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EXPANDING *BHASIN*: ACTING HONESTLY INCLUDES CORRECTING FALSE IMPRESSIONS

In 2014, the Supreme Court of Canada’s (the “SCC”) landmark ruling in *Bhasin v Hrynew* recognized a duty of honest contractual performance and affirmed that contracting parties cannot “lie or otherwise knowingly mislead” one another in matters directly linked to the performance of a contract. On December 18, 2020, the SCC released *CM Callow Inc v Zollinger*, expanding the list of behaviors that breach a party’s contractual duty of honest performance. In doing so, the SCC explained the difference between acceptable non-disclosure and behaviour that it considers to be actively misleading. The decision made clear that the duty of honest performance includes correcting false impressions created through lies, half-truths, omissions, and, in certain cases, silence.

Facts of the Case

A group of ten condominium corporations (“**Baycrest**”) entered into two maintenance services contracts with CM Callow Inc. (the “**Contractor**”). The first was a two-year winter services contract (for the 2013 and 2014 winter seasons) and the second was a summer services contract for 2013. Under the 2-year winter contract, Baycrest had the right to unilaterally terminate upon 10 days’ written notice.

During the 2013 winter, Baycrest received several complaints from residents. It did not relay the complaints to the Contractor. In the spring of 2013, Baycrest made the decision to terminate the winter contract for the 2014 winter season but did not inform the Contractor. Between the spring and fall of 2013, two Baycrest executives discussed renewal of the winter contract beyond the 2014 winter season with the Contractor. These discussions left the Contractor with the impression that it was not in danger of losing the 2014 portion of the winter contract. During the 2013 summer contract, the Contractor performed additional services free of charge, aiming to incentivize Baycrest to renew its winter contract beyond 2014.

In September of 2013, Baycrest terminated the winter contract ahead of the 2014 winter season. At that point in time, all

tenders for the 2014 winter season were complete; the Contractor could not secure another contract for the winter of 2014. The Contractor sued Baycrest for breach of contract and loss of opportunity. The Contractor alleged Baycrest had acted in bad faith by accepting free services while knowing it intended to terminate the winter contract. It further alleged that Baycrest would have known the Contractor did not bid on other 2014 winter contracts, based on the Contractor’s belief in the stability of its two-year winter contract with Baycrest.

Lower Court Decisions

The trial judge found that Baycrest “actively deceived” the Contractor through its ongoing communications regarding contract renewal after having decided to terminate the current contract. The trial judge concluded these discussions led the Contractor to believe Baycrest was satisfied with its services. It held Baycrest breached its duty of honest performance by withholding its decision to terminate the winter contract. Damages were awarded to the Contractor.

The Ontario Court of Appeal (the “ONCA”) allowed the appeal. It held that since Baycrest had “no unilateral duty to disclose information relevant to termination”, Baycrest was free to terminate the contract so long as the requisite 10-day notice was given. The ONCA found that while Baycrest’s actions demonstrated a failure to act honourably, they did not meet the high threshold required to establish a breach of the duty of honest performance. It concluded that any deception in communications of possibly renewing the winter contract beyond 2014 were considered pre-contractual negotiations (during which the duty of honest performance does not apply).

The Contractor appealed to the SCC.

Failing to Correct a Misconception Can Amount to a Breach of Honest Contractual Performance

The SCC reinstated the trial judge’s decision. It emphasized that the duty of honest performance does not impose a *positive*

duty of loyalty or of disclosure, nor must a party give up advantages flowing from a contract. However, the duty of honest performance creates a *negative* obligation, that contracting parties “*not lie or otherwise knowingly mislead each other* about matters directly linked to the performance of the contract”. Such matters include the exercise of rights set out in a contract (e.g. a unilateral termination right).

The SCC found that the active communications between Baycrest and the Contractor about future winter contracts, combined with Baycrest intentionally withholding its decision to terminate the winter contract for the 2014 season, misled the Contractor about the security of its current contract. The SCC found that when Baycrest realized the Contractor was under a false impression, Baycrest was obligated to correct that impression. Although Baycrest had a right to terminate the contract on 10 days’ notice, it also had a duty to exercise the termination right in an honest way. Since Baycrest knowingly allowed the Contractor to believe its contract was secure, Baycrest breached its duty of honest contractual performance through its deceitful conduct.

The SCC stopped short of recognizing a new duty of good faith relating to “active non-disclosure”. It held the trial judge went too far in concluding that the 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”. The SCC simply found that, at minimum, Baycrest was required to refrain from false representations in anticipation of terminating the contract.

Take Away

The duty of honest performance by parties to a contract applies to all contracts and all contractual rights and obligations. Leases are contracts too, so it applies as between landlords and tenants. This duty requires parties to *not lie or knowingly mislead one another* about matters directly linked to the performance of the contract. Where a contracting party lies or misleads its counterparty, it is required to correct a false impression created by its own actions. Remaining silent may amount to a breach of the duty of honest performance and trigger liability for damages.

For example, a landlord may approach its tenant to exercise a right of relocation under a lease, in which case the landlord should not lie or mislead the tenant being relocated as to potential term extensions in the relocated premises, when no such term extensions are in fact being promised. Equally, a tenant may approach its landlord to exercise a right to sublease, in which case the tenant should not lie or mislead its landlord as to the subtenant’s intention to materially alter the use or character of the premises, when such alterations would be material to the landlord’s determination of whether to consent.

It is difficult to predict when a set of facts might trigger liability of the sort encountered in *CM Callow Inc v Zollinger*, but it is important to recognize that being forthright and honest may require more than truth-telling; it entails not withholding critical information.

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