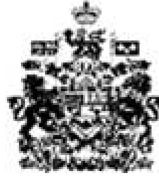

SUPREME COURT OF CANADA

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

Appeal Heard: Decembe
Judgment Rendered: D
Docket: 38463

Between:

C.M. Callow Inc.
Appellant

and

Tammy Zollinger, Condominium Management Group, Car
Condominium Corporation No. 703, Carleton Condominium C
No. 726, Carleton Condominium Corporation No. 742, Carleton Condominiu
Carleton Condominium Corporation No. 783, Carleton Condominium Corpo
Condominium Corporation
No. 806, Carleton Condominium Corporation No. 826, Carleton Condominium
Carleton Condominium Corporation No. 877
Respondents

\- and -

Canadian Federation of Independent Business and Canadian Chamb
Interveners

Coram: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Mar

Reasons for Judgment: (paras. 1 to 120)	Kasirer J. (Wagner C.J. and Abella, Karakats 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 f *Supreme Court Reports*.

C.M. Callow Inc. *Appellar*

v.

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 *Respondent*

and

Canadian Federation of Independent Business and
Canadian Chamber of Commerce *Intervener*

Indexed as: C.M. Callow Inc. *v.* Zollinger

2020 SCC 45

File No.: 38463.

2019: December 6; 2020: December 18.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Mart

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Breach — Performance — Duty of honest perfor maintenance agreement permitting unilateral termination of contract without cau: Contract terminated by condominium corporations with required notice to contrac breach of contract — Trial judge finding that statements and conduct by condomi deceived contractor and led it to believe contract would not be terminated — Trial j breach of contract — Whether exercise of termination clause constituted breach of d

In 2012, a group of condominium corporations ("Baycrest") ent maintenance contract and into a separate summer maintenance contract with C.N Pursuant to clause 9 of the winter maintenance contract, Baycrest was entitled to Callow failed to give satisfactory service in accordance with its terms. Clause 9 al other reason, Callow's services were no longer required, Baycrest could terminate t days' written notice.

In early 2013, Baycrest decided to terminate the winter maintenance inform Callow of its decision at that time. Throughout the spring and summer of 20 with Baycrest regarding a renewal of the winter maintenance agreement. Followin thought that it was likely to get a two-year renewal of the winter maintenance con satisfied with its services. During the summer of 2013, Callow performed work abc maintenance contract at no charge, which it hoped would act as an incentive for B maintenance agreement.

Baycrest informed Callow of its decision to terminate the winter September 2013. Callow filed a statement of claim for breach of contract, alleging faith. The trial judge held that the organizing principle of good faith performan performance were engaged. She was satisfied that Baycrest actively deceived termination decision was made to September 2013, and found that Baycrest acted

that the contract was not in danger despite knowing that Callow was taking on extra

of the winter maintenance contract being renewed. She awarded damages to Callov

same position as if the breach had not occurred. The Court of Appeal set aside the

holding that the trial judge erred by improperly expanding the duty of honest perfor

the winter maintenance agreement. Further, it held that any deception in the commur

of 2013 related to a new contract not yet in existence, namely the renewal that Call

therefore was not directly linked to the performance of the winter contract.

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

Per Wagner C.J. and Abella, Karakatsanis, Martin and **Kasirer** JJ. : Th performance of the contract precluded the active deception by Baycrest by which i into believing that the winter maintenance agreement would not be terminated. By clause dishonestly, it breached the duty of honesty on a matter directly linked to the p even if the 10-day notice period was satisfied. Accordingly, the Court of Appeal sho the conclusions of the trial judge.

The duty of honest performance in contract, formulated in *Bhasin v. Hr* 3 S.C.R. 494, applies to all contracts and requires that parties must not lie or otherw other about matters directly linked to the performance of the contract. In determi connected to a given contract, the relevant question is whether a right under that co obligation under that contract was performed, dishonestly. While the duty of hone equated with a positive obligation of disclosure, in circumstances where a contractin misleads another, a lack of a positive obligation of disclosure does not preclude an impression created through that party's own actions.

The organizing principle of good faith recognized in *Bhasin* is not a fre manifests itself through existing good faith doctrines. While the duty of honest pe

organizing principle, they should not be thought of as disconnected from one ar
performance shares a common methodology with the duty to exercise contractual di
faith by fixing on the wrongful exercise of a contractual prerogative. Each of the spe
from the organizing principle rest on a requirement of justice that a contracting party
the legitimate contractual interests of their counterparty. They need not subvert their
counterparty by acting as a fiduciary or in a selfless manner. This requirement of ju
the bargain, the rights and obligations agreed to, is the first source of fairness be
Those rights and obligations must be exercised and performed honestly and reasona
arbitrarily where recognized by law.

The duty of honesty as contractual doctrine has a limiting function on
complete and clear right since the duty, irrespective of the intention of the parties, ap
all contracts, and by extension, to all contractual obligations and rights. Instead of
terminate in and of itself, the duty of honest performance attracts damages where th
was exercised was dishonest. This focus on the manner in which the termination rig
be confused with whether the right could be exercised. No contractual right, includ
be exercised dishonestly and, as such, contrary to the requirements of good faith.

The requirements of honesty in performance can go further than prohib
or not a party has knowingly misled its counterparty is a highly fact-specific determi
half-truths, omissions, and even silence, depending on the circumstances. One can
saying something directly to its counterparty, or through inaction, by failing to correc
by one's own misleading conduct.

The duty of honest performance is a contract law doctrine, not a tort an
contractual relationship is required. A breach must be directly linked to the perfor
framework for abuse of rights in Quebec is useful to illustrate the required direct li
performance from *Bhasin*. Authorities from Quebec serve as persuasive authority a
common law and civil law as they evolve in Canada is a particularly useful and fam

requirements of good faith. The direct link exists when the party performs their c
right under the contract dishonestly. While the duty of honest performance has simi
estoppel, it is not subsumed by them. Unlike estoppel and civil fraud, the duty of h
require a defendant to intend that the plaintiff rely on their representation or false stat

The duty of honest performance attracts damages according to the or
The ordinary approach is to award contractual damages corresponding to the ex
damages should put the injured party in the position that it would have been in ha
Although reliance damages, which are the ordinary measure of damages in tort, and e
the same in many if not most cases, they are conceptually distinct, and there is no b
the duty of honest performance should in general be compensated by way of reliance

In the instant case, Baycrest knowingly misled Callow in the manner in
of the winter maintenance agreement and this wrongful exercise of the termination
of contract. Even though Baycrest had what was, on its face, an unfettered rig
maintenance agreement on 10 days' notice, the right had to be exercised in keeping w
Baycrest's deception was directly linked to this contract, because its exercise of
dishonest. It may not have had a free-standing obligation to disclose its intention to t
had an obligation to refrain from misleading Callow in the exercise of that clause. E
false representations in anticipation of the notice period. If someone is led to belie
content with their work and their ongoing contract is likely to be renewed, it is re
infer that the ongoing contract is in good standing and will not be terminated ear
Callow's misapprehension that arose due to these false representations, Baycrest bre
in the exercise of its right of termination. Damages thus flow for the consequential
damages are to be measured against a defendant's least onerous means of performan
of performance in this case would have been to correct the misrepresentation once
drawn a false inference. Had it done so, Callow would have had the opportunity to
the upcoming winter.

Per Moldaver, **Brown** and Rowe JJ.: As a universally applicable mini must be performed honestly. Contracting parties may therefore not lie to, or otherwi other about matters directly linked to performance. If a plaintiff suffers loss in re misleading conduct, the duty of honest performance serves to make the plaintiff w impose a duty of loyalty or of disclosure or require a party to forego advantages flo dividing line between (1) actively misleading conduct, and (2) permissible non- demarcated by cases addressing misrepresentation and the same settled principles performance, although it also applies (unlike misrepresentation) to representa formation.

There is, in the context of misrepresentation, a rich law acceptin half-truths amount to a statement. Although contracting parties have no duty to disc contracting party may not create a misleading picture about its contractual performa or partial disclosure. Representations need not take the form of an express statem communicated, it may comprise other acts or conduct on the part of the defendant includes the nature of the parties' relationship, is to be considered in determinin defendant made a representation to the plaintiff. The question is whether the contributed to a misapprehension that could be corrected only by disclosing additio parties are required to correct representations that are subsequently rendered false, o discovers were erroneous. The question of whether a representation has been made 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 bargain by placing it in the position it would have occupied had the contract justification for awarding expectation damages does not apply to breach of the dut such cases, the issue is not that the defendant has failed to perform the contract, ther expectations. It is, rather, that the defendant has performed the contract, but has also making dishonest extra-contractual misrepresentations concerning that performanc relied to its detriment. The plaintiff's complaint is not lost value of performance,

And just as these are unrelated interests, an expectation measure of damage is unrela
of honest performance.

Much like estoppel and civil fraud, the duty of honest performance vindi
interest. A contracting party that breaches this duty will be liable to compensa
foreseeable losses suffered in reliance on the misleading representations. The duty o
subsumed by estoppel and civil fraud; rather, it protects the reliance interest in a c
since the defendant may be held liable even where it does not intend for the plainti
representation. Irrespective of the defendant's intention, all a plaintiff need show is
the misleading representation, it would not have sustained the loss.

Disposing of the present case is a simple matter of applying the
Callow's claim should be resolved by applying only the duty of honest performa
disturbing the trial judge's conclusions. Baycrest's conduct did not fall on the side
The trial judge found that active communications between the parties deceived Ca
palpable and overriding error to justify overturning these conclusions. The pr
represents the loss Callow suffered in reliance on Baycrest's misleading representatic

The majority relies on the civilian concept of "abuse of rights" in its ana
from the Court's accepted practice in respect of comparative legal analysis. The p
appeal are determinative and settled. Canada's common law and civil law systems
approaches to the place of good faith in contract law. The majority's reliance on the
a right distorts the analysis in *Bhasin* and elides the distinction between honest per
the exercise of a contractual discretion.

Courts should draw on external legal concepts only where domestic law
or where it is necessary to modify or otherwise develop an existing legal rule. C
experience of other legal systems in considering whether a potential solution to a
negative consequences, or to observe that a domestic legal concept mirrors one fou

in using concepts from one of Canada's legal systems to modify the other is that the

able to completely and coherently integrate into the adopting system's structure.

Per **Côté** J. (dissenting): The appeal should be dismissed. Callow's re

breach of the duty of honest performance. Although Baycrest's conduct may not b

within the category of active dishonesty prohibited by that duty.

The duty of honest performance is described in *Bhasin* as a simp

knowingly mislead about matters directly linked to performance of the contract. The

lie is straightforward; however, the kind of conduct covered by the requireme

knowingly mislead each other is not. The law imposes neither a duty of loya

requirement to forego advantages flowing from the contract on a contracting party.

is far from obvious when exactly one's silence will knowingly mislead the other c

point a permissible silence turns into a non-permissible silence that may constitute

event, the duty of honest performance should remain clear and easy to apply.

The obligations flowing from the duty of honest performance are neg

the duty beyond that scope would detract from certainty in commercial dealings. T

considered dishonest within the meaning of *Bhasin* unless there is a positive ob

obligation does not arise simply because a party to a contract realizes that his count

mistaken belief. Absent a duty of disclosure, a party to a contract has no obligation t

mistaken belief unless the party's active conduct has materially contributed to it.

contribution will obviously depend upon the context, which includes the nature of

well as the relevant provisions of the contract. Parties that prefer not to disclose ce

they are entitled not to do — are not required to adopt a new line of conduct in th

simply because they chose silence over speech.

In the context of a right to terminate a contract without cause, a

agreement does not have to convey hints in order to alert his counterparty that thei

contract will not be terminated unless the party has taken positive action that ma belief. If one party leads another to believe that their contract will be renewed, it foll reasonably expect their business relationship to be extended rather than terminate effect cannot be drawn in the abstract. In order to infer that one party, through discus other party to think that there was no risk their existing agreement would be termin process must obviously take into account the nature of the risk at stake and what during those discussions. Otherwise, the inference would entail a palpable and ove subject to appellate review.

In the present case, Baycrest bargained for a right to terminate its winte and at any time upon giving 10 days' notice. In her assessment of Baycrest's conduc herself if Baycrest lied or otherwise knowingly misled Callow about the exercise winter agreement for any other reason than unsatisfactory services. She wrongf alleged performance issues despite the fact that the winter agreement could be te services were satisfactory. The trial judge also did not consider that the active decepti to the performance of the contract. It is clear that the representations she found had b not directly linked to the performance of the winter agreement. The trial judge applicable legal principles vitiated the fact-finding process.

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APPEAL from a judgment of the Ontario Court of Appeal (Lauwers,
2018 ONCA 896, 429 D.L.R. (4th) 704, 86 B.L.R. (5th) 53, [2018] O.J. No. 585
18697 (WL Can.), setting aside a decision of O’Bonsawin J., 2017 ONSC 7095, [
2017 CarswellOnt 18587 (WL Can.). Appeal allowed, Côté J. dissenting.

Brandon Kain, *Adam Goldenberg*, *Vivian Ntiri* and *Miriam Vale Peters*,

Catherine Beagan Flood and *Nicole Henderson*, for the intervener

Independent Business.

Jeremy Opolsky and *Winston Gee*, for the intervener the Canadian Cham

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

KASIRER J. —

I. Introduction

[1] This appeal concerns a clause in a commercial winter maintenance a clients to terminate the contract unilaterally, without cause, upon giving the contr dispute does not turn on whether the clause represented a fair bargain between the pa about the meaning of the termination clause. The dispute turns rather on the mann (collectively "Baycrest") exercised the termination clause. Acknowledging that 10 appellant, C.M. Callow Inc. ("Callow"), argues that Baycrest exercised the termina requirements of good faith set forth by this Court in *Bhasin v. Hrynew*, 2014 SCC particular the duty to perform the contract honestly.

[2] In *Bhasin*, Cromwell J. recognized a general organizing principle of g "parties generally must perform their contractual duties honestly and reasonabl arbitrarily" (para. 63). This organizing principle, he explained, "is not a free-standin that underpins and is manifested in more specific legal doctrines and may be given situations" (para. 64). The organizing principle of good faith manifests itself th addressing "the types of situations and relationships in which the law requires, candid, forthright or reasonable contractual performance" (para. 66).

[3] In this appeal, the applicable good faith doctrine is the duty of honesty
As Cromwell J. explained in *Bhasin*, at para. 73, the duty of honesty applies to a
contractual doctrine, and means “simply that parties must not lie or otherwise kno
about matters directly linked to the performance of the contract”. Callow says Bayc
right to terminate in keeping with the mandatory duty of honest performance amour
It points to the trial judge’s findings that Baycrest withheld the information that th
termination. Baycrest then continued to represent that the contract was not in danger
correct the false impression it had created and under which Callow was operating. Th
several months, “in anticipation of the notice period” wrote the trial judge and, cl
foregoing the opportunity to bid on other winter contracts and thereby justifies a
ONSC 7095, at para. 67 (CanLII)).

