



SUPREME COURT OF CANADA

CITATION: C.M. Callow Inc. v.
Zollinger, 2020 SCC 45

APPEAL HEARD: December 6, 2019
JUDGMENT RENDERED: December 18,
2020
DOCKET: 38463

BETWEEN:

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**
Intervenors

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

REASONS FOR JUDGMENT:
(paras. 1 to 120)

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

CONCURRING REASONS:
(paras. 121 to 182)

Brown J. (Moldaver and Rowe JJ. concurring)

DISSENTING REASONS:
(paras. 183 to 238)

Côté J.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

C.M. CALLOW INC. v. ZOLLINGER

C.M. Callow Inc.

Appellant

v.

**Tammy Zollinger,
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Carleton Condominium Corporation No. 703,
Carleton Condominium Corporation No. 726,
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2020 SCC 45

File No.: 38463.

2019: December 6; 2020: December 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Breach — Performance — Duty of honest performance — Clause in winter maintenance agreement permitting unilateral termination of contract without cause upon 10 days' notice — Contract terminated by condominium corporations with required notice to contractor — Contractor suing for breach of contract — Trial judge finding that statements and conduct by condominium corporations actively deceived contractor and led it to believe contract would not be terminated — Trial judge awarding damages for breach of contract — Whether exercise of termination clause constituted breach of duty of honest performance.

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

In early 2013, Baycrest decided to terminate the winter maintenance agreement but chose not to inform Callow of its decision at that time. Throughout the

spring and summer of 2013, Callow had discussions with Baycrest regarding a renewal of the winter maintenance agreement. Following those discussions, Callow thought that it was likely to get a two-year renewal of the winter maintenance contract and that Baycrest was satisfied with its services. During the summer of 2013, Callow performed work above and beyond the summer maintenance contract at no charge, which it hoped would act as an incentive for Baycrest to renew the winter maintenance agreement.

Baycrest informed Callow of its decision to terminate the winter maintenance agreement in September 2013. Callow filed a statement of claim for breach of contract, alleging that Baycrest acted in bad faith. The trial judge held that the organizing principle of good faith performance and the duty of honest performance were engaged. She was satisfied that Baycrest actively deceived Callow from the time the termination decision was made to September 2013, and found that Baycrest acted in bad faith by withholding that information to ensure Callow performed the summer maintenance contract and by continuing to represent that the contract was not in danger despite knowing that Callow was taking on extra tasks to bolster the chances of the winter maintenance contract being renewed. She awarded damages to Callow in order to place it in the same position as if the breach had not occurred. The Court of Appeal set aside the judgment at first instance, holding that the trial judge erred by improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. Further, it held 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, and therefore was not directly linked to the performance of the winter contract.

Held (Côté J. dissenting): The appeal should be allowed and the judgment of the trial judge reinstated.

Per Wagner C.J. and Abella, Karakatsanis, Martin and **Kasirer JJ.** : The duty to act honestly in the performance of the contract precluded the active deception by Baycrest by which it knowingly misled Callow into believing that 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. Accordingly, the Court of Appeal should not have interfered with the conclusions of the trial judge.

The duty of honest performance in contract, formulated in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, applies to all contracts and requires that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. In determining whether dishonesty is connected to a given contract, the relevant question is whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly. While the duty of honest performance is not to be equated with a positive obligation of disclosure, in circumstances where a contracting party lies to or knowingly misleads

another, a lack of a positive obligation of disclosure does not preclude an obligation to correct a false impression created through that party's own actions.

The organizing principle of good faith recognized in *Bhasin* is not a free-standing rule, but instead manifests itself through existing good faith doctrines. While the duty of honest performance and the duty to exercise discretionary powers in good faith are distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. The duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing on the wrongful exercise of a contractual prerogative. Each of the specific legal doctrines derived from the organizing principle rest on a requirement of justice that a contracting party have appropriate regard to the legitimate contractual interests of their counterparty. They need not subvert their own interests to those of the counterparty by acting as a fiduciary or in a selfless manner. 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. Those rights and obligations must be exercised and performed honestly and reasonably and not capriciously or arbitrarily where recognized by law.

The duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right since 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. 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. This focus on the manner in which the termination right was exercised should not be confused with whether the right could be exercised. No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith.

The requirements of honesty in performance can go further than prohibiting outright lies. 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. One can mislead through action, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct.

The duty of honest performance is a contract law doctrine, not a tort and therefore a nexus with the contractual relationship is required. A breach must be directly linked to the performance of the contract. The framework for abuse of rights in Quebec is useful to illustrate the required direct link between dishonesty and performance from *Bhasin*. Authorities from Quebec serve as persuasive authority and comparison between the common law and civil law as they evolve in Canada is a particularly useful and familiar exercise for the Court. Like in the Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to the requirements of good faith. The direct link exists when the party performs their obligation or exercises their right under the contract dishonestly. While the duty of

honest performance has similarities with civil fraud and estoppel, it is not subsumed by them. 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.

The duty of honest performance attracts damages according to the ordinary contractual measure. The ordinary approach is to award contractual damages corresponding to the expectation interest. That is, damages should put the injured party in the position that it would have been in had the duty been performed. Although reliance damages, which are the ordinary measure of damages in tort, and expectation damages will be the same in many if not most cases, they are conceptually distinct, and there is no basis to hold that a breach of the duty of honest performance should in general be compensated by way of reliance damages.

In the instant case, Baycrest knowingly misled Callow in the manner in which it exercised clause 9 of the winter maintenance agreement and this wrongful exercise of the termination clause amounts to a breach of contract. Even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days' notice, the right had to be exercised in keeping with the duty to act honestly. Baycrest's deception was directly linked to this contract, because its exercise of the termination clause was dishonest. It may not have had a free-standing obligation to disclose its intention to terminate, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. Baycrest had to refrain from false representations in anticipation of the notice period. 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. Having failed to correct Callow's misapprehension that arose due to these false representations, Baycrest breached its duty of good faith in the exercise of its right of termination. Damages thus flow for the consequential loss of opportunity. 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.

Per Moldaver, **Brown** and Rowe JJ.: 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. If a plaintiff suffers loss in reliance on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole. It does not, however, impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract. The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure has been clearly demarcated by cases addressing misrepresentation and the same settled principles apply to the duty of honest performance, although it also applies (unlike misrepresentation) to representations made after contract formation.

There is, in the context of misrepresentation, a rich law accepting that sometimes silence or half-truths amount to a statement. Although contracting parties have no duty to disclose material information, a contracting party may not create a misleading picture about its contractual performance by relying on half-truths or partial disclosure. Representations 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. The entire context, which includes the nature of the parties' relationship, is to be considered in determining, objectively, whether the defendant made a representation to the plaintiff. The question is whether the defendant's active conduct contributed to a misapprehension that could be corrected only by disclosing additional information. Contracting parties are required to correct representations that are subsequently rendered false, or which the representor later discovers were erroneous. The question of whether a representation has been made is a question of mixed fact and law, subject to appellate review only for palpable and overriding error.

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. 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. 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.

Much like estoppel and civil fraud, the duty of honest performance vindicates the plaintiff's reliance interest. 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. The duty of honest performance is not subsumed by estoppel and civil fraud; rather, it protects the reliance interest in a distinct and broader manner since the defendant may be held liable even where it does not intend for the plaintiff to rely on the misleading representation. 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.

Disposing of the present case is a simple matter of applying the Court's decision in *Bhasin*; Callow's claim should be resolved by applying only the duty of honest performance. There is no basis for disturbing the trial judge's conclusions. Baycrest's conduct did not fall on the side of innocent non-disclosure. The trial judge found that active communications between the parties deceived Callow. Baycrest identifies no palpable and overriding error to justify overturning these conclusions. The

proper measure of damages represents the loss Callow suffered in reliance on Baycrest's misleading representations.

