COURT FILE NUMBER	2401-02680
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.
DOCUMENT	**BOOK OF AUTHORITIES FOR BENCH BRIEF OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP. TO BE HEARD ON NOVEMBER 27, 2024 AT 10:00 A.M.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins, KC / Pantelis Kyriakakis / Nathan Stewart / Samantha