[4] Baycrest, for its part, recalling that Cromwell J. explicitly stated in *Bh*
performance does not amount to a duty to disclose, argues that its silence did not c
says the alleged dishonesty was not connected to the contract in place at the time be
impugned communications related to the possibility of a future contract not yet exe
agreed and overturned the trial judge’s decision (2018 ONCA 896, 429 D.L.R. (4th)

[5] I respectfully disagree with the Court of Appeal on whether the mann
clause was exercised ran afoul of the minimum standard of honesty. The duty to act
of the contract precludes active deception. Baycrest breached its duty by knowing
believing the winter maintenance agreement would not be terminated. By exercis
dishonestly, it breached the duty of honesty on a matter directly linked to the perfor
if the 10-day notice period was satisfied and irrespective of their motive for termi
follow, I would allow the appeal and restore the judgment of the Ontario Superior Co

II. Background

[6] Baycrest includes 10 condominium corporations managed by Condor

collectively, they established a Joint Use Committee ("JUC"). The JUC makes decis
shared assets of the condominiums. In 2010, the condominium corporations ente
maintenance agreement with Callow, a corporation owned and operated by Christop
terms of the agreement, Callow provided winter services, including snow rem
corporations.

[7] At the conclusion of the two-year term in 2012, the corporations enter
with Callow. Joseph Peixoto — president of one of the condominium corporations
JUC — negotiated the main pricing terms with Mr. Callow for the renewal of the w
which also added a separate summer maintenance services contract.

[8] At issue in this appeal is the winter maintenance agreement, which
from November 1, 2012 to April 30, 2014. Pursuant to clause 9, the corporations w
winter maintenance agreement if Callow failed to give satisfactory service in accor
Agreement. Moreover, clause 9 provided that "if for any other reason [Callow's] ser
for the whole or part of the property covered by this Agreement, then the [cond
terminate this contract upon giving ten (10) days' notice in writing to [Callow]" (A.R

[9] During the first winter of the two-winter term, there were complaint
condominiums, many of which related to snow removal from individual parkir
Mr. Callow attended a JUC meeting to address the concerns. The minutes reflecte
meeting, recording that "[t]he Committee confirmed that [Callow] has been diligen
best as could be expected considering the nature of the storms recently experience
After the meeting, the property manager at the time also sent a follow-up email to
that your Board has been generally satisfied with the snow removal — so there is n
here" (p. 39).

[10] A few months later — still in the first year of the agreement — re
became the property manager. About three weeks after Ms. Zollinger's arrival, anot

maintenance agreement with Callow "due to poor workmanship in the 2012-13 wint
The minutes went on to indicate that Ms. Zollinger had reviewed the contract and ad
they could terminate the contract with Callow with no financial penalty. Ms. Zollin
would get quotes from other snow removal contractors. The JUC voted to termin
agreement shortly thereafter, "in either March or April" of 2013 (trial reasons, at para
inform Mr. Callow of its decision to terminate the winter maintenance agreement at t

[11] Although only one winter of the two-winter term had been complete
throughout the spring and summer of 2013 with Baycrest regarding a renewal
agreement. Specifically, Mr. Callow had various exchanges with two condom
members, one of whom was Mr. Peixoto. Following these conversations, wrote t
thought that he was likely to get a two-year renewal of his winter maintenance serv
satisfied with his services" (para. 41).

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

[13] Conversations between Callow and Mr. Peixoto continued into July
decided to improve the appearance of two gardens. In an email dated July 17, 2
another condominium corporation board member regarding this "freebie" work, wr
doing it but I am sure it's an attempt at us keeping him. Btw, I was talking to him
under the impression we're keeping him for winter again. I didn't say a word to
involved but I did tell [Ms. Zollinger] that [Mr. Callow] thinks we're keeping him f
p. 73).

[14] Baycrest did not inform Callow about the decision to terminate the wi
until September 12, 2013. At that point, Ms. Zollinger advised Callow by way of e
be requiring your services for the winter contract for the 2013/2014 season, as pe
Baycrest needs to provide the contractor with 10 days' notice" (A.R., vol. III, at p. 4

[15] Callow consequently filed a statement of claim for breach of contract,
in bad faith by accepting free services while knowing Callow was offering them in o
contractual relationship. Moreover, Callow alleged that Baycrest knew or ought t
would not seek other winter maintenance contracts in reliance on the representation
satisfactory service and the contract would not be prematurely terminated. Accordi
misrepresentations and/or bad faith conduct, [Mr. Callow on behalf of Callow] did
winter maintenance contracts. [Baycrest is] now liable for Callow's damages for
vol. I, p. 45, at para. 30). Finally, Callow alleged that Baycrest was unjustly enri
provided in the summer of 2013.

[16] Callow sought damages in the amount of $81,383.68 for breach of co
to the one year remaining on the winter maintenance agreement, damages for i
contractual relations, inducing breach of contract, and negligent misrepresentation.
the amount of $5,000.00 for unjust enrichment, an amount equivalent to the "freebi
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 com
several key witnesses, concluding that Mr. Callow was a credible witness. In contra
witnesses — including a former property manager, as well as Ms. Zollinger and M
many exaggerations, over-statements and constantly provided comments contra

[18] At trial, Baycrest advanced two main submissions. First, it argued contractual interpretation, clause 9 clearly and unambiguously states that it could te reason by providing Callow with 10 days' notice in writing. Second, even though n invoke clause 9, Baycrest nonetheless argued that the evidence before the trial judge level of service did not comply with the contractual specifications and was not to its

[19] The trial judge dismissed both arguments. First, she found that Call standard. While there were complaints about Callow's work, she observed that "a s the clearing of parking stalls, which was the fault of owners/tenants who did not mo quality of Callow's work below standard?" asked the trial judge, "The evidence answer no" (para. 55).

[20] Second, the trial judge held that this was not a simple contractual inte the organizing principle of good faith performance and the duty of honest performa judge explained that, as Cromwell J. noted in *Bhasin*, the duty of honest performa with a duty of disclosure. "However," she wrote, "contracting parties must be a standard of honesty" to ensure "that parties will have a fair opportunity to protect t does not work out" (para. 60, citing *Bhasin*, at para. 86). For the purposes of drawi failure to disclose a material fact and active dishonesty, the trial judge observed t deception, there is no unilateral duty to disclose information before the notice period'

[21] The trial judge was satisfied that Baycrest "actively deceived' termination decision was made in March or April 2013 to the time wh September 12, 2013. Specifically, she found that Baycrest "acted in bad faith by (1) to ensure Callow performed the summer maintenance services contract; and (2) con contract was not in danger despite [Baycrest's] knowledge that Callow was taking chances of renewing the winter maintenance services contract" (para. 65). Given between the parties during the summer of 2013, "which deceived Callow", the tr [Baycrest's] argument that no duty was owed to disclose the decision to terminate th

performance issues, to provide prompt notice, or to refrain from any representations
period" (para. 67).

[22] The trial judge tied Baycrest's dishonesty to the way in which it delay
notice period set out in clause 9, while it actively deceived Callow that the contra
reasons relied upon, by analogy, the law recognizing a duty to exercise good faith
when terminating an employee. She noted that Baycrest "intentionally withheld th
(para. 69). She expressly acknowledged that exercising a termination clause is not, ir
of good faith. However, in this case, Baycrest deliberately deceived Callow abou
breach of the duty of honest performance.

[23] By reason of this contractual breach, the trial judge awarded damages tc
in the same position as if the breach had not occurred. These damages amour
equivalent to the value of the winter maintenance agreement for one year, minus e
typically incur; a further amount of $14,835.14, representing the value of one year
Callow would not have leased if it had known the winter maintenance was to be te
the final invoice for the summer work, which Baycrest had failed to pay to Call
Callow.

[24] The trial judge was also satisfied that Baycrest was unjustly enriche
performed by Callow during the summer of 2013. She declined, however, to aw
enrichment since Callow failed to provide evidence of its expenses.

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

[25] Baycrest appealed, arguing that the trial judge erred in two respects.
improperly expanding the duty of honest performance beyond the terms of the win
Second, it argued the trial judge erred in assessing damages.

[26] The Court of Appeal unanimously agreed with Baycrest on the f
judgment at first instance. The Court of Appeal recognized, as the trial judge had fo
two of the condominium corporations and members of the JUC were aware that M
'freebie' work, and knew he was under the impression that the contracts were likel
Nonetheless, the court stressed that *Bhasin* was a modest, incremental step, and goo
manner so as to avoid commercial uncertainty. As such, the duty of honesty "does n
or of disclosure or to require a party to forego advantages flowing from the contract'
para. 73).

[27] The Court of Appeal further emphasized that Callow had made tw
First, Callow acknowledged that Baycrest was not contractually required to disclose
winter maintenance agreement prior to the 10-day notice period. Second, Callow ac
to provide notice on a more timely basis was not, in and of itself, evidence of bad
unilateral duty to disclose information relevant to termination", the court reason
terminate the winter contract with [Callow] provided only that [it] informed him of
gave the required notice. That is all that [Callow] bargained for, and all that he was e
the trial judge's findings "may well suggest a failure to act honourably," the Court o
that the findings "do not rise to the high level required to establish a breach of the d
(para. 16).

[28] In any event, the Court of Appeal said that any deception in the
summer of 2013 related to a new contract not yet in existence, namely the ren
negotiate. Accordingly, in its view, any deception could not be said to be directly li
the winter contract (para. 18).

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

IV. Analysis

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

[31] Before this Court, Callow does not dispute the meaning of clause 9. N on appeal concern the adequacy of the bargain struck with Baycrest or whether the t Callow is not saying, for instance, that it should have been afforded more notice bec unfair in the circumstances. I recognize that, at trial, there was some question as to v fitting given Callow's work record. Indeed, the trial judge found in Callow's favou that it had provided satisfactory services. But the suggestions that Callow was ter purpose or motive, or even that the termination was unreasonable, need not be dete narrow question addressed here is whether Baycrest failed to satisfy its duty not t Callow about matters directly linked to the performance of the winter maintenance exercising the termination clause as it did.

[32] In the present circumstances, Callow says Baycrest misled Mr. Callow of the winter maintenance agreement and, as a result, it knowingly deceived him ir with Callow's performance of the agreement then in force for the upcoming wir mistakenly inferred, as a consequence of this dishonesty, that there was no danger of being terminated pursuant to clause 9 of the contract. This, Callow submits, wa Baycrest, who failed to correct its false impression which amounted to a brea performance. In short, Callow says this deceitful conduct meant the exercise of wrongful in that it was breached even if, strictly speaking, the required notice was g claims Callow, to compensatory damages on the ordinary measure as the trial judg lost profits, wasted expenditures and an unpaid invoice.

[33] In addition to the duty of honest performance, Callow invokes a fre contractual discretionary powers in good faith, which, it argues, Cromwell J. alsc

been a breach of one or another of those existing duties, Callow submits, alternati
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 C
that clause 9 on its face did not require it to give more notice. Baycrest agrees wi
whatever communications took place between the parties, those communications
and were not directly related to the performance of the winter contract then in fo
Baycrest an unqualified right to terminate the contract on notice for any reaso
occurred. Recalling that the duty to act honestly in performance is not a duty of disc
a duty of loyalty akin to that of a fiduciary, Baycrest says that Callow seeks to have i
requiring it to inform Callow of its intention to end the winter maintenance agre
10 days' notice. The Court of Appeal was thus correct in concluding that the ba
entitled Baycrest to end the contract as it did. In a similar vein, with respect to the du
powers in good faith, Baycrest says that because it respected the terms of the con
contractual discretion does not arise on the facts of this case.

[35] In any event, Baycrest emphasizes the conclusion reached by th
discussions in the spring and summer of 2013 that may have misled Callow were c
negotiations. Thus, any dishonesty cannot be said to be directly linked to the
maintenance agreement.

[36] The appeal should be allowed. I respectfully disagree with the Court of

[37] First, *Bhasin* is clear that even though Baycrest had what was, on its
terminate the winter maintenance agreement on 10 days' notice, the right had to be e
duty to act honestly, i.e. Baycrest could not "lie or otherwise knowingly mislead" Ca
linked to the performance of the contract". According to the Court of Appeal, a
renewal, which was in turn connected to pre-contractual negotiations to which the d
not apply. I respectfully disagree. In my view, the Court of Appeal may have e

was not in danger of non-renewal" (emphasis added). Referring instead to th

agreement, the trial judge had found Baycrest misrepresented "that the contract

[Baycrest's] knowledge that Callow was taking on extra tasks to bolster the chan

maintenance services contract" (para. 65). In determining whether dishonesty is co

the relevant question is generally whether a right under that contract was exercised,

contract was performed, dishonestly. As I understand it, the trial judge's finding wa

case was related not to a future contract but to the termination of the winter mainten

is led to believe that their counterparty is content with their work and their ongo

renewed, it is reasonable for that person to infer that the ongoing contract is in go

terminated early. This is what the trial judge found. Simply said, Baycrest's alle

linked to this contract because its exercise of the termination clause in this contract w

[38] Second, the Court of Appeal erred when it concluded that the trial judg

to a breach of the duty of honest performance. While the duty of honest performance

positive obligation of disclosure, this too does not exhaust the question as to v

constituted, as a breach of the duty of honesty, a wrongful exercise of the terminatio

have had a free-standing obligation to disclose its intention to terminate the contr

days' notice, but it nonetheless had an obligation to refrain from misleading Cal

clause. In circumstances where a party lies to or knowingly misleads another, a lac

disclosure does not preclude an obligation to correct the false impression created thr

[39] In light of these points, it is my view that this is not a simple contractua

on the meaning to be given to clause 9. Nor is this a case involving passive failure

Instead, as recognized by the Court of Appeal, "[n]ot only did [Baycrest] fail to infor

to terminate, . . . [it] actively deceived Callow as to [its] intentions and accep

performed, in the knowledge that this extra work was performed with the in

[Baycrest] to award [Callow] additional contracts once the present contracts ex

added)). While Baycrest was not required to subvert its legitimate contractual inte

respect of the existing winter services agreement, it could not, as it did, "undermine

[40] For the reasons that follow, this dispute can be resolved on the basis o

relating to the duty of honest performance. Baycrest knowingly misled Callow

exercised clause 9 of the agreement and this wrongful exercise of the termination cla

contract under *Bhasin*. In the circumstances, I find it unnecessary to answer Callow's

of the question of honesty, Baycrest breached a duty to exercise a discretionary po

necessary to extend *Bhasin* to recognize a new duty of good faith relating to wh

"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 co

was not connected to the contract "then in effect" (C.A. reasons, at para. 18). As I

while Baycrest had the right to terminate, it breached the duty of honest performance

did.

[42] Callow relies on the duty of honest performance in contract formulated

applies to all contracts, "requires the parties to be honest with each other in relation

contractual obligations" (para. 93). While this formulation of the duty refers expli

contractual obligations, it applies, of course, both to the performance of one's obliga

one's rights under the contract. Cromwell J. concluded, at paragraphs 94 and 103, th

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 di
> exercising the non-renewal clause": para. 261; see also para. 271. There
> that finding on appeal. It follows that Can-Am breached its duty to perfo
>
> . . .
>
> As the trial judge found, this dishonesty on the part of Can-Am w
> connected to Can-Am's performance of the Agreement with Mr. Bhasin
> renewal provision. I conclude that Can-Am breached the 1998 Agree

This same framework for analysis applies to this appeal. The trial judge here made Baycrest acted dishonestly toward Callow by representing that the contract was n decision to terminate the contract had already been made (paras. 65 and 67). There that finding on appeal. As I will explain, it follows that Baycrest deceived Callow ar of honest performance.

