to the trial judge in our case, notwithstanding the fact that its terms — the 10-day notice — were otherwise respected. Pointing to the dishonest representations, regarding the danger to the contract and made in anticipation of the notice period, she held that the duty to act honestly was linked to the termination of the contract and the exercise of that right in the circumstances was a breach of contract. The trial judge did not deny the right of Baycrest to terminate the contract, but the manner in which it did so was wrongful — in breach of the duty of honesty — and for that it owed Callow damages. Importantly, this does not deny the existence of the termination right but fixes on the wrongful manner in which it was exercised.

(2) Baycrest's Conduct Constitutes Dishonesty

76 The second issue to be resolved is whether Baycrest's conduct amounts to dishonesty within the meaning of the duty of honest performance in *Bhasin*. Callow takes issue with the Court of Appeal's conclusion that while the facts may have suggested a failure to act honourably, they did not rise to the level of a breach of this duty. To dispose of this appeal, then, we must determine what standard of honesty was expected of Baycrest in its exercise of clause 9.

77 There is common ground that parties to a contract cannot outright lie or tell half-truths in a manner that knowingly misleads a counterparty. It is also agreed here that the failure to disclose a material fact, without more, would not be contrary to the standard. Beyond this, however, the parties continue to disagree about what might constitute knowingly misleading conduct as that idea was alluded to in *Bhasin*.

78 Callow argues that while this Court in *Bhasin* held that the duty of honest performance does not impose a duty of disclosure, it left open the possibility that an omission to inform can nonetheless be knowingly misleading in certain circumstances. Callow acknowledges that the line between a misrepresentation and the innocent failure to disclose is not always easy to draw. But by "positively misleading" Mr. Callow that the winter maintenance agreement was likely to be renewed in 2014, he was led to infer, mistakenly and to the knowledge of Baycrest, that a decision had not been made to terminate the existing contract in 2013. Failing to correct this false impression, in Callow's view, was a breach of its obligation to act honestly in the performance of the winter maintenance agreement. It meant that clause 9 was not exercised in keeping with the obligatory duty to perform the contract honestly imposed in *Bhasin*.

79 Baycrest submits that "active deception" — a term invoked by the trial judge, as well as both parties — requires actual dishonesty, in the sense that an outright lie is necessary. "Silence", said its counsel at the hearing, "can only constitute misrepresentation when there is a duty to speak". Since the duty of honest performance does not bring with it a duty of disclosure, "silence cannot constitute dishonesty or an act of misrepresentation, whether done intentionally or, I suppose, accidentally" (transcript, at p. 37).

80 Baycrest is right to say that the duty to act honestly "does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract" (*Bhasin*, at para. 73; see also A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 347). Cromwell J. referred to *United Roasters Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (U.S. C.A. 4th Cir. 1981), in support of his conclusion that the duty of honest performance is distinct from a free-standing duty to disclose information (para. 87). In *United Roasters Inc.*, the terminating party had decided in advance of the required notice period to terminate the contract. The court held that no disclosure of that intention was required other than what was stipulated in the contract. In Cromwell J.'s view, this made "it clear that there is no unilateral duty to disclose information relevant to termination" (para. 87).

81 One might well understand that courts would shy away from imposing a free-standing positive duty to disclose information to a counterparty where it would serve to upset the corrective justice orientation of contract law. Whether or not a positive duty

to cooperate of this character should be associated with the principle of good faith performance in the common law, a party to a contract has no general duty to subordinate their interests to that of the other party in the law as it now stands (see *Bhasin*, at para. 86). Requiring a party to speak up in service of the requirements of good faith where nothing in the parties' contractual relationship brings a duty to do so could be understood to confer an unbargained-for benefit on the other that would stand outside the usual compass of contractual justice. Yet where the failure to speak out amounts to active dishonesty in a manner directly related to the performance of the contract, a wrong has been committed and correcting it does not serve to confer a benefit on the party who has been wronged. To this end, Cromwell J. clarified that the "situation is quite different ... when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87). In such circumstances, contractual parties should be mindful to correct misapprehensions, lest a contractual breach of the *Bhasin* duty be found.

82 By noting that liability flowed from active dishonesty and not a unilateral duty to disclose, Cromwell J. indicated that the duty of honesty is consonant with the ordinary principles of contractual justice: that *Bhasin* does not impose a duty to disclose or a fiduciary-type obligation means that performing a contract honestly is not a selfless or altruistic act. One might well say that performing one's own end of a bargain honestly is in keeping with the pursuit of self-interest as long as the law can be counted on to require the same honest conduct from one's counterparty. Whatever constraints it justifies on Baycrest's ability to terminate the contract based on values of honesty associated with good faith, it does not require it to confer a benefit on Callow in exercising that right. As Cromwell J. explained, having appropriate regard for the legitimate contractual interests of the contracting parties "does not require acting to serve those interests in all cases" (para. 65). This explains, to my mind, the limited character of the duty of honesty: it is not a device that allows a court, in the name of a conception of good faith resting on distributive justice, to require the party that has to exercise a contractual right or power "to serve" the other party's interest at the expense of their own.

83 This emphasis on the corrective justice foundation of the duty to act honestly in performance is, in my view, helpful to understanding why a facially unfettered right is nonetheless constrained by the imperative requirement of good faith explained in *Bhasin*. I recall that Cromwell J. sought to reassure those who feared commercial uncertainty resulting from the recognition of this new duty by explaining that the requirement of honest performance "interferes very little with freedom of contract" (para. 76). After all, the expectation that a contract would be performed without lies or deception can already be thought of as a minimum standard that is part of the bargain. I agree with the sentiment expressed by the Chief Justice of Alberta in a case that relied on *Bhasin* and *Potter*: "Companies are entitled to expect that the parties with whom they contract will be honest" in their contractual dealings (*IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta. L.R. (6th) 96 (Alta. C.A.), at para. 4). In that sense, while the duty is one of mandatory law, in most cases it can be thought of as leaving the agreement and both parties' expectations — the first source of justice between the parties — in place. By extension, requiring that a party exercise a right under the contract in keeping with this minimum standard only precludes the commission of a wrong and thus repairing that breach, where damage resulted, may be thought of as consonant with the principles of corrective justice. Where a party has lied or otherwise knowingly misled the other contracting party in respect of a matter that is directly linked to the performance of the contract, it amounts to breach of contract that must be set right, but the benefits of the bargain need not be otherwise reallocated between the parties involved.

84 That said, I emphasize once again that it is unquestionable that the duty is imposed as a matter of contractual doctrine rather than by implication or interpretation, and, by virtue of its status as contractual doctrine, parties are "not free to exclude" the duty altogether (*Bhasin*, at para. 75). Even if the parties, as here, have agreed to a term that provides for an apparently unfettered right to terminate the contract for convenience, that right cannot be exercised in a manner that transgresses the core expectations of honesty required by good faith in the performance of contracts.

85 This framework for measuring the wrongful exercise of the termination right does not turn on Baycrest's motive in exercising clause 9 beyond the observation that it did so dishonestly. The right of termination was, on its face, one without cause: Baycrest may have had legitimate grievances against Callow or some ulterior motive for its knowing deception — it is of no moment. The negative view that the property manager may have had of Callow, alluded to by the trial judge (at para. 14), is not the source of the breach of the duty of honest performance.

86 Moreover, I note that Cromwell J. described the requirements of the duty of honesty negatively: while the duty of honest performance does not require parties to act angelically by subordinating their own interests to that of their counterparty (*Bhasin*, at para. 86), they must *refrain* from lying or knowingly misleading their counterparty (para. 73). As a "negative" obligation — that is, in the absence of a recognized duty to act, the injunction it imposes is one not to act dishonestly — it sits more plainly with the ordinary objectives of corrective justice and what one scholar sees as the traditional posture of the common law in favour of contractual autonomy and individual freedom in private law. [TRANSLATION] "It is clear", wrote Professor Daly in a comment on the common law method consecrated in *Bhasin*, "that the duty of honesty recognized in *Bhasin* is a negative obligation — not to lie — rather than a positive obligation — to act in good faith" (pp. 101-2). This same orientation has been observed as animating the analogous contractual duty of good faith in the civil law. While positive obligations to cooperate in performance may be otherwise required by the law of good faith, scholars have observed that the notional equivalent of the duty of honest performance in Quebec civil law most typically imposes negative obligations — to refrain from lying, for example — in the measure of the abuse of a contractual right (Baudouin and Jobin, at No. 161). Care must be taken, I hasten to say, not to confuse the [TRANSLATION] "duty to act faithfully" recognized in this regard, with the fiduciary duty of loyalty that stands outside of good faith in both legal traditions.

87 I would add that, as Cromwell J. made plain, the recognition of the duty to act honestly in performance does not necessarily mean that the ideal spoken to in the organizing principle of good faith set forth in *Bhasin* might not manifest itself otherwise. Even within the limited compass of corrective justice, circumstances may arise in which the organizing principle would encourage the view that contractual rights must be exercised in a manner that was neither capricious nor arbitrary, for example, or that some duty to cooperate between the parties be imposed, though recognizing that, contrary to fiduciary duties, "good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first" (*Bhasin*, at para. 65). But for present purposes, it is not necessary to go that further step: I am of the view that where the exercise of a contractual right is undertaken dishonestly, the exercise is in breach of contract and this wrong must be corrected. That is what happened here.

88 The question that remains is whether Baycrest lied to or knowingly misled Callow and thus breached the duty to act honestly.

89 I recognize that in cases where there is no outright lie present, like the case before us, it is not always obvious whether a party "knowingly misled" its counterparty. Yet, Baycrest is wrong to suggest that nothing stands between the outright lie and silence. Elsewhere, as in the law of misrepresentation, for instance, one encounters examples of courts determining whether a misrepresentation was present, regardless of whether there was some direct lie (see A. Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*" (2015), 56 *Can. Bus. L.J.* 395, at p. 402). As Professor Waddams has written, "[a]n incomplete statement may be as misleading as a false one, and such half-truths have frequently been treated as legally significant misrepresentations." Ultimately, he wrote, "it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statements into misrepresentations" (*The Law of Contracts* (7th ed. 2017), at No. 441). Similarly, where a party makes a statement it believes to be true, but later circumstances affect the truth of that earlier statement, courts have found, in various contexts, that the party has an obligation to correct the misrepresentation (see *Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6 (Alta. C.A.), at para. 58; see also C. Mummé, "*Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?" (2016), 32 *Intl J. Comp. Lab. L. & Ind. Rel.* 117, at p. 123).

90 These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — 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. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., *Yam Seng Pte Ltd. v. International Trade Corp Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.), at para. 141).

91 At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies. No reviewable error has been shown in the finding of dishonesty that took place in anticipation of the exercise of clause 9 here. I would not interfere with the trial judge's view here on a matter that is owed deference. Deference should be shown to the trial judge in reviewing her discretionary exercise of weighing the evidence, especially given credibility played a part in her analysis, as she explained.

92 Reading the whole of the first instance judgment, I see no consequential error in the account given by the trial judge of the law on the duty of honest performance. She did not base her conclusions on some free-standing duty to disclose information. Instead, she examined whether Baycrest knowingly misled Callow as to the standing of the winter maintenance agreement, and thus wrongfully exercised its right of termination. Despite this, however, Baycrest argues that the trial judge erred in failing to recognize that its conduct did not reach the "much higher standard" spoken to in *Bhasin*. I disagree. No such error has been shown.

93 It is helpful for our purposes to recall that on the facts in *Bhasin*, part of the dishonest conduct concerned the respondent Can-Am's plans to reorganize its activities in Alberta. Its plan contemplated invoking its contractual right of non-renewal to force a merger between Mr. Bhasin and his competitor, Mr. Hrynew. In effect, this reorganization would have given Mr. Bhasin's business to Mr. Hrynew. Can-Am, however, had said nothing of its plan to Mr. Bhasin. When Mr. Bhasin first heard of the merger plans he questioned an official of Can-Am about its intentions. "[T]he official 'equivocated'", Cromwell J. explained, "and did not tell him the truth that from Can-Am's perspective this was a 'done deal'" (para. 100). Cromwell J. later concluded that "Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal" (para. 108). Cromwell J. wrote: "The trial judge made a clear finding of fact that Can-Am 'acted dishonestly toward Bhasin in exercising the non-renewal clause'. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly" (para. 94 (references omitted)).

94 It is true that Baycrest remained silent about its decision to terminate Callow's contract and that clause 9, on its face, did not impose on it a duty to disclose its intention except for on the 10-day notice requirement. That said, it had to refrain, as the trial judge said, from "deceiv[ing] Callow" through a series of "active communications" (para. 66). When it failed to refrain from doing so in anticipation of exercising its termination right, it deceived Callow into thinking it would leave the existing winter services agreement intact.

95 These "active communications", as I understand the trial judge's findings of fact, came in two forms. First, Mr. Peixoto made statements to Mr. Callow suggesting that a renewal of the winter maintenance agreement was likely. As the trial judge found, "[a]fter his discussions with Mr. Peixoto and Mr. Campbell, Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and [it was] satisfied with his services [under the existing agreement which had one winter to run]. This assumption is also supported by the documentary evidence, especially by the private e-mails between Mr. Peixoto and Mr. Campbell" (para. 41).

96 Baycrest attempts to recast the significance of this finding, arguing that Mr. Callow only had casual discussions with two of the JUC members — Mr. Peixoto and Mr. Campbell — about the possibility of a contract renewal. Such casual discussions, it says, cannot rise to the level of a lie. This position ignores the key finding in the trial judge's reasons that it was Mr. Peixoto — the JUC member who negotiated the main pricing terms with Callow for the winter maintenance agreement — who made statements to Mr. Callow suggesting that a renewal was likely (paras. 23 and 40-43). After making credibility findings against Mr. Peixoto, the trial judge found that he had "led Mr. Callow to believe that all was fine with the winter [contract]" and that Baycrest was "interested in a future extension of Callow's contracts" (para. 47). This dishonesty did not take place in the abstract: the trial judge found it to be relevant to the exercise of clause 9.

97 The second form of "active communications" that deceived Callow was related to the "freebies" Callow had offered Baycrest in the summer of 2013. As the trial judge found, Callow performed this free work because Mr. Callow wanted to

provide an incentive for Baycrest to renew the winter maintenance agreement. Baycrest, for its part, gladly accepted the services offered by Callow.

98 Again, Baycrest attempts to recast the significance of these findings, arguing that "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" (R.F., at para. 112). Whether or not that is the case, I again stress that Mr. Peixoto "understood that the work performed by Callow was a 'freebie' to add an incentive for the boards to renew his winter maintenance services contract" and "advised Mr. Callow that he would tell the other board members about this work" (trial reasons, at para. 43). These active communications by Baycrest suggested, deceptively, that there was hope for renewal and, perforce, the current contract would not be terminated.

99 Considering Baycrest's conduct as a whole over those few months, it was certainly reasonable for Mr. Callow, who was led to believe that a renewal was likely, to infer that Baycrest had not decided to terminate the ongoing contract. Moreover, Baycrest knew Mr. Callow was under this false impression, as shown by the email sent by Mr. Peixoto on July 17, 2013 and, nonetheless, continued to give him the impression that a renewal was likely even though the decision to terminate him was made (see trial reasons, at para. 48). Upon realizing that Mr. Callow was under this false impression, Baycrest should have corrected the misapprehension; in the circumstances, its conduct misled Callow.

100 I respectfully disagree with the idea that the deception in this case only concerned termination for unsatisfactory services and did not extend to termination for any other reason. The trial judge found that the dishonest conduct involved representations that the contract was not in danger at all when Baycrest knew it would be terminated (para. 65).

101 The Court of Appeal did not interfere with these findings, nor has Baycrest argued that the trial judge made any palpable and overriding errors. Accordingly, in light of the trial judge's findings of fact, I agree that Baycrest intentionally withheld information in anticipation of exercising clause 9, knowing that such silence, when combined with its active communications, had deceived Callow. By failing to correct Mr. Callow's misapprehension thereafter, Baycrest breached its contractual duty of honest performance. This is in stark contrast to *United Roasters Inc.*, where the defendant merely withheld its decision to terminate the agreement. Unlike in this case, the defendant there did not engage in a series of acts that it knew would cause the plaintiff to draw an incorrect inference and then fail to correct the plaintiff's misapprehension.

102 In this sense, this case is broadly similar to *Dunning v. Royal Bank* (1996), 23 C.C.E.L. (2d) 71 (Ont. Gen. Div.), one of the examples of breaches of the duty to exercise good faith in the manner of dismissal provided by Iacobucci J. in support of his conclusions in *Wallace*. While it was decided in the distinctive good faith setting of the employment context, *Dunning* is an appropriate analogy to the present case because in *Bhasin* Cromwell J. explicitly recognized that "the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts" (*Bhasin*, at para. 73, citing *Wallace*, at para. 98; *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.), at para. 58). It seems to me that if the duty of honest performance was a key component of the good faith requirements spoken to in *Wallace* and *Keays*, a similar framework applies, again bound together through the organizing principle. As Iacobucci J. explained, the employee's job in *Dunning* had been eliminated, but the employer told him another position would probably be found for him and the new assignment would necessitate a transfer. While the employee was being reassured about his future, the employer was contemplating his termination. Eventually, the employer chose to terminate the employee but withheld that information from the employee for some time, despite knowing the employee was in the process of selling his home in anticipation of the transfer. News of the termination only came after the employee had sold his home. Such conduct, Iacobucci J. observed, clearly violated the expected standard of good faith in the manner of dismissal.

103 As *Dunning*, *Wallace* and *Keays* make plain, an employer has the right to terminate an employment contract without cause, subject to the duty to provide reasonable notice. However broad that right may be, however, an unhappy employee can allege a distinct contractual breach when the employer has mistreated them in the manner of dismissal. In the end, as Cromwell J. noted, "contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests" (*Bhasin*, at para. 86). When Baycrest deliberately remained silent, while knowing that Mr. Callow had drawn the mistaken inference the contract was in good standing because it was likely to be renewed, it breached the duty to act honestly.

In my view, the trial judge did not create a new duty of disclosure in correcting that wrong but rather sought to denounce the Baycrest's conduct. Remedying that with an order for damages to repair Baycrest's failure to exercise clause 9 in accordance with the requirements of the duty of honest performance did not confer a benefit on Callow; it merely set matters right on the usual measure of corrective justice following this breach of contract. Respectfully stated, it is therefore my view that the Court of Appeal erred in concluding that Baycrest's conduct was dishonourable but not dishonest.

104 I would note, however, that I do agree in part with the Court of Appeal's observation that the trial judge went too far in concluding that "[t]he minimum standard of honesty would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (trial reasons, at para. 67). In my respectful view, to impute these first two requirements would amount to altering the bargain struck between the parties substantively, a conclusion not sought by Callow before this Court. That said, I agree with the trial judge that, at a minimum, Baycrest had to refrain from false representations in anticipation of the notice period. Having failed to correct Mr. Callow's misapprehension that arose due to these false representations, I too would recognize a contractual breach on the part of Baycrest in the exercise of its right of termination in clause 9. Damages thus flow for the consequential loss of opportunity, a matter to which I now turn.

C. Damages

105 Baycrest submits that Callow is not entitled to any damages for the breach. Baycrest argues that the trial judge erred in fixing the quantum of damages, first, by awarding Callow its expected profits over the full balance of the contract; second, by misapprehending the evidence relating to Callow's expenses; and, finally, by awarding both the loss of profit and the expenses incurred.

106 On the first point, I note that the trial judge correctly 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" (para. 79). Indeed, as Cromwell J. explained in *Bhasin*, breach of the duty of honest contractual performance supports a claim for damages according to the ordinary contractual measure (para. 88).

107 The ordinary approach is to award contractual damages corresponding to the expectation interest (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.), at para. 108). That is, damages should put Callow in the position that it would have been in had the duty been performed.

108 While it has rightly been observed that reliance damages and expectation damages will be the same in many if not most cases, they are nevertheless conceptually distinct. As Professor Stephen Smith wrote: "Defendants are ordered to do what they promised to do, not to do whatever is necessary to ensure the claimant is not harmed by relying on the promise" (*Atiyah's Introduction to the Law of Contract* (6th ed. 2006), at p. 405). Damages corresponding to the reliance interest are the ordinary measure of damages in tort (*PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412, 309 O.A.C. 139 (Ont. C.A.), at para. 65). This measure may be appropriate where it would be difficult for the plaintiff to prove the position they would have been in had the contract been performed. Reliance damages in contract mean putting the injured party in the position it would have been in had it not entered into the contract at all (para. 66).

109 I see no basis to hold that a breach of the duty of honest performance should in general be compensated by way of reliance damages. I recall that the duty of honest performance is a doctrine of contract law. Its breach is not a tort. Not only would basing damages in this case on the reliance interest set this contractual breach apart from the ordinary measure of contractual damages, but it would depart from the measure as it was applied in *Bhasin* (para. 108; see also MacDougall, at §1.130). In my respectful view, there is no basis to depart from *Bhasin* on this point which, in any event, was not argued by the parties. Further, I note that this view is shared by authors who have written that the duty of honest performance protects a party's expectation interest, rather than reliance interest (see, e.g., McCamus (2015), at pp. 112-13). Finally, while reliance damages and expectation damages coincide on the facts here, there is good reason to retain, in my view, the ordinarily applicable measure of contractual damages that seeks to provide the plaintiff with what they had expected. Professor Waddams has written that this can have a positive deterrent effect: "One of the legitimate arguments in favour of the current rule and against a rule measuring damages only by

the plaintiff's reliance is that a rule protecting only reliance would fail to deter breach in a large number of cases where the defendant calculated that the plaintiff's provable losses were less tha[n] the cost of performance" ("Breach of Contract and the Concept of Wrongdoing" (2000), 12 *S.C.L.R.* (2d) 1, at pp. 18-19).

