

In a recent decision, the Supreme Court of Canada (“SCC”) clarified and arguably expanded the duty of honest performance (often referred to simply as the “duty of good faith”), which requires that parties to a contract not lie to or otherwise “knowingly mislead” one another about “matters directly linked to the performance of the contract”. In particular, the SCC held in *C.M. Callow Inc v Zollinger* [*Callow*] that a party to a contract may “knowingly mislead” another party, and thereby breach the duty of honest performance, through half-truths, omissions, and sometimes even silence.

Although *Callow* addressed a dispute arising from a commercial contract, it has significant implications for employers given that the SCC recently confirmed in *Matthews v Ocean Nutrition Canada Ltd* that the duty of honest performance applies to all contracts, including employment agreements (for a detailed analysis on the duty of honest performance, including its implications for employers, please read our blog).

Facts and Procedural History

The plaintiff, C.M. Callow Inc. (“Callow”), provided landscaping and property maintenance services to the defendant condominium corporations (“Baycrest”) under two seasonal contracts: a two-year winter maintenance contract, set to expire in April 2014, and a summer maintenance contract, set to expire in October 2013. The winter contract provided that Baycrest could unilaterally terminate it before the end of the two-year term, without cause, by giving ten days’ notice.

In early 2013, Baycrest decided to terminate the winter contract early, but chose not to inform Callow of its decision for several months. In the meantime, Callow and Baycrest had discussions which led Callow to believe that Baycrest was satisfied with its services and would likely renew the winter contract for another two years. Moreover, Baycrest allowed Callow to perform work for free during this time that was not required by the summer contract, while knowing that Callow hoped that this would increase the likelihood of the winter contract being renewed.

In September 2013, Baycrest gave the required ten days’ notice and informed Callow that it was terminating the contract. Callow sued for breach of contract, alleging that Baycrest had acted in bad faith.

At trial, the Ontario Superior Court of Justice (“ONSC”) ruled in Callow’s favour after finding that Baycrest had failed to act with the “minimum standard of honesty” and had “actively deceived” Callow. On appeal, the Ontario Court of Appeal (“ONCA”) reversed the trial decision and held that the ONSC had improperly expanded the duty of honest performance beyond the terms of the

winter contract. The ONCA found that Baycrest's actions may be dishonourable, but did not rise to the level required to establish a breach of the duty of honest performance.

Decision

The SCC, in a five-judge majority and a three-judge concurrence, found that Baycrest had breached its duty of honest performance by "knowingly misleading" Callow to believe that the winter contract would not be terminated.

The SCC's majority and concurring decisions both held that a party to a contract may "knowingly mislead" another party, and thereby breach the duty of honest performance, through half-truths, omissions, and sometimes even silence. Although the duty of honest performance does not equate to a positive obligation of disclosure, in circumstances where one party to a contract has knowingly misled another, they may be required to correct the false impression that they created.

In this case, the majority found that Baycrest knowingly misled Callow by making false representations that it was likely to renew the winter contract, and by failing to correct this false impression while it "gladly accepted" the free services that Callow offered in hopes of the winter contract being renewed. Thus, Baycrest exercised its right to terminate the winter contract dishonestly, which violated the duty of honest performance and amounted to a breach of contract.

Takeaways for Employers

Callow has significant implications for employers, given that the SCC arguably expanded duty of honest performance which applies to all contracts, including employment agreements.

In particular, *Callow* suggests that employers may be found to have breached the duty of honest performance by knowingly misleading employees about matters directly linked to their employment relationship through half-truths, omissions, or silence, and not just through overt dishonesty. Accordingly, in order to minimize exposures, employers should endeavour to ensure that they do not say or do anything that may mislead employees about matters that materially affect the terms of their employment. Moreover, employers should bear in mind that they may be required to disclose information to employees to correct false impressions regarding such matters, where the employer has created the false impression.

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This information is not intended as legal advice.