[43] I begin by recognizing the debate as to the extent to which good faith, should substantively constrain a right to terminate, in particular one found in a cont "Good Faith and Termination: The English and Australian Experience" (2019), 1 *Law* 185, at p. 189; M. Bridge, "The Exercise of Contractual Discretion" (2019), 13 some, the right to terminate is in the nature of an "absolute right" insulated from ju exercise of contractual discretion (see E. Peel, *The Law of Contract* (15th ed. 202 end, I recall that Cromwell J. observed that "[c]lassifying the decision not to renew discretion would constitute a significant expansion of the decided cases under that t para. 72). I need not and do not seek to resolve this debate in this case. I emphasi recognized that, regardless of this debate, the non-renewal clause could not be exer Whatever the full range of circumstances to which good faith is relevant to contract l it is beyond question that the duty of honesty is germane to the performance of this way in which the unilateral right to terminate for convenience set forth in clause 9 wa

[44] As a further preliminary matter, I recall that the organizing principle Cromwell J. is not a free-standing rule, but instead manifests itself through existin that this list may be incrementally expanded where appropriate. In this case, C doctrines: the duty of honest performance and the duty to exercise discretionary p view, properly understood, the duty to act honestly about matters directly linked contract — the exercise of the termination clause — is sufficient to dispose of this law set forth in *Bhasin* is necessary to find in favour of Callow. Rather, this appeal illustrate this existing doctrine that, I say respectfully, was misconstrued by the Court

[45] While these two existing doctrines are indeed distinct, like each of the
the organizing principle, they should not be thought of as disconnected from one ano
that good faith contractual performance is a shared "requirement of justice" that
various rules recognized by the common law on obligations of good faith contractu
para. 64). The organizing principle of good faith was intended to correct the "piecem
in the common law, which too often failed to take a consistent or principled approa
instead, develop the law in this area in a "coherent and principled way" (paras. 59 an

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

[47] The specific legal doctrines derived from the organizing principle rest o
that a contracting party, like Baycrest here in respect of the contractual duty of
appropriate regard to the legitimate contractual interests of their counterparty (*Bhas*
not, according to *Bhasin*, subvert its own interests to those of Callow by acting as
manner that would confer a benefit on Callow. To be sure, this requirement of justic
bargain, the rights and obligations agreed to, is the first source of fairness between p
the same token, those rights and obligations must be exercised and performed, a
principle, honestly and reasonably and not capriciously or arbitrarily where recogniz
of justice, rooted in a contractual ideal of corrective justice, ties the existing doctri
the duty to act honestly, together. The duty of honest performance is but an exempl
based on its failure to perform clause 9 honestly, Baycrest committed a breach of
which it has to answer.

[48] When, in *Bhasin*, Cromwell J. recognized a duty to act honestly in the p
explained that this duty "should not be thought of as an implied term, but a general c
imposes as a contractual duty a minimum standard of honest contractual performance
this new duty as a matter of contractual doctrine was appropriate, Cromwell J. wrot
expect that their contracts permit dishonest performance of their obligations" (pa
applies even where — as in our case — the parties have expressly provided for th
given that the duty of good faith "operates irrespective of the intentions of the parties
right, including a termination right, can be exercised dishonestly and, as such, cont
good faith.

[49] Cromwell J.'s choice of language is telling. It is not enough to say
dishonesty occurred while both parties were performing their obligations unde
dishonest or misleading conduct must be directly linked to performance. Otherwis
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 a
law that address the legal consequences of deceit with which it may share cert
imagine analyzing the facts giving rise to a duty of honest performance claim throu
legal doctrines, such as fraudulent misrepresentation giving rise to rescission of the
fraud (see, e.g., B. MacDougall, *Misrepresentation* (2016), at §1.144-1.145). Howe
wrote explicitly that while the duty of honest performance has similarities with civil
subsumed by them" (para. 88). For instance, unlike estoppel and civil fraud, the c
does not require a defendant to intend that the plaintiff rely on their represe
Cromwell J. explicitly defined the duty as a new and distinct doctrine of contract
liability or tort damages but rather resulting in a breach of contract when violated (pa
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 appro
must be directly linked to the performance of the contract. Cromwell J. observed a

particular, to the trial judge's conclusion that Can-Am "acted dishonestly with Mr. B

leading up to its exercise of the non-renewal clause" (para. 98; see also para. 103). A

performance of obligations under a contract, or to the exercise of rights set forth the

of the duty. In a comment on *Bhasin*, Professor McCamus underscored this connecti

view that the new duty of honesty could be breached in the context of the exercise

That was the holding in *Bhasin*" ("The New General 'Principle' of Good Faith Perfo

of Honesty in Performance in Canadian Contract Law" (2015), 32 *J.C.L.* 103, at p

discretion was not the basis of the damages awarded in *Bhasin*, the duty of ho

common methodology with the duty to exercise contractual discretionary powers in g

in circumstances like ours, on the wrongful exercise of a contractual prerogative.

[52] Importantly, Callow does not seek to bar Baycrest from exercising the t

in *Bhasin*, it only seeks damages flowing from the fact that the clause was exercised

Callow's argument, properly framed, is that Baycrest could not exercise clause 9 in

duty of honesty, however absolute that right appeared on its face.

[53] Good faith is thus not relied upon here to provide, by implication,

guide to interpretation of language that was somehow an unclear statement of parties

honesty as contractual doctrine has a limiting function on the exercise of an otherw

because the duty, irrespective of the intention of the parties, applies to the performa

extension, to all contractual obligations and rights. This means, simply, that instead

to terminate in and of itself, the duty of honest performance attracts damages whe

right was exercised was dishonest.

[54] The issue, then, is not whether the clause was properly interpreted, or

inadequate. Moreover, what is important is not the failure to act honestly in the ab

failed to act honestly in exercising clause 9. Stated simply, no contractual right can

manner because, pursuant to *Bhasin*, that would be contrary to an imperative requir

to lie or knowingly deceive one's counterparty in a matter directly linked to the perfo

[55] This argument invites this Court to explain if and how Baycre termination clause, quite apart from any notice requirement. I would add that this fo the termination right was exercised should not be confused with *whether* the right does not allege that Baycrest did not have the right to terminate the agreement — thi days' notice, pursuant to clause 9, is not at issue here. However, according to Callc dishonestly, in breach of the duty in *Bhasin*, obliging Baycrest to pay damage behaviour. Accordingly, I would draw the same distinction made by Cromwell exercise of the non-renewal clause at issue in that case: Can-Am acted dishones exercising the non-renewal clause as it did, and was liable for damages as a result, bu exercising its prerogative not to renew the contract.

[56] In service of its argument that Baycrest breached the duty of honest pe clause 9 of the contract, Callow points to references in *Bhasin* to Quebec law (at p 85) and in particular to Cromwell J.'s reference to the theory of the abuse of co arts. 6, 7 and 1375 of the *Civil Code of Québec* ("*C.C.Q.*" or "*Civil Code*") (para. 8 requirement not to abuse contractual rights is recognized as a feature of good faith submits that the allusion to the doctrine of abuse of rights was an indication of the re *Bhasin* and argues that the same framework can usefully illustrate how the con constrains the termination clause in this case.

[57] I agree that looking to Quebec law is useful here. The direct link bet and the exercise of clause 9 was not properly identified by the Court of Appeal ir helps illustrate the requirement that there be such a link from *Bhasin*. In my view, B is not a wrong independent of the termination clause but a breach of contract manifested itself upon the exercise of clause 9. Through that direct link between the of the clause, the conduct is understood as contrary to the requirements of good faith when considered in light of the civilian doctrine of contractual good faith alluded tc fact that, in Quebec "[t]he notion of good faith includes (but is not limited to) the performing the contract" (para. 83). Thus, like in Quebec civil law, no contractu

framework for connecting the exercise of a contractual clause and the requirements
illustrate, for the common law, the link made in *Bhasin* that the Court of Appeal faile

[58] Mindful no doubt of its unique vantage point which offers an occasion
both the common law and the civil law in its work, this Court has often draw
environment to inform its decisions, principally in private law appeals. While this p
and has been most prevalent in civil law cases in which common law authorities are
bijuralism is not and need not be confined to appeals from Quebec or to matters re
(see J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada* (2007), a
jurisprudence, this Court has recognized the value of looking to legal sources fro
appeals, and has often observed how these sources resolve similar legal issues to t
law (see, e.g., *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*,
pp. 1143-44; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S
also *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1
in this way, authorities from Quebec do not, of course, bind this Court in its disposi
from a common law province, but rather serve as persuasive authority, in particular
the jurisdictionally applicable rules work. In my respectful view, it is uncontroversia
sources of law may be used in this way (*Farber v. Royal Trust Co.*, [1997] 1 S.C
J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Ca
Rev. 715, at p. 726). As Robert J. Sharpe put it, writing extra-judicially, judges "sh
coherence and integrity of the law as defined by the binding authorities, using persu
and flesh out its basic structure" (*Good Judgment: Making Judicial Decisions* (2018)

[59] This does not mean the appropriate use of these sources is limited to c
the law of the jurisdiction in which the appeal originates, in the sense that there
problem in that law, or where a court contemplates modifying an existing rule. Resp
no authority of this Court supporting so restrictive an approach and note that, while u
debates in both the common law and the civil law as to what exactly a "gap" in t
J. Gardner, "Concerning Permissive Sources and Gaps" (1988), 8 *Oxford J. Leg. S*

Louis-Philippe Pigeon (1989), 109). Taking this approach would unduly inhibit t
understand the law better in reference to how comparable problems are addressed els
be wrong to disregard potentially helpful material in this way merely because of its o

[60] In private law, comparison between the common law and civil law as
particularly useful and familiar exercise for this Court. This exercise of comparison
the purposes of "explanation" and "illustration" has been described as "worthwhi
(*Farber*, at para. 32 and 35; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 6
para. 76; *Norsk*, at p. 1174, per Stevenson J. (concurring)). Principles from the comm
serve as a "source of inspiration" for the other, precisely because these "two legal
broad social values" (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC
para. 38). The common law and the civil law are not the only legal traditions releva
yet, the opportunity for dialogue between these legal traditions is arguably a spec
given the breadth and responsibilities of its bijural jurisdiction. This opportunity
scholarly commentary, including in the field of good faith performance of con
P.-L. Le Saunier, "L'interaction du droit civil et de la common law à la Cour suprêm
de D. 179, at p. 206; R. Jukier, "Good Faith in Contract: A Judicial Dialogue Betw
and Québec" (2019), 1 *Journal of Commonwealth Law* 83).

[61] Writing extra-judicially, LeBel J. has observed that this exercise is
Court, as a national appellate court, adding that [TRANSLATION] "because it has the a
to its institutional resources, the Supreme Court now assumes the symbolic responsib
of dialogue between the two major legal traditions" ("Les cultures de la Cour
l'émergence d'une culture dialogique?", in J.-F. Gaudreault-DesBiens et al., eds., *C*
harmonisation des systèmes juridiques (2009), 1, at p. 7). This Court's unique instit
court of common law and civil law appeals in Canada allows it to engage in dialogue
court of appeal for each of the provinces" (F. Allard, *The Supreme Court of Can*
Expression of Bijuralism (2001), at p. 21). The opportunity for dialogue presents itse
of the common law good faith doctrines. Pointing to the writing of LeBel J. and to

traditions must be "maintained and jealously protected, [this] need not prevent [the another]" (R. Jukier, "The Legacy of Justice Louis LeBel: The Civilian Tradition ar 70 *S.C.L.R.* (2d) 27, at p. 45). Professor Waddams has remarked that the reference to "invitation" to consider civil law concepts, including abuse of rights, in the develc relating to good faith (see "Unfairness and Good Faith in Contract Law: A New Ap (2d) 309, at pp. 330-31). This would be consistent with a broader pattern of "n influence between traditions as comparative analysis becomes increasingly pr judgments" (Allard, at p. 22).

[62] Indeed, this Court has undertaken this exercise in some common l which good faith principles are engaged, including *Bhasin* itself (see also *Potter v. Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, at para. 30; *Wallace v. U* [1997] 3 S.C.R. 701, at paras. 75 and 96, citing *Farber*). Cromwell J. pointed to the from the experience of the civil law of Quebec, for example, by those common lawye of honest performance would "create uncertainty or impede freedom of contra Cromwell J. also pointed to substantive points of comparison in support of his analys implied terms in the common law and good faith in Quebec as well as on the fact th also includes a requirement of honesty in performing contracts (paras. 44 and 83 Quebec example that is especially relevant here, Gascon J., writing for a majority c on the degree to which the organizing principle of good faith exemplifies the noti should have "appropriate regard" to the legitimate contractual interests of their c "[t]his statement applies equally to the duty of good faith in Quebec civil law" (*Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 117). I note accepted judicial reasoning in this field, where comparisons are rightly said to be Court nevertheless invoked a leading common law authority on good faith to illumi treatment as both helpful and persuasive.

[63] In the same way, I draw on Quebec civil law in this appeal to dishonesty to be directly linked to contractual performance. As I will explain, the ci

of rights helps to focus the analysis of whether the common law duty of honest perf
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
linked to the performance of a contract. The Court of Appeal recognized the duty
concluded that the communications at issue were not directly linked to performan
"Communications between the parties may have led Mr. Callow to believe that ther
but those communications did not preclude [Baycrest] from exercising their rig
contract then in effect" (para. 18). The Court's reasons also conclude that B
termination clause "provided only that [it] informed him of [its] intention to do so a
That is all [Callow] bargained for, and all that [it] was entitled to" (para. 17). The
did not consider that the manner in which the termination right was exercised amou
to act honestly. This was, for the trial judge in the present appeal, the matter directl
of the contract in the dispute with Callow.

[65] These diverging conclusions in this case are unsurprising given that thi
of honest performance as a "new" good faith doctrine relatively recently (*Bhasin*, at
reasons in *Bhasin* indicate how the required connection between the dishonesty
manifest. When Cromwell J. summarized the new duty, he suggested that it requi
directly linked to the performance of the contract" and, later, "in relation to the perfo
obligations" (paras. 73 and 92). But this latter formulation does not of course co
required link, not least of all because it speaks of honesty in the performance of an o
about the exercise of a right. Yet, in applying the duty to the facts in *Bhasin*, this Co
a breach of the duty on the basis of the trial judge's finding that Can-Am acted disho
non-renewal clause (paras. 94 and 103).

[66] Further, I note that while the duty of honest performance has simil
common law doctrines of civil fraud and estoppel, these doctrines do not assist in
link to the performance of the contract. The duty of honest performance is a contra

with the contractual relationship. While other areas of the law involving dishonesty ı
what it means to be dishonest, they provide no obvious assistance in determining
linked to the performance of a contract.

[67] In my view, the required direct link between dishonesty and perforı
plain, by way of simple comparison, when one considers how the framework for
connects the manner in which a contractual right is exercised to the requirements of
direct link exists when the party performs their obligation or exercises their right un
When read together, arts. 6, 7 and 1375 *C.C.Q.* point to this connection by providi
may be exercised abusively without violating the requirements of good faith. Arti
"[n]o right may be exercised with the intent of injuring another or in an excessive an
therefore contrary to the requirements of good faith." While the substantive content
to the common law analysis, the framework is illustrative. This article shows how the
can be tied to the exercise of a right, including a right under a contract. It is the
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
unfettered on its face, it is insulated from review as to the manner in which it wa
doctrine of abuse of right does not preclude the holder from exercising the contra
Professors Jobin and Vézina have written on abuse of contractual rights in Qu
doctrine of abuse of right does not lead to the negation of the right as such; rather, i
the right by its holder" (J.-L. Baudouin and P.-G. Jobin, *Les* obligations (7th ed.
N. Vézina, at No. 156). It has been said that good faith in the civil law has a [TRANS
in directing standards of ethical conduct to which parties must conform, as a matt
performing the contract: [TRANSLATION] "It [i.e. the limiting function of good fait
party's improper conduct in the exercise of the party's contractual prerogatives."
responsabilité et utilité : la bonne foi comme instrument de justice (2010), at p. 22
here: whether the ethical standard expressed in the common law duty to act hon
manifestation of the organizing principle of good faith recognized in *Bhasin*, li

exercise of a particular right under a particular contract, a direct link to the perf
helpfully drawn.