The majority relies on the civilian concept of "abuse of rights" in its analysis. In so doing, it departs from the Court's accepted practice in respect of comparative legal analysis. The principles that apply to this appeal are determinative and settled. Canada's common law and civil law systems have adopted very different approaches to the place of good faith in contract law. The majority's reliance on the civilian doctrine of abuse of a right distorts the analysis in *Bhasin* and elides the distinction between honest performance and good faith in the exercise of a contractual discretion.

Courts should draw on external legal concepts only where domestic law does not provide an answer or where it is necessary to modify or otherwise develop an existing legal rule. Courts may also look to the experience of other legal systems in considering whether a potential solution to a legal problem will result in negative consequences, or to observe that a domestic legal concept mirrors one found in another system. Even where comparative analysis is appropriate, it must be undertaken with care and circumspection. 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.

Per Côté J. (dissenting): The appeal should be dismissed. Callow's recourse cannot be based on a breach of the duty of honest performance. Although

Baycrest's conduct may not be laudable, it does not fall within the category of active dishonesty prohibited by that duty.

The duty of honest performance is described in *Bhasin* as a simple requirement not to lie or knowingly mislead about matters directly linked to performance of the contract. The requirement that parties not lie is straightforward; however, the kind of conduct covered by the requirement that they not otherwise knowingly mislead each other is not. The law imposes neither a duty of loyalty or of disclosure nor a requirement to forego advantages flowing from the contract on a contracting party. Absent a duty to disclose, it is far from obvious when exactly one's silence will knowingly mislead the other contracting party or at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract. In any event, the duty of honest performance should remain clear and easy to apply.

The obligations flowing from the duty of honest performance are negative obligations. Extending the duty beyond that scope would detract from certainty in commercial dealings. 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. Absent a duty of disclosure, 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. What constitutes a material contribution will

obviously depend upon the context, which includes the nature of the parties' relationship as well as the relevant provisions of the contract. 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.

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 obligation to speak arises when a party becomes aware of his counterparty's mistaken belief that the contract will not be terminated unless the party has taken positive action that materially contributed to that belief. 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.

In the present case, Baycrest bargained for a right to terminate its winter agreement for any reason and at any time upon giving 10 days' notice. In her

assessment of Baycrest's conduct, the trial judge did not ask herself if Baycrest lied or otherwise knowingly misled Callow about the exercise of its right to terminate the winter agreement for any other reason than unsatisfactory services. She wrongfully insisted on addressing alleged performance issues despite the fact that the winter agreement could be terminated even if Callow's services were satisfactory. The trial judge also did not consider that the active deception had to be directly linked to the performance of the contract. It is clear that the representations she found had been made by Baycrest were not directly linked to the performance of the winter agreement. The trial judge's misunderstanding of the applicable legal principles vitiated the fact-finding process.

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By Kasirer J.

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Hydro-Québec, 2018 SCC 46, [2018] 3 S.C.R. 101; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Mayor of Bradford v. Pickles*, [1895] A.C. 587; *Allen v. Flood*, [1898] A.C. 1; *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981); *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta. L.R. (6th) 96; *Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6; *Yam Seng Pte Ltd. v. International Trade Corp. Ltd.*, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321; *Dunning v. Royal Bank* (1996), 23 C.C.E.L. (2d) 71; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; *PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412, 309 O.A.C. 139; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303; *Lamb v. Kincaid* (1907), 38 S.C.R. 516.

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755; *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303; *Wood v. Grand Valley Rway. Co.* (1915), 51 S.C.R. 283; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433; *Caisse populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu*, [1990] 2 S.C.R. 995; *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95; *Moses v. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392; *Sport Maska Inc. v. Zitrer*, [1988] 1 S.C.R. 564; *Colonial Real Estate Co. v. La Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 S.C.R. 585; *Birdair inc. v. Danny's Construction Co.*, 2013 QCCA 580; *Bhasin v. Hrynew*, 2011 ABQB 637, 526 A.R. 1; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19.