110 Baycrest nevertheless argues that the trial judge did not actually consider what position Callow would be in if it had fulfilled the duty and instead awarded the value of the balance of the winter maintenance agreement. In so doing, it argues, she fell into the same error as the trial judge in *Bhasin*, who simply awarded damages as though the contract had been renewed. Baycrest says that this Court has appropriately condemned this approach because the parties did not intend or presume a perpetual contract.

111 Moreover, Baycrest points to *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), for the proposition that damages are assessed by that mode of performance which is least burdensome to the defendant. Callow, it is said, is entitled to no more than the minimum that Baycrest was obligated to do pursuant to the contract. Since clause 9 allowed it to terminate the winter maintenance agreement at any point on 10 days' notice, no damages should flow.

112 In my view, *Hamilton* is of no assistance to Baycrest in this case. While Cromwell J. referenced this principle in *Bhasin*, he did so in the context of whether the Court should recognize a broad, free-standing duty of good faith, for which the appellant there had argued. Briefly stated, the appellant's position was that the respondent, Can-Am, would have been in breach of such a duty since it had attempted to use the non-renewal clause to force Mr. Bhasin into a merger. Cromwell J. declined to recognize such a broad duty, reasoning that "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" (*Bhasin*, at para. 90; see also J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 23-25). Because no damages would have flowed from this breach, it was unnecessary for the Court to decide whether a broad, free-standing duty of good faith should be recognized.

113 It bears emphasizing that, despite Cromwell J.'s comments related to *Hamilton*, he nonetheless awarded damages to the appellant flowing from the breach of the respondents' obligation to perform the contract honestly. Damages were awarded using the ordinary measure of contractual expectation damages, namely to put Mr. Bhasin in the position he would have been in had Can-Am not breached its obligation to behave honestly in the exercise of the non-renewal clause (*Bhasin*, at paras. 88 and 108). This resulted in Mr. Bhasin being compensated for the value of his business that eroded (paras. 108-10). As Professors O'Byrne and Cohen helpfully explain, "if Can-Am had dealt with Bhasin honestly on all fronts (though without requiring it to disclose its intention not to renew), Bhasin would have realized much sooner that his relationship with Can-Am was in tremendous jeopardy and reaching a breaking point. He could have taken proactive steps to protect his business, instead of seeing it 'in effect, expropriated and turned over to Mr. Hrynew'" ("The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015), 53 *Alta. L.R.* 1, at p. 8 (footnotes omitted)).

114 How is it that damages were awarded for a breach of the duty of honest performance despite the principle outlined in *Hamilton*? While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference. Had it done so, Callow would have had the opportunity to secure another contract for the upcoming winter. As Callow explained at the hearing, "since this dishonesty caused Callow a loss by inducing it not to bid on other contracts during the summer of 2013 for the winter of 2013 to 2014, the condos are liable to it for damages" (transcript, at p. 5), which reflect its lost opportunity arising out of its abuse of clause 9.

115 It may be true that the trial judge could have explained her rationale for awarding damages more plainly. But even if the trial judge fell into the same error that the trial judge in *Bhasin* committed, so as to award damages as though the contract had carried on, it was one of no consequence.

116 As the trial judge found, Baycrest "failed to provide a fair opportunity for [Callow] to protect its interests" (para. 67). Had Baycrest acted honestly in exercising its right of termination, and thus corrected Mr. Callow's false impression, Callow would have taken proactive steps to bid on other contracts for the upcoming winter (A.F., at paras. 91-95). Indeed, there was ample evidence before the trial judge that Callow had opportunities to bid on other winter maintenance contracts in the summer

of 2013, but chose to forego those opportunities due to Mr. Callow's misapprehension as to the status of the contract with Baycrest. In any event, even if I were to conclude that the trial judge did not make an explicit finding as to whether Callow lost an opportunity, it may be presumed as a matter of law that it did, since it was Baycrest's own dishonesty that now precludes Callow from conclusively proving what would have happened if Baycrest had been honest (see *Lamb v. Kincaid* (1907), 38 S.C.R. 516 (S.C.C.), at pp. 539-40).

117 In the result, I see no palpable and overriding error. I am satisfied that, if Baycrest's dishonesty had not deprived Callow of the opportunity to bid on other contracts, then Callow would have made an amount that was at least equal to the profit it lost under the winter maintenance agreement. The trial judge found that, once expenses are deducted, that award amounts to $64,306.96. I see no reason to interfere with her fact finding as to the estimation of expenses. Consequently, I see no basis for overturning this portion of the trial judge's award of damages.

118 The trial judge also awarded Callow $14,835.14, representing the cost of leasing a piece of machinery for one year. Mr. Callow testified that he had leased the machinery specifically for the winter maintenance agreement, but would not have had he known the contract would be terminated (para. 81). Baycrest submits that the trial judge erred by awarding these expenses because it amounts to double recovery.

119 I see no issue of double recovery in this case. The trial judge awarded the $64,306.96 as lost profit, not lost revenue. This is appropriate because Callow was not actually hired for the other contract on which it did not bid and therefore did not necessarily have to undertake all the expenses that would have been required to fulfill that contract. However, as Callow had already committed to this expense, the lease of the machinery, it too should be compensated for along with the lost profit. The trial judge was entitled to decide this point as she did, having the advantage of measuring losses first hand. I see no reviewable error in the trial judge's approach on this issue.

V. Disposition

120 I would allow the appeal, set aside the order of the Court of Appeal and reinstate the judgment of the trial judge, with costs throughout.

Brown J. **(Moldaver, Rowe JJ. concurring):**

I. Introduction

121 This appeal invites us to affirm the scope and operation of the duty of honest performance, recognized in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.), by clarifying the distinction between actively misleading conduct and innocent non-disclosure. Applying that distinction to the facts of this appeal, is a straightforward matter. As the trial judge found, the respondents (collectively, "Baycrest") represented to Callow (referring interchangeably in these reasons to the appellant and its principal) that its contract would not be terminated (2017 ONSC 7095 (Ont. S.C.J.)). By relying on Baycrest's representations, Callow lost the opportunity to secure other work for the contract's term. Callow's complaint therefore does not relate to Baycrest's *silence* but rather to its positive representations, which can clearly ground a claim based on the duty of honest performance.

122 Given that Baycrest did not identify any palpable and overriding errors in the trial judge's findings, I agree with the majority that the appeal should be allowed and the trial judge's award restored. Regrettably, however, I am compelled to express my respectful objection to the majority's view that the doctrine of abuse of right in the civil law of Quebec is "useful" and "helpful" in understanding the application of *Bhasin* to this appeal (para. 57). Again respectfully, I see this digression as neither "useful" nor "helpful" to the judges and lawyers who must try to understand the common law principles of good faith as developed in this judgment. Indeed, it will only inject uncertainty and confusion into the law.

123 This is not to suggest that comparative legal analysis is not an important tool or that its use should somehow be unduly limited at this Court. As the majority's reasons amply document, the Court has a longstanding tradition of looking to Quebec's civil law in developing the common law whether to answer a question that the common law does not answer (that is, to fill a "gap") or where it is necessary to modify or otherwise develop existing rules. In addition, where concerns are raised about the

effects of moving the common law in one direction or another, this Court has considered the experience in Quebec and elsewhere, often for reassurance that the posited concerns are unfounded or overstated. What this Court has refrained from doing, however, is deploying comparative legal analysis that serves none of these purposes or, even worse, renders the law obscure to those who must know and apply it. But by invoking the civilian abuse of right framework to clarify when "[d]ishonesty is directly linked to the performance of a given contract" (para. 73) — a question requiring no "clarification" — the majority does exactly that.

124 While, therefore, my objection is fundamentally methodological, it also speaks to the substantive consequences that follow. As the majority acknowledges, this appeal concerns the duty of honest performance, not the duty to exercise discretionary powers in good faith. And yet, its digression into the notion of "wrongful exercise of a right", in substance, pulls it into that very territory, since it ties *dishonesty* to *the manner in which contractual discretion is exercised*. Effectively, then, the majority's reliance on a civil law concept leads it to conflate, or at least obscure the distinction between what are distinct common law concepts. This is both unnecessary and undesirable, since the exercise of discretion apart from being a matter of performance that may be misrepresented has little to do with the duty of honest performance. Rather, the duty to exercise discretionary powers in good faith or, expressed with the civilian terminology the majority adds, in a manner that is not "abusive" or "wrongful" is a distinct concept that has no application to this appeal.

125 Our aim in deciding this appeal should be to develop the common law's organizing principle of good faith carefully, and in a coherent manner, and more particularly in a manner that gives clear guidance by taking care to distinguish among the distinct doctrines identified by this Court in *Bhasin*. Respectfully, I say that the majority has not done so here.

II. Background

126 Baycrest comprises ten condominium corporations with shared assets, for which decisions are made by a Joint Use Committee. In April 2012, Baycrest entered into two separate two-year agreements with Callow to provide summer landscaping and winter snow removal services. The terms of the winter service agreement stipulated that Baycrest could terminate the agreement, without cause, upon giving 10 days' notice.

127 In March or April 2013, the Joint Use Committee voted to terminate the winter service agreement earlier than its scheduled expiry in April 2014. Baycrest opted not to tell Callow about its decision until September 2013, however, so as not to jeopardize his performance under the summer service agreement. Unaware of Baycrest's decision, Callow performed free work for Baycrest in the spring and summer of 2013 in the hope that Baycrest would renew both agreements. Callow also discussed the prospect of renewal with two Baycrest representatives, one of whom had negotiated Callow's existing agreements in 2012. These discussions led him to believe that he was likely to receive a two-year contract renewal in 2014 and, therefore, that the winter service agreement was not in danger. Knowing that Callow was operating under this misapprehension, Baycrest nevertheless continued to withhold information about its termination decision.

128 On September 12, 2013, Baycrest gave Callow notice that it was terminating the winter service agreement. Callow sued, claiming that Baycrest failed to perform the winter service agreement in good faith and was therefore liable for breach of contract. The trial judge held that Baycrest breached the duty of honest performance. She found that Baycrest's statements and conduct actively deceived Callow and led him to believe that the winter service contract would not be terminated. As a result, she awarded damages to place Callow in the position that it would have been in had the contract not been terminated. The Court of Appeal for Ontario reversed, stating that the duty of honest performance does not impose a requirement of disclosure (2018 ONCA 896, 429 D.L.R. (4th) 704 (Ont. C.A.)). In its view, even if Baycrest had misled Callow, Callow bargained only for 10 days' notice of termination and that was the extent of its entitlement.

III. Analysis

A. This Case Can Be Readily Decided by Applying the Common Law Principle of Good Faith

129 Disposing of this case is really a simple matter of applying this Court's decision in *Bhasin*. The first step in deciding a common law good faith claim is to consider whether any established good faith doctrines apply. Callow bases its claim on

two established doctrines: the duty of honest performance and the duty to exercise discretionary powers in good faith. As I will explain, however, Callow's claim should be resolved by applying only the duty of honest performance.

(1) The Duty of Honest Performance

130 As a universally applicable minimum standard, all contracts must be performed honestly. Contracting parties may therefore not lie to, or otherwise knowingly mislead, each other about matters directly linked to performance (*Bhasin*, at paras. 73-74). If a plaintiff suffers loss in reliance on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole. The duty of honest performance does not, however, "impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract" (*Bhasin*, at para. 73).

131 The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure, is the central issue in this appeal. As that line has been clearly demarcated by cases addressing misrepresentation in other contexts, it is in my view worth affirming here that the same settled principles apply to the duty of honest performance. The duty of honest performance is, after all, broadly comparable to the doctrine of fraudulent misrepresentation, although it applies (unlike misrepresentation) to representations made *after* contract formation (B. MacDougall, *Misrepresentation* (2016), at pp. 63-64). It follows that those representations sufficient to ground a claim for misrepresentation are analogous to the representations that will support a claim based on the duty of honest performance.

132 The general rule, applicable to contracts other than those requiring utmost good faith, is that contracting parties have no duty to disclose material information (*Bhasin*, at paras. 73 and 86). Mere silence therefore cannot be considered actively misleading conduct (*Alevizos v. Nirula*, 2003 MBCA 148, 180 Man. R. (2d) 186 (Man. C.A.), at para. 19). In some cases, however, silence on a particular topic is misleading in light of what *has* been said (*Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6 (Alta. C.A.), at para. 56, citing *Opron Construction Co. v. Alberta* (1994), 151 A.R. 241 (Alta. Q.B.)). Again, no wheels need re-inventing here. There is, in the context of misrepresentation, "a rich law accepting that sometimes silence or half-truths amount to a statement" (MacDougall, at p. 67; see also A. Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v Hrynew*" (2015), 56 *Can. Bus. L.J.* 395, at p. 402). A contracting party therefore may not create a misleading picture about its contractual performance by relying on half-truths or partial disclosure (*Peek v. Gurney* (1873), L.R. 6 H.L. 377 (U.K. H.L.); *Alevizos*, at paras. 24-25; *Xerex*, at paras. 56-57). And contracting parties are required to correct representations that are subsequently rendered false, or which the representor later discovers were erroneous (*Xerex*, at para. 58; MacDougall, at pp. 118-19).

133 Further, the representation need not take the form of an express statement. So long as it is clearly communicated, it may comprise other acts or conduct on the part of the defendant (MacDougall, at p. 87). The question is whether the defendant's active conduct contributed to a misapprehension that could be corrected only by disclosing additional information. If so, the defendant must make that disclosure. Conversely, a contracting party is not required to correct a misapprehension to which it has not contributed (T. 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 *Can. Bus. L.J.* 1, at p. 13). The entire context, which includes the nature of the parties' relationship, is to be considered in determining, objectively, whether the defendant made a misrepresentation to the plaintiff (MacDougall, at p. 102; see, e.g., *Outaouais Synergest Inc. v. Keenan*, 2013 ONCA 526, 116 O.R. (3d) 742 (Ont. C.A.), at paras. 84-87; *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1981), 33 B.C.L.R. 291 (B.C. C.A.), at p. 296). It follows that the question of whether a misrepresentation has been made is a question of mixed fact and law, subject to appellate review only for palpable and overriding error.

134 In light of these principles which, again, are well established and require nothing more than a statement by this Court of their application to the duty of honest performance I cannot accept Baycrest's argument that its conduct fell on the side of innocent non-disclosure. Indeed, the trial judge found that "active communications between the parties between March/April and September 12, 2013 ... deceived Callow" (para. 66 (CanLII)). Based on Baycrest's conduct and express statements, the trial judge found that Baycrest had represented that the winter service agreement was not in danger of termination (paras. 65 and 76). Further, the trial judge found that Baycrest knew that its representations were misleading and nonetheless expressed its

intention of keeping Callow in the dark (paras. 48 and 69). These findings are sufficient to support the conclusion that Baycrest breached the duty of honest performance. And Baycrest identifies no palpable and overriding error to justify overturning them.

135 Nor do I accept Baycrest's argument that its representations related only to the renewal of a new winter agreement and not to the termination of Callow's existing agreement. As I have explained, whether Baycrest made an actionable representation about its performance must be determined in context, which included its conduct as I have described it. And it was open to the trial judge to conclude from that conduct that Callow reasonably inferred that the winter service agreement would not be terminated (see, e.g., *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at pp. 128-32). Again, I see no basis for disturbing the trial judge's conclusion.

(2) The Duty to Exercise Discretionary Powers in Good Faith

136 Callow also argues that Baycrest's decision to terminate the winter service agreement was a discretionary decision that it was required to make in good faith. He relies on the good faith duty that arises "where one party exercises a discretionary power under the contract", and which was affirmed by this Court in *Bhasin* (para. 47). As a preliminary matter, I note that not every decision that involves a degree of discretion is subject to this duty (*Bhasin*, at para. 72; J. T. Robertson, "Good Faith as an Organizing Principle in Contract Law: *Bhasin v. Hrynew* Two Steps Forward and One Look Back" (2015), 93 *Can. Bar Rev.* 809, at p. 859). The extent to which it applies to unfettered termination rights remains unsettled, and I do not purport to resolve that controversy here (*Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214 (Alta. C.A.), at para. 41; *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428, 423 D.L.R. (4th) 174 (Ont. C.A.), at para. 19).

137 This duty limits the exercise of certain contractual powers that may appear to grant one party unfettered discretion. For the purposes of this appeal, it is unnecessary to express a firm view on the standard that applies to a breach of this duty. It is sufficient to note that where a plaintiff relies on this duty, its complaint is *not* about dishonesty; rather, it is that the defendant was not entitled to make the decision that it made. The wrongful behavior is the very exercise of discretion, and the plaintiff therefore bases its claim on the *effect* of that decision (see, e.g., *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.); *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38 (Alta. C.A.)). Damages are awarded based on the difference between the outcome that occurred and the outcome that would have occurred if the defendant had exercised its discretion in the least onerous, yet lawfully acceptable, manner.

138 Callow, however, does not dispute that Baycrest was entitled to terminate the winter service agreement, as it did, without cause and by providing only 10 days' notice. Rather, Callow impugns *the dishonesty* that *preceded* Baycrest's exercise of discretion. Callow therefore seeks damages measured by considering what would have happened had Baycrest made the same decision, albeit without misrepresenting its intentions. The applicable duty is therefore the duty of honest performance. In sum, the appeal at bar presents a case about dishonesty in the performance of a contract, and nothing more. Indeed, it represents *precisely* the sort of instance contemplated by Cromwell J.'s reference for this Court in *Bhasin*, at para. 73, to circumstances where a party "lie[s] or mislead[s] the other party about one's contractual performance". Conversely, it is *not* a case about the exercise of a discretionary power.

(3) Damages

139 Having concluded that Baycrest breached the duty of honest performance, the remaining issue is whether the trial judge awarded the appropriate quantum of damages. While I reach the same result as the majority, I approach this question somewhat differently than it does. The majority would retain the expectation measure of damages for breach of the duty of honest performance. I say, however, that it follows from recognizing Baycrest's misleading conduct as a wrong independent of the termination provision that the proper measure of damages represents the loss Callow suffered in reliance on Baycrest's misleading representations (which I accept will often coincide with the expectation measure).

140 The majority relies on Cromwell J.'s statement in *Bhasin* that a breach of the duty of honest contractual performance "supports a claim for damages according to the contractual rather than the tortious measure" (para. 88). But when the purpose of the expectation measure of damages for breach of contract is examined and contrasted with the legal framework developed

in *Bhasin*, the actual claim in *Bhasin* and the damages actually received, it becomes readily apparent that the reliance measure is precisely the measure that the *Bhasin* framework contemplates should be awarded. On this point, the majority's reasons represent *not* fidelity to *Bhasin*, but a regrettable departure that undermines the coherence between the interests sought to be protected in *Bhasin* and the remedy to be awarded.

141 It has "long been settled and [is] indeed axiomatic" that the legal aim in remedying a breach of contract is to give the innocent party the full benefit of the bargain by placing it in the position it would have occupied had the contract been performed (P. Benson, *Justice in Transactions* (2019), at p. 5; see also *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.), at para. 27). Awarding a reliance measure that is, compensating for losses sustained by the innocent party in reliance on the contract would ignore the innocent party's right to performance that flows from its having pledged consideration therefor, thereby potentially depriving it of the benefit of the contract. Indeed, confining recovery to losses sustained in reliance on the agreement would create an incentive to breach agreements where the cost of performance outweighs the reliance measure of damage (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at para. 704; see also L. L. Fuller and W. R. Perdue Jr., "The Reliance Interest in Contract Damages" (1936), 46 *Yale L.J.* 52, at pp. 57-66).

142 But the justification for awarding expectation damages does not apply to breach of the duty of honest performance. In such cases, the issue is *not* that the defendant has failed to perform the contract, thereby defeating the plaintiff's expectations. It is, rather, that the defendant *has* performed the contract, but has also caused the plaintiff loss by making dishonest extra-contractual misrepresentations concerning that performance, *upon which the plaintiff relied* to its detriment. In short, the plaintiff's complaint is not lost value of performance, but detrimental reliance on dishonest misrepresentations. The interest being protected is not an expectation interest, but a reliance interest. And just as these are unrelated interests, an expectation measure of damage is unrelated to the breach of the duty of honest performance.

143 The claim in *Bhasin* itself is illustrative. Bhasin contracted to sell financial products for Can-Am. The contract would renew automatically at the end of the initial term unless one of the parties gave six months' notice of non-renewal. Can-Am intended to force a takeover of Bhasin's business by his competitor, Hrynew, but misled him about its intention to do so. Can-Am also appointed Hrynew to audit Bhasin's business. When Bhasin protested this conflict of interest, Can-Am lied to him about the reason for Hrynew's appointment as auditor and the terms that would govern his access to Bhasin's confidential information. Ultimately, when Can-Am gave notice of non-renewal, Bhasin lost the value of his business. This Court found that, but for Can-Am's dishonesty in the period leading up to the non-renewal, he "would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew" (para. 109). It awarded damages to compensate for the lost value of the business.