[69] Thus, in *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122 — a Q
at para. 85 — the contracting party's right to demand repayment of the loan, as sti
upheld (p. 169). The "abuse of right" identified by the Court was the manner in wh
This is, as I have noted, broadly similar to *Bhasin*. There, Can-Am had a contractu
Can-Am nonetheless exercised that right in a dishonest manner, and thus bre
performance (para. 94). This was a wrongful exercise of the right in that it was
mandatory requirement of good faith performance.

[70] There are special reasons, of course, to be cautious in undertaking
which Callow invites us here. One is that there are important differences between the
of contractual rights and the current state of the common law. The *Civil Code* pro
exercised with the intent to injure another or in an excessive and unreasonable mann
the requirements of good faith requiring that parties conduct themselves in good fa
an obligation is performed. Insofar as the organizing principle in *Bhasin* speaks to
generally must perform their contractual duties honestly and reasonably and not cap
principle, unlike Quebec law, is not a free-standing rule but rather a standard that un
in more specific doctrines. Further, in *Bhasin*, positive law was only formally extend
duty of honesty in contractual performance.

[71] An additional reason is the common law's fabled reluctance to emb
with the civilian idea of "abuse of rights", including abuse of contractual rights, a
alluded in para. 83 (see, e.g., the survey in H. C. Gutteridge, "Abuse of Rights" (193
pp. 22 and 30-31).[1] Mindful of this, Cromwell J. recalled the "fundamental comm
of contract" to the "freedom of contracting parties to pursue their individual self-inte
the theory of abuse of rights — that the organizing principle he recognized "should
scrutinizing the motives of contracting parties" (para. 70). Others have observed tha

law, or even that the preoccupation with the "social" dimension of limits to righ
"economic" aspect of a freely-negotiated bargain, is peculiar to the civil law (see, e.g
in the Civil Law (1950), at pp. 15-20). Still others have observed the differing techni
rules of law according to the common law and civil law methods (see, e.g., P. Daly, '
law: l'arrêt *Bhasin* c. *Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Pél
droit civil (2018), 89, at pp. 101-2). One should not lose sight of the fact that, a
traditions, the common law and the civil law represent, in many respects, distinctive

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

[73] First, I stress that I do not rely on the civil law here for the specifi
similar claim in Quebec. Rather, within the constraints imposed on this Court by the
wider common law context, I draw on abuse of rights as a framework to understa
honest performance. Second, there is no serious concern here that looking to Q
common law into a state of uncertainty. As Cromwell J. did in *Bhasin*, this Court
experience of Quebec to allay fears that applying this general framework of wron
result in commercial uncertainty or inappropriately constrain freedom of contr
differences, the common law and the civil law in Quebec share, in respect of goo
broad social values" that justify comparison generally (*Bou Malhab*, at para. 38). As
a shared concern for the proper compass of good faith in that it "does not requir
contracting party's] interests in all cases" and both anchor remedies in correcti

a judge [TRANSLATION] "the value of individual autonomy, and the fear that good fa
are not exclusive to the common law. They are discussed at length in civil law com
("Brèves remarques spontanées sur l'arrêt *Bhasin c. Hrynew*", in J. Torres-C
C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 81, at p. 84). For these rea
to illustrate the duty of honest performance using the framework of the wrongful exe
is directly linked to the performance of a given contract where it can be said that tl
performance of an obligation under that contract has been dishonest.

[74] Applying *Bhasin* to this case, and drawing on the illustration provic
sources Cromwell J. himself cites, I am of the respectful view that the Court of App
that the dishonesty here was only about a future contract. Properly understood, the
case was directly linked to the performance of the contract because Baycrest's exerc
provided to it under the contract was dishonest.

[75] The termination right was exercised dishonestly according to
notwithstanding the fact that its terms — the 10-day notice — were otherwise
dishonest representations, regarding the danger to the contract and made in anticipat
held that the duty to act honestly was linked to the termination of the contract and
the circumstances was a breach of contract. The trial judge did not deny the right o
contract, but the manner in which it did so was wrongful — in breach of the duty o
owed Callow damages. Importantly, this does not deny the existence of the termin
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 amou
meaning of the duty of honest performance in *Bhasin*. Callow takes issue with the C
that while the facts may have suggested a failure to act honourably, they did not rise
this duty. To dispose of this appeal, then, we must determine what standard of honest

[77] There is common ground that parties to a contract cannot outright lie o
that knowingly misleads a counterparty. It is also agreed here that the failure to disc
more, would not be contrary to the standard. Beyond this, however, the parties cont
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 h
impose a duty of disclosure, it left open the possibility that an omission to inform ca
misleading in certain circumstances. Callow acknowledges that the line between a
innocent failure to disclose is not always easy to draw. But by "positively misle
winter maintenance agreement was likely to be renewed in 2014, he was led to i
knowledge of Baycrest, that a decision had not been made to terminate the existing
correct this false impression, in Callow's view, was a breach of its obligation to act l
of the winter maintenance agreement. It meant that clause 9 was not exercised in l
duty to perform the contract honestly imposed in *Bhasin*.

[79] Baycrest submits that "active deception" — a term invoked by the
parties — requires actual dishonesty, in the sense that an outright lie is necessary. "
the hearing, "can only constitute misrepresentation when there is a duty to speak"
performance does not bring with it a duty of disclosure, "silence cannot constitu
misrepresentation, whether done intentionally or, I suppose, accidentally" (transcript,

[80] Baycrest is right to say that the duty to act honestly "does not im
disclosure or require a party to forego advantages flowing from the contract" (*B*
A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 3
United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981), in su
the duty of honest performance is distinct from a free-standing duty to disclose infor
Roasters, the terminating party had decided in advance of the required notice perio
The court held that no disclosure of that intention was required other than what was
Cromwell J.'s view, this made "it clear that there is no unilateral duty to discl

[81] One might well understand that courts would shy away from impos
duty to disclose information to a counterparty where it would serve to upset the cor
contract law. Whether or not a positive duty to cooperate of this character sho
principle of good faith performance in the common law, a party to a contract has no
their interests to that of the other party in the law as it now stands (see *Bhasin*, at pa
speak up in service of the requirements of good faith where nothing in the parti
brings a duty to do so could be understood to confer an unbargained-for benefit on
outside the usual compass of contractual justice. Yet where the failure to speak out a
in a manner directly related to the performance of the contract, a wrong has been
does not serve to confer a benefit on the party who has been wronged. To this end, C
"situation is quite different . . . when it comes to actively misleading or deceiving th
relation to performance of the contract" (para. 87). In such circumstances, contractu
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
Cromwell J. indicated that the duty of honesty is consonant with the ordinary princ
that *Bhasin* does not impose a duty to disclose or a fiduciary-type obligation mean
honestly is not a selfless or altruistic act. One might well say that performing o
honestly is in keeping with the pursuit of self-interest as long as the law can be cou
honest conduct from one's counterparty. Whatever constraints it justifies on Baycre
contract based on values of honesty associated with good faith, it does not requi
Callow in exercising that right. As Cromwell J. explained, having appropriate
contractual interests of the contracting parties "does not require acting to serve t
(para. 65). This explains, to my mind, the limited character of the duty of honesty: it
court, in the name of a conception of good faith resting on distributive justice, to r
exercise a contractual right or power "to serve" the other party's interest at the expen

[83] This emphasis on the corrective justice foundation of the duty to act ho
my view, helpful to understanding why a facially unfettered right is nonetheless co

commercial uncertainty resulting from the recognition of this new duty by explain honest performance "interferes very little with freedom of contract" (para. 76). Afte contract would be performed without lies or deception can already be thought of as part of the bargain. I agree with the sentiment expressed by the Chief Justice of Alb *Bhasin* and *Potter*: "Companies are entitled to expect that the parties with whom they their contractual dealings (*IFP Technologies (Canada) Inc. v. EnCana Midstream a* 157, 53 Alta. L.R. (6th) 96, at para. 4). In that sense, while the duty is one of mandat be thought of as leaving the agreement and both parties' expectations — the first sc parties — in place. By extension, requiring that a party exercise a right under the c minimum standard only precludes the commission of a wrong and thus repairing resulted, may be thought of as consonant with the principles of corrective justice. otherwise knowingly misled the other contracting party in respect of a matter th performance of the contract, it amounts to breach of contract that must be set ri bargain need not be otherwise reallocated between the parties involved.

[84] That said, I emphasize once again that it is unquestionable that the du contractual doctrine rather than by implication or interpretation, and, by virtue doctrine, parties are "not free to exclude" the duty altogether (*Bhasin*, at para. 75). have agreed to a term that provides for an apparently unfettered right to terminate th that right cannot be exercised in a manner that transgresses the core expectations o faith in the performance of contracts.

[85] This framework for measuring the wrongful exercise of the termin Baycrest's motive in exercising clause 9 beyond the observation that it did so termination was, on its face, one without cause: Baycrest may have had legitimate g some ulterior motive for its knowing deception — it is of no moment. The nega manager may have had of Callow, alluded to by the trial judge (at para. 14), is not the duty of honest performance.

[86] Moreover, I note that Cromwell J. described the requirements of the
while the duty of honest performance does not require parties to act angelically
interests to that of their counterparty (*Bhasin*, at para. 86), they must *refrain* from lyi
their counterparty (para. 73). As a "negative" obligation — that is, in the absence of a
injunction it imposes is one not to act dishonestly — it sits more plainly with
corrective justice and what one scholar sees as the traditional posture of the
contractual autonomy and individual freedom in private law. [TRANSLATION] "It is c
in a comment on the common law method consecrated in *Bhasin*, "that the duty of h
is a negative obligation — not to lie — rather than a positive obligation — to act in g
same orientation has been observed as animating the analogous contractual duty of
While positive obligations to cooperate in performance may be otherwise require
scholars have observed that the notional equivalent of the duty of honest performan
typically imposes negative obligations — to refrain from lying, for example — in th
contractual right (Baudouin and Jobin, at No. 161). Care must be taken, I hasten
[TRANSLATION] "duty to act faithfully" recognized in this regard, with the fiduciary
outside of good faith in both legal traditions.

[87] I would add that, as Cromwell J. made plain, the recognition of
performance does not necessarily mean that the ideal spoken to in the organizing prin
in *Bhasin* might not manifest itself otherwise. Even within the limited com
circumstances may arise in which the organizing principle would encourage the
must be exercised in a manner that was neither capricious nor arbitrary, for exa
cooperate between the parties be imposed, though recognizing that, contrary to fi
performance does not engage duties of loyalty to the other contracting party or a du
other contracting party first" (*Bhasin*, at para. 65). But for present purposes, it is not
step: I am of the view that where the exercise of a contractual right is undertaken di
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 knowin

[89] I recognize that in cases where there is no outright lie present, like always obvious whether a party “knowingly misled” its counterparty. Yet, Baycre nothing stands between the outright lie and silence. Elsewhere, as in the law of mis one encounters examples of courts determining whether a misrepresentation was pr there was some direct lie (see A. Swan, “The Obligation to Perform in Good Fa *Hrynew*” (2015), 56 *Can. Bus. L.J.* 395, at p. 402). As Professor Waddams has statement may be as misleading as a false one, and such half-truths have freque significant misrepresentations.” Ultimately, he wrote, “it is open to the court to hold material facts can, when taken with general statements, true in themselves but incom into misrepresentations” (*The Law of Contracts* (7th ed. 2017), at No. 441). Simila statement it believes to be true, but later circumstances affect the truth of that ea found, in various contexts, that the party has an obligation to correct the mi *Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6, at para “*Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law 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 do, go further than prohibiting outright lies. Indeed, the concept of “misleading” one invoked separately by Cromwell J. — will in some circumstances capture forms o can mislead through action, for example, by saying something directly to its counte by failing to correct a misapprehension caused by one’s own misleading conduct. To in the catalogue of deceptive contractual practices (see, e.g., *Yam Seng Pte Ltd. v. 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” fact-specific determination, and can include lies, half-truths, omissions, and even circumstances. I stress that this list is not closed; it merely exemplifies that dishones not confined to direct lies. No reviewable error has been shown in the finding of d anticipation of the exercise of clause 9 here. I would not interfere with the trial ju

that is owed deference. Deference should be shown to the trial judge in reviewing h
weighing the evidence, especially given credibility played a part in her analysis, as sh

[92] Reading the whole of the first instance judgment, I see no consequentia
by the trial judge of the law on the duty of honest performance. She did not base he
standing duty to disclose information. Instead, she examined whether Baycrest kno
the standing of the winter maintenance agreement, and thus wrongfully exercise
Despite this, however, Baycrest argues that the trial judge erred in failing to recogn
reach the "much higher standard" spoken to in *Bhasin*. I disagree. No such error has l

[93] It is helpful for our purposes to recall that on the facts in *Bhasin*, pa
concerned the respondent Can-Am's plans to reorganize its activities in Alberta. Its p
its contractual right of non-renewal to force a merger between Mr. Bhasin and his
effect, this reorganization would have given Mr. Bhasin's business to Mr. Hrynew. C
nothing of its plan to Mr. Bhasin. When Mr. Bhasin first heard of the merger plans
Can-Am about its intentions. "[T]he official 'equivocated'", Cromwell J. explained
truth that from Can-Am's perspective this was a 'done deal'" (para. 100). Cromw
"Can-Am's breach of contract consisted of its failure to be honest with Mr. B
performance and, in particular, with respect to its settled intentions with respec
Cromwell J. wrote: "The trial judge made a clear finding of fact that Can-Am 'acted
in exercising the non-renewal clause'. There is no basis to interfere with that findin
Can-Am breached its duty to perform the Agreement honestly" (para. 94 (references

[94] It is true that Baycrest remained silent about its decision to terminate
clause 9, on its face, did not impose on it a duty to disclose its intention excep
requirement. That said, it had to refrain, as the trial judge said, from "deceiv[ing] C
"active communications" (para. 66). When it failed to refrain from doing so in an
termination right, it deceived Callow into thinking it would leave the existing winter

[95] These “active communications”, as I understand the trial judge’s fi

forms. First, Mr. Peixoto made statements to Mr. Callow suggesting that a renewal

agreement was likely. As the trial judge found, “[a]fter his discussions with Mr.

Mr. Callow thought that he was likely to get a two-year renewal of his winter mainte

[it was] satisfied with his services [under the existing agreement which had one win

is also supported by the documentary evidence, especially by the private e-mails

Mr. Campbell” (para. 41).

[96] Baycrest attempts to recast the significance of this finding, arguing that

discussions with two of the JUC members — Mr. Peixoto and Mr. Campbell —

contract renewal. Such casual discussions, it says, cannot rise to the level of a lie. T

finding in the trial judge’s reasons that it was Mr. Peixoto — the JUC member who

terms with Callow for the winter maintenance agreement — who made statements to

a renewal was likely (paras. 23 and 40-43). After making credibility findings against

found that he had “led Mr. Callow to believe that all was fine with the winter [contr

“interested in a future extension of Callow’s contracts” (para. 47). This dishonest

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 v

Callow had offered Baycrest in the summer of 2013. As the trial judge found, Callo

because Mr. Callow wanted to provide an incentive for Baycrest to renew the win

Baycrest, for its part, gladly accepted the services offered by Callow.