By Côté J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Huscroft and Trotter JJ.A.), 2018 ONCA 896, 429 D.L.R. (4th) 704, 86 B.L.R. (5th) 53, [2018] O.J. No. 5855 (QL), 2018 CarswellOnt 18697 (WL Can.), setting aside a decision of O’Bonsawin J., 2017 ONSC 7095, [2017] O.J. No. 6176 (QL), 2017 CarswellOnt 18587 (WL Can.). Appeal allowed, Côté J. dissenting.

Brandon Kain, Adam Goldenberg, Vivian Ntiri and Miriam Vale Peters,
for the appellant.

Anne Tardif, Rodrigue Escayola and David Plotkin, for the respondents.

Catherine Beagan Flood and Nicole Henderson, for the intervener the
Canadian Federation of Independent Business.

Jeremy Opolsky and Winston Gee, for the intervener the Canadian
Chamber of Commerce.

The judgment of Wagner C.J. and Abella, Karakatsanis, Martin and Kasirer JJ. was delivered by

KASIRER J. —

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, 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, 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).

[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 J.J.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.

...

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 Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at pp. 1143-44; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 138; see also *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, 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 v. Royal Trust Co.*, [1997] 1 S.C.R. 846, 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; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, 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 v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, 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, at para. 30; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 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, 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 *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122 — 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

¹ Professor Gutteridge pointed in particular to the influence of *Mayor of Bradford v. Pickles*, [1895] A.C. 587 (H.L.) and, in the contractual setting, *Allen v. Flood*, [1898] A.C. 1 (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".

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 (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*, 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, 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, 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] 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. 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*, 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. C.J. (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; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, 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, 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 element 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, 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 than 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.*, 2004 SCC 9, [2004] 1 S.C.R. 303, 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, 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.

The reasons of Moldaver, Brown and Rowe JJ. were delivered by

BROWN J. —

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, 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). 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). 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, 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, at para. 56, citing *Opron Construction Co. v. Alberta* (1994), 151 A.R. 241 (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; *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. Lang Michener LLP*, 2013 ONCA 526, 116 O.R. (3d) 742, at paras. 84-87; *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1981), 33 B.C.L.R. 291 (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, 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, at para. 41; *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428, 423 D.L.R. (4th) 174, 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 basis its claim on the *effect* of that decision (see, e.g., *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.); *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38 (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, 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.*, 2004 SCC 9, [2004] 1 S.C.R. 303, 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 Rway. Co.* (1915), 51 S.C.R. 283, at pp. 288-91; see also *Lamb v. Kincaid* (1907), 38 S.C.R. 516, 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, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, 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*, at para. 85 (emphasis added)). It follows that, just as this Court decided in *Reference re Supreme Court Act* 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 v. Société mutuelle d’assurance contre l’incendie de la Vallée du Richelieu*, [1990] 2 S.C.R. 995, 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. v. Chambre des notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95, 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 (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, 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 Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 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 v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, 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, 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, at para. 138 (per McLachlin C.J., dissenting in part); *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at para. 41; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at paras. 76-79; see also *Sport Maska Inc. v. Zitrer*, [1988] 1 S.C.R. 564, 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. La Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 S.C.R. 585, 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 rescission by a distributor for reasons found not to be within the spirit of the discretionary rescission clause, or where the rescission 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 rescind a contract in a strictly lawful manner (in accordance with the language of a rescission clause), it is also necessary to do so in a legitimate way. [Emphasis added.]

(Birdair inc. v. Danny’s Construction Co., 2013 QCCA 580, 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, 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, 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.

The following are the reasons delivered by

CÔTÉ J. —

[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, 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, 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, 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, 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 with costs throughout, CÔTÉ J. dissenting.

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