144 Neither the claim, then, nor the damage award, related to Can-Am's failure to perform the contract with Bhasin. The theory of the judgment was that Bhasin lost the value of his business by relying on Can-Am's dishonest representations. The relief actually awarded was therefore measured by the difference between Bhasin's position and the position he would have occupied had Can-Am not been dishonest about its intention to force a takeover by way of cancelling his contract. Had Bhasin not relied on Can-Am's dishonesty, no damages could have been awarded on this basis, because the dishonesty would not have altered his position.

145 The measure applied in *Bhasin* was, therefore, clearly not based on expected performance, and indeed it appears to have had nothing to do with placing Bhasin in the position he would have occupied had the contract been performed (K. Maharaj, "An Action on the Equities: Re-Characterizing *Bhasin* as Equitable Estoppel" (2017), 55 *Alta. L. Rev.* 199, at p. 215). Rather, it was directed solely towards making good the detriment that flowed from Bhasin's reliance on a dishonest misrepresentation — a measure characterized by one scholar as "very tort-like" (MacDougall, at p. 65). Much like estoppel and civil fraud, therefore, the duty of honest performance vindicates the plaintiff's *reliance* interest (Robertson, at p. 861; Maharaj, at pp. 215-18). A contracting party that breaches this duty will be liable to compensate its counterparty for any foreseeable losses suffered *in reliance* on the misleading representations.

146 This is not to suggest that the duty of honest performance is "subsumed" by estoppel and civil fraud (Kasirer J.'s reasons, at para. 50). Rather, it is merely to observe that each of these legal devices protects the same interest. Indeed, far from being

"subsumed" into estoppel and civil fraud, the duty of honest performance protects the reliance interest in a distinct and broader manner since, as this Court observed in *Bhasin*, the defendant may be held liable even where it does not *intend* for the plaintiff to rely on the misleading representation (para. 88). Irrespective of the defendant's intention, all a plaintiff need show is that, but for its reliance on the misleading representation, it would not have sustained the loss.

147 Baycrest advances three arguments for reducing the trial award. First, it says that the ten day notice period defines its maximum exposure for damages because, irrespective of its dishonesty, its least onerous means of performance was to terminate the agreement. The trial judge therefore incorrectly awarded damages as if the winter contract had not been terminated.

148 While Baycrest is correct to say that damages for breach of contract are measured against the defendant's least onerous means of performance (*Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 20), that principle does not assist Baycrest here. To perform the contract *honestly* (that is, without breaching the duty of honest performance), Baycrest was required *not to mislead* Callow about whether the contract would be terminated. It could have accomplished this by keeping silent about termination or, having misled Callow as to the true state of affairs, by correcting Callow's misapprehension before he relied on the misleading conduct to his detriment. Had either of these possibilities occurred, Callow would have been able to seek other work for the 2013-14 winter season.

149 Of course, we cannot say with certainty that Callow *would have secured* other work. He might have sat idle in any event, assuming that the winter service contract was in good standing. But this evidentiary difficulty is the product of Baycrest's dishonesty, and Baycrest should not be relieved from liability simply because Callow cannot definitively prove what would have occurred had it not been misled (*Wood v. Grand Valley Railway* (1915), 51 S.C.R. 283 (S.C.C.), at pp. 288-91; see also *Lamb v. Kincaid* (1907), 38 S.C.R. 516 (S.C.C.), at pp. 539-40). Callow gave evidence that it typically bid on winter contracts during the summer months and that it was too late to find replacement work by the time it was notified of termination. I agree with the majority that, based on the record, we can reasonably presume that Callow would have been able to replace the winter service agreement with a contract of similar value. While the trial judge erred by awarding damages as if the winter service agreement had not been terminated, I would, based on this presumption, award the same quantum of damages.

150 Secondly, Baycrest says that the trial judge's award led to double recovery for Callow's expenses. But this is simply incorrect. The trial judge awarded Callow the *net* value of the winter service agreement ($64,306.96) representing the gross contract value ($80,383.70) less Callow's expenses, which the trial judge approximated at 20 percent ($16,076.74). She then added back the cost of an equipment lease, which Callow had already entered into in reliance on Baycrest's misleading representations. Though the trial judge did not say so expressly, the record shows that Callow's approximated expenses included the cost of leasing equipment. If Callow is not reimbursed for the leasing expenses that he incurred in reliance on Baycrest's misleading representations, those expenses would therefore be counted against him twice. Absent Baycrest's breach of contract, Callow would have obtained a similarly valued contract and ended the 2013-14 winter season with $64,306.96 in profit. The trial judge's approach ensured that Callow was restored to this position, and, accordingly, I see no basis for overturning this aspect of her award.

151 Finally, Baycrest argues that the trial judge misapprehended the evidence relating to Callow's expenses. I am not convinced, however, that the trial judge did anything other than estimate Callow's expenses at 20 percent of the winter service contract's value, based on evidence that Callow gave regarding its expenses in previous years. Estimating the expenses was a decision that fell within the trial judge's remit as a fact-finder and should not be disturbed on appeal. Indeed, it is difficult to imagine how the trial judge could have proceeded differently, given that the winter services agreement was never performed and that we therefore cannot say with certainty what Callow's expenses would have been.

B. "Abuse of Right", "Wrongful Exercise of a Right", and Comparative Analysis of Good Faith in the Law of Contract

152 With the exception of my discussion regarding damages, most of the foregoing is consistent, or at least not inconsistent, with the majority's reasons, and is sufficient to dispose of this appeal. But while acknowledging this (at para. 44: "the duty to act honestly about matters directly linked to the performance of the contract ... is sufficient to dispose of this appeal"; "[n]o expansion of the law set forth in *Bhasin* is necessary to find in favour of Callow"), the majority nonetheless proceeds to delve

into matters beyond the duty to act honestly. And in so doing, it does indeed expand upon (and, I say, confuse) the law set forth in *Bhasin*.

153 More particularly, the majority says that this appeal presents an opportunity to resolve two issues: first, "what constitutes a breach of the duty of honest performance where it manifests itself in connection with the exercise of a seemingly unfettered, unilateral termination clause" (para. 30); and secondly, "when dishonesty is directly linked to the performance of a contract" (para. 64). These questions lead the majority to focus on whether the exercise of the termination provision was *itself* dishonest. It explains:

> ... the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right .... This means, simply, that instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest. [para. 53]

The majority finds support for this approach in Quebec civil law. Specifically, it contends that the "required direct link between dishonesty and performance" is "made plain" by considering "how the framework for abuse of rights in Quebec connects the manner in which a contractual right is exercised to the requirements of good faith" (para. 67). It states that arts. 6, 7 and 1375 of the *Civil Code of Québec* "point to this connection by providing that no contractual right may be exercised abusively without violating the requirements of good faith" (para. 67).

154 Both as a substantive and methodological matter, I cannot endorse this. First, in the circumstances of this particular appeal, the majority's resort to the civil law as a "source of inspiration" (para. 60) is inappropriate. As the majority acknowledges, the issues to which its analysis responds are fully addressed by *Bhasin* itself, and there is no indication that the principles outlined therein require further elaboration. Secondly, and relatedly, the majority's focus on the wrongful exercise of a right distorts the analysis mandated by *Bhasin* and undermines the independent character of the various common law good faith duties identified therein.

(1) Comparative Analysis

155 The majority draws on the civilian concept of abuse of rights "as a framework to understand the common law duty of honest performance" (para. 73). Specifically, it finds that this framework "helps to focus the analysis of whether the common law duty of honest performance has been breached on what might be called the wrongful exercise of a contractual right" (para. 63).

156 In considering the utility of the comparative exercise that the majority proposes, it must be borne in mind that the common law principles applicable to this appeal are both determinative and settled. Drawing from civil law in these circumstances departs from this Court's accepted practice in respect of comparative legal analysis. 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. And to the extent it does so, it confuses matters significantly, the majority's assurances to the contrary notwithstanding.

157 As Moldaver J. observed (in dissent, but not on this point) in *Reference re Supreme Court Act (Canada)*, 2014 SCC 21, [2014] 1 S.C.R. 433 (S.C.C.), at para. 113 (emphasis added), "[t]he coexistence of *two distinct legal systems* in Canada — the civil law system in Quebec and the common law system elsewhere — is a unique and defining characteristic of our country." The distinct common law and civil law traditions represent an integral component of Canadian legal heritage and identity (Hon. M. Bastarache, "Bijuralism in Canada", in *Bijuralism and Harmonization: Genesis* (2001), at p. 26; see also M. Samson, "Le droit civil québécois: exemple d'un droit à porosité variable" (2018-19), 50 *Ottawa L. Rev.* 257, at p. 257).

158 Preserving this unique aspect of Canada's identity requires maintaining the distinct features of both the common law and civil law traditions. Indeed, this Court has gone so far as to describe its own composition as having been designed to ensure "that the common law and the civil law would evolve side by side, *while each maintained its distinctive character*" (*Reference re Supreme Court Act (Canada)*, at para. 85 (emphasis added)). It follows that, just as this Court decided in *Reference re Supreme Court Act (Canada)* that the presence on this Court of at least three judges from Quebec "ensur[es] civil law expertise and

the representation of Quebec's legal traditions", the integrity and distinct character of the common law is also ensured by the presence of judges from Canada's common law jurisdictions.

159 It also follows from the distinct nature of Canada's two legal traditions that drawing from one tradition to influence the other is simply an exercise in comparative legal analysis (*Caisse populaire des Deux Rives c. Vallée du Richelieu, cie mutuelle d'assurance de dommages*, [1990] 2 S.C.R. 995 (S.C.C.), at p. 1016). As I have already recounted, this is what the majority claims it is doing here. But while comparison is an important tool, its uses are not unlimited. In particular, comparative analysis, in the sense of using law from another legal system to elucidate or develop the domestic legal system, is generally appropriate only where domestic law does not provide an answer to the problem facing the court, or where it is necessary to otherwise develop that law. Using law from other systems in other circumstances would either be superfluous, or would (to the extent of its use) have the undesirable effect of displacing established domestic jurisprudence (J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975), 53 *Can. Bar Rev.* 715, at pp. 725-27; see also K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd rev. ed. 1998), at pp. 17-18; T. Lundmark, *Charting the Divide between Common and Civil Law* (2012), at pp. 8-10). As Justice Sharpe writes extra-judicially about the use of authority generally, which applies equally to comparative legal analysis, "[i]t is only where the case cannot readily be decided on the basis of binding authority that non-binding sources will have a material effect on the decision" (*Good Judgment: Making Judicial Decisions* (2018), at p. 171).

160 These sources are not expressions of jurisdictional chauvinism. Rather, they express a posture of prudence and disciplined restraint in the deployment of comparative analysis in judgments. And for good reason. Seeking inspiration from external sources when it is unnecessary to do so may simply complicate a straightforward subject, thereby introducing uncertainty to a previously settled area of law (*Gilles E. Néron Communication Marketing inc. c. Chambre des notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95 (S.C.C.), at para. 56, citing J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (6th ed. 2003), at p. 193). Even something as seemingly innocuous as changing the terminology used to describe a concept for example, the majority's reliance on the civil law device of abuse of right and references to the wrongful exercise of a right can have substantive legal implications, affecting the coherence and stability of the resulting modified legal system. Language itself, after all, plays "a crucial role in the evolution of the law" (Bastarache, at p. 20; see also Lundmark, at pp. 74-86).

161 This is not mere conjecture. The seemingly benign injection of civil law terminology into common law judgments has previously generated precisely that kind of instability. Substantial confusion in the common law of unjust enrichment arose in Canada in the 1970s from the introduction of civil law terminology of "absence of juristic reasons for an enrichment" as if it were synonymous with the traditional requirement of "unjust factors" that had been "deeply ingrained" since Lord Mansfield's judgment in *Moses v. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676 (Eng. K.B.) (M. McInnes, "The Reason to Reverse: Unjust Factors and Juristic Reasons" (2012), 92 *B.U.L. Rev.* 1049, at pp. 1052 and 1054). As Professor McInnes explains:

> ... without discussion or explanation, the Supreme Court of Canada began to use the civilian terminology (i.e., "absence of juristic reason for the enrichment") while continuing to apply the traditional unjust factors. Predictably, the Canadian law of unjust enrichment grew ever more confused as the court said one thing and did another. [Footnotes omitted; p. 1056.]

162 The result was, to put it mildly, destabilizing. And predictably so. While Western legal systems are called upon to address the same kinds of disputes, each has developed different ways over the centuries to resolve them. The result is like two massive jigsaw puzzles that cover the same amount of ground. From a distance, each looks much the same as the other, but up close, it becomes apparent that the pieces are cut differently so that pieces from one cannot fit (or at least fit easily) into the other. And so it was when "juristic reasons" began to be spoken of in the Canadian common law of unjust enrichment. Conflicting lines of authorities continued to apply the common law requirement of unjust factors, while in other decisions courts ascribed legal significance to the introduction of civilian language that is, they "took the civilian language at face value and ordered restoration when defendants could not justify the retention of their enrichments" (McInnes, at p. 1056 (footnote omitted)). In the end, this Court had to settle the question in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), which it did by clarifying that the civilian terminology of "juristic reasons" applies. But coming even several decades after the uncertainty arose, we must acknowledge that this confirmation of the civil law terminological shift *itself* also effected substantive instability in the administration of the common law:

> In a stroke, lawyers and judges were required to alter fundamentally their conception of injustice. Liability now responds to the *absence* of any reason for the defendant's *retention*, rather than to the *presence* of some reason for the plaintiff's *recovery*. The transition has not been seamless, and it will be many years before practice settles into the level of consistency and certainty that litigants have the right to expect from a mature system of law. [Emphasis in original.]
>
> (McInnes, at p. 1057)

163 This is not to suggest that *Garland* is wrongly decided, or that its authority in the common law of unjust enrichment is somehow undermined by its civilian inclination. Rather, it is simply to point out that there can be a heavy price to pay typically, by unijural lawyers and their clients when external legal concepts are introduced via a judgment on a purely domestic legal issue. Hence the restraint which this Court has (until now) shown, by introducing external legal concepts to a judgment only where it is necessary to do so that is, to fill a gap where domestic law *does not* provide an answer, or where it is necessary to modify or otherwise develop an existing legal rule. In such circumstances, other legal systems may well reveal potential solutions that would not have been apparent from a narrow domestic focus (Zweigert and Kötz, at pp. 17-20; see also *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), at pp. 1140-47 (per McLachlin J., as she then was)). This is what we mean when we say that Canada's two legal systems can serve as sources of "inspiration" (*Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214 (S.C.C.), at para. 38).

164 We can also draw on the experience of other legal systems to assist our deliberations about whether an identified potential solution to a legal problem will result in negative consequences. Indeed, that was the limited use this Court made of Quebec law (and, for that matter, U.S. law) in *Bhasin*, at paras. 83-85, *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543 (S.C.C.), at para. 34, and *Norsk*, at pp. 1174-75 (per Stevenson J., concurring). Similarly, this Court will sometimes observe that a legal concept developed within one system, using domestic sources, mirrors a concept found in another system (*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855 (S.C.C.), at para. 138 (per McLachlin C.J., dissenting in part); *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3 (S.C.C.), at para. 41; *Barrette c. Ciment du St-Laurent inc.*, 2008 SCC 64, [2008] 3 S.C.R. 392 (S.C.C.), at paras. 76-79; see also *Zittrer c. Sport Maska Inc.*, [1988] 1 S.C.R. 564 (S.C.C.), at p. 570 (per Beetz J., concurring)). When used in these ways, comparative sources are relied on to provide comfort that other legal systems have arrived at similar conclusions.

165 But that is not this case. Here, no gaps are to be filled, and no domestic common law requires development (or even "clarification"). 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. Further, this case engages an issue the place of good faith in contract law on which the Canadian common law and civil law systems have adopted very different approaches each autonomous, and neither inherently superior to the other (see, generally, R. Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019), 1 *Journal of Commonwealth Law* 83). As the Hon. Louis LeBel observed:

> [TRANSLATION] The fact that the Court has maintained the specificity of the two legal traditions with respect to good faith shows the importance it attaches to respect for their conceptual autonomy. The dialogue between the two systems remains circumscribed by a judicial stance that, in general today, understands the importance and characteristics of the major legal traditions that make up Canadian bijuralism.
>
> ("Les cultures de la Cour suprême du Canada: vers l'émergence d'une culture dialogique?", in J.-F. Gaudreault-DesBiens et al., eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (2009), 1, at p. 15)

166 Indeed, there are principled reasons for the distinct treatment of good faith as between the common law and civil law systems. As Professor Valcke observes, the common law also relies on other concepts, including the equitable doctrine of estoppel, to achieve similar outcomes as the doctrine of good faith ("*Bhasin v Hrynew*: Why a General Duty of Good Faith Would Be Out of Place in English Canadian Contract Law" (2019), 1 *Journal of Commonwealth Law* 65, at p. 77). At a more general level, the common law and civil law are premised on different understandings of legal rights (H. Dedek, "From Norms

to Facts: The Realization of Rights in Common and Civil Private Law" (2010), 56 *McGill L.J.* 77, at pp. 79-81) and of the role of the state in mitigating the effects of harsh bargains (M. Pargendler, "The Role of the State in Contract Law: The Common-Civil Law Divide" (2018), 43 *Yale J. Intl L.* 143, at p. 179).

167 I acknowledge that the majority refers to "special reasons" to be "cautious in undertaking the comparative exercise to which Callow invites us here" (para. 70). But and, again I stress, in an area of common law that admits of no lacuna or gap that needs filling, or that is in need of development by applying the civilian doctrine of "abuse of right" as it does, caution is thrown to the wind, the independent character of the existing good faith doctrine, which *Bhasin* carefully preserved, is undermined, and the generally applicable rule that this Court rejected in *Bhasin* is at least implicitly embraced.

168 To be clear, the majority's comparative methodology is not mere surplusage. Rather, its application is the only point of the exercise. As I have already recounted, the doctrine of abuse of rights is applied "to focus the analysis of whether the common law duty of honest performance has been breached on what might be called the wrongful exercise of a contractual right" (para. 63). Quebec civil law is cited as authority for the proposition that "no contractual right may be exercised abusively" (para. 67). This leads to another reason why comparative methodology is undesirable in this case, which requires me to speak plainly. The passages I have just cited from the majority's reasons, and indeed the very notion of "abuse of right", would not be familiar, meaningful or even comprehensible to the vast majority of common law lawyers and judges. And yet, many of them would reasonably assume as many did when the language of "juristic reasons" entered the common law lexicon of unjust enrichment that there is legal significance in their use here, and that they must therefore familiarize themselves with these concepts or retain bijural assistance in order to competently represent their clients or adjudicate their cases. At the very least, common law lawyers applying the common law concepts under discussion here will presumably need to have an eye, as the majority does, to the *Civil Code of Québec*. How they would acquire the necessary familiarity, and the extent to which they must acquire it, is left unexplained.

169 These are not idle concerns, and on this point there is a certain reality that we must bear in mind. Few common law lawyers and judges in most provinces are sufficiently versed in French to read the sources of civil law concerning the abuse of right. And of those who are, fewer still will be trained in the civil law so as to understand their substance.

170 I confess that I am in no position to express a view on the correctness of the majority's proclamation that it, or this Court, is pursuing a "dialogue" between the civil and common legal systems. Indeed, it is not obvious to me what having such a "dialogue" means in the context of discharging our adjudicative responsibilities. But accepting that my colleagues understand themselves to be so engaged, I suggest with utmost respect that their dialogical pursuit should not occur at the expense of those who must know, understand and apply an aspect of one of those legal systems that the majority now renders opaque. It really comes down to this: the majority's unnecessary digression into external legal concepts will create practical difficulties on the ground by making the common law governing contractual relationships less comprehensible and therefore less accessible to those who need to know it, thereby increasing costs for all concerned. At a time when many are striving to remove old barriers that impede access to justice, I would not erect new barriers in the form of legal expression that bears little to no resemblance to the training and experience of those who help citizens navigate the legal system.

171 Even where a comparative analysis *is* appropriate, the analogy of the jigsaw puzzles must be borne in mind. It is simply not the case that "the common law and the civil law represent ... distinctive *ways of knowing the law*" (Kasirer J.'s reasons, at para. 71 (emphasis added)). They are not different *theories* of law. They are different *systems* of law. And because legal rules must originate from the system within which that rule will operate, comparative analysis must be undertaken with care and circumspection. This Court's statement in *Caisse populaire des Deux Rives*, at p. 1004, is apposite:

> ... apparent similarity of the fundamental rules should not cause us to forget that the courts have a duty to ensure that insurance law develops in a manner consistent with the rest of Quebec civil law, of which it forms a part. Accordingly, while the judgments of foreign jurisdictions, in particular Britain, the United States and France, may be of interest when the law there is based on similar principles, the fact remains that Quebec civil law is rooted in concepts peculiar to it, and while it may be necessary to refer to foreign law in some cases, the courts should only adopt what is consistent with the general scheme of Quebec law. [Emphasis added.]

172 The direction that civil law developments must be consistent with the overall civil law of Quebec applies with equal force when considering potential modifications to the common law. Maintaining the distinct character of each of Canada's legal traditions requires administering each system according to its own scheme of rules, and by reference to its own authorities (*Colonial Real Estate Co. v. Sisters of Charity* (1918), 57 S.C.R. 585 (S.C.C.), at p. 603; see also J. Dainow, "The Civil Law and the Common Law: Some Points of Comparison" (1967), 15 *Am. J. Comp. L.* 419, at pp. 434-35). It follows that any enrichment from another legal system must be incorporated only insofar as it conforms to the internal structure and organizing principles of the adopting legal system (F. Allard, *The Supreme Court of Canada and its Impact on the Expression of Bijuralism* (2001), at p. 9). Ultimately, the golden rule in using concepts from one of Canada's legal systems to modify the other is that the proposed solution must be able to completely and coherently integrate into the adopting system's structure (J.-L. Baudouin, "Mixed Jurisdictions: A Model for the XXIst Century?" (2003), 63 *La. L. Rev.* 983, at pp. 990-91).