[98] Again, Baycrest attempts to recast the significance of these findings, ar

inherently unlawful or unfair about accepting a contractor’s incentives offered in tl

contract or the renewal of an existing contract” (R.F., at para. 112). Whether or not tl

that Mr. Peixoto “understood that the work performed by Callow was a ‘freebie’

boards to renew his winter maintenance services contract” and “advised Mr. Callow

board members about this work” (trial reasons, at para. 43). These active co

suggested, deceptively, that there was hope for renewal and, perforce, the curr
terminated.

[99] Considering Baycrest's conduct as a whole over those few months, it ·
Mr. Callow, who was led to believe that a renewal was likely, to infer that Baycrest l
the ongoing contract. Moreover, Baycrest knew Mr. Callow was under this false ir
email sent by Mr. Peixoto on July 17, 2013 and, nonetheless, continued to give
renewal was likely even though the decision to terminate him was made (see trial
realizing that Mr. Callow was under this false impression, Baycrest should have cor
in the circumstances, its conduct misled Callow.

[100] I respectfully disagree with the idea that the deception in this case onl
unsatisfactory services and did not extend to termination for any other reason. Th
dishonest conduct involved representations that the contract was not in danger at
would be terminated (para. 65).

[101] The Court of Appeal did not interfere with these findings, nor has B
judge made any palpable and overriding errors. Accordingly, in light of the trial judg
that Baycrest intentionally withheld information in anticipation of exercising cla
silence, when combined with its active communications, had deceived Callo
Mr. Callow's misapprehension thereafter, Baycrest breached its contractual duty of l
in stark contrast to *United Roasters*, where the defendant merely withheld its
agreement. Unlike in this case, the defendant there did not engage in a series of ac
the plaintiff to draw an incorrect inference and then fail to correct the plaintiff's misa

[102] In this sense, this case is broadly similar to *Dunning v. Royal Bank* (
(Ont. C.J. (Gen. Div.)), one of the examples of breaches of the duty to exercise g
dismissal provided by Iacobucci J. in support of his conclusions in *Wallace*. W
distinctive good faith setting of the employment context, *Dunning* is an appropriate

faith requirements which have been recognized in relation to termination of employ

para. 73, citing *Wallace*, at para. 98; *Honda Canada Inc. v. Keays*, 2008 SCC 3

para. 58). It seems to me that if the duty of honest performance was a key co

requirements spoken to in *Wallace* and *Keays*, a similar framework applies, again

organizing principle. As Iacobucci J. explained, the employee's job in *Dunning* ha

employer told him another position would probably be found for him and the new as

a transfer. While the employee was being reassured about his future, the emplo

termination. Eventually, the employer chose to terminate the employee but withhel

employee for some time, despite knowing the employee was in the process of selling

the transfer. News of the termination only came after the employee had sold

Iacobucci J. observed, clearly violated the expected standard of good faith in the man

[103] As *Dunning*, *Wallace* and *Keays* make plain, an employer has the right t

contract without cause, subject to the duty to provide reasonable notice. Howeve

however, an unhappy employee can allege a distinct contractual breach when the en

in the manner of dismissal. In the end, as Cromwell J. noted, "contracting parties

minimum standard of honesty from their contracting partner in relation to per

reassurance that if the contract does not work out, they will have a fair opportunit

(*Bhasin*, at para. 86). When Baycrest deliberately remained silent, while knowing tha

mistaken inference the contract was in good standing because it was likely to be rene

act honestly. In my view, the trial judge did not create a new duty of disclosure in

rather sought to denounce the Baycrest's conduct. Remedying that with an or

Baycrest's failure to exercise clause 9 in accordance with the requirements of the

did not confer a benefit on Callow; it merely set matters right on the usual me

following this breach of contract. Respectfully stated, it is therefore my view that th

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 Appea

judge went too far in concluding that "[t]he minimum standard of honesty woul

the notice period" (trial reasons, at para. 67). In my respectful view, to impute tl
would amount to altering the bargain struck between the parties substantively, a
Callow before this Court. That said, I agree with the trial judge that, at a minimum, I
false representations in anticipation of the notice period. Having failed to correct Mr
that arose due to these false representations, I too would recognize a contractual bre
in the exercise of its right of termination in clause 9. Damages thus flow for
opportunity, a matter to which I now turn.

C. *Damages*

[105] Baycrest submits that Callow is not entitled to any damages for the brea
trial judge erred in fixing the quantum of damages, first, by awarding Callow its ex
balance of the contract; second, by misapprehending the evidence relating to Callow
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
breach of contract, [Callow] is entitled to be placed in the same position as if the
(para. 79). Indeed, as Cromwell J. explained in *Bhasin*, breach of the duty of hone
supports a claim for damages according to the ordinary contractual measure (para. 88

[107] The ordinary approach is to award contractual damages correspondin
(*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 108). That is, damag
position that it would have been in had the duty been performed.

[108] While it has rightly been observed that reliance damages and expectatio
in many if not most cases, they are nevertheless conceptually distinct. As Profe
"Defendants are ordered to do what they promised to do, not to do whatever is neces
is not harmed by relying on the promise" (*Atiyah's Introduction to the Law of* (
p. 405). Damages corresponding to the reliance interest are the ordinary measure of d

it would be difficult for the plaintiff to prove the position they would have bee
performed. Reliance damages in contract mean putting the injured party in the pos
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 perfor
compensated by way of reliance damages. I recall that the duty of honest performa
law. Its breach is not a tort. Not only would basing damages in this case on th
contractual breach apart from the ordinary measure of contractual damages, but
measure as it was applied in *Bhasin* (para. 108; see also MacDougall, at §1.130). In
no basis to depart from *Bhasin* on this point which, in any event, was not argued b
that this view is shared by authors who have written that the duty of honest per
expectation interest, rather than reliance interest (see, e.g., McCamus (2015), at
reliance damages and expectation damages coincide on the facts here, there is good r
the ordinarily applicable measure of contractual damages that seeks to provide the p
expected. Professor Waddams has written that this can have a positive deterrent ef
arguments in favour of the current rule and against a rule measuring damages only
that a rule protecting only reliance would fail to deter breach in a large number of
calculated that the plaintiff's provable losses were less tha[n] the cost of performanc
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 co
would be in if it had fulfilled the duty and instead awarded the value of the balanc
agreement. In so doing, it argues, she fell into the same error as the trial judge in *B*
damages as though the contract had been renewed. Baycrest says that this Court ha
this approach because the parties did not intend or presume a perpetual contract.

[111] Moreover, Baycrest points to *Hamilton v. Open Window Bakery Ltd.*, 2
303, for the proposition that damages are assessed by that mode of performance w
the defendant. Callow, it is said, is entitled to no more than the minimum that Ba

pursuant to the contract. Since clause 9 allowed it to terminate the winter maintenanc
10 days' notice, no damages should flow.

[112] In my view, *Hamilton* is of no assistance to Baycrest in this case. W
this principle in *Bhasin*, he did so in the context of whether the Court should reco
duty of good faith, for which the appellant there had argued. Briefly stated, the appe
respondent, Can-Am, would have been in breach of such a duty since it had attem
clause to force Mr. Bhasin into a merger. Cromwell J. declined to recognize such
"Can-Am's contractual liability would still have to be measured by reference to
performance, which in this case would have meant simply not renewing the contra
also J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 23-25). Becau
flowed from this breach, it was unnecessary for the Court to decide whether a broad
faith should be recognized.

[113] It bears emphasizing that, despite Cromwell J.'s comments related t
awarded damages to the appellant flowing from the breach of the respondents' oblig
honestly. Damages were awarded using the ordinary measure of contractual expectat
Mr. Bhasin in the position he would have been in had Can-Am not breached its obli
the exercise of the non-renewal clause (*Bhasin*, at paras. 88 and 108). This res
compensated for the value of his business that eroded (paras. 108-10). As Prof
helpfully explain, "if Can-Am had dealt with Bhasin honestly on all fronts (tho
disclose its intention not to renew), Bhasin would have realized much sooner that hi
was in tremendous jeopardy and reaching a breaking point. He could have taken p
business, instead of seeing it 'in effect, expropriated and turned over to Mr. H
Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015), 53 *Al*
omitted)).

[114] How is it that damages were awarded for a breach of the duty of hon
principle outlined in *Hamilton*? While damages are to be measured against a defend

misrepresentation once Baycrest knew Callow had drawn a false inference. Had it d
had the opportunity to secure another contract for the upcoming winter. As Callo
“since this dishonesty caused Callow a loss by inducing it not to bid on other cont
2013 for the winter of 2013 to 2014, the condos are liable to it for damages” (transcri
lost opportunity arising out of its abuse of clause 9.

[115] It may be true that the trial judge could have explained her rationale
plainly. But even if the trial judge fell into the same error that the trial judge in *Bhasi*
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 opportunit
interests” (para. 67). Had Baycrest acted honestly in exercising its right of term
Mr. Callow’s false impression, Callow would have taken proactive steps to bid
upcoming winter (A.F., at paras. 91-95). Indeed, there was ample evidence before the
opportunities to bid on other winter maintenance contracts in the summer of 2013
opportunities due to Mr. Callow’s misapprehension as to the status of the contract v
even if I were to conclude that the trial judge did not make an explicit finding as
opportunity, it may be presumed as a matter of law that it did, since it was Baycrest
precludes Callow from conclusively proving what would have happened if Baycrest
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, i
not deprived Callow of the opportunity to bid on other contracts, then Callow would
was at least equal to the profit it lost under the winter maintenance agreement. The
expenses are deducted, that award amounts to $64,306.96. I see no reason to interfer
the estimation of expenses. Consequently, I see no basis for overturning this portion
damages.

[118] The trial judge also awarded Callow $14,835.14, representing th

maintenance agreement, but would not have had he known the contract would be ter
submits that the trial judge erred by awarding these expenses because it amounts to d

[119] I see no issue of double recovery in this case. The trial judge awarded t
not lost revenue. This is appropriate because Callow was not actually hired for the ot
not bid and therefore did not necessarily have to undertake all the expenses that w
fulfill that contract. However, as Callow had already committed to this expense, th
too should be compensated for along with the lost profit. The trial judge was entitle
did, having the advantage of measuring losses first hand. I see no reviewable error i
on this issue.

V. Disposition

[120] I would allow the appeal, set aside the order of the Court of Appeal a
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 d
recognized in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, by clarifyi
actively misleading conduct and innocent non-disclosure. Applying that distinction t
a straightforward matter. As the trial judge found, the respondents (collectively,
Callow (referring interchangeably in these reasons to the appellant and its principal
be terminated (2017 ONSC 7095). By relying on Baycrest's representations, Cal

secure other work for the contract's term. Callow's complaint therefore does not rel
rather to its positive representations, which can clearly ground a claim based on the d

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

[123] This is not to suggest that comparative legal analysis is not an importa
somehow be unduly limited at this Court. As the majority's reasons amply d
longstanding tradition of looking to Quebec's civil law in developing the common la
question that the common law does not answer (that is, to fill a "gap") or where i
otherwise develop existing rules. In addition, where concerns are raised about the eff
law in one direction or another, this Court has considered the experience in Queb
reassurance that the posited concerns are unfounded or overstated. What this Cour
however, is deploying comparative legal analysis that serves none of these purposes
law obscure to those who must know and apply it. But by invoking the civilian a
clarify when "[d]ishonesty is directly linked to the performance of a given contrac
requiring no "clarification" — the majority does exactly that.

[124] While, therefore, my objection is fundamentally methodological, it al
consequences that follow. As the majority acknowledges, this appeal concerns the c
not the duty to exercise discretionary powers in good faith. And yet, its digression i
exercise of a right", in substance, pulls it into that very territory, since it ties *dishon*
contractual discretion is exercised. Effectively, then, the majority's reliance on a c
conflate, or at least obscure the distinction between what are distinct common

may be misrepresented —— has little to do with the duty of honest performance.
discretionary powers in good faith —— or, expressed with the civilian terminolc
manner that is not “abusive” or “wrongful” —— is a distinct concept that has no app

[125] Our aim in deciding this appeal should be to develop the common la
good faith carefully, and in a coherent manner, and more particularly in a manner t
taking care to distinguish among the distinct doctrines identified by this Court in *Bha*
the majority has not done so here.

II. Background

[126] Baycrest comprises ten condominium corporations with shared ass
made by a Joint Use Committee. In April 2012, Baycrest entered into two separate
Callow to provide summer landscaping and winter snow removal services. The t
agreement stipulated that Baycrest could terminate the agreement, without cause, upc

[127] In March or April 2013, the Joint Use Committee voted to terminate tl
earlier than its scheduled expiry in April 2014. Baycrest opted not to tell Callc
September 2013, however, so as not to jeopardize his performance under the s
Unaware of Baycrest’s decision, Callow performed free work for Baycrest in the spı
the hope that Baycrest would renew both agreements. Callow also discussed the pr
Baycrest representatives, one of whom had negotiated Callow’s existing agreements
led him to believe that he was likely to receive a two-year contract renewal in 2(
winter service agreement was not in danger. Knowing that Callow was operating u
Baycrest nevertheless continued to withhold information about its termination decisic

[128] On September 12, 2013, Baycrest gave Callow notice that it was ter
agreement. Callow sued, claiming that Baycrest failed to perform the winter service a
was therefore liable for breach of contract. The trial judge held that Baycrest bı

that the winter service contract would not be terminated. As a result, she awarded (
the position that it would have been in had the contract not been terminated. The C
reversed, stating that the duty of honest performance does not impose a requirement
896, 429 D.L.R. (4th) 704). In its view, even if Baycrest had misled Callow, Callow
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*

[129] Disposing of this case is really a simple matter of applying this Cou
first step in deciding a common law good faith claim is to consider whether any esta
apply. Callow bases its claim on two established doctrines: the duty of honest pe
exercise discretionary powers in good faith. As I will explain, however, Callow's c
applying only the duty of honest performance.

(1) The Duty of Honest Performance

[130] As a universally applicable minimum standard, all contracts m
Contracting parties may therefore not lie to, or otherwise knowingly mislead, each
linked to performance (*Bhasin*, at paras. 73-74). If a plaintiff suffers loss in rel
misleading conduct, the duty of honest performance serves to make the plaintiff
performance does not, however, "impose a duty of loyalty or of disclosure or
advantages flowing from the contract" (*Bhasin*, at para. 73).

[131] The dividing line between (1) actively misleading conduct, and (2) pe
the central issue in this appeal. As that line has been clearly demarcated by cases add
other contexts, it is in my view worth affirming here that the same settled principles
performance. The duty of honest performance is, after all, broadly comparable to

formation (B. MacDougall, *Misrepresentation* (2016), at pp. 63-64). It follows
sufficient to ground a claim for misrepresentation are analogous to the representatio
based on the duty of honest performance.

[132] The general rule, applicable to contracts other than those requirin
contracting parties have no duty to disclose material information (*Bhasin*, at paras
therefore cannot be considered actively misleading conduct (*Alevizos v. Nirula*, 200
(2d) 186, at para. 19). In some cases, however, silence on a particular topic is misl
been said (*Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R
Opron Construction Co. v. Alberta (1994), 151 A.R. 241 (Q.B.)). Again, no whe
There is, in the context of misrepresentation, "a rich law accepting that sometimes s
to a statement" (MacDougall, at p. 67; see also A. Swan, "The Obligation to Perfor
on *Bhasin v. Hrynew*" (2015), 56 *Can. Bus. L.J.* 395, at p. 402). A contracting party
misleading picture about its contractual performance by relying on half-truths or
Gurney (1873), L.R. 6 H.L. 377; *Alevizos*, at paras. 24-25; *Xerex*, at paras. 56-57).
required to correct representations that are subsequently rendered false, or which the
were erroneous (*Xerex*, at para. 58; MacDougall, at pp. 118-19).

[133] Further, the representation need not take the form of an express staten
communicated, it may comprise other acts or conduct on the part of the defendant (
question is whether the defendant's active conduct contributed to a misapprehension
by disclosing additional information. If so, the defendant must make that disclosure
party is not required to correct a misapprehension to which it has not contril
Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v.*
Principle of Good Faith in Common Law Canada" (2016), 58 *Can. Bus. L.J.* 1, at
which includes the nature of the parties' relationship, is to be considered in detern
the defendant made a misrepresentation to the plaintiff (MacDougall, at p. 102; see
Inc. v. Lang Michener LLP, 2013 ONCA 526, 116 O.R. (3d) 742, at paras. 84-87; *C.*
Chemical International Ltd. (1981), 33 B.C.L.R. 291 (C.A.), at p. 296). It follows th

misrepresentation has been made is a question of mixed fact and law, subject tc palpable and overriding error.

[134] In light of these principles —— which, again, are well established and statement by this Court of their application to the duty of honest performance —— argument that its conduct fell on the side of innocent non-disclosure. Indeed, the tr communications between the parties between March/April and September 12, 2((para. 66 (CanLII)). Based on Baycrest's conduct and express statements, the trial ju represented that the winter service agreement was not in danger of termination (par trial judge found that Baycrest knew that its representations were misleading anc intention of keeping Callow in the dark (paras. 48 and 69). These findings ar conclusion that Baycrest breached the duty of honest performance. And Baycrest overriding error to justify overturning them.

[135] Nor do I accept Baycrest's argument that its representations related o winter agreement and not to the termination of Callow's existing agreement. As Baycrest made an actionable representation about its performance must be det included its conduct as I have described it. And it was open to the trial judge to conc Callow reasonably inferred that the winter service agreement would not be term *Cognos Inc.*, [1993] 1 S.C.R. 87, at pp. 128-32). Again, I see no basis for disturbing t

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

[136] Callow also argues that Baycrest's decision to terminate the wint discretionary decision that it was required to make in good faith. He relies on the "where one party exercises a discretionary power under the contract", and which w *Bhasin* (para. 47). As a preliminary matter, I note that not every decision that involv subject to this duty (*Bhasin*, at para. 72; J. T. Robertson, "Good Faith as an Orgar Law: *Bhasin v Hrynew* —— Two Steps Forward and One Look Back" (2015), 93 *C*

that controversy here (*Styles v. Alberta Investment Management Corp.*, 2017 ABCA at para. 41; *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428, para. 19).

[137] This duty limits the exercise of certain contractual powers that ma unfettered discretion. For the purposes of this appeal, it is unnecessary to express a that applies to a breach of this duty. It is sufficient to note that where a plaintiff relie is *not* about dishonesty; rather, it is that the defendant was not entitled to make the wrongful behavior is the very exercise of discretion, and the plaintiff therefore bas that decision (see, e.g., *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.); *Mesa v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38 (C.A.)). Damages difference between the outcome that occurred and the outcome that would have oc exercised its discretion in the least onerous, yet lawfully acceptable, manner.

[138] Callow, however, does not dispute that Baycrest was entitled to t agreement, as it did, without cause and by providing only 10 days' notice. Ra *dishonesty* that *preceded* Baycrest's exercise of discretion. Callow therefore se considering what would have happened had Baycrest made the same decision, albeit intentions. The applicable duty is therefore the duty of honest performance. In sum, case about dishonesty in the performance of a contract, and nothing more. Indeed, it of instance contemplated by Cromwell J.'s reference for this Court in *Bhasin*, at where a party "lie[s] or mislead[s] the other party about one's contractual performa case about the exercise of a discretionary power.

(3) Damages

[139] Having concluded that Baycrest breached the duty of honest perform whether the trial judge awarded the appropriate quantum of damages. While I re majority, I approach this question somewhat differently than it does. The majority v

recognizing Baycrest's misleading conduct as a wrong independent of the terminati
measure of damages represents the loss Callow suffered in reliance on Baycrest's
(which I accept will often coincide with the expectation measure).

[140] The majority relies on Cromwell J.'s statement in *Bhasin* that a b
contractual performance "supports a claim for damages according to the contract
measure" (para. 88). But when the purpose of the expectation measure of damag
examined and contrasted with the legal framework developed in *Bhasin*, the actu
damages actually received, it becomes readily apparent that the reliance measure i
the *Bhasin* framework contemplates should be awarded. On this point, the majo
fidelity to *Bhasin*, but a regrettable departure that undermines the coherence betwe
protected in *Bhasin* and the remedy to be awarded.

[141] It has "long been settled and [is] indeed axiomatic" that the legal ai
contract is to give the innocent party the full benefit of the bargain by placing it in
occupied had the contract been performed (P. Benson, *Justice in Transactions* (201
Sun Life Assurance Co. of Canada, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 27). A
—— that is, compensating for losses sustained by the innocent party in reliance
ignore the innocent party's right to performance that flows from its having pled
thereby potentially depriving it of the benefit of the contract. Indeed, confining rec
reliance on the agreement would create an incentive to breach agreements whe
outweighs the reliance measure of damage (S. M. Waddams, *The Law of Contracts*
see also L. L. Fuller and W. R. Perdue Jr., "The Reliance Interest in Contract Damag
at pp. 57-66).

[142] But the justification for awarding expectation damages does not ap
honest performance. In such cases, the issue is *not* that the defendant has failed to p
defeating the plaintiff's expectations. It is, rather, that the defendant *has* performe
caused the plaintiff loss by making dishonest extra-contractual misrepresentations c

performance, but detrimental reliance on dishonest misrepresentations. The interes
expectation interest, but a reliance interest. And just as these are unrelated interests
damage is unrelated to the breach of the duty of honest performance.

[143] The claim in *Bhasin* itself is illustrative. Bhasin contracted to sell fina
The contract would renew automatically at the end of the initial term unless one of t
notice of non-renewal. Can-Am intended to force a takeover of Bhasin's business
but misled him about its intention to do so. Can-Am also appointed Hrynew to aud
Bhasin protested this conflict of interest, Can-Am lied to him about the reason fo
auditor and the terms that would govern his access to Bhasin's confidential inf
Can-Am gave notice of non-renewal, Bhasin lost the value of his business. This
Can-Am's dishonesty in the period leading up to the non-renewal, he "would have b
of his business rather than see it, in effect, expropriated and turned over to Mr. Hryn
damages to compensate for the lost value of the business.

[144] Neither the claim, then, nor the damage award, related to Can-Am's fai
with Bhasin. The theory of the judgment was that Bhasin lost the value of his busin
dishonest representations. The relief actually awarded was therefore measured
Bhasin's position and the position he would have occupied had Can-Am not been dis
force a takeover by way of cancelling his contract. Had Bhasin not relied on Can-A
could have been awarded on this basis, because the dishonesty would not have altere

[145] The measure applied in *Bhasin* was, therefore, clearly not based on
indeed it appears to have had nothing to do with placing Bhasin in the position he w
contract been performed (K. Maharaj, "An Action on the Equities: Re-Characte
Estoppel" (2017), 55 *Alta. L. Rev.* 199, at p. 215). Rather, it was directed solely
detriment that flowed from Bhasin's reliance on a dishonest misrepresentation —
one scholar as "very tort-like" (MacDougall, at p. 65). Much like estoppel and civil
honest performance vindicates the plaintiff's *reliance* interest (Robertson, at p. 861;

contracting party that breaches this duty will be liable to compensate its counterpart
suffered *in reliance* on the misleading representations.

[146] This is not to suggest that the duty of honest performance is "subsu
fraud (Kasirer J.'s reasons, at para. 50). Rather, it is merely to observe that each of
the same interest. Indeed, far from being "subsumed" into estoppel and civil
performance protects the reliance interest in a distinct and broader manner since
Bhasin, the defendant may be held liable even where it does not *intend* for the plaint
representation (para. 88). Irrespective of the defendant's intention, all a plaintiff ne
reliance on the misleading representation, it would not have sustained the loss.

[147] Baycrest advances three arguments for reducing the trial award. First, it
period defines its maximum exposure for damages because, irrespective of its d
means of performance was to terminate the agreement. The trial judge therefore inco
if the winter contract had not been terminated.

[148] While Baycrest is correct to say that damages for breach of contra
defendant's least onerous means of performance (*Hamilton v. Open Window Bakery*
S.C.R. 303, at para. 20), that principle does not assist Baycrest here. To perform th
without breaching the duty of honest performance), Baycrest was required *not to mi*
the contract would be terminated. It could have accomplished this by keeping silent a
misled Callow as to the true state of affairs, by correcting Callow's misapprehens
misleading conduct to his detriment. Had either of these possibilities occurred, Callo
seek other work for the 2013-14 winter season.

[149] Of course, we cannot say with certainty that Callow *would have secured*
sat idle in any event, assuming that the winter service contract was in good sta
difficulty is the product of Baycrest's dishonesty, and Baycrest should not be rel
because Callow cannot definitively prove what would have occurred had it not be

pp. 539-40). Callow gave evidence that it typically bid on winter contracts during the was too late to find replacement work by the time it was notified of termination. I a based on the record, we can reasonably presume that Callow would have been able t agreement with a contract of similar value. While the trial judge erred by awardin service agreement had not been terminated, I would, based on this presumption, a damages.

[150] Secondly, Baycrest says that the trial judge's award led to double reco But this is simply incorrect. The trial judge awarded Callow the *net* value of th ($64,306.96) —— representing the gross contract value ($80,383.70) less Callow' judge approximated at 20 percent ($16,076.74). She then added back the cost of Callow had already entered into in reliance on Baycrest's misleading representations not say so expressly, the record shows that Callow's approximated expenses in equipment. If Callow is not reimbursed for the leasing expenses that he incurred misleading representations, those expenses would therefore be counted against hi breach of contract, Callow would have obtained a similarly valued contract and season with $64,306.96 in profit. The trial judge's approach ensured that Callow w and, accordingly, I see no basis for overturning this aspect of her award.

[151] Finally, Baycrest argues that the trial judge misapprehended the ev expenses. I am not convinced, however, that the trial judge did anything other than at 20 percent of the winter service contract's value, based on evidence that Callow in previous years. Estimating the expenses was a decision that fell within the trial ju and should not be disturbed on appeal. Indeed, it is difficult to imagine how the trial differently, given that the winter services agreement was never performed and that w certainty what Callow's expenses would have been.

B. *"Abuse of Right", "Wrongful Exercise of a Right", and Comparative Analysis of Contract*

[152] With the exception of my discussion regarding damages, most of the f
least not inconsistent, with the majority's reasons, and is sufficient to dispose
acknowledging this (at para. 44: "the duty to act honestly about matters directly link
contract . . . is sufficient to dispose of this appeal"; "[n]o expansion of the law set fo
find in favour of Callow"), the majority nonetheless proceeds to delve into matt
honestly. And in so doing, it does indeed expand upon (and, I say, confuse) the law s

[153] More particularly, the majority says that this appeal presents an oppor
first, "what constitutes a breach of the duty of honest performance where it manife
the exercise of a seemingly unfettered, unilateral termination clause" (para. 30); and
is directly linked to the performance of a contract" (para. 64). These questions le
whether the exercise of the termination provision was *itself* dishonest. It explains:

> . . . the duty of honesty as contractual doctrine has a limiting func
> otherwise complete and clear right . . . . This means, simply, that instead
> to terminate in and of itself, the duty of honest performance attracts da
> which the right was exercised was dishonest. [para. 53]

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

[154] Both as a substantive and methodological matter, I cannot endorse this
of this particular appeal, the majority's resort to the civil law as a "source o
inappropriate. As the majority acknowledges, the issues to which its analysis resp
Bhasin itself, and there is no indication that the principles outlined therein require fu
and relatedly, the majority's focus on the wrongful exercise of a right distorts the a

(1) Comparative Analysis

[155] The majority draws on the civilian concept of abuse of rights "as a fi
common law duty of honest performance" (para. 73). Specifically, it finds that this
the analysis of whether the common law duty of honest performance has been breacl
the wrongful exercise of a contractual right" (para. 63).

[156] In considering the utility of the comparative exercise that the majority p
mind that the common law principles applicable to this appeal are both determinativ
civil law in these circumstances departs from this Court's accepted practice in re
analysis. Rather than permissibly drawing inspiration or comfort from the civil
common law or in modifying it, the majority's approach, I say respectfully, risks su
already-established and distinct conception of good faith into the civil law's conc
does so, it confuses matters significantly, the majority's assurances to the contrary no

[157] As Moldaver J. observed (in dissent, but not on this point) in *Reference
and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 113 (emphasis added), "[t]he coex
<u>systems</u> in Canada — the civil law system in Quebec and the common law system e
defining characteristic of our country." The distinct common law and civil law trac
component of Canadian legal heritage and identity (Hon. M. Bastarache, "Bijuralisr
and Harmonization: Genesis (2001), at p. 26; see also M. Samson, "Le droit civil qu
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 common law and civil law traditions. Indeed, this Court has gone so far as to de
as having been designed to ensure "that the common law and the civil law would evo
<u>maintained its distinctive character</u>" (*Reference re Supreme Court Act*, at para. 85 (e
that, just as this Court decided in *Reference re Supreme Court Act* that the presence o
judges from Quebec "ensur[es] civil law expertise and the representation of Que

integrity and distinct character of the common law is also ensured by the presenc
common law jurisdictions.

[159] It also follows from the distinct nature of Canada's two legal tradit
tradition to influence the other is simply an exercise in comparative legal analysis (
Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelie
p. 1016). As I have already recounted, this is what the majority claims it is doing he
an important tool, its uses are not unlimited. In particular, comparative analysis, in t
another legal system to elucidate or develop the domestic legal system, is genera
domestic law does not provide an answer to the problem facing the court, or where
develop that law. Using law from other systems in other circumstances would either l
the extent of its use) have the undesirable effect of displacing established do
Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canad
715, at pp. 725-27; see also K. Zweigert and H. Kötz, *Introduction to Comparative*
pp. 17-18; T. Lundmark, *Charting the Divide between Common and Civil Law* (20
Sharpe writes extra-judicially about the use of authority generally, which applies e
analysis, "[i]t is only where the case cannot readily be decided on the basis of bindin
sources will have a material effect on the decision" (*Good Judgment: Making Ju*
p. 171).

[160] These sources are not expressions of jurisdictional chauvinism. Rath
prudence and disciplined restraint in the deployment of comparative analysis in
reason. Seeking inspiration from external sources when it is unnecessary to do s
straightforward subject, thereby introducing uncertainty to a previously settled ar
Communication Marketing Inc. v. Chambre des notaires du Québec, 2004 SCC
para. 56, citing J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (6th e
something as seemingly innocuous as changing the terminology used to describe a
the majority's reliance on the civil law device of abuse of right and references to the
—— can have substantive legal implications, affecting the coherence and stabilit

legal system. Language itself, after all, plays "a crucial role in the evolution of the

see also Lundmark, at pp. 74-86).