173 This is of practical concern here. Analytically jamming the civilian concept of abuse of right regarding the termination of a contract into the common law is not the tidy and discrete affair that the majority appears to suppose. This is because the obligation of good faith in civil law imposes more onerous duties on the party terminating the contract than it does at common law. The Quebec Court of Appeal has explained the notion of abuse of right in the context of termination of a contract in the following way:

> [TRANSLATION] Up until now, the courts have sometimes sanctioned abuse of right in cases of malice. However, they have also sanctioned unilateral resiliation by a distributor for reasons found not to be within the spirit of the discretionary resiliation clause, or where the resiliation was improper, that is, without any valid reason, or without prior notice or without any sign of what was to come. These cases clearly illustrate the "moralization" of contractual relations by the doctrine of abuse of right: for it is not enough to resiliate a contract in a strictly lawful manner (in accordance with the language of a resiliation clause), it is also necessary to do so in a legitimate way. [Emphasis added.]
>
> (*Danny's Construction Co. c. Birdair inc.*, 2013 QCCA 580 (C.A. Que.), at para. 131 (CanLII), citing J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin with the collaboration of N. Vézina, at para. 125)

174 Even if we were to imagine that it *was* the exercise of the termination clause that led in this case to the breach of duty of honest contractual performance which, as I shall explain below, it was not *Bhasin* stipulates clearly that there is no duty to disclose information or intentions relevant to termination that flows from the common law duty of good faith. But under the civilian doctrine invoked by the majority, terminating a contract without disclosing intentions can constitute an abuse of right. While the majority acknowledges that it "do[es] not rely on the civil law here for the specific rules that would govern a similar claim in Quebec" (para. 73), this tends to affirm how inappropriate its comparative analysis is here. The majority either relies on a truncated and therefore distorted version of the civilian framework of abuse of right, or else opens the door to future "clarifications" (which would further undermine the integrity of the common law duty of honest performance as stated in *Bhasin*). Even on its own terms, then, the majority's invocation of abuse of right raises more questions than it claims to answer.

175 For all these reasons, I am of the respectful view that it is not appropriate to refer to, and rely upon, the doctrine of abuse of right in this case. This appeal calls upon this Court to straightforwardly apply the duty of honest performance, and nothing more. Transplanting the doctrine of abuse of right into the common law context is not only unnecessary here, doing so without reference to the broader context in which good faith operates in the common law will cause significant uncertainty.

(2) The Wrongful Exercise of a Right

176 The majority's reliance on the civilian doctrine of abuse of a right leads me to a final, substantive criticism: in focusing on the wrongful exercise of a right, it distorts the analysis described in *Bhasin* and elides the distinction between honest performance and good faith in the exercise of a contractual discretion.

177 The gravamen of a claim in honest performance is that a party made dishonest representations concerning contractual performance that caused its counterparty to suffer loss. It is *not* that a right was exercised in a way that was wrongful, abusive, or even dishonest. Here, for example, the complaint hinges on Baycrest's deceptive conduct *preceding* the exercise of the

termination clause. By relying on Baycrest's misleading representations, Callow missed the opportunity to bid on other contracts. The exercise of the termination clause is relevant only in the sense that it was the subject of the misrepresentation.

178 I recognize that, in *Bhasin*, Cromwell J. stated that the defendant breached the duty of honest performance when it "failed to act honestly with [the plaintiff] in exercising the non-renewal clause" (para. 103). This phrasing, however, mirrored the trial judge's finding that the defendant "acted dishonestly toward Bhasin in exercising the non-renewal clause" (*Bhasin v. Hrynew*, 2011 ABQB 637 (Alta. Q.B.), 526 A.R. 1, at para. 261, quoted in *Bhasin*, at para. 94). Elsewhere, Cromwell J. is clear that the breach "consisted of [the defendant's] failure to be honest with [the plaintiff] about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal" (para. 108). This reflects the general framework that he describes, i.e., that the duty of honest performance "is a simple requirement not to lie or mislead the other party about one's contractual performance" (para. 73).

179 Maintaining analytical clarity about the source of the breach the dishonesty that preceded the termination, and not the termination itself is important for two reasons. First, a breach of the duty of honest performance may arise from many aspects of performance. The general rule enunciated in *Bhasin* provides a clear standard that can be applied across different contexts, including to the facts of this appeal. There is no benefit in developing a separate analysis that responds narrowly to dishonesty concerning the exercise of a contractual right. Doing so will only make the law more confused and difficult to apply.

180 Secondly, the source of the breach distinguishes the duty of honest performance from the duty to exercise contractual discretion in good faith. As discussed above, where a breach of the latter duty is alleged, the focus of the analysis is whether the defendant was entitled to exercise its discretion in the way that it did. By shifting the focus of the honest performance analysis to the manner in which a right was exercised, the majority blurs the boundaries between these two distinct duties. Indeed, it contends that "the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing, at least in circumstances like ours, on the wrongful exercise of a contractual prerogative" (para. 51).

181 We are bound by *Bhasin* to treat the duty of honest performance as conceptually distinct from the duty to exercise discretionary powers in good faith (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.), at para. 65). This is not simply a matter of *stare decisis* and incremental legal development (although it is at least those things); there is also the practical concern that blurred and ambiguous treatment of these two duties has a meaningful impact on the outcome for contracting parties. Contrary to the majority's suggestion, the wrong at issue in each category of cases is distinct, and the damages available differ accordingly. The award for a breach of the duty of honest performance addresses the effect of the *dishonesty*. In contrast, the award for a breach of the duty to exercise discretion in good faith addresses the effect of the *exercise of discretion itself*. Placing both duties under the umbrella of the "wrongful exercise of a contractual right" obscures these distinctions and thus represents an unfortunate departure from *Bhasin*.

IV. Conclusion

182 I would allow the appeal, set aside the Court of Appeal decision, and reinstate the judgment of the trial judge with costs in this Court and the courts below.

***Côté J.* (dissenting):**

183 What constitutes actively misleading conduct in the context of a contractual right to terminate without cause? Where should the line be drawn between active dishonesty and permissible non-disclosure of information relevant to termination? Does a party to a contract have an obligation to dissuade his counterparty from entertaining hopes regarding the duration of their business relationship? These are the questions raised by this appeal.

184 In this case, the respondents ("Baycrest") bargained for a right to terminate *at any time* and *for any other reason than unsatisfactory services* upon giving 10 days' notice. Baycrest made the decision to terminate, but it chose to wait before sending the notice, as it did not want to jeopardize the performance of other work that was being done by the appellant ("Callow", referring interchangeably to C.M. Callow Inc. and to its principal, Mr. Christopher Callow). In the meantime, Baycrest became

aware that its counterparty was entertaining hopes of a renewal, although it did not say or do anything that materially contributed to those hopes. Baycrest did nothing to discourage them; such conduct may not be laudable, but it does not fall within the category of "active dishonesty" prohibited by the contractual duty of honest performance.

I. Issue on Appeal

185 Both of my colleagues seem to agree on the following propositions.

186 First, this case concerns solely the duty of honest performance and not the duty to exercise discretionary powers in good faith (these two duties were distinguished in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.), at paras. 47, 50 and 72-73).

187 Second, the duty of honest performance "means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" (*Bhasin*, at para. 73).

188 Third, there is no duty to disclose information or one's intentions with respect to termination (*Bhasin*, at paras. 73 and 87).

189 Fourth, there is no need to extend the law by recognizing a new duty of good faith relating to "active non-disclosure".

190 I take it we all agree with these premises. Therefore, the issue, when properly framed, bears on the distinction referred to in *Bhasin* (at paras. 73 and 86-87) between actively misleading conduct and permissible non-disclosure. In the context of this case it comes down to this: did Baycrest lie or otherwise knowingly mislead Callow into thinking that there was no risk it would exercise its right to terminate the winter agreement for any other reason than unsatisfactory services? The answer to this question is no.

191 Before turning to my analysis, I wish to express my substantial agreement with Justice Brown's observations insofar as they pertain to the role of external legal concepts. Justice Kasirer states at paragraph 44 of his reasons that "[n]o expansion of the law set forth in *Bhasin* is necessary" to dispose of this appeal. However, he then embarks on, and I say this respectfully, an unnecessary comparative exercise between the civil law and the common law under the pretext of "dialogue". I am perplexed by the virtues of "dialogue" in a case like this one where no gaps in the common law need to be filled and no rules need to be modified. I do not see why we should adopt such an approach, one that provides no palpable benefits and that is also arbitrary and unpredictable.

192 That being said, I believe that the common law as it now stands does not support the result my colleagues arrive at. I am afraid that the unnecessary debate about comparative legal exercises may have diverted attention from the facts of this case as they are.

II. Ambit of the Duty of Honest Performance

A. Context in Which the Duty Was Created

193 In *Bhasin*, the Court unanimously introduced the contractual duty of honest performance as a "new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts" (para. 72). Cromwell J. stressed that this was no more than a "modest, incremental step" (para. 73; see also paras. 82 and 89), with the duty of honest performance being a "minimum standard" (para. 74).

194 In Cromwell J.' opinion, the new duty would "interfer[e] very little with freedom of contract" (para. 76); so little that he thought such interference would be "more theoretical than real" (para. 81). On the subject of the organizing principle of good faith from which it grew, Cromwell J. stated:

> The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of

> economic self-interest .... The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties. [para. 70]

195 Cromwell J. also expressed specific concerns relating to the clarity of the duty, its effect on commercial certainty and other practical implications (at paras. 59, 66, 70-71, 73, 79-80 and 86-87). He endeavoured to explain what the new duty was *not*:

> The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. [Emphasis added; para. 86.]

196 Turning to a positive description, he stressed that the duty of honest performance *was* a "simple requirement" not to lie or knowingly mislead about matters directly linked to performance of the contract (para. 73).

197 The requirement that parties not lie is straightforward. But what kind of conduct is covered by the requirement that they not otherwise knowingly mislead each other? Absent a duty to disclose, it is far from obvious when exactly one's silence will "knowingly mislead" the other contracting party. Are we to draw sophisticated distinctions between "mere silence" and other types of silence, as Brown J. suggests? If that be so, I wonder how a contracting party — on whom, I note, the law imposes *neither* "a duty of loyalty or of disclosure" *nor* a requirement "to forego advantages flowing from the contract" (*Bhasin*, at para. 73) — is supposed to know at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract. With the greatest respect, I do not believe such casuistry is compatible with the "simple requirement" Cromwell J. meant to set out in *Bhasin*.

198 As Cromwell J. put it, "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" (para. 86 (emphasis added)). He added that "*United Roasters* makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is *quite different*, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87 (emphasis added)). These words should be taken at face value. The duty of honest performance should remain "clear and easy to apply" (para. 80).

B. Permissible Non-disclosure

199 It must be borne in mind that all obligations flowing from the duty of honest performance are "negative" obligations (P. Daly, "La bonne foi et la common law: l'arrêt *Bhasin c. Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 89, at pp. 101-2; see also Kasirer J.'s reasons, at para. 86). Extending the duty beyond that scope would "detract from ... certainty in commercial dealings" (*Bhasin*, at para. 80).

200 Therefore, silence cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak. Such an obligation does not arise simply because a party to a contract realizes that his counterparty is operating under a mistaken belief.

201 Absent a duty of disclosure, that is, absent any kind of free-standing positive obligation flowing from the duty of honest performance, a party to a contract has no obligation to correct his counterparty's mistaken belief unless the party's active conduct has *materially* contributed to it (see, in a different context, T. 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 *Can. Bus. L.J.* 1, at pp. 12-13).

202 What constitutes a material contribution will obviously depend upon the context, which includes the nature of the parties' relationship (see Brown J.'s reasons, at para. 133) as well as the relevant provisions of the contract. But the reason underlying this requirement is a practical one that is consistent with *Bhasin*'s emphasis on commercial expectations (at paras. 1, 34, 41, 60 and 62): parties that prefer not to disclose certain information — which they are entitled not to do — are not required to adopt a new line of conduct in their contractual relationship simply because they chose silence over speech.

203 It cannot be that the law, on the one hand, allows contracting parties not to disclose information but, on the other hand, negates that possibility by imposing a standard of conduct that is at odds with the spontaneous attitudes — such as evasiveness and equivocation — parties might have when their conversations bear precisely on what they wish not to disclose.

204 Even though parties who make that choice must be careful with what they say or do, especially if they become aware that their counterparties are operating under a mistaken belief, they should not be asked to behave as if their actions were being scrutinized under a microscope to determine whether they have contributed to that mistaken belief. Such a requirement would be unacceptable.

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

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

207 In sum, the "minimum standard" of honesty imposed by the duty of honest performance has to be consistent with the other principles set out in *Bhasin*. It also has to be realistic and not overly formalistic. Absent a duty of disclosure, a party has no obligation to dissuade his counterparty from persisting in a mistaken belief. This does not mean that the party may induce or reinforce such a belief by significant positive actions or representations. There is an obligation to correct this mistaken belief if the party's active conduct has *materially* contributed to it.

III. Analysis

208 Callow and Baycrest entered into two two-year contracts: a winter agreement covering mostly snow removal services for the period from November 1, 2012 to April 30, 2014 and a summer maintenance services agreement for the period from May 1, 2012 to October 31, 2013. The winter agreement, which is at issue here, contained the following provision:

> 9. If the Contractor [i.e. Callow] fails to give satisfactory service to the Corporation [i.e. Baycrest] 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 termination, all obligations of the Contractor shall cease and the Corporation shall pay to the Contractor any monies due to it up to the date of such terminations. [Emphasis added.]
>
> (A.R., vol. III, at p. 10)

209 In March or April 2013, Baycrest decided to terminate the winter agreement. On September 12, 2013, it gave Callow 10 days' notice that it was terminating the contract. In the meantime, Baycrest had learned that Callow was performing free extra landscaping work and that he was under the impression the winter agreement would not be terminated (trial reasons, 2017 ONSC 7095 (Ont. S.C.J.), at para. 48 (CanLII)).

210 It can easily be understood from these circumstances that Callow was "shocked" by the termination. Callow believed that, "if there was a problem, he would have expected [Baycrest] to bring it to his attention like [it] had done in the past" (trial reasons, at para. 49). Baycrest's behaviour was certainly discourteous and cavalier. Yet, that is not the question here. The question is whether Baycrest materially contributed to Callow's mistaken belief that the contract would not be terminated. If Baycrest did, then it had an obligation to correct that mistaken belief in accordance with its duty of honest performance. Otherwise, it had no obligation to disclose anything.

211 Before our Court, Callow acknowledged that by entering into the winter agreement, he had taken the risk that Baycrest "may terminate [the contract], but only disclose the termination decision on 10 days' written notice" (transcript, at p. 11; see also C.A. reasons, 2018 ONCA 896, 429 D.L.R. (4th) 704 (Ont. C.A.), at para. 14). I am of the view that according to the terms of the winter agreement, Callow could have found himself in the exact same situation regardless of Baycrest's behaviour during the spring and summer of 2013. Such a possibility was in fact inherent in the contract he had bargained for.

212 Callow essentially submits that Baycrest's active conduct led him to believe that the winter agreement was no longer at risk of being terminated despite the clear wording of the termination provision. He stresses the following points:

(1) Baycrest deliberately kept its decision secret because it did not want to jeopardize the performance of the summer agreement;

(2) Baycrest showed satisfaction with Callow's services;

(3) Callow had discussions with Mr. Peixoto and Mr. Campbell regarding the renewal of the winter agreement;

(4) Baycrest accepted Callow's "freebie" work; and

(5) Baycrest was aware of Callow's mistaken belief.

213 In my view, the appeal should be dismissed.

214 The trial judge's understanding of "active dishonesty" is tainted by an error of law. She did not consider the principle that, in order to amount to a breach of the duty of honest performance, any active dishonesty had to be "directly linked to the performance of the contract" (*Bhasin*, at para. 73). In assessing Baycrest's conduct, she did not inquire into whether Baycrest had "lie[d] or otherwise knowingly misle[d]" Callow about the exercise of its right to terminate the winter agreement for *any other reason* than unsatisfactory services. This explains why she wrongly insisted on, amongst other things, the need to "address the alleged performance issues" (para. 67) despite the fact that the winter agreement could be terminated even if Callow's services were satisfactory.

215 Furthermore, although the trial judge seems to have been aware that there was no duty of disclosure (para. 60), she nonetheless found that Baycrest had acted in bad faith by "withholding the information to ensure Callow performed the summer maintenance services contract" (para. 65; see also para. 76). She never asked herself whether Baycrest had explicitly or implicitly said or done anything that could have misled Callow into thinking that the contract was at no risk of being terminated for any other reason than unsatisfactory services. It is clear from reading the trial judge's reasons as a whole that the "representations" she found had been made by Baycrest (at paras. 65, 67 and 76) were not directly linked to the performance of the winter agreement. In sum, the trial judge's misunderstanding of the applicable legal principles vitiated the fact-finding process.

216 Baycrest had bargained for a right to terminate its winter agreement *for any reason* and *at any time* upon giving 10 days' notice. Its duty of honest performance did not require it to "forego" this undeniable "advantag[e] flowing from the contract" (*Bhasin*, at para. 73). It had no obligation to tell Callow about its decision to terminate the winter agreement until 10 days before the termination was to take effect, as the contract stipulated. Even after Baycrest became aware of Callow's mistaken belief, it had no obligation to refuse the "freebie" work Callow was performing on his own initiative or to correct this mistaken belief he was operating under. Such an obligation would have arisen only if Baycrest had contributed materially to that mistaken belief by inducing it or reinforcing it. In light of the evidence and the trial judge's findings, I am not convinced that Baycrest had done so.

217 I do not have the same reading as my colleague Kasirer J. about certain of the trial judge's findings of fact (para. 100). These findings expressed in very broad terms should not be insulated from the reasons as a whole and from the evidence that was before the trial judge. For instance, my colleague writes that "Mr. Peixoto made statements to Mr. Callow suggesting that a renewal of the winter maintenance agreement was likely" (para. 95), and he considers that to be a "key finding" (para. 96). However, the trial judge's finding pertained to *what Callow had thought*, not to *what Baycrest had said* (trial reasons, at para.

41), which is something quite different. Indeed, as I demonstrate below, the evidence supporting this "key finding" shows that Callow's thoughts regarding a renewal of the winter agreement had nothing to do with what Baycrest said to him.

218 I now turn to the application of the foregoing legal principles to the facts of this case.

A. Discussions About Renewal

219 Callow argues that Baycrest materially contributed to his mistaken belief by discussing a possible renewal. Indeed, the renewal issue is central in this appeal. It is not disputed that unlike the contract at issue in *Bhasin*, the winter agreement did not contemplate any automatic renewal; it only contemplated termination. Since renewal was not a term of the winter agreement, it cannot be considered "performance of the contract" within the meaning of *Bhasin*. For Callow's claim to succeed, any breach of the duty of honest performance must pertain to termination.

220 Both of my colleagues accept Callow's submission that it can be inferred from the discussions about renewal that the winter agreement was not in danger of termination. I would agree with such a proposition in the following circumstances: if one party leads another to believe that their contract will be renewed, it follows that the other party can reasonably expect their business relationship to be extended rather than terminated. But an inference to that effect cannot be drawn in the abstract. In order to infer that one party, through discussions about renewal, led the other party to think that there was no risk their existing agreement would be terminated, the inference-drawing process must obviously take into account the nature of the risk at stake and what was actually communicated during those discussions. Otherwise, the inference would entail a palpable and overriding error that would be subject to appellate review (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 22-23).

221 Here, s. 9 of the winter agreement contemplated that the agreement might be terminated (1) for unsatisfactory services, or (2) for any other reason than unsatisfactory services. Did Baycrest, by discussing renewal, communicate anything that might have led Callow to believe there was no risk the winter agreement would be terminated for *any other reason* than unsatisfactory services? The trial judge described the discussions between the parties as follows:

> During the spring and summer of 2013, Callow performed regular weekly grass cutting, garbage pick-up and 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.
>
> After his discussions with Mr. Peixoto and Mr. Campbell, Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and they were satisfied with his services. [Emphasis added; paras. 40-41.]

222 The trial judge, who found Callow to be credible, relied on the following part of his testimony:

> Q. Now is probably a good time to — well tell me about these discussions. Let's hear what discussions were you 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?
>
> A. Kyle Campbell I ran into once or twice on site and we had discussions as well too.
>
> Q. Okay, and what was 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. [Emphasis added.]

(A.R., vol. II, at pp. 67-68)

223 Apparently not much importance was attached to the renewal issue at trial. The amended statement of claim did not even address this issue; it instead focused on Baycrest's knowledge, Callow's "freebie" work and the provision of satisfactory services. Even though the trial judge did consider renewal, I note that her findings in this regard bore on Callow's *mistaken belief* that the winter agreement was likely to be renewed (at para. 41); they did *not* bear on anything Baycrest actually did or said that would have misled Callow into that belief.