[161] This is not mere conjecture. The seemingly benign injection of civil lav

law judgments has previously generated precisely that kind of instability. Substantia

law of unjust enrichment arose in Canada in the 1970s from the introduction o

"absence of juristic reasons for an enrichment" as if it were synonymous with the

"unjust factors" that had been "deeply ingrained" since Lord Mansfield's judgm

(1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) (M. McInnes, "The Reason to Reverse:

Reasons" (2012), 92 *B.U.L. Rev.* 1049, at pp. 1052 and 1054). As Professor McInnes

> . . . without discussion or explanation, the Supreme Court of Canad
> terminology (i.e., "absence of juristic reason for the enrichment") wh
> traditional unjust factors. Predictably, the Canadian law of unjust er
> confused as the court said one thing and did another. [Footnotes omitted;

[162] The result was, to put it mildly, destabilizing. And predictably so. Whil

called upon to address the same kinds of disputes, each has developed different

resolve them. The result is like two massive jigsaw puzzles that cover the same

distance, each looks much the same as the other, but up close, it becomes appar

differently so that pieces from one cannot fit (or at least fit easily) into the other. A

reasons" began to be spoken of in the Canadian common law of unjust enrich

authorities continued to apply the common law requirement of unjust factors, whi

ascribed legal significance to the introduction of civilian language —— that is, they

at face value and ordered restoration when defendants could not justify the reter

(McInnes, at p. 1056 (footnote omitted)). In the end, this Court had to settle t

Consumers' Gas Co., 2004 SCC 25, [2004] 1 S.C.R. 629, which it did by clarifying t

of "juristic reasons" applies. But coming even several decades after the uncertainty a

that this confirmation of the civil law terminological shift *itself* also effected su

administration of the common law:

> In a stroke, lawyers and judges were required to alter fundamentally tł
> Liability now responds to the *absence* of any reason for the defendant's
> *presence* of some reason for the plaintiff's *recovery*. The transition has n
> be many years before practice settles into the level of consistency and
> 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 auth unjust enrichment is somehow undermined by its civilian inclination. Rather, it is si can be a heavy price to pay —— typically, by unijural lawyers and their clients concepts are introduced via a judgment on a purely domestic legal issue. Hence th has (until now) shown, by introducing external legal concepts to a judgment only w —— that is, to fill a gap where domestic law *does not* provide an answer, or where otherwise develop an existing legal rule. In such circumstances, other legal system solutions that would not have been apparent from a narrow domestic focus (Zweigert also *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.F McLachlin J., as she then was)). This is what we mean when we say that Canada's t as sources of "inspiration" (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 S at para. 38).

[164] We can also draw on the experience of other legal systems to assist our an identified potential solution to a legal problem will result in negative consequ limited use this Court made of Quebec law (and, for that matter, U.S. law) in *Bhasir Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 34, and *Norsk*, at pp. concurring). Similarly, this Court will sometimes observe that a legal concept dev using domestic sources, mirrors a concept found in another system (*Deloitte & Tou of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 138 (per McLachlin C.J., diss *Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at par *Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at paras. 76-79; see also *Sport I* 1 S.C.R. 564, at p. 570 (per Beetz J., concurring)). When used in these ways, compa 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 dom development (or even "clarification"). Rather, in service of what the majority describ the civil law and common law, it uses the civil law device of abuse of right to drive is neither necessary to decide this appeal, nor helpful in its obscuring of the law. F issue —— the place of good faith in contract law —— on which the Canadian systems have adopted very different approaches —— each autonomous, and neithe other (see, generally, R. Jukier, "Good Faith in Contract: A Judicial Dialogue Betw and Québec" (2019), 1 *Journal of Commonwealth Law* 83). As the Hon. Louis LeBel

> [TRANSLATION] The fact that the Court has maintained the specificity with respect to good faith shows the importance it attaches to respect for The dialogue between the two systems remains circumscribed by a jud today, understands the importance and characteristics of the major leg Canadian bijuralism.
>
> ("Les cultures de la Cour suprême du Canada: vers l'émergence d'une c Gaudreault-DesBiens et al., eds., *Convergence, concurrence et ha juridiques* (2009), 1, at p. 15)

[166] Indeed, there are principled reasons for the distinct treatment of good fa law and civil law systems. As Professor Valcke observes, the common law also including the equitable doctrine of estoppel, to achieve similar outcomes as the doctr *Hrynew*: Why a General Duty of Good Faith Would Be Out of Place in English Cana 1 *Journal of Commonwealth Law* 65, at p. 77). At a more general level, the com premised on different understandings of legal rights (H. Dedek, "From Norms to Rights in Common and Civil Private Law" (2010), 56 *McGill L.J.* 77, at pp. 79-81) a mitigating the effects of harsh bargains (M. Pargendler, "The Role of the Sta 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 " comparative exercise to which Callow invites us here" (para. 70). But —— and, a common law that admits of no lacuna or gap that needs filling, or that is in nee

character of the existing good faith doctrine, which *Bhasin* carefully preserved, is un
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 surplu
is the only point of the exercise. As I have already recounted, the doctrine of abuse c
the analysis of whether the common law duty of honest performance has been breacl
the wrongful exercise of a contractual right" (para. 63). Quebec civil law is cited as a
that "no contractual right may be exercised abusively" (para. 67). This leads to anotl
methodology is undesirable in this case, which requires me to speak plainly. The pas
the majority's reasons, and indeed the very notion of "abuse of right", would not be f
comprehensible to the vast majority of common law lawyers and judges. And
reasonably assume —— as many did when the language of "juristic reasons" entere
of unjust enrichment —— that there is legal significance in their use here, an
familiarize themselves with these concepts or retain bijural assistance in order to
clients or adjudicate their cases. At the very least, common law lawyers applying
under discussion here will presumably need to have an eye, as the majority does, tc
How they would acquire the necessary familiarity, and the extent to which th
unexplained.

[169] These are not idle concerns, and on this point there is a certain reality
Few common law lawyers and judges in most provinces are sufficiently versed in F
civil law concerning the abuse of right. And of those who are, fewer still will be trai
understand their substance.

[170] I confess that I am in no position to express a view on the co
proclamation that it, or this Court, is pursuing a "dialogue" between the civil a
Indeed, it is not obvious to me what having such a "dialogue" means in the
adjudicative responsibilities. But accepting that my colleagues understand thems
suggest with utmost respect that their dialogical pursuit should not occur at the e

really comes down to this: the majority's unnecessary digression into external
practical difficulties on the ground by making the common law governing co
comprehensible and therefore less accessible to those who need to know it, there
concerned. At a time when many are striving to remove old barriers that impede ac
erect new barriers in the form of legal expression that bears little to no resem
experience of those who help citizens navigate the legal system.

[171] Even where a comparative analysis *is* appropriate, the analogy of the ji
in mind. It is simply not the case that "the common law and the civil law represe
<u>knowing the law</u>" (Kasirer J.'s reasons, at para. 71 (emphasis added)). They are no
They are different *systems* of law. And because legal rules must originate from the sy
will operate, comparative analysis must be undertaken with care and circumspectio
Caisse populaire des Deux Rives, at p. 1004, is apposite:

> . . . apparent similarity of the fundamental rules should not cause us t
> a duty to ensure that insurance law develops in a manner consistent w
> law, of which it forms a part. Accordingly, while the judgments of foreig
> Britain, the United States and France, may be of interest when the law
> principles, the fact remains that Quebec civil law is rooted in concepts
> <u>may be necessary to refer to foreign law in some cases, the courts</u>
> <u>consistent with the general scheme of Quebec law</u>. [Emphasis added.]

[172] The direction that civil law developments must be consistent with the
applies with equal force when considering potential modifications to the common la
character of each of Canada's legal traditions requires administering each system acc
rules, and by reference to its own authorities (*Colonial Real Estate Co. v. La Cor*
Charité de l'Hôpital Général de Montréal (1918), 57 S.C.R. 585, at p. 603; see also
and the Common Law: Some Points of Comparison" (1967), 15 *Am. J. Comp. L.* 41
that any enrichment from another legal system must be incorporated only insofar as
structure and organizing principles of the adopting legal system (F. Allard, *The Sup*
its Impact on the Expression of Bijuralism (2001), at p. 9). Ultimately, the golden r
one of Canada's legal systems to modify the other is that the proposed solution mus

coherently integrate into the adopting system's structure (J.-L. Baudouin, "Mixed Ju

XXIst Century?" (2003), 63 *La. L. Rev.* 983, at pp. 990-91).

[173] This is of practical concern here. Analytically jamming the civilia

regarding the termination of a contract into the common law is not the tidy and disc

appears to suppose. This is because the obligation of good faith in civil law imposes

party terminating the contract than it does at common law. The Quebec Court o

notion of abuse of right in the context of termination of a contract in the following w

> [TRANSLATION] Up until now, the courts have sometimes sanctioned abus
> However, they have also sanctioned unilateral resiliation by a distributor
> within the spirit of the discretionary resiliation clause, or where the resil
> without any valid reason, or without prior notice or without any sign o
> cases clearly illustrate the "moralization" of contractual relations by the
> for it is not enough to resiliate a contract in a strictly lawful mann
> language of a resiliation clause), it is also necessary to do so in a legitima
>
> (*Birdair inc. v. Danny's Construction Co.*, 2013 QCCA 580, at para.
> Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin
> Vézina, at para. 125)

[174] Even if we were to imagine that it *was* the exercise of the termination c

the breach of duty of honest contractual performance —— which, as I shall expl

Bhasin stipulates clearly that there is no duty to disclose information or intentions

flows from the common law duty of good faith. But under the civilian doctrin

terminating a contract without disclosing intentions can constitute an abuse of

acknowledges that it "do[es] not rely on the civil law here for the specific rules t

claim in Quebec" (para. 73), this tends to affirm how inappropriate its compar

majority either relies on a truncated and therefore distorted version of the civilian f

or else opens the door to future "clarifications" (which would further undermine t

law duty of honest performance as stated in *Bhasin*). Even on its own terms, then,

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 appropria

the doctrine of abuse of right in this case. This appeal calls upon this Court to straig

of honest performance, and nothing more. Transplanting the doctrine of abuse of

context is not only unnecessary here, doing so without reference to the broader c

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 lea

criticism: in focusing on the wrongful exercise of a right, it distorts the analysis des

the distinction between honest performance and good faith in the exercise of a contra

[177] The gravamen of a claim in honest performance is that a party mad

concerning contractual performance that caused its counterparty to suffer loss. It is *n*

in a way that was wrongful, abusive, or even dishonest. Here, for example, the com

deceptive conduct *preceding* the exercise of the termination clause. By relying

representations, Callow missed the opportunity to bid on other contracts. The exerci

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 b

performance when it "failed to act honestly with [the plaintiff] in exercising the non-

This phrasing, however, mirrored the trial judge's finding that the defendant "acted d

exercising the non-renewal clause" (*Bhasin v. Hrynew*, 2011 ABQB 637, 526 A.R

Bhasin, at para. 94). Elsewhere, Cromwell J. is clear that the breach "consisted of [t

honest with [the plaintiff] about its contractual performance and, in particular,

intentions with respect to renewal" (para. 108). This reflects the general framework

the duty of honest performance "is a simple requirement not to lie or mislead t

contractual performance" (para. 73).

[179] Maintaining analytical clarity about the source of the breach —— the c
termination, and not the termination itself —— is important for two reasons. First, a b
performance may arise from many aspects of performance. The general rule enun
clear standard that can be applied across different contexts, including to the facts
benefit in developing a separate analysis that responds narrowly to dishonesty co
contractual right. Doing so will only make the law more confused and difficult to app

[180] Secondly, the source of the breach distinguishes the duty of honest pe
exercise contractual discretion in good faith. As discussed above, where a breach of t
focus of the analysis is whether the defendant was entitled to exercise its discretio
shifting the focus of the honest performance analysis to the manner in which a right
blurs the boundaries between these two distinct duties. Indeed, it contends that "the
shares a common methodology with the duty to exercise contractual discretionar
fixing, at least in circumstances like ours, on the wrongful exercise of a contractual p

[181] We are bound by *Bhasin* to treat the duty of honest performance as co
duty to exercise discretionary powers in good faith (*Atlantic Lottery Corp. Inc. v.*
para. 65). This is not simply a matter of *stare decisis* and incremental legal develop
those things); there is also the practical concern that blurred and ambiguous treatme
meaningful impact on the outcome for contracting parties. Contrary to the majority
issue in each category of cases is distinct, and the damages available differ accordin
of the duty of honest performance addresses the effect of the *dishonesty*. In contras
the duty to exercise discretion in good faith addresses the effect of the *exercise of di*
duties under the umbrella of the "wrongful exercise of a contractual right" obscures
represents an unfortunate departure from *Bhasin*.

IV. Conclusion

[182] I would allow the appeal, set aside the Court of Appeal decision, and r

The following are the reasons delivered by

CÔTÉ J. —

[183] What constitutes actively misleading conduct in the context of a cc without cause? Where should the line be drawn between active dishonesty and pe information relevant to termination? Does a party to a contract have an obligation t from entertaining hopes regarding the duration of their business relationship? These this appeal.

[184] In this case, the respondents ("Baycrest") bargained for a right to termi *other reason than unsatisfactory services* upon giving 10 days' notice. Baycrest mac but it chose to wait before sending the notice, as it did not want to jeopardize the per was being done by the appellant ("Callow", referring interchangeably to C.M. Call Mr. Christopher Callow). In the meantime, Baycrest became aware that its counterp of a renewal, although it did not say or do anything that materially contributed tc nothing to discourage them; such conduct may not be laudable, but it does not fall w 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 a discretionary powers in good faith (these two duties were distinguished in *Bhasin* [2014] 3 S.C.R. 494, at paras. 47, 50 and 72-73).

[187] Second, the duty of honest performance "means simply that partie

para. 73).

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

[189] Fourth, there is no need to extend the law by recognizing a new du "active non-disclosure".

[190] I take it we all agree with these premises. Therefore, the issue, when pı distinction referred to in *Bhasin* (at paras. 73 and 86-87) between actively misleadi non-disclosure. In the context of this case it comes down to this: did Baycrest I mislead Callow into thinking that there was no risk it would exercise its right to tern 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 agre observations insofar as they pertain to the role of external legal concepts. Justice Ka of his reasons that "[n]o expansion of the law set forth in *Bhasin* is necessary" However, he then embarks on, and I say this respectfully, an unnecessary comparativ law and the common law under the pretext of "dialogue". I am perplexed by the vir like this one where no gaps in the common law need to be filled and no rules need why we should adopt such an approach, one that provides no palpable benefits ar unpredictable.

[192] That being said, I believe that the common law as it now stands doe colleagues arrive at. I am afraid that the unnecessary debate about comparative diverted attention from the facts of this case as they are.

II. Ambit of the Duty of Honest Performance

[193] In *Bhasin*, the Court unanimously introduced the contractual duty of ho
common law duty under the broad umbrella of the organizing principle of good faitl
(para. 72). Cromwell J. stressed that this was no more than a "modest, increment
paras. 82 and 89), with the duty of honest performance being a "minimum standard"

[194] In Cromwell J.' opinion, the new duty would "interfer[e] very littl
(para. 76); so little that he thought such interference would be "more theoretical tl
subject of the organizing principle of good faith from which it grew, Cromwell J. stat

> The principle of good faith must be applied in a manner that is cons
> commitments of the common law of contract which generally places gre
> contracting parties to pursue their individual self-interest. In commer
> cause loss to another — even intentionally — in the legitimate pursuit of
> The development of the principle of good faith must be clear not to
> judicial moralism or "palm tree" justice. In particular, the organizing pr
> not be used as a pretext for scrutinizing the motives of contracting partie

[195] Cromwell J. also expressed specific concerns relating to the clari
commercial certainty and other practical implications (at paras. 59, 66, 70-71,
endeavoured to explain what the new duty was *not*:

> The duty of honest performance that I propose <u>should not be confus</u>
> or of fiduciary loyalty. A party to a contract has no general duty to subo
> that of the other party. [Emphasis added; para. 86.]