224 What Callow thought is one thing; what Baycrest said or did is another. According to Callow himself, Mr. Peixoto did not propose anything on behalf of Baycrest. Mr. Peixoto's statement that "I'm sure they'll be up for it, let me talk to them" (A.R., vol. II, at p. 67) clearly meant that despite his favorable opinion, he was not the one making the decision and that Baycrest had not even considered the mere possibility of a renewal at the time. It certainly could not be inferred from this statement that a renewal was likely. Callow's testimony does not suggest that he was misled into believing that Baycrest was actually contemplating a renewal — Mr. Peixoto's response instead presupposes the contrary — nor does it suggest that Baycrest did or said anything to negate the risk Callow took that his contract might be terminated for any other reason than unsatisfactory services. Indeed, Callow insisted that he had believed a renewal was likely because "there was no reason not to, they were satisfied with the service, they were happy with it" (A.R., vol. II, at p. 68).

225 In his examination for discovery, Callow had given the same reason for thinking his winter agreement would be renewed, that is, because "there was no reason not to" (A.R., vol. II, at p. 49). He did *not* refer to his discussions with Mr. Peixoto or Mr. Campbell. When asked if anyone had told him that his contract would be renewed, he said he could not recall. The evidence does *not* establish that Mr. Peixoto or Mr. Campbell initiated the discussions about renewal. On the contrary, it suggests that Callow did. When cross-examined about his "freebie" work, Callow admitted that, although he was under the mistaken belief that his contract was likely to be renewed, he was in fact only "*hopeful*" that it would be. *Nowhere* in his testimony did he suggest that he had been given *any* information that could mislead him into believing that Baycrest was seriously contemplating a two-year renewal instead of termination.

226 The trial judge referred to "active communications ... between March/April and September 12, 2013, which deceived Callow" (para. 66), and to "representations in anticipation of the notice period" (para. 67; see also paras. 65 and 76). But those references must be read in light of the evidence and the reasons as a whole. Even though the trial judge made credibility findings against Mr. Peixoto and Mr. Campbell and credibility findings in favour of Callow, the evidence pertaining to renewal supports only a very limited number of inferences regarding termination.

227 At most, it can be said that Mr. Peixoto and Mr. Campbell did not dissuade Callow from entertaining hopes when they had a chance to do so. But, and most importantly, they did not suggest that Baycrest was actually contemplating a continuation of their business relationship. If that had been the case, then I would agree that it might have been justifiable to infer that Callow had been led to believe there was no risk that his existing contract would be terminated before its term. But that was simply not the case here. In my view, the trial judge did not infer from the discussions about renewal that Baycrest had done or said anything to negate the risk that the winter agreement would be terminated for any other reason than unsatisfactory services. Had she made such an inference, it would be subject to appellate review, as it would not be supported by the evidence. Given the context discussed above, Mr. Peixoto's and Mr. Campbell's vague and evasive declarations did not materially contribute to Callow's mistaken belief that would have required Baycrest to disclose additional information.

B. Baycrest's Satisfaction With Callow's Services

228 The trial judge placed great importance on the fact that Callow's services had been satisfactory and that Baycrest's conduct had given him no reason to think otherwise (paras. 22, 27, 29-30, 34-36, 39, 41, 46-47 and 55). I note there is no finding that Baycrest communicated any particular sign of satisfaction pertaining *to the performance of the winter agreement*

past March 19, 2013. That being said, there is nothing dishonest about Baycrest terminating the winter agreement after showing its satisfaction with the quality of Callow's work.

229 Further, the parties had explicitly contemplated that Baycrest could terminate the winter agreement even if it was satisfied with Callow's performance, as the contract provided that Baycrest could exercise its termination right for any other reason than unsatisfactory services. Thus, positive feedback about Callow's services cannot justify Callow's mistaken belief that the contract would not be terminated.

C. Callow's Mistaken Belief That the Winter Agreement Would Remain in Effect

230 The trial judge found that Baycrest had "continu[ed] to represent that the contract was not in danger" (paras. 65 and 76; see also para. 13). This finding was essentially grounded on the overall signs of satisfaction communicated by Baycrest, on its acceptance of the "freebie" work and on Callow's mistaken belief following the discussions pertaining to renewal. As I have already explained, nothing here required Baycrest to disclose its intent to terminate the winter agreement.

231 What the trial judge *did not find* is also relevant. She did *not* find that Baycrest had decided to forego its right to terminate the winter agreement. She did *not* find that Baycrest had lied to Callow. She did *not* find that Baycrest had negated the risk taken by Callow that his contract would be terminated for any other reason than unsatisfactory services. Lastly, she did not clearly indicate why Callow so firmly believed "that his winter maintenance services contract would remain in place during the following winter" (para. 13).

232 Callow's belief that there was no risk Baycrest would exercise its termination right was based on two things. First, on the positive feedback he had received regarding his services. In his words, Baycrest was "happy with it". However, this is not very relevant in a context in which Baycrest could terminate the winter agreement for any other reason than unsatisfactory services. Second, and most importantly, Callow's mistaken belief was based on an erroneous interpretation of the winter agreement.

233 At trial, Callow testified that he was aware of the termination clause, but that he thought the two-year term made it unenforceable:

> Q. ... So, in that letter, there is a — a statement that the termination was in breach of the agreement. So, my question for you is, at that point in time what was your understanding, why was the termination in breach of the agreement?
>
> A. Because they asked me, and we entered into a two year agreement, to provide services both summer and winter; and I did so at a reduced rate. I upheld my end of the bargain which was to perform that work at that reduced rate. They — and which I might add, I was not paid for, the landscaping and the final aspect of it, they were supposed to pay me. They didn't do it. And I continued to fulfill my contractual obligations. I expected nothing less than the same from them.
>
> Q. So — so, when you — because you talk — but you knew that in the winter contract, there was that termination clause.
>
> A. They had a clause written in there. I didn't believe it be enforceable because we had a two year contract. That's the whole idea to a two year contract. You have contract for two years. I provide services for two years and they pay me for those services. [Emphasis added.]

(A.R., vol. II, at p. 120; see also pp. 106-7.)

234 Even though that was not the position he took in this Court, Callow's uninformed interpretation of the termination provision casts an important light on the reason why he did not believe there was a risk the winter agreement would be terminated for any other reason than unsatisfactory services. The evidence does not suggest that Baycrest said or did anything that could have negated that risk, nor does it suggest that Baycrest had anything to do with Callow's erroneous interpretation of the termination provision. I am therefore of the view that Baycrest was not required to correct Callow's mistaken belief by disclosing information it decided not to disclose.

IV. Conclusion

235 The trial judge erred in concluding that Baycrest had to address performance issues or provide prompt notice prior to termination (para. 67). She did not inquire into whether Baycrest had made any representations that had misled Callow into thinking Baycrest would not terminate the winter agreement for any other reason than unsatisfactory services. In my view, the trial judge extended the ambit of the duty of honest performance in a way that was not consistent with the other principles set out in *Bhasin*.

236 In sum, the narrow issue in this appeal comes down to this: Did Baycrest lie or otherwise knowingly mislead Callow into thinking that there was no risk it would exercise its right to terminate the winter agreement for any other reason than unsatisfactory services? There were no outright lies. Baycrest was aware of Callow's mistaken belief that his services would be required for the upcoming winter. But Baycrest never forewent the contractual advantage it had of being able to end the winter agreement at any time upon 10 days' notice. Nor did Baycrest say or do anything that materially contributed to Callow's mistaken belief that the winter agreement would not be terminated for any other reason than unsatisfactory services. Regardless of how its conduct is characterized, Baycrest had no obligation to correct Callow's mistaken belief.

237 To be clear, the result I arrive at should not be interpreted as meaning that Baycrest's behaviour was appropriate or that Callow has no recourse. It means that Callow's recourse cannot be based on a breach of the duty of honest performance. The trial judge did in fact find that Baycrest had been unjustly enriched by the "freebie" work (at para. 77), but she stated that Callow had not provided evidence of his expenses. That question exceeds the scope of this appeal, however.

238 I would therefore dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 Professor Gutteridge pointed in particular to the influence of *Bradford (City) v. Pickles*, [1895] A.C. 587 (U.K. H.L.) and, in the contractual setting, *Allen v. Flood* (1897), [1898] A.C. 1 (U.K. H.L.), quoting from p. 46 of the latter judgment: "... any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel, or mean the motive may be which determines the enforcement of the right".

2021 ABQB 137
Alberta Court of Queen's Bench

CWB Maxium Financial Inc v. 2026998 Alberta Ltd

2021 CarswellAlta 392, 2021 ABQB 137, [2021] 7 W.W.R. 299, [2021] A.W.L.D. 2089, [2021] A.W.L.D. 2090, [2021] A.W.L.D. 2091, [2021] A.W.L.D. 2092, [2021] A.W.L.D. 2093, [2021] A.W.L.D. 2126, [2021] A.W.L.D. 2127, [2021] A.W.L.D. 2128, [2021] A.W.L.D. 2135, [2021] A.W.L.D. 2152, 25 Alta. L.R. (7th) 3, 331 A.C.W.S. (3d) 229, 88 C.B.R. (6th) 196

CWB Maxium Financial Inc. and Canadian Western Bank (Plaintiffs) and 2026998 Alberta Ltd., Grandin Prescription Centre Inc., 517751 Alberta Ltd., 1396987Alberta Ltd., 1396966 Alberta Ltd. and Harold Douglas Loder (Defendants)

Douglas R. Mah J.

Heard: January 11-12, 2021
Judgment: February 23, 2021
Docket: Edmonton 2003-04457

Counsel: Terrence M. Warner, Spencer Norris, for Plaintiffs
Jim Schmidt, for Defendants
Ryan F.T. Quinlan, for Interim Receiver, MNP Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Insolvency

Headnote

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Petition by only creditor

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — Application of good faith doctrines in contractual context may lead to finding that transgressing party was liable in damages for breach of contract, and adopting those doctrines to inform good faith requirement in s. 4.2 of Bankruptcy and Insolvency Act (BIA) may lead to invocation of broad discretionary authority to grant "any order that it considers appropriate in the circumstances" — Secured creditor seeking Receivership Order was "interested person" subject to good faith requirement, and its conduct in events preceding application was covered by that requirement, where that conduct was factually and temporally connected to proceedings, i.e. such conduct is "with respect to" BIA proceeding — Remedy, at least in this case and given broad discretion

requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 78; Belobaba; ***Greenberg v. Meffert*** (1985), 1985 CanLII 1975(ON CA), 50 O.R. (2d) 755 (C.A.), at p. 764; Gateway Realty, at para. 38, *per* Kelly J.; ***Shelanu Inc. v. Print Three Franchising Corp***. (2003), 2003 CanLII 52151 (ON CA), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: ***Wallace***, at para. 98; ***Honda Canada***, at para. 58.

53 A closer analogy to the present case is found in the Supreme Court of Canada's recent decision in *CM Callow Inc v Zollinger*, 2020 SCC 45 where the Court agreed with the trial judge who found that the defendant condo corporations (through their agent Zollinger) had by means of omission or silence misled the plaintiff into believing its snow removal contract would be renewed, when in actuality the decision had been made months earlier to terminate it. By making the plaintiff believe that the contract would be renewed, the defendants induced the plaintiff to provide an entire summer season of free services as an incentive for renewal.

54 In *Callow*, the Court extended the general duty of honesty in contractual performance to the exercise of discretionary decisions, even where the decision-maker has an absolute right by contract to make the decision.

55 In speaking for the majority, Kassirer J helpfully observes with regard to modes of dishonesty:

> [90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — 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. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., ***Yam Seng Pte Ltd. v. International Trade Corp. Ltd.***, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (Q.B.), at para. 141).
>
> [91] At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half- truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies. ...

56 The relationship between lender and debtor is contractual. The remedy of receivership sought from the Court is a contractual component and its initiation is subject to the exercise of the lender's discretion, although the legal test is statutory. The good faith to be exhibited must be "in respect of" *BIA* proceedings which, as I concluded, encompasses not only conduct in the course of such proceedings but also the conduct that precipitated the proceedings, as it relates to the indebtedness in question and the relationship between lender and borrower.

57 The application of good faith doctrines in the contractual context may lead to a Court finding that the transgressing party is liable in damages for breach of contract. Adopting those doctrines to inform the good faith requirement in section 4.2 of the *BIA* may lead to the Court invoking a broad discretionary authority to grant "any order that it considers appropriate in the circumstances", which presumably includes denial of the requested receivership order.

58 At least so far as a creditor invoking insolvency proceedings is concerned, I find it appropriate to import common law concepts stated in *Bhasin* and developed in *Callow* [1] , as cited above, to give content to the notion of "good faith" as found in section 4.2 of the *BIA*. I temper that statement only by saying that the Court must also remain cognizant of and seek to advance the policy objectives underlying the *BIA*.

59 I summarize and conclude on this point as follows:

- Interested persons in proceedings under the *BIA* are statutorily required to act in good faith with respect to those proceedings.

• A secured creditor seeking a Receivership Order is an "interested person" subject to the good faith requirement, and its conduct in events preceding the application is covered by that requirement, where that conduct is factually and temporally connected to the proceedings, i.e. such conduct is "with respect to" *BIA* proceedings.

• Based on previous caselaw, the statutory requirement of good faith in the insolvency context requires that an interested party not bring or conduct proceedings for an oblique motive or improper purpose.

• Further, since there is no statutory definition of "good faith", the common law relating to the organizing principle of good faith in contractual performance may be used to inform the good faith requirement in section 4.2 of the *BIA* in the present circumstances, that is, the relationship between lender and borrower being essentially contractual in nature and, in this case, the contract includes a right on the lender's part to appoint a receiver or to seek such appointment.

• The duty of good faith, in this case, requires the parties not to lie to or mislead the other with respect to the status of the loan or the state of the lender-borrower relationship. It does not impose a duty of loyalty or disclosure, or require the subordination of one's own interests to the other, and falls short of a fiduciary duty.

• Whether dishonesty has occurred in a given case is fact-specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence.

• A remedy, at least in this case and given the broad discretion of the Court under s. 4.2, may include denial of the Receivership Order.

• The conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the *BIA*.

60 I emphasize that I am dealing here only with a situation of allegations of lack of good faith in respect of a secured lender's conduct in the events that precipitated the bringing of an application to appoint a receiver. The content or degree of the good faith requirement will necessarily vary with different *BIA* actors and different facts.

2. Section 66(1) of the PPSA

61 The defendants also cite and rely on section 66(1) of *PPSA*, which provides that all rights, duties or obligations arising under a security agreement must be exercised or discharged in good faith and in a commercially reasonable manner. Again, there is no statutory guidance as to what is meant by "good faith". The authorities have considered the good faith requirement in section 66(1) of Alberta's *PPSA* in these contexts:

• Whether a supposed *bona fide* purchaser for value had a role in improperly discharging a true secured creditor's security interest registration, so as to acquire clear title to stolen trucks, was a question of good faith for determination at trial: *E Dehr Delivery Ltd v Dehr* 2018 ABQB 846 at para 71;

• The duty informs the exercise of a secured party's manner of disposing of the collateral: *Edmonton Kenworth Ltd v Kos* 2018 ABQB 439 at paras 80-81; and whether such realization is provident or improvident: *Farm Credit Canada v Fenton* 2008 ABQB 268 at paras 11-16;

• The good faith requirement applies to the way a Court-appointed Receiver conducts a bid process: *Cobrico Developments Inc v Tucker Industries Inc* 2000 ABQB 766 at para 35;

• Professor Rod Wood gives this example in his 2017 paper "A Guide to the Alberta Personal Property Act" [2] at para 8.2.3:

> Subsection 66(1) imposes an obligation on parties to act in good faith and in a commercially reasonable manner. A failure to meet the good faith standard might occur where the secured party misled the other secured party into thinking that its security interest was properly perfected (by misrepresenting the name of the debtor) or by performing some

2020 ABQB 809
Alberta Court of Queen's Bench

Bellatrix Exploration Ltd (Re)

2020 CarswellAlta 2545, 2020 ABQB 809, [2020] A.J. No. 1453, [2021] A.W.L.D. 478, [2021] A.W.L.D. 481, [2021] A.W.L.D. 483, [2021] A.W.L.D. 568, 327 A.C.W.S. (3d) 166, 86 C.B.R. (6th) 191

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

B.E. Romaine J.

Judgment: December 22, 2020
Docket: Calgary 1901-13767

Counsel: Kelly Bourassa (agent), James Reid (agent), for National Bank of Canada
Robert J Chadwick, Caroline Descours, for Bellatrix Exploration Ltd.
Howard A Gorman, Q.C., Gunnar Benidiktsson, for BP Canada Energy Group LLC
Joseph G.A. Kruger, Q.C., Robyn Gorofsky, for Monitor, Pricewaterhousecoopers Inc.

Subject: Civil Practice and Procedure; Insolvency; Restitution

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Disclaimer provisions did not require performance of contract — Rather, these provisions provided opportunity for orderly termination of contract when necessary.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Corporation had no right to set-off either legal or equitable — Corporation's damages arose from pre-filing contract — Company had not violated Act process — Court was reluctant to interfere with contract between parties — Continuation of stay would not prejudice corporation.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer

3. Bad Faith

99 BP also relies on section 18.6 of the CCAA, a new provisison that provides that any interested person in any proceedings under the *Act* shall act in good faith with respect to the proceedings, and that if it is satisfied that an interested person fails to act in good faith, the Court may make the appropriate order. The duty of acting in good faith is not a new duty for a CCAA debtor: sections 11.02(3), 33(3), 50(12), 50.4(11) and 65.12(2)

100 As I have noted previously, BP has not established any wrongful conduct by Bellatrix, which has merely used the tools available to it under the CCAA. Bellatrix was faced with an uneconomic agreement that it could not afford to perform while attempting to restructure. Bellatrix advised BP at an early stage of the proceedings that, in the circumstances, the agreement would never be accepted by a purchaser of Bellatrix's assets, which BP as a sophisticated party would likely have recognized. BP had the option of terminating the agreement as an EFC and exercising its right to set-off after termination, but chose the option of maintaining that Bellatrix was required to continue to perform the agreement.

101 While Bellatrix breached the GasEDI Agreement by non-performance, it has been transparent and candid throughout with respect to its position and conduct. Although it did not abide by the statutory 30 days notice under its notice of disclaimer, that was after BP refused to accept the disclaimer and advised Bellatrix of its view that the agreement was an EFC.

102 It is not unusual for a CCAA debtor to fail to perform uneconomic ongoing monthly contracts, both before and after filing, whether formally disclaimed or not, and such failure to perform is not per se bad faith.

103 The December payment has been held in trust pending a resolution of the issues of set-off and priority, so Bellatrix has not failed to act in good faith with respect to the payment. The timing of the disclaimer notice, while strategic, was not bad faith conduct, and Bellatrix has not, as alleged by BP, misled the Court or failed to comply with a Court order.

104 The Monitor has stated that it is satisfied that Bellatrix has acted in good faith throughout the proceedings.

105 As noted by Dr. Janis Sarra in "La bonne foi est une considération de base — Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", Annual Review of Insolvency Law, eds Janis Sarra & Barbara Romaine, Toronto: Thomson Reuters Canada, 2014:

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.

106 Bellatrix has not exhibited conduct that would fall within these categories and has not acted in bad faith.

107 The First Lien Lenders and Bellatrix point out that BP failed to allege that Bellatrix was not acting in good faith through four stay applications, and only raised the allegation at the end of August, 2020. However, BP responds that, as Bellatrix as a concession to BP agreed to hold back an amount from the sale proceeds to cover BP's damages claim, it had no need to object to the stay extension. While I have not found bad faith by Bellatrix, I accept that BP's failure to object to the stay does not preclude its claim of bad faith in the circumstance.

4. Delay

108 The First Lien Lenders and Bellatrix submit that it would be inequitable to grant BP the super-priority it seeks for damages in priority to the stakeholders of Bellatrix.

109 They note that BP initially applied for various forms of relief, including orders directing Bellatrix to resume performance of the GasEDI Agreement and to remedy any existing default, but ultimately only pursued the issue of characterization of the GasEDI Agreement as an EFC. While BP may have been constrained by time limits in its initial application heard on January

2024 SCC 39, 2024 CSC 39
Supreme Court of Canada

Québec (Procureur général) c. Pekuakamiulnuatsh Takuhikan

2024 CarswellQue 13564, 2024 CarswellQue 13563, 2024 SCC 39, 2024 CSC 39, 2024 A.C.W.S. 4384, 498 D.L.R. (4th) 1

Attorney General of Quebec (Appellant) and Pekuakamiulnuatsh Takuhikan (Respondent) and Attorney General of Canada, Attorney General of Ontario, Attorney General of Saskatchewan, Attorney General of Alberta, Assembly of First Nations Quebec-Labrador, Congress of Aboriginal Peoples, Assembly of Manitoba Chiefs, Indigenous Police Chiefs of Ontario, First Nations Child & Family Caring Society of Canada, Okanagan Indian Band and Assembly of First Nations (Interveners)

Wagner C.J.C., Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin, Moreau JJ.

Heard: April 23, 24, 2024
Judgment: November 27, 2024
Docket: 40619

Proceedings: affirming *Takuhikan c. Procureur général du Québec* (2022), 2022 CarswellQue 21485, 2022 CarswellQue 18997, EYB 2022-501025, 2022 QCCA 1699, Simon Ruel J.C.A. (C.A. Que.); reversing *Takuhikan c. Procureur général du Québec* (2019), 2019 CarswellQue 12186, 2019 QCCS 5699, EYB 2019-342205, Dufresne J.C.S. (C.S. Que.)

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Subject: Civil Practice and Procedure; Constitutional; Contracts; Public

Headnote

Aboriginal and indigenous law --- Miscellaneous

Agreements concerning police services were entered into by Canada, Quebec and First Nation — Agreements set financial contribution by Canada and Quebec to operation of police force — However, government funding proved to be inadequate on its own to ensure maintenance of police force — As result, First Nation had to assume resulting deficits — First Nation brought legal proceedings claiming reimbursement of accumulated deficits from Canada and Quebec — Trial judge dismissed application, holding that contract prevailed and that honour of Crown did not apply — Court of Appeal set aside that judgment and ordered Canada and Quebec to pay their share of accumulated deficits — Quebec appealed from Court of Appeal's decision — Appeal dismissed — Quebec's conduct was in breach of principle of good faith, contrary to art. 1375 of Civil Code of Québec — It was also in breach of obligation to act in manner consistent with honour of Crown — Record did not make it possible

a contract may thus be a source of contractual liability (*Singh v. Kohli* 2015 QCCA 1135, at para. 67; see also *Billards Dooly's inc. v. Entreprises Prébour ltée* 2014 QCCA 842, at para. 98, and *Centre de santé et de services sociaux de l'Énergie v. Maison Claire Daniel inc.* 2012 QCCA 1975, at para. 80).

110 Although good faith requires more than the absence of bad faith, it does not require parties to subordinate their interests to those of the other parties (*Ponce*, at para. 77). It is well established that good faith does not serve to "transform the objectives of corrective justice [it is] intended to protect into a mechanism of distributive justice that would be unpredictable and contrary to contractual stability" (*Churchill Falls*, at para. 125). In the case at bar, good faith does not require the parties to forsake their own interests to benefit their counterparties in the performance of the agreement. But as the Court noted in *Ponce*, "in the pursuit of their interests and the exercise of their rights, parties to a contract must conduct themselves loyally by not unduly increasing the burden on the other party or behaving in an excessive or unreasonable manner" (para. 76).

111 It is true that no effect can be given to a contractual clause that is contrary to public order, a concept that includes the implied obligation to act in good faith that applies to every contract through the combined operation of arts. 1375 and 1434 *C.C.Q.* However, enforcement of the rule requiring good faith performance of a contract does not amount to a mandate to [TRANSLATION] "rewrite" a contract freely entered into (see J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 415). In this sense, good faith in the performance of a contract must be seen as a standard that does not conflict with the binding force of contracts, but is its ally. Performing a contract in good faith does not require the debtor to renounce its rights.

112 Similarly, good faith does not permit the creditor to go back on its word. As author Laurent Aynès writes about French law, good faith is [TRANSLATION] "a duty of conduct that involves making the performance of the contract consistent with what was undertaken" (preface by L. Aynès in R. Jabbour, *La bonne foi dans l'exécution du contrat* (2016), at p. VII). In the instant case, good faith performance of the clauses contemplating the renewal of the contract cannot serve, for example, to require or impose specific outcomes from the negotiations. That being said, a party that enters into negotiations in good faith must consider the interests of any other party to the negotiations and avoid behaving unreasonably (see *Singh*, at paras. 67 and 74; *Jolicoeur v. Rainville*, 2000 CanLII 30012 (Que. C.A.), at para. 51). Negotiating tenaciously in one's self-interest — an approach that can be entirely compatible with good faith — does not mean negotiating in an obstinate or intransigent manner that would undermine the counterparty's legitimate expectations. Good faith requires parties who discuss a renewal clause to negotiate faithfully. Parties are of course free — again, subject to the requirements of good faith — to end their existing contractual relationship. But when they begin renewal negotiations as permitted by the very terms of the contract, they are obliged to behave a manner that is neither excessive nor unreasonable in this final stage of carrying out their agreement (see, e.g., *Société sylvicole de l'Outaouais v. Rasmussen* 2005 QCCA 729, at paras. 27-28). Refusal to act in good faith in the negotiation of a renewal contemplated by the parties may jeopardize the very purpose of the contract where, as here, the achievement of that purpose depends on the existence of a relationship over time (see D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at Nos. 1979-80 and 1987).

(b) Quebec's Breach of the Requirements of Good Faith in Negotiations

113 Did Quebec breach its duty to perform the tripartite agreements in good faith during the renegotiations contemplated by these agreements?

114 Quebec argues that the Court of Appeal made several errors in arriving at the conclusion that it committed an abuse of right in performing its contractual obligations. First of all, the Court of Appeal could not find a breach on the basis of non-compliance with commitments set out in the federal *Policy*, as the *Policy* does not give rise to obligations and is not binding on Quebec. In addition, it could not find an abuse of right because it did not identify any right set out in the contract that Quebec had supposedly abused. Quebec submits that the Court of Appeal failed to show deference to the trial judge's conclusion that the evidence supported neither a finding that the governments of Canada and Quebec had acted in bad faith nor a finding that the community of Mashteuiatsh was receiving police services of lower quality than those received by comparable communities in the region.

2025 ABKB 30
Alberta Court of King's Bench

Razor Energy Corp, Razor Holdings Gp Corp., and Blade Energy Services Corp (Re)

2025 CarswellAlta 124, 2025 ABKB 30, [2025] A.W.L.D. 1095, 2025 A.C.W.S. 495

In the Matter of The Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended

And In the Matter of the Plan of Compromise or Arrangement of Razor Energy Corp., Razor Holdings GP Corp., and Blade Energy Services Corp.

B.E. Romaine J.

Heard:
Judgment: January 17, 2025
Docket: Calgary 2401-02680

Counsel: Sean Collins, K.C., Pantelis Kyriakakis, Samantha Arbor, Nathan Stewart, for Razor Energy Corp.
Kelly Bourassa, for Monitor
Jessica L. Cameron, Anthony Mersich, for Arena Investors LP
Maria Lavelle, for Alberta Energy Regulator
William Shores, K.C., for APMC
Michael Swanberg, for Big Lakes County and Municipalities
Marianne Panenka, for Indian Oil and Gas Canada
Keely Cameron, Sarah Aaron, for Conifer
Kenneth Whitelaw, for Alberta Energy and Minerals
Stephen Kroeger, for Canadian Natural Resources Limited
Corey Luda, for Vulcan County

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Liquidation or sale of assets

Reverse vesting order — Applicants, petroleum and natural gas producing entities, obtained initial order under Companies' Creditors Arrangement Act (CCAA) — Initial order authorized applicants, monitor and sales agent to carry out sale and investment solicitation process — Applicants sought approval of reverse vesting order (RVO) that included proposed vesting off of majority of indebtedness owed to secured creditor AI, including certain security relating to assignment of gross over-riding royalties (GORRS) — AI held valid and enforceable security interests securing its indebtedness, and result of proposed transaction would be that AI would receive payment of $750,000 on debt of approximately $7.6 million — Agreements assigning GORRS would be vested out but not GORRS themselves, with result that purchaser would receive benefit of only valuable asset, GORRs, free and clear of interests of AI, and AI would no longer receive monthly payments on GORRs — Application was dismissed because equities favoured AI in its opposition to vesting off of most of its claim — Applicants sought approval of revised proposal that improved position of AI, as it would received $2,500,000 — Application granted — Requirements under s. 36(3) of CCAA had been met — Process leading to proposed disposition was reasonable in circumstances — Monitor approved process and recommended disposition as more beneficial to creditors than bankruptcy; creditors were extensively consulted; consideration was fair; and under revised proposal, effects of proposed sale on creditors and stakeholders leaned toward approval of transaction — Factors of whether party made sufficient effort to obtain best price and to not act improvidently; interests of all parties; efficacy and integrity of process by which party obtained offers; and whether working out of process was unfair were all met — Under revised transaction, equities favoured approval — Applicants had made efforts to address AI's objection resulting in substantially better recovery for AI — Given potential recoveries to creditors under revised transaction compared

to sale or disposition under bankruptcy, which would likely result in assets being transferred to governmental agency, revised transaction was in best interests of stakeholders and creditors as whole — RVO was necessary, structure produced economic result at least as favourable as any other viable alternative, no stakeholder was worse off under structure than it would have been under any other viable alternative, and consideration paid reflected importance and value of intangible assets — Parties acted in good faith to structure transaction.

APPLICATION by debtors seeking approval of reverse vesting order.

***B.E. Romaine J.*:**

Decision

I. Introduction

1 The Applicants sought an Approval and Reverse Vesting Order (the **RVO order**) that included the proposed vesting off the majority of the indebtedness owed to a secured creditor, including certain security relating to an assignment of gross over-riding royalties (**GORRs**).

2 This Court dismissed the application in its original proposed form, not because of issues with the RVO structure, but because the equities favoured the secured creditor in its opposition to the vesting off of most of its claim.

3 The parties returned nine days later with a revised proposal that improved the position of the secured creditor. The revised proposal was approved. These are my reasons.

II. Application

4 Razor Energy Corp., Razor Holdings GP Corp. and Blade Energy Services Corp. (collectively the **Applicants**) sought a RVO order, a Retained Contracts order, a Stay Extension and Enhanced Monitor's Powers order, and a Restricted Court Access order. Arena Investors LP, a secured creditor, opposed the application for the RVO.

III. Relevant Facts

5 In February, the Applicant petroleum and natural gas producing entities obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36. Among the usual stay provisions and appointment of a Monitor, the initial order authorized the Applicants, the Monitor and a sales agent to carry out a sale and investment solicitation process (the **SISP).**

6 The SISP was a broadly structured process designed to solicit en bloc or going concern offers or offers for individual assets. Despite a through and properly-conducted process with the receipt of numerous bids, most of these bids were non-conforming or non-compliant bids on specific producing wells that would have resulted in a significant number of inactive wells and "stranded" liabilities left behind. The only viable en bloc offer received was a non-binding letter of intent (**LOI**) dated March 28, 2024 from Solidarity Holdings Inc. The Applicants, the Monitor and the sales agent selected this offer to move forward.

7 In addition, the parties undertook and completed a transaction for a portion of the assets, which was approved by way of an approval and vesting order on July 17, 2024. That transaction is not relevant to the present application.

8 The Applicants note that:

(a) the Solidarity LOI represented the highest and best overall bid received under the SISP, and was the only bid that contemplated a going concern transaction that provided the means of addressing all of the abandonment and reclamation orders (**AROs**) of the Razor entities (deemed to be in the amount of approximately $115 million to $123 million, depending on methodology);

(b) Solidarity engaged in due diligence and, in the sale agent's view, had sufficient financial capacity to fund the acquisition contemplated by the Solidarity LOI; and

(c) the Monitor advised Razor Energy Corp. that, in the Monitor's view, the SISP transaction represented the best overall recovery in the circumstances. Razor Energy's management shared the Monitor's view, based upon a review of the various bids received under the SISP and consultation with the Monitor and the sales agent.

9 It was obvious that the proceeds of the proposed transaction and the previously completed transaction would not be sufficient to repay all of the Applicants' creditors, including those holding security interests. However, Arena stated that, since April 2024, Solidarity expressed that the purchase price it would pay to conclude such a transaction would include the assumption of the first ranking secured indebtedness owing by certain of the Applicants and the Razor Royalties Limited Partnership to the Arena lenders, together with an assumption of certain **GORRs** that had been assigned to Arena as part of the transaction. On that basis, Arena said, it supported the Applicants throughout these proceedings.

10 Arena's uncontradicted evidence is that:

(a) since March or April of 2024, Solidarity represented that it was interested in purchasing a one-hundred percent equity interest in Razor Energy for a purchase price that included the "assumption of the secured obligations owing by Razor Royalties LP and guaranteed by Razor, to Arena, in the approximate amount of $6.5 million"; and

(b) on or around May 3, 2024, Arena provided Solidarity with copies of its loan agreement and security documentation for the Arena indebtedness and the GORRs so that Solidarity could consider them in developing the transaction.

11 In its Eighth Report dated November 6, 2024, the Monitor confirmed that it had reviewed the Arena loan agreement and the lender's security and determined that, subject to standard qualifications and assumptions, Arena had a valid and enforceable security interest securing its debt.

12 On May 16, 2024, Razor Energy held a virtual meeting with nine of eleven stakeholders that had agreed to confidentiality terms. The stakeholders that attended the meeting included:

(a) governmental agencies: the Alberta Energy Regulator (the **AER**), The Orphan Well Association (the **OWA**) and the Alberta Petroleum Marketing Commission ("**APMC**");

(b) counsel to the municipal authorities of Big Lakes County and Vulcan County;

(c) counsel to Arena;

(d) counsel to Solidarity; and

(e) counsel to Razor Energy's largest working interest partners, Conifer Energy Inc. and Canadian Natural Resources Ltd.

13 Following the virtual meeting, the Applicants met further with various parties, including Conifer, the municipal authorities and CNRL.

14 Arena states that, well into the autumn of 2024, the Applicants, Solidarity and Arena through their respective counsel engaged in discussions regarding the structure of a proposed transaction. Arena's evidence is that, throughout that period and until October 2024, the Applicants and Solidarity represented that the Arena indebtedness and its interests in the GORRs would be preserved.

15 The Applicants concede that the initial Solidarity LOI contemplated that Arena's indebtedness and its GORRs would be preserved. It also contemplated that the retained liabilities of the Applicant entities would include all AROs other than with respect to certain non-operated assets (the **Swan Hill Assets**) and the Swan Hills assets as retained assets, together with most of Razor Energy's other petroleum and natural gas assets.

16 On August 16, 2024, Razor delivered a draft copy of a subscription agreement to Solidarity that contemplated total consideration of approximately $10 million, the assumption of the Arena debt and the exclusion of the Swan Hills assets.

17 However, on August 23, 2024, the AER delivered a letter to Razor Energy setting out the AER's position that "[i]f any of Razor's non-operated working interest holdings are not included as part of the corporate transaction or assumed by another responsible party, the AER would not support that transaction."

18 Negotiations between Solidarity and the Applicants were renewed. As a result, the Swan Hills assets were reintegrated into the proposed transaction to ensure that none of Razor Energy's working interests would be disclaimed.

19 Mr. Bailey of the Applicants and Mr. White of Arena met on September 4, 2024. Mr. Bailey advised Mr. White that he was concerned that Solidarity may not assume the Arena debt. Mr. White says in his affidavit that Mr. Bailey assured him that, due to the nature of the GORR structure and the fact that it was an interest in land, the GORRs would be Arena's "hammer", and that Arena would receive monthly cheques even if the debt obligations were not assumed. Mr. Bailey's response to that assertion in his cross-examination on affidavit was equivocal: he indicated he was not a lawyer, that there was no reason for him not to believe that although "that was not my opinion", but that he would "qualify that" because "there was some belief by some other legal people around the table that it may not be a valid security."

20 Mr. Bailey indicated that he first became aware that the transaction would not include the assumption of Arena's debt when it was excluded from the September 16th, 2024 draft of the subscription agreement, which, unlike the August 16 draft, did not include the assumption.

21 However, Arena was not advised of this development until October 22, 2024 when its counsel requested a copy of the final subscription agreement. On October 27, 2024, the Applicants and Solidarity reached an agreement on the final terms of a proposed transaction, with a proposed closing date of November 30, 2024.

22 The key terms of the final subscription agreement were as follows:

(a) the purchaser would be a newly-formed entity, Texcal Energy Canada Inc., which is part of the same corporate group as Solidarity;

(b) the purchaser would pay $8,375,000 for the assets by way of a $1 million deposit and the balance due on closing;

(c) Texcal would obtain 100% of the equity interests in Razor Energy (the parent company of the other Applicants), and all other equity interests in Razor Energy would be retracted and cancelled;

(d) Razor Energy would retain specified retained contracts and retained assets, free and clear of all claims and encumbrances, other than permitted encumbrances and assumed liabilities;

(e) Razor Energy would retain all of its AROs and all of its current operated and non-operated working interests;

(f) excluded assets, excluded liabilities and excluded contracts would be vested in ResidualCo;

(g) all post-filing municipal taxes would be paid to the Monitor on closing, and distributed to the applicable parties; other than those post-filing municipal taxes in respect of which the purchaser had entered into a tax payment plan or other agreement regarding payment thereof with the applicable municipal authority(ies) prior to closing, which would instead be retained by Razor Energy;

(h) all "cure costs" in respect of the restricted retained contracts would be paid to the Monitor on closing, and distributed to the applicable counterparties thereafter;

(i) pursuant to an Approval and Reverse Vesting Order, the Monitor, following closing, would pay the regulatory payments, and payment of any accrued amounts under the priority charges granted pursuant to the AROs would be paid to the Monitor and held pending further order of the Court.

23 The result of the transaction was as follows (provided in the Applicants' November 25, 2024 reply brief):

Waterfall Analysis		
($000s)		29-Nov
Receipts		
Subscription Price	$	8,375
Statement of Adjustments		1,342
Total - Receipts		9,717
Secured Lender (Arena)		(750)
Regulatory Payments		
2024 AER Admin Fee		(370)
2024 OWA Levy		(733)
APMC (Royalties)		(492)
Post Filing Municipal Taxes		(2,967)
Restricted Retained Contracts Cure Costs		
TAQA		(225)
PG		(274)
Enercapita		(37)
CNRL		(488)
Forty Mile Gas Co-op Ltd.		(4)
Paramount		(36)
Post-Filing Joint Venture		
Conifer		(771)
CNRL		(453)
Paramount		(163)
Outlier		(48)
Journey		(44)
TAQA		(32)
Cenovus		(2)
Other Disbursements		
Sale Advisor Fee		(320)
Professional Fees		(50)
Total - Payments at Close		(8,258)
Net cash flow at close		1,459
Opening Cash balance		248
Ending cash balance transferred to ResidualCo	(g)	1,708

24 It was anticipated that the funds transferred to ResidualCo. would be dealt with as follows:

(a) $615,000 reserved with respect to obligations that may accrue under the Director's Charge and the Administration Charge and a potential trust claim by Sabre Energy Ltd.;

(b) $1,276,000 to be paid in relation to post-filing payables.

25 In the circumstances, it is unlikely that there would be any significant amounts available for additional distribution from residual Co., despite a subsequent claims process.

26 As noted, the payment to Arena was to be $750,000, compared to the current amount of debt owing to it of $7,618,000.98 as of November 4, 2024. Regulatory payments were to be made to the AER, the OWA, the APMC, Indian Oil and Gas Canada (IOGC) and post-filing municipal taxes, "cure costs" on "Restricted Retained Contracts", post-filing payments to various joint venture partners and professional fees.

27 The Applicants submitted that the transaction provided significant benefits to stakeholders, in that:

(a) it preserved the employment of employees;

(b) most contracts with suppliers, vendors, creditors, and other counterparties would continue in the normal course;

(c) the operations of the Razor entities would be preserved and continue uninterrupted in the normal course;

(d) all "cure costs" relating to the Restricted Retained Contracts would be satisfied; and

(e) the Applicant entities would exit CCAA proceedings with a significantly deleveraged balance sheet.

28 They note that some limited matters would remain for the administration and wind-down of ResidualCo and suggested that there may be further distributions to creditors. A post-closing claims process would be conducted by the Monitor.

29 In its Eighth Report, the Monitor commented that:

a) Razor Energy's assets were marketed by the sales agent, in consultation with the Monitor, through the SISP in an effort to maximize potential recoveries to all stakeholders;

b) there was no viable alternative to the proposed transaction identified through the SISP that resulted in a higher potential recovery to the creditors. The transaction represented the highest and best available recovery to creditors and an alternative to the transaction would be a sale or disposition under a bankruptcy. Given the significant abandonment and reclamation obligations of Razor Energy, and regulatory requirements of the AER, the Monitor believes it would unlikely that a sale under a bankruptcy would be possible, resulting in all licensed assets being turned over to the OWA;

c) Razor Energy would exit the CCAA proceedings as a going concern and retain responsibility for the ongoing environmental obligations associated with its petroleum and natural gas assets;

d) the jobs of approximately 54 employees and contractors would be preserved; and

e) Razor Energy would continue to honour certain obligations identified as "Retained Assets", "Retained Contracts", and "Assumed Liabilities".

30 For these reasons, the Monitor was of the view that the transaction represented fair value in the circumstances.

31 The Monitor noted, that in its opinion, the Applicants consulted sufficiently with creditors throughout the CCAA proceedings as they attempted to negotiate the Transaction on terms that would be acceptable to a significant number of creditors and stakeholders.

32 In addition, the Monitor was of the view that the RVO was necessary to provide additional value to the estate and its stakeholders that would not be possible without the use of an RVO structure, including:

a) various licenses and permits are held by Razor Energy with the AER, Alberta Boilers Safety Association and Association of Professional Engineers and Geologists of Alberta, which are available to the purchaser without need for transfer. In particular as it relates to the AER, the Monitor's understanding is that the abandonment costs are estimated at approximately $115 to $123 million, depending on the methodology, which obligations will be assumed as part of the transaction, if approved;

b) the preservation of certain of Razor Energy's tax attributes;

c) the Monitor noted that the purchaser was not willing to complete a transaction for Razor Energy under an alternative structure or plan of arrangement under the CCAA; and the result of the transaction would be that Razor Energy would carry on business with a new sole shareholder, with ownership of the Assumed Liabilities, the Permitted Encumbrances, the

Retained Assets, the Retained Contracts, and a restructured balance sheet, free of all indebtedness (having been cleansed by the RVO or paid or assumed as a cure cost).