[196] Turning to a positive description, he stressed that the duty of honest
requirement" not to lie or knowingly mislead about matters directly linked to p
(para. 73).

[197] The requirement that parties not lie is straightforward. But what kind
requirement that they not otherwise knowingly mislead each other? Absent a dut
obvious when exactly one's silence will "knowingly mislead" the other contract

disclosure” *nor* a requirement “to forego advantages flowing from the contract” supposed to know at what point a permissible silence turns into a non-permissible s breach of contract. With the greatest respect, I do not believe such casuistry is c requirement” Cromwell J. meant to set out in *Bhasin*.

[198] As Cromwell J. put it, “a clear distinction can be drawn between a f fact, even a firm intention to end the contractual arrangement, and active disho added)). He added that “*United Roasters* makes it clear that there is no unilateral c relevant to termination. But the situation is quite different, as I see it, when it com deceiving the other contracting party in relation to performance of the contract” (These words should be taken at face value. The duty of honest performance shoul apply” (para. 80).

B. *Permissible Non-disclosure*

[199] It must be borne in mind that all obligations flowing from the duty “negative” obligations (P. Daly, “La bonne foi et la common law: l’arrêt *Bhasin c. H* G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), Kasirer J.’s reasons, at para. 86). Extending the duty beyond that scope would “d commercial dealings” (*Bhasin*, at para. 80).

[200] Therefore, silence cannot be considered dishonest within the meanin positive obligation to speak. Such an obligation does not arise simply because a par his counterparty is operating under a mistaken belief.

[201] Absent a duty of disclosure, that is, absent any kind of free-standing from the duty of honest performance, a party to a contract has no obligation t mistaken belief unless the party’s active conduct has *materially* contributed to it T. Buckwold, “The Enforceability of Agreements to Negotiate in Good Faith: The I

[202] What constitutes a material contribution will obviously depend upon

the nature of the parties' relationship (see Brown J.'s reasons, at para. 133) as well a

the contract. But the reason underlying this requirement is a practical one that

emphasis on commercial expectations (at paras. 1, 34, 41, 60 and 62): parties that p

information — which they are entitled not to do — are not required to adopt a n

contractual relationship simply because they chose silence over speech.

[203] It cannot be that the law, on the one hand, allows contracting parties

but, on the other hand, negates that possibility by imposing a standard of condu

spontaneous attitudes — such as evasiveness and equivocation — parties might hav

bear precisely on what they wish not to disclose.

[204] Even though parties who make that choice must be careful with what

they become aware that their counterparties are operating under a mistaken belief,

behave as if their actions were being scrutinized under a microscope to determine wh

to that mistaken belief. Such a requirement would be unacceptable.

[205] In the context of a right to terminate a contract without cause, a

agreement does not have to convey hints in order to alert his counterparty that thei

danger. No duty of disclosure should mean no duty of disclosure.

[206] A party's awareness of his counterparty's mistaken belief will theref

obligation to speak unless the party has taken positive action that materially contribu

conduct and the mistaken belief must both pertain to contractual performance; otherw

that one has "knowingly misle[d] [the] other about matters directly linked to the p

(*Bhasin*, at para. 73).

[207] In sum, the "minimum standard" of honesty imposed by the duty of h

consistent with the other principles set out in *Bhasin*. It also has to be realistic and no

This does not mean that the party may induce or reinforce such a belief by sig

representations. There is an obligation to correct this mistaken belief if the party's ac

contributed to it.

III. Analysis

[208] Callow and Baycrest entered into two two-year contracts: a winter

snow removal services for the period from November 1, 2012 to April 30, 2014 a

services agreement for the period from May 1, 2012 to October 31, 2013. The wi

issue here, contained the following provision:

> 9. If the Contractor [i.e. Callow] fails to give satisfactory service to the
> in accordance with the terms of this Agreement and the specificatic
> attached hereto <u>or if for any other reason</u> the Contractor's services are
> whole or part of the property covered by this Agreement, then the Cor
> contract upon giving ten (10) days' notice in writing to the Contractor,
> all obligations of the Contractor shall cease and the Corporation shall
> 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

September 12, 2013, it gave Callow 10 days' notice that it was terminating the

Baycrest had learned that Callow was performing free extra landscaping work a

impression the winter agreement would not be terminated (trial reasons, 2017

(CanLII)).

[210] It can easily be understood from these circumstances that Cal

termination. Callow believed that, "if there was a problem, he would have expected

attention like [it] had done in the past" (trial reasons, at para. 49). Baycrest'

discourteous and cavalier. Yet, that is not the question here. The question is w

contributed to Callow's mistaken belief that the contract would not be terminated. If

[211] Before our Court, Callow acknowledged that by entering into the win the risk that Baycrest "may terminate [the contract], but only disclose the termin written notice" (transcript, at p. 11; see also C.A. reasons, 2018 ONCA 896, 429 D.L am of the view that according to the terms of the winter agreement, Callow could exact same situation regardless of Baycrest's behaviour during the spring and possibility was in fact inherent in the contract he had bargained for.

[212] Callow essentially submits that Baycrest's active conduct led hir agreement was no longer at risk of being terminated despite the clear wording of th stresses the following points:

(1) Baycrest deliberately kept its decision secret because it did performance of the summer agreement;

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

(3) Callow had discussions with Mr. Peixoto and Mr. Campbell re 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 consider the principle that, in order to amount to a breach of the duty of hone dishonesty had to be "directly linked to the performance of the contract" (*Bhasin*

services. This explains why she wrongly insisted on, amongst other things, the n
performance issues" (para. 67) despite the fact that the winter agreement could be t
services were satisfactory.

[215] Furthermore, although the trial judge seems to have been aware that the
(para. 60), she nonetheless found that Baycrest had acted in bad faith by "withholdi
Callow performed the summer maintenance services contract" (para. 65; see also
herself whether Baycrest had explicitly or implicitly said or done anything that cou
thinking that the contract was at no risk of being terminated for any other reason tha
is clear from reading the trial judge's reasons as a whole that the "representations" s
Baycrest (at paras. 65, 67 and 76) were not directly linked to the performance of the
the trial judge's misunderstanding of the applicable legal principles vitiated the fact-f

[216] Baycrest had bargained for a right to terminate its winter agreement *fo*
upon giving 10 days' notice. Its duty of honest performance did not require it t
"advantag[e] flowing from the contract" (*Bhasin*, at para. 73). It had no obligati
decision to terminate the winter agreement until 10 days before the termination
contract stipulated. Even after Baycrest became aware of Callow's mistaken belief, i
the "freebie" work Callow was performing on his own initiative or to correct t
operating under. Such an obligation would have arisen only if Baycrest had co
mistaken belief by inducing it or reinforcing it. In light of the evidence and the tria
convinced that Baycrest had done so.

[217] I do not have the same reading as my colleague Kasirer J. about certain
of fact (para. 100). These findings expressed in very broad terms should not be ins
whole and from the evidence that was before the trial judge. For instance, my collea
made statements to Mr. Callow suggesting that a renewal of the winter maintena
(para. 95), and he considers that to be a "key finding" (para. 96). However, the trial
what Callow had thought, not to *what Baycrest had said* (trial reasons, at para. 41

different. Indeed, as I demonstrate below, the evidence supporting this “key fin
thoughts regarding a renewal of the winter agreement had nothing to do with what Ba

[218] I now turn to the application of the foregoing legal principles to the fact

A. *Discussions About Renewal*

[219] Callow argues that Baycrest materially contributed to his mistaken bel
renewal. Indeed, the renewal issue is central in this appeal. It is not disputed that ur
Bhasin, the winter agreement did not contemplate any automatic renewal; it only
Since renewal was not a term of the winter agreement, it cannot be considered “pe
within the meaning of *Bhasin*. For Callow’s claim to succeed, any breach of the c
must pertain to termination.

[220] Both of my colleagues accept Callow’s submission that it can be in
about renewal that the winter agreement was not in danger of termination. I would ag
in the following circumstances: if one party leads another to believe that their c
follows that the other party can reasonably expect their business relationship t
terminated. But an inference to that effect cannot be drawn in the abstract. In or
through discussions about renewal, led the other party to think that there was no ri
would be terminated, the inference-drawing process must obviously take into accou
stake and what was actually communicated during those discussions. Otherwise, tl
palpable and overriding error that would be subject to appellate review (*Housen v.*
[2002] 2 S.C.R. 235, at paras. 22-23).

[221] Here, s. 9 of the winter agreement contemplated that the agreement
unsatisfactory services, or (2) for any other reason than unsatisfactory services. I
renewal, communicate anything that might have led Callow to believe there was no
would be terminated for *any other reason* than unsatisfactory services? The trial judg

During the spring and summer of 2013, Callow performed regular w
pick-up and was in discussions with the condominium corporations' b
contract for the following summer and also the winter maintenance se
two years. At this time, Callow had only completed year one of a two-
was supposed to remain in place for the winter of 2013-2014.

After his discussions with Mr. Peixoto and Mr. Campbell, Mr. Callov
to get a two-year renewal of his winter maintenance services contract a
his services. [Emphasis added; paras. 40-41.]

[222] The trial judge, who found Callow to be credible, relied on the followin

Q. Now is probably a good time to — well tell me about these di
discussions were you having.

A. Mostly with Joe [Peixoto], we discussed it, and he said "yeah, it lool
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 discussion

Q. Okay, and what was your impression of —of — I mean I suppose you

A. That I was likely going to be getting a two-year renewal, there was
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 t
of claim did not even address this issue; it instead focused on Baycrest's knowledg
and the provision of satisfactory services. Even though the trial judge did consid
findings in this regard bore on Callow's *mistaken belief* that the winter agreement v
para. 41); they did *not* bear on anything Baycrest actually did or said that would h
belief.

[224] What Callow thought is one thing; what Baycrest said or did is an

they'll be up for it, let me talk to them" (A.R., vol. II, at p. 67) clearly meant that de
he was not the one making the decision and that Baycrest had not even considere
renewal at the time. It certainly could not be inferred from this statement that a re
testimony does not suggest that he was misled into believing that Baycrest wa
renewal — Mr. Peixoto's response instead presupposes the contrary — nor does it s
said anything to negate the risk Callow took that his contract might be terminatec
unsatisfactory services. Indeed, Callow insisted that he had believed a renewal was l
reason not to, they were satisfied with the service, they were happy with it" (A.R., vo

[225] In his examination for discovery, Callow had given the same rea
agreement would be renewed, that is, because "there was no reason not to" (A.R., v
refer to his discussions with Mr. Peixoto or Mr. Campbell. When asked if anyone ha
would be renewed, he said he could not recall. The evidence does *not* establish that M
initiated the discussions about renewal. On the contrary, it suggests that Callow did. W
his "freebie" work, Callow admitted that, although he was under the mistaken belief
to be renewed, he was in fact only "*hopeful*" that it would be. *Nowhere* in his testin
had been given *any* information that could mislead him into believing that Baycrest w
a two-year renewal instead of termination.

[226] The trial judge referred to "active communications . . .
September 12, 2013, which deceived Callow" (para. 66), and to "representations i
period" (para. 67; see also paras. 65 and 76). But those references must be read in li
reasons as a whole. Even though the trial judge made credibility findings against Mr
and credibility findings in favour of Callow, the evidence pertaining to renewal su
number of inferences regarding termination.

[227] At most, it can be said that Mr. Peixoto and Mr. Campbell did
entertaining hopes when they had a chance to do so. But, and most importantly
Baycrest was actually contemplating a continuation of their business relationship. If

that his existing contract would be terminated before its term. But that was simply nc
the trial judge did not infer from the discussions about renewal that Baycrest had don
the risk that the winter agreement would be terminated for any other reason than u
she made such an inference, it would be subject to appellate review, as it woul
evidence. Given the context discussed above, Mr. Peixoto's and Mr. Campbell's vag
did not materially contribute to Callow's mistaken belief that would have req
additional information.

B. *Baycrest's Satisfaction With Callow's Services*

[228] The trial judge placed great importance on the fact that Callow's servic
that Baycrest's conduct had given him no reason to think otherwise (paras. 22, 27,
and 55). I note there is no finding that Baycrest communicated any particular sign
the performance of the winter agreement past March 19, 2013. That being said, ther
Baycrest terminating the winter agreement after showing its satisfaction with the qua

[229] Further, the parties had explicitly contemplated that Baycrest could ter
even if it was satisfied with Callow's performance, as the contract provided that
termination right for any other reason than unsatisfactory services. Thus, positiv
services cannot justify Callow's mistaken belief that the contract would not be termin

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
danger" (paras. 65 and 76; see also para. 13). This finding was essentially groun
satisfaction communicated by Baycrest, on its acceptance of the "freebie" work and
following the discussions pertaining to renewal. As I have already explained, nothir
disclose its intent to terminate the winter agreement.

[231] What the trial judge *did not find* is also relevant. She did *not* find tl
forego its right to terminate the winter agreement. She did *not* find that Baycrest had
find that Baycrest had negated the risk taken by Callow that his contract would l
reason than unsatisfactory services. Lastly, she did not clearly indicate why Callow
winter maintenance services contract would remain in place during the following wir

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

[233] At trial, Callow testified that he was aware of the termination clause,
year term made it unenforceable:

> **Q.** . . . So, in that letter, there is a — a statement that the termina
> agreement. So, my question for you is, at that point in time what was yo
> the termination in breach of the agreement?
>
> **A.** Because they asked me, and we entered into a two year agreemer
> summer and winter; and I did so at a reduced rate. I upheld my end o
> perform that work at that reduced rate. They — and which I might a
> landscaping and the final aspect of it, they were supposed to pay me
> continued to fulfill my contractual obligations. I expected nothing less th
>
> **Q.** So — so, when you — because you talk — but you knew that in the
> that termination clause.
>
> **A.** They had a clause written in there. <u>I didn't believe it be enforceable</u>
> <u>contract. That's the whole idea to a two year contract. You have contra</u>
> <u>services for two years and they pay me for those services.</u> [Emphasis add
>
> (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 u
the termination provision casts an important light on the reason why he did not b

anything to do with Callow's erroneous interpretation of the termination provision. that Baycrest was not required to correct Callow's mistaken belief by disclosing in disclose.

IV. Conclusion

[235] The trial judge erred in concluding that Baycrest had to address per prompt notice prior to termination (para. 67). She did not inquire into whethe representations that had misled Callow into thinking Baycrest would not terminate th other reason than unsatisfactory services. In my view, the trial judge extended the performance in a way that was not consistent with the other principles set out in *Bhas*

[236] In sum, the narrow issue in this appeal comes down to this: Di knowingly mislead Callow into thinking that there was no risk it would exercise its r agreement for any other reason than unsatisfactory services? There were no outright Callow's mistaken belief that his services would be required for the upcoming forewent the contractual advantage it had of being able to end the winter agreemen notice. Nor did Baycrest say or do anything that materially contributed to Callov winter agreement would not be terminated for any other reason than unsatisfactory s its conduct is characterized, Baycrest had no obligation to correct Callow's mistaken

[237] To be clear, the result I arrive at should not be interpreted as meanin was appropriate or that Callow has no recourse. It means that Callow's recourse can the duty of honest performance. The trial judge did in fact find that Baycrest had be "freebie" work (at para. 77), but she stated that Callow had not provided evidence of 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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Solicitors for the intervener the Canadian Chamber of Commerce: Torys

[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".