33 Therefore, the Monitor was of the view that the subscription agreement was as structured the best (and only) transaction available to Razor Energy's stakeholders in the circumstances, as the alternative was a bankruptcy that would erode substantial value for stakeholders including amounts owing for priority payables and cure costs payable to counterparties, each of whom were benefiting from the transaction.

34 The Monitor noted that stakeholders and creditors would be prejudiced if the transaction did not proceed, including:

a) the AER and the OWA, which would have the Applicants' interests in 2,074 oil and gas wells turned over to the OWA rather than a solvent counterparty;

b) municipalities that would lose the payment of post-filing property taxes and the benefit of a solvent owner going forward;

c) regulatory payment arrears to OWA, AER, APMC and IOGC would go unpaid;

d) employment would be lost;

e) post-filing creditors would go unpaid; and

f) potential beneficiaries of a summary claims process conducted by ResidualCo would lose any hope of distributions.

35 Thus, the Monitor was of the view that, on balance, the transaction was more favourable for the creditors and stakeholders as a whole than a bankruptcy. This opinion, however, did not take into account the prejudice suffered by Arena, which would recover roughly 10% of its debt, compared to a much higher percentage for other creditors, including unsecured creditors.

36 In its Supplemental Report dated November 26, 2024 to the Eighth Report, the Monitor continued to support the transaction,

37 The Monitor stated that it was not aware of any actions taken by Mr. Bailey or the other remaining employee of Razor, Kevin Braun, during the CCAA proceedings that would indicate they were not acting in good faith, let alone in bad faith, and without the intention of obtaining the best possible outcome for the benefit of all creditors and stakeholders. The Monitor noted that Mr. Bailey and Mr. Braun remained with Razor Energy for many months beyond what was originally conceived as a proceeding that would conclude in the spring of 2024, despite the lack of a key employee retention plan.

38 As noted however, Arena opposed the transaction.

39 The Arena lenders had made available to the Applicant entities three senior secured term loan facilities with initial maximum principal amounts of approximately USD $31 million. The current amount of the debt outstanding is approximately $7.6 million.

40 As part of the loan arrangements, the parties agreed to grant Arena GORRs in respect of certain mineral leases in Alberta. While initially, this was contemplated as a direct purchase by Arena from Razor Energy, tax implications led to a different structure. A limited partnership (Razor Royalties LP) was established for the purpose of borrowing funds from Arena to purchase the GORRs from Razor Energy. Pursuant to certain royalty agreements, Razor Energy granted to the limited partnership a ten percent gross overriding royalty in all of its petroleum and natural gas interests. This royalty was assigned by the limited partnership to an agent. Arena is not a party to the GORR agreements, but the assignment agreements are security for the Arena loans.

41 The GORRs are described as "synthetic royalties", in that the structure of the Arena credit was that the GORRs were to approximate the regularly scheduled monthly payments to Arena. Historically, Razor Energy advanced funds to the limited partnership in an amount sufficient to cover the limited partnership's obligations to Arena under the loan agreements for any given period.

42 In summary, Arena holds valid and enforceable security interests securing its indebtedness that is secured against all of Razor Energy's and Razor LP's respective petroleum and natural gas interests, the limited partnership units in Razor Royalties LP and the common shares in Razor Holdings and the GORRs granted by Razor Energy in favour of Razor Royalties LP.

43 The result of the proposed transaction would be that Arena would receive $750,000 on a debt of approximately $7.6 million. The agreements assigning the GORRs would be vested out, but not the GORRs themselves. Therefore, through the transaction, Texcal would receive the benefit of Razor Royalties LP's only valuable asset, the GORRs, free and clear of the interests of Arena, and Arena would no longer receive monthly payments on the GORRs.

IV. The Applicable Tests

44 Osborne, J. in ***In the Matter of CannaPiece Group Inc.***, 2023 ONSC 841 (Ont. S.C.J. [Commercial List]) (Ont. S.C.J. [Commercial List]) sets out succinctly the applicable tests relating to the issues in this type of application, and I can do no better than to adopt his analysis at paras 53-58 of that decision:

> Beyond the general jurisdiction of the Court found in s.11 of the CCAA to make any order that it considers appropriate in the circumstances, s.36(3) of the CCAA sets out the factors the court is to consider in deciding whether to grant authorization to dispose of assets:
>
> > (3) In deciding whether to grant the authorization, the court is to consider, among other things,
> >
> > (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> >
> > (b) whether the monitor approved the process leading to the proposed sale or disposition;
> >
> > (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> >
> > (d) the extent to which the creditors were consulted;
> >
> > (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
> >
> > (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> Moreover, the well-known *Soundair* factors to be considered for approval of a transaction following a Court-supervised sales process, not surprisingly track many of the same principles. (see *Royal Bank of Canada v Soundair Corp.*, (1991), 1991 CanLII 2727 (ON CA), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):
>
> > (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
> >
> > (b) the interests of all parties;
> >
> > (c) the efficacy and integrity of the process by which the party obtained offers; and
> >
> > (d) whether the working out of the process was unfair.
>
> The Court of Appeal for Ontario considered in *Third Eye Capital Corporation v Dianor Resources Inc.*, 20169 ONCA 508 ("*Third Eye*") what it described as a "cascading analysis" of the factors to be considered when determining whether a third party interest should be extinguished in a vesting order:
>
> > (a) first, the nature and strength of the interest that is proposed to be extinguished;

(b) second, whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency; and

(c) third, if the first two steps proved to be ambiguous or inconclusive, a consideration of the equities to determine if a vesting order is appropriate in the circumstances.

(see paras. 102-110)

A consideration of the equities contemplated in the third step incudes consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition [or] sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith (*Third Eye*, para. 110).Justice Penny observed that a reverse vesting order was both an equitable and an extraordinary remedy, and one that ought not to be regarded as the "norm" and concluded that the following factors are applicable to consideration of whether a reverse vesting order is appropriate in the circumstances:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure then they would have been under any other viable alternative? and

(d) does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO structure?

(see *Harte Gold*, para. 38)

Finally, Penny, J. considered the factors applicable to a determination of whether a reverse vesting order should be approved in *Harte Gold Corp. (Re)*, 2022 ONSC 653. In that case, the Court considered the s.36(3) factors set out above, "making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction" since the very nature of a reverse vesting order is such that it does not contemplate a typical sale of assets.

45 The facts in ***CannaPiece*** are similar to those in this case, but the important distinction is that there was an alternative to the proposed transaction that allowed some return to stakeholders, while it appears that if the transaction in this case is not approved, the only alternative may be a sale or disposition under a bankruptcy. As noted by the Monitor, given the significant abandonment and reclamation obligations of Razor Energy and the regulatory requirements of the AER, a sale under a bankruptcy likely would be impossible, with the result that all licensed assets would be turned over to the OWA.

V. Analysis

a. Arena's position on the original transaction

46 Arena submitted that it would be inequitable for this Court to approve the RVO in its then proposed form because:

(a) the Applicants and the purchaser failed to act in good faith; and

(b) they had failed to satisfy statutory requirements and relevant case authority, including the *Harte Gold* factors.

47 Arena submitted that, if the Court found otherwise, the RVO should not be approved unless Arena's interests in the GORRs were not vested out. Arena raised a number of issues with the waterfall of payments, specifically with respect to the priority of payees compared with Arena's security interests.

48 Arena did not suggest that the Court lacked jurisdiction to approve the RVO as a general proposition.

b. Failure to act in good faith

49 Arena submitted that the Applicants and Solidarity failed to act in good faith by leading Arena to believe that its interests would be preserved in the transaction in order to obtain Arena's support throughout the CCAA proceedings, only to pull the rug out from under Arena at the eleventh hour, and after Arena had already provided the support that the Applicants and Solidarity needed in order to get to the stage of this application.

50 Arena submitted that the Applicants concealed the true nature of the transaction from Arena for over a month, only disclosing its true terms after Arena's counsel requested the latest documents for the transaction. This late disclosure is accurate: however, the Applicants did warn Arena of the possibility that Solidarity may renege on its intention to assume the Arena debt at the early September meeting of Mr. White and Mr. Bailey. Unfortunately, both appear to have been of the view that the nature of the GORRs as interests in land would prevent their erosion of value to Arena.

51 Section 18.6 of the CCAA provides that "any interested person" in the proceedings shall act in good faith, failing which the Court may make any order that it considers appropriate. The duty of good faith requires parties to act candidly, honestly and forthrightly in their dealings, and precludes parties from knowingly misleading each other about matters relating to the insolvency: ***RE Bellatrix Exploration*, 2020 ABQB 809** at para. 105.

52 Omission or silence can also amount to a breach of a duty of good faith: ***CWB Maximum Financial Inc. v 2026998 Alberta Ltd.*, 2021 ABQB 137** at para.53.

53 While Mr. Bailey cannot be said to have misled Mr. White at the September meeting, given his perhaps mistaken view of the nature of the GORR interests and how they may be vested out, the Applicants' subsequent failure to advise Arena that the transaction had changed to involve the vesting-out of Arena's GORR interests in a timely way was a breach of good faith, particularly given the fact that this application was to be brought close to a proposed closing date for the transaction, putting pressure on the parties and the Court. This failure to advise Arena of the true nature of the transaction also led Arena to continue to support the Applicants with respect to an appeal of a decision involving a claim by the APMC, which will be referred to later in this decision.

c. Compliance with statutory and case authority requirements

54 I find that the process leading to the proposed transaction was reasonable in the circumstances, at least until the receipt of the 16th draft of the subscription agreement in September 2024. The Monitor approved the process and provided the requisite opinion that the transaction would be more beneficial to the creditors than a sale or disposition under a bankruptcy. Creditors were consulted, and there is no reason to believe that the consideration proposed to be received for the assets is not reasonable and fair. Therefore, most of the factors set out in section 36(3) of the CCAA are positive to the application. However, the effect of the proposed transaction on Arena was an issue.

55 Similarly, the ***Soundair*** factors are positive to approval of the transaction, again except the effect of the transaction on Arena's interest.

56 Key to the analysis, however, are the factors set out in ***Dianor*** to be considered when determining whether a third-party interest should be extinguished in a vesting order.

57 With respect to the first Dianor factor, Arena's interest is that of a secured creditor. Arena's interest in the GORRs may or may not be interests in land. It is not necessary that I decide that issue since whether our not Arena's interest in the GORRs are interest in land, they are akin to a security interest. Arena certainly has not consented to the vesting out of its interest, and in fact supported the transaction because of its understanding that its debt would be assumed.

58 As noted by Arena, the Court in a CCAA proceeding is not free to disregard the general scheme of priorities of creditors without good reason: ***Re Smoky River Coal Ltd.*, 2000 ABQB 621** at para. 34. Although the CCAA does not expressly set out

a priority distribution scheme, the absence of such a statutory scheme does not entitle unsecured creditors to obtain enhanced priority over secured creditors: ***Re Windsor Machine*, 2009 CarswellOnt 4471** at para.43.

59 This leads to the third Dianor factor, a consideration of the equities to determine if a vesting order is appropriate. Arena submitted that certain aspects of the proposed "waterfall" of payments gave enhanced priority over Arena to unsecured creditors to the detriment of its secured interests:

60 The subscription agreement contemplates the payment of cure costs to remedy any pre-filing monetary defaults under the Restricted Retained Contracts, similar to what would be payable if the Applicants were completing a traditional asset sale and assigning the Restricted Retained Contracts under section 11.3(4) of the CCAA. However, given the RVO structure of the proposed transaction, the assignment of retained contexts would in the ordinary course not be required as they would be retained by the debtor. In Acerus Pharmaceuticals Corporation (Re) 2023 ONSC 3314.Penny, J noted that an RVO structure that provided for the contracts to remain with the purchaser although no assignment of contracts was contemplated did not materially disadvantage the Applicants' creditors, as "the contracting parties have the opportunity to continue supplying good and services to the applicants' post- CCAA proceedings if they choose to do so." However, in that case, the subscription agreement did not provide for the applicants to pay pre filing "cure costs"

61 The Monitor noted that unless the Retained Contacts Order, including the Retained Contracts Stay and certain declaratory relief that forms part of the transaction was granted, which provided with respect to the Restricted Retained Contracts that all monetary defaults have been cured and the "assignee" receives the benefits of the rights and obligations of the agreement, the *Harte Gold* factor that contractual counterparts will receive the same benefit as they would in an asset sale structure may not be met. The Applicants in this regard cite section 11.3 (4) of the CCAA, which provides that an order forcibly assigning contracts under section 11.3 may not be made unless all monetary defaults in relation to the agreement are cured.

62 However, the proposed transaction does not result in a forcible assignment of the Retained Contacts or any assignment at all. Thus, while the cure costs remedy may have resolved one issue with respect to an RVO structure, it does not address the priority of secured creditor issue.

63 The proposed transaction provided for the payment of post-filing municipal taxes and all amounts owing by Razor Energy to a) the OWA on account of the 2024 orphan fund levy, b) the AER on account of the 2024 administration fee, and c) the APMC on account of Razor Energy's unremitted royalty share for the month of January 2024. Arena does not question the payment of post-filing municipal taxes, but submits that the regulatory payments, unlike the regulator's non-provable claim in relation to Razor Energy's end of life AROs, are purely monetary amounts that constitute provable claims in bankruptcy. Arena submits that as a basic principle of secured lending no subordinate ranking creditor of Razor Energy or Razor Royalties LP, such as an unsecured creditor, may receive any distribution from the proceeds of the proposed transaction, until the Arena indebtedness is repaid in full: Morawetz, J in Windsor Machine & Stamping Ltd. (Re) [2009] O.J. No 3195 at para 416:

> Although there is no specific priority distribution scheme in the CCAA, that does not mean that priority issues should not be considered. An initial order under the CCAA usually results in a stay of proceedings as against secured creditors as well as unsecured creditors. The stay prevents creditors from taking enforcement proceedings which would confirm their priority position. The inability of a secured creditor to take such enforcement of proceedings should not result in an enhanced position for unsecured creditors. There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the status quo during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors . . .

64 With respect to the AER and OWA claims, section 103 (3) of the Oil and Gas Conservation Act, RSA 2000, c 0-6 provides that the administration fee and orphan fund levy are secured by way of lien that gives them super-priority. However, Arena submits that exercises of provincial power that have the effect of altering bankruptcy priorities are inoperative as they frustrate Parliament's purpose of equitably distributing the estate's assets in accordance with the federal statutory regime: Newfoundland and Labrador v Abitibi Bowater Inc., 2021 SCC 67 at para 19; Huskey Oil Operations Ltd. v Minister of National Revenue [1995] 3 SCR 453 at para 32.

65 Arena relies on section 39 of the CCAA for the proposition that statutory Crown securities are only valid if, pre CCAA filing, they are registered under a system of registration of securities, and that, even if registered, are subordinate to previously registered securities. The AER responds that it is not an agent of the Crown based on section 4 of the Responsible Energy Development Act, SA 2012, c R - 17.3, but Arena notes that the AER has been recognized as an agent of the Crown in a priority dispute concerning unpaid municipal property taxes where it was advantageous to the " Crown" in defeating the municipalities' competing priority claim: *Orphan Well Association v Tirdent Exploration Corp*2022 ABKB 839 at paras 57 and 64.

66 Given the resolution reached in the amended transaction, it is not necessary that I decide whether section 39 applies to the AER and the OWA, leaving this as an issue for future resolution.

67 With respect to the payment of the unsecured claim of the AMPC as compensation for Razor's under-delivery of the Crown royalty share from its production for the month of January, 2024, Arena and the AMPC disagree on the meaning of a decision by Burns, J at 2024 ABKB 534. In that case the Court upheld the stay provisions of the CCAA and dismissed APMC's application to direct delivery of the Crown royalty share during CCAA proceedings. While the Court found that APMC could not exercise its *in rem* rights with respect to the January, 2024 oil, the decision did not preclude the APMC from using section 12 of the Petroleum Marketing Regulation after the stay was lifted to recover for the under delivery of royalty oil. However, APMC's claim is an unsecured claim, and thus payment would be a preferred settlement payment that likely renders APMC's leave to appeal the Burns decision moot.

68 The proposed transaction contemplated the payment of certain unsecured post-filing claims in priority to repayment of Arena's indebtedness, including specifically, to Conifer and CNRL. Arena notes that generally, post-filing claims are unsecured claims that rank subordinate to the claims of pre-filing secured creditors, unless the post-filing claim is secured by a court-ordered priority change: *Smokey River Coal Ltd (Re) 2000 ABQB 621*. Although it is expected that amounts owing for post-filing goods and services will be paid on an ongoing basis, and will be kept current, post-filing creditors do not enjoy any priority to secured creditors if their claims are not paid when due, unless the court has granted a charge to secure those amounts.

69 No such charges were granted in these proceedings. The Applicants' initial amended and restated order authorizes, but does not obligate, the Applicants to pay post-filing obligations on an ongoing basis. This provision does not create a priority change: *Sanjel (Re)*, 2017 ABQB 69 at paras 21, 22, and 30. Arena submits that, therefore, these proposed payments are preferential, and should not be approved as part of the RVO transaction.

70 As noted previously, the amounts of the post-filing claims by Conifer and CNRL have been contested. They arise from processing and operating costs incurred in relation to joint ventures and joint venture operations agreements that provide for a right of set-off. Conifer, CNRL and possibly Paramount exercised these set-off rights in order to collect their share of processing and operations costs despite the Applicant's stay of proceedings order. However, these parties seek the payment of additional costs incurred in excess of the set-off amounts.

71 The proposed transaction contemplated the payment of both post-filing amounts for goods and services requested by the Applicants and non-requested post-filing amounts, incurred in circumstances where joint venture partners, including CNRL and Conifer, withheld Razor's Energy's production and marketed such production on Razor Energy's behalf, with the proceeds being set-off against the post-filing processing and operating costs. However, in certain instances the amount of post-filing revenue was not sufficient to offset the full amount of post-filing expenses and accordingly certain partners, again including CNRL and Conifer, allege that post-filing amounts are owing.

72 Conifer applied for payment or a secured charge for its non-requested post-filing amounts during these proceedings, and the Applicants during the application stated that it was contemplated that the "current structure" (as of September 6, 2024), would involve payment of Confer's post-filing claim. Thus, Confer submits that it would be inequitable if this payment was not made. However, it is clear that these post-filing amounts are not secured debts, and the same representation was made to Arena. Arena supported the Applicants in their opposition to the application.

73 The Monitor in its Eighth Report noted that there is a "significant" discrepancy in the amount of non-requested post-filing amounts as calculated by Razor Energy versus the amount calculated by CNRL and Conifer, and its proposed resolution was for the Monitor to pay the post-filing amounts owing based on Razor Energy's books and records at closing or from the funds received in ResideualCo prior to completing summary claims process for any pre-filing claims or post-filing disputed amounts.

74 The Monitor's rationale was that the CCAA proceedings would not have advanced to this point if vendors has not provided services in respect of which they relied on representations from the Applicants that they would be paid.

75 Of course, Arena received the same representation.

76 In the Monitor's Supplemental Report dated November 26, 2024 to the Eighth Report, the Monitor did not dispute Arena's position with respect to the relative priorities of its pre-filing secured claim versus post-filing trade creditor claims. The Monitor noted, however, that typically in CCAA proceedings, post-filing trade creditor claims are paid by debtor companies in the normal course.

77 In this case, the Applicants were unable to obtain interim financing and had to rely on cash flow from operations to continue as a going concern. The Monitor submitted that the post-filing services provided by suppliers were provided in good faith and with the understanding that the amounts would be paid at closing of the transaction.

78 The Monitor stated that it supported the continued stay extension on the basis of its understanding that post-filing trade creditors would be paid from proceeds of the transaction. Otherwise, the CCAA proceedings would have terminated, and the transaction would not have been brought forward for approval, resulting in no proceeds available for distribution.

79 While this is true with respect to post-filing trade creditors, as noted above, non-requested post-filing amounts fall into a different category.

80 In summary, Arena submitted that the proposed transaction was merely a disguised fraudulent conveyance transferring Razor Royalties LLP's only available asset to a third party for little consideration.

81 Given the above factors, and including particularly that Arena supported the Applicants throughout the process on the basis of representations that the Arena indebtedness would be preserved, the equities weighed heavily against approving the transaction in its original form.

82 In a decision on the original transaction delivered on December 2, 2023, I dismissed the application with the following reasons:

83 The analysis of whether to approve the RVO in this case turns on the Dianor factors: specifically, a consideration of the equities to determine whether a vesting order, including a vesting order in the context of an RVO, is appropriate. I find that the equities favour Arena.

84 While nearly all creditors are affected by the proposed transaction, Arena is clearly disproportionately prejudiced in comparison with other secured creditors, and indeed in comparison with certain unsecured creditors. Its recovery would roughly equate to ten cents on the dollar, while, for example, Conifer, an unsecured creditor, would recover close to 64 cents on the dollar. The various regulatory parties would, in the main, not suffer any impairment, and unsecured post-filing obligations would be met in full. The transaction certainly accomplishes the goal of a cleaned up balance sheet, but at significant prejudice to Arena's interest.

85 While the prejudice to any one creditor is not of itself a determinative factor, the preferential nature of the proposed waterfall distribution is a major concern in this case.

86 The SISP process was thorough, fair and reasonable, and while I find that the Applicants and the Monitor did their best to maintain the integrity of the process and attempt to achieve the best recovery for creditors, the process was upended by the position of the AER on the Swan Hills assets and the late disclosure of the abrupt turnabout in the expressed intention that the Arena debt would be assumed.

87 Arena supported the applications and the proposed transaction based on this assumption in material and expensive ways throughout the process, including declining to take distribution from prior asset sales so that proceeds would be applied to continuation of proceedings, thereby foregoing their opportunity to oppose the transaction until this very late date. In addition, the assumption by Arena and the Applicants that the GORRs were interests in land, and therefore protected from erosion in value contributed to Arena's support of the transaction until it became clear that this assumption would be questioned. Whether or not these interests are interests in land becomes irrelevant when they were proposed to be transferred to a non-operating ResidualCo.

88 While it may be true that the best interests of all stakeholders other then Arena favour approval of the proposed RVO, and that therefore business efficiency favours that approval, as noted in Dianor (at para 144 of the ONCA decision), the imperatives of the purchaser should not necessarily trump the interests of a secured creditor. The preferential nature of the waterfall payments betray an interest in satisfying creditors that will be important to the continued operations of Razor as Texcal but this does not shift the equities to the Applicants or the purchaser.

89 In summary, I cannot conclude that it is equitable in all the circumstances to approve this RVO in its present form. To be clear, the issue is not the RVO structure but the inequities in the proposed assumption of obligations and debt. I will, however, adjourn the application to allow the parties to continue negotiations toward the possibility of a more equitable resolution to the competing interests of the stakeholders.

e. The revised transaction

90 On December 6, 2024, after further discussion and negotiations with stakeholders, the Applicants renewed their application with a revised transaction.

91 Under the revised transaction, Arena would receive $2.5 million, rather then $750,000. The AER and the OWA waived payment of the administrator fee and the OWA levy, while continuing to assert their position that these fees were secured.

92 The municipalities and Conifer agreed to reductions in amounts to be distributed to them. Overall concession made by the AER, the OWA, the municipalities and Conifer resulted in the possibility of substantive increase in the proposed distribution to Arena.

93 Arena neither contested or opposed the application in its new proposed form.

94 The Monitor supported the Applicants' request in light of the efforts made by the Applicants to address Arena's objection, the revised recovery to Arena and the concessions provided by the AER, the OWA, the municipalities, and Conifer.

95 I approved the revised transaction for the following reasons:

96 The application engaged the following statutory and case authority requirements for approval:

97 The first is section 36 (3) of the CCAA; the factors the Court is to consider in deciding whether to grant authorization to dispose of assets.

98 I found that these requirements had been met.

99 The process leading to the proposed disposition was reasonable in the circumstances. The Monitor has approved the process and recommends the disposition as more beneficial to creditors than a bankruptcy, creditors were extensively consulted, the consideration is fair, and, under the revised proposal, the effects of the proposed sale on creditors and stakeholders leans toward approval of the transaction.

100 The second set of factors to be considered were the Soundair factors, and I found that they had been met.

101 In determining whether a third part interest should be extinguished, I must consider the Dianor factor. Under the original proposed transaction I found that the equities favoured Arena's objection to the transaction. Under the revised transaction the opposite it true - the equities favour approval. The Applicants have made efforts to address Arena's objection resulting in a substantially better recovery to Arena, due to concessions made by the AER, the OWA, the municipalities and Conifer.

102 Given the potential recoveries to creditors under the revised transaction compared to a sale or disposition under bankruptcy, which would likely result in the assets being transferred to the OWA, I found that the revised transaction was in the best interests of the stakeholders and creditors as a whole.

103 Finally, in considering whether a RVO should be approved. I found that such an order was necessary in this case, that the structure produced an economic result at least as favourable as any other viable alternative, that no stakeholder was worse off under the structure than it would have been under any other viable alternative and the consideration paid reflected the importance and value of the intangible assets.

104 Given the efforts of the Applicants and the Monitor, and the concessions of other stakeholders that made this revised transaction possible, I found that the parties had acted in good faith to structure this transaction in a difficult situation.

Application granted.

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Civil Appeals § 3:41

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§ 3:41. Final Orders in Connection with the Realization of Security

Proceedings seeking to realize security can include a number of sequential orders before they are completed. Nevertheless, orders that determine a person's rights to property are generally characterized as "final." For example, an order approving a receiver's sale, [1] an order of sale, [2] a decision that a person had no interest in property, [3] an order declaring a share certificate cancelled and that the purchase price be paid into court, [4] an order as to entitlement of monies paid pursuant to a garnishee, [5] or as to the early payment of a holdback, [6] or as to funds held by a trustee, [7] dismissal of an application to rectify a mortgage, [8] a declaration that a transaction was an impeachable one, [9] a declaration that a *Builders Lien Act* applied, [10] and an order declaring a lien invalid, [11] have all been held to be "final" orders. And, although fixing or varying security is generally an interlocutory order, an order reducing the security required to discharge a lien from title pursuant to s. 44(2) of the *Construction Lien Act* is final. [12] Similarly, an order for repayment of an overpayment in the context of a winding-up, [13] dismissal of an application for recovery of unpaid taxes in the context of mortgage proceedings, [14] and an order declining to prohibit collection of income arrears, [15] have all been held to be "final" orders. Moreover, an order dismissing an application for a declaration that a landlord had no right to possession or to distrain was said to be final even though the declaration sought was limited to the time-frame of proceedings seeking specific performance. [16] So too were orders refusing to extend the time to exercise a power of sale, [17] and extending the time for redemption in mortgage proceedings, [18] although an order extending time is typically characterized as interlocutory. [19] As well, notwithstanding that an order appointing an inspector to investigate the affairs of a company under the *Corporations Act* appears to be interlocutory in nature, it has been held to be final since it disposed of the parties' right to have an inspector appointed. [20] Likewise, an order, which finally disposed of an issue arising in relation to the appointment of a receiver, was held to be final in nature. [21]

Conversely, an order directing that new share certificates be issued to replace those that could not be located has been held to be interlocutory. [22] So too has an order of interpleader. [23] And in the context of Ontario's *Construction Lien Act, 1983*, a third-party tenderer could not appeal a court order approving another offer, as that decision was interlocutory, not final, [24] as was dismissal of a motion seeking to set aside a PPSA registration, [25] an order dismissing a motion to discharge a lien, [26] and an order that information be provided in order to facilitate execution of a judgment. [27] Likewise, until a master's report was confirmed, it was said not to be final. [28]

Footnotes

1 ***Cameron v. Bank of Nova Scotia***, [1981] N.S.J. No. 43 (NSCA) (order approving sale final, at least *vis-à-vis* unsuccessful bidders).

2 Dow v. Briggs (1994), 31 C.P.C. (3d) 232 (BCCA). **But see** Hockin v. Bank of British Columbia, [1989] B.C.J. No. 1049 (BCCA) (order following trial of an issue as to whether Bank alienated its interest in trust containing employees' pension funds interlocutory); Galway Capital Corp. v. Nikolov, 2005 BCSC 517 at para. 8, leave to appeal ref'd 2005 BCCA 375; CIBC Mortgage Corp. v. Schiel, 2003 BCSC 1782 (unsettled whether order approving sale final or interlocutory).

3 Royal Trust Co. of Canada v. Brechert, [1993] B.C.J. No. 2675 (BCCA). **See also** Giesbrecht Dairies Ltd. v. Milk Board (B.C.) (1993), 39 B.C.A.C. 69 (BCCA).

4 Topgro Greenhouses et al. v. Houweling, 2002 BCCA 387.

5 Lindholm v. HyWave Inc., [1997] B.C.J. No. 91 (BCCA). **See also** Source Atlantic Ltd. v. Nova Electric Ltd., [2017] N.B.J. No. 218 (NBCA) at para. 4 (refusal to make an attaching order is a final order).

6 PCL Industrial Management Inc. v. Agrium, a Partnership of Agrium Products Inc., 2015 SKCA 55 at para. 21.

7 St. AnneNackawic Pulp Co. (Trustee of) v. Graham, [2005] N.B.J. No. 121 (NBCA).

8 Oceanus Marine Inc. v. Saunders, [1996] N.S.J. No. 539 (NSCA).

9 Saunders, Howell Manufacturing Ltd. v. Pike, 2002 NFCA 13.

10 PCL Construction Management Inc. v. Saskatoon (City), 2020 SKCA 12 at para. 61.

11 477954 B.C. Ltd. v. Air Sea Aircraft Maintenance Ltd., 2002 BCCA 386.

12 HMI Construction Inc. v. Index Energy Mills Road Corp., 2017 ONSC 4075 (Ont. Div. Ct.) at para.13; H.I.R.A Limited v. Middlesex Standard Condominium Corporation No. 823, 2018 ONSC 3661 (Ont. Div. Ct.) at para. 22.

13 Keddy Motor Inns Ltd. (Re), [1991] N.S.J. No. 443 (NSCA).

14 Canada Trustco Mortgage Company v. Canadian Imperial Bank of Commerce (1990), 47 C.P.C. (2d) 310 (BCCA).

15 Manson v. Canada (Minister of National Revenue M.N.R.), [2000] F.C.J. No. 1234 (FCTD).

16 Re Top Banana and Foodcorp Ltd. (1981), 32 O.R. (2d) 289 (Ont. C.A.).

17 McGovern v. Mayhart Developers Ltd., [1972] 1 O.R. 545 (Ont. C.A.).

18 Lundy v. Travail Holdings Ltd. (1980), 30 O.R. (2d) 747 (Ont. Div. Ct.).

19 E.g. Lipson v 365414 Ontario Ltd. (1982), 36 O.R. (2d) 729 (Ont. Div. Ct.). **And see** § 3:57, *post.*

20 Re H. Flagal (Holdings) Ltd., [1966] 1 O.R. 33. (Ont. H.C.J.).

21 Akagi v. Synergy Group (2000) Inc., 2015 ONCA 368 at para. 56.

22 Shinkaruk v. Credit Foncier Trust Co., [1987] S.J. No. 359 (Sask. C.A.).

23 Bernard LLP (Re), 2015 BCSC 2382 at para. 20 (generally order of interpleader is interlocutory).

24 Alpa Lumber Inc. v. 786366 Ontario Ltd. (1991), 6 O.R. (3d) 496 (Ont. Div. Ct.). **Compare** ***Cameron v. Bank of Nova Scotia***, [1981] N.S.J. No. 43 (NSCA) (order approving sale final, at least *vis-à-vis* unsuccessful bidders).

25 2441472 Ontario Inc. v. Collicutt Energy Services, 2017 ONCA 452.

26 Stubbes Precast v. King & Columbia, 2018 ONSC 6539.

27 Tsai v. Pochwalowski, [2005] O.J. No. 5216 (Ont. Div. Ct.).

28 Gryphon Building Solutions Inc. v. Danforth Estates Management Inc., [2009] O.J. No. 2910 (Ont. Div. Ct.) at para. 16.

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Bankruptcy and Insolvency Law of Canada, 4th Edition § 1:68

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part I. The Bankruptcy and Insolvency Act

Chapter 1. General; Short Title (S. 1)

III. Interpretation (SS. 2-4.1)

B. Sections 3 to 4.2

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§ 1:68. Requirement to Act in Good Faith

The *BIA* was amended effective November 1, 2019 to add s. 4.2 to the *BIA*, which requires all parties in a *BIA* proceeding to act in good faith. Section 4.2(1) specifies that any interested persons in any proceedings under the *Act* must act in good faith with respect to the proceedings. Section 4(2) sets out the powers of the court—if the court is satisfied that an interested person is failing to act in good faith, on application by any interested person, the court may make any order it considers appropriate in the circumstances. The debtor and the licensed insolvency trustee already have obligations to act in good faith, thus this amendment is aimed at imposing the same obligation on creditors and other parties participating in proceedings under the *BIA*.

See Janis Sarra, "La bonne foi est une considération de base-Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", in J. Sarra and B. Romaine, eds., Annual Review of Insolvency Law 2014 (Toronto: Carswell, 2015) at 145–186.

For a discussion of the cases under this provision, see § 4:82 "Good Faith".

The Alberta Court of Queen's Bench granted a final order of receivership against the debtors. The debtors had argued that the receivership order should not be granted on the basis that the secured creditor had not acted in good faith. Section 4.2 of the *BIA* specifies that any interested person in any *BIA* proceedings shall act in good faith with respect to the proceedings; and if the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances. Justice Mah noted that the statutory provision is relatively new and there is a dearth of case law to guide its application. Justice Mah referenced Century Services Inc. v. Canada (A.G.)), 2010 CarswellBC 3419, 72 C.B.R. (5th) 170, 2010 SCC 60, [2010] S.C.J. No. 60, (*sub nom.* Re Ted LeRoy Trucking Ltd.) 326 D.L.R. (4th) 577 (S.C.C.) where the Court, at para. 70, held that good faith, along with appropriateness and due diligence, are "baseline considerations" for the court when exercising authority under the *CCAA*. Justice Mah held that: interested persons in proceedings under the *BIA* are statutorily required to act in good faith with respect to those proceedings; a secured creditor seeking a receivership order is an "interested person" subject to the good faith requirement, and its conduct in events preceding the application is covered by that requirement, where that conduct is factually and temporally connected to the proceedings; the statutory requirement of good faith in the insolvency context requires that an interested party not bring or conduct proceedings for an oblique motive or improper purpose; since there is no statutory definition of "good faith", the common law relating to the organizing principle of good faith in contractual performance may be used to inform the good faith requirement in s. 4.2 of the *BIA*. Justice Mah held that the duty of good faith, in this case, requires the parties not to lie to or mislead the other with respect to the status of the loan or the state of the lender-borrower relationship; it does not require the subordination of one's own interest to the other and falls short of a fiduciary duty; whether dishonesty has occurred in a given case is fact- specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence; a remedy may include denial of a receivership order; and the conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the *BIA*. Justice Mah indicated that since the standards of good faith and commercial reasonableness are conjunctive, the breach of one of them is enough to attract consequences. Justice Mah held that for the

purposes of a secured creditor's conduct in the circumstances at hand, the standard of good faith should be consonant with that expressed by the Supreme Court of Canada in pronouncing upon the organizing principle of good faith in contract law in cases such as Bhasin v. Hrynew, 2014 CarswellAlta 2046, 2014 SCC 71, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494 (S.C.C.) and C.M. Callow Inc. v. Zollinger, 2020 CarswellOnt 18468, 2020 SCC 45 (S.C.C.). Given the factual findings, Mah J. found that there had been no breach of the good faith requirement and it was just and convenient to appoint a receiver over the assets of the corporate defendants. The Court used the factors to be considered set out in Frank Bennett in *Bennett on Receiverships*, 2nd edition, (1995), Thomson Canada Ltd., at 130: CWB Maxium Financial Inc. v. 2026998 Alberta Ltd., 2021 CarswellAlta 392, 2021 ABQB 137 (Alta. Q.B.). [Editor's Note: Both s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act* (Ontario) provide that a receiver may be appointed by an interlocutory order, when it appears to the court to be "*just or convenient*" to do so. Mah J. referenced "*just and convenient*" to do so].

The Ontario Superior Court of Justice held that a bank demonstrated a lack of good faith in events leading up to a scheduled closing date of a transaction, and ordered the bank to close the transaction. Following defaults on credit facilities, the bank applied for a receiver, which was adjourned *sine die* on terms and a monitor was appointed to monitor the finances of the debtor and given limited power to undertake a sale and investment solicitation process (SISP). The monitor conducted a full SISP with a number of interested parties, and the bank accepted the offer of the purchaser. A letter agreement confirmed an irrevocable offer for sale, and the offer was made and accepted. The contract required "to take all reasonable steps necessary" to give effect to the agreement. The Court held that the bank was responsible for the agreement failing to close and was held to a higher standard than passive resistance to closing the deal that it had agreed to and that was under protection of a court-supervised process. The Court held that the creditor's conduct was outside the boundaries of good faith, and the purchaser and debtors would have been able to close on time but for the bank's unreasonable actions: Bank of Montreal v. 592931 Ontario Inc., 2021 CarswellOnt 9150, 90 C.B.R. (6th) 223, 2021 ONSC 4412 (Ont. S.C.J. [Commercial List]).

The appellant claimed that at the time that the Superior Court of Québec granted a bankruptcy order, it had no jurisdiction to make such order because the appellant was arguably already bankrupt due to his failure to file required documents in a proposal proceeding. The Court of Appeal of Québec held that the Superior Court of Québec had jurisdiction to grant the order, and dismissed the appeal. The Court held that pursuant to ss. 43(10) and (11) *BIA*, the Superior Court may suspend bankruptcy proceedings where the debtor denies the truth of the facts in support of the motion or for other reasons deemed sufficient. In addition, ss. 69 and 69.1 *BIA* provide a stay of civil remedies of creditors and the Crown — and not a judicial bankruptcy proceeding — where a notice of intent to make a proposal or proposal is tabled. Section 69.3 *BIA* provides for the suspension of creditors' remedies against the bankrupt. However, s. 69.4 *BIA* allows a bankruptcy court to lift the suspension. The notice of intention to make a proposal does not exclude the court's jurisdiction to issue a bankruptcy order. Here, the court questioned the motivation of the appellant who filed a notice of intention and omitted to file the required documents within the prescribed time limit. Section 4.2(2) *BIA* gives the bankruptcy court a broad power to make any order to remedy a party's lack of good faith. In Québec, the concept of good faith in the context of insolvency can draw on the tradition of the Civil Code of Québec, while keeping in mind the specific objectives of the *BIA* scheme. In the present case, the appellant cannot benefit from his bad faith conduct: Syndic de Poirier, 2024 CarswellQue 4600, 2024 QCCA 554 (C.A. Que.).

Justice Loo of the British Columbia Supreme Court considered the good faith provision of s. 4.2 of the *BIA*. A debtor was involved in a motor vehicle accident with a cyclist who suffered catastrophic injuries, and an award of more than $4 million in damages was awarded against the debtor, exceeding his insurance coverage by more than $2 million. The debtor then made a proposal in bankruptcy. He also commenced an action against Insurance Corporation of British Columbia (ICBC) as well as against the lawyers who represented him and gave him advice in relation to the jury trial ("bad faith action"), and a trial was set for 19 days. The *BIA* requires a trustee to call a meeting of creditors to be held within 21 days after the filing of a proposal; however, in this case, the first meeting of creditors has been adjourned 19 times. The defendants in the action sought to place the debtor into bankruptcy. The Court noted that the applicants rely on s. 4.2(2) of the *BIA* and submit that they are interested persons. It specifies: "If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances." The term "interested person" is not defined in the *BIA*, and the Court held that under s. 4.2, in order to have standing to bring an application under that section, a person must at least have a present legal or financial stake in the bankruptcy that would entitle him or her to

participate in the bankruptcy proceedings. The applicants did not fall into that category: Re Lau, 2024 CarswellBC 3207, 2024 BCSC 1991 (B.C. S.C.).

Associate Justice Rappos of the Ontario Superior Court of Justice held that an objecting creditor, who was the former spouse of the bankrupt, had failed to act in good faith throughout the proceeding. Associate Justice Rappos noted that the purposes of the bankruptcy system are the equitable distribution of the bankrupt's assets among their creditors, the bankrupt's financial rehabilitation, and protecting the public interest, citing Scott v. Golden Oaks Enterprises Inc., 2024 CarswellOnt 15330, 2024 SCC 32 (S.C.C.). When considering discharge matters, the court is also required to take into consideration the integrity of the bankruptcy process (Poonian v. British Columbia (Securities Commission), 2024 CarswellBC 2171, 14 C.B.R. (7th) 1, 2024 SCC 28 (S.C.C.)). It would be contrary to the bankruptcy regime to allow creditors to use the process to exact penance for grievances. Section 4.2(1) of the *BIA* provides that any interested person in any proceedings shall act in good faith with respect to those proceedings. Section 4.2(2) provides that if the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances. The purpose of s. 4.2 is to ensure that all parties act honestly, reasonably, and candidly throughout bankruptcy proceedings, the failure of which may be appropriately sanctioned. The Court relied on the factors set out in CWB Maxium Financial Inc. v. 2026998 Alberta Ltd., 2021 CarswellAlta 392, 88 C.B.R. (6th) 196, 2021 ABQB 137 (Alta. Q.B.), to conclude that here, the creditor failed in act in good faith. The e-mails and voicemails he sent to parties were abusive and vexatious, pursuing a strategy of harassment and intimidation; his conduct resulted in the use of an inordinate amount of judicial resources as he openly flouted and acted against court orders. During each of the attendances before the court, the creditor acted inappropriately and with a total lack of respect for the court through his use of expletives and aggressive tone. On certain occasions, it was necessary to have the registrar mute his microphone given the content of his statements. The Court held that striking his claim and striking his notice of objection to discharge were appropriate consequences for the utter disregard with which he treated parties and the court in this proceeding. These consequences further the principles of rehabilitation for a bankrupt and the integrity of the bankruptcy process: Re Gregoriou, 2024 CarswellOnt 16837, 2024 ONSC 5972 (Ont. S.C.J.).

For a discussion of the obligation to act in good faith during a proposal proceeding and the appropriate remedy for failure to do so, see Re Taber Water Disposal Inc., 2024 CarswellAlta 2941, 16 C.B.R. (7th) 75, 2024 ABKB 680 (Alta. K.B.) under § 4:82 “Good Faith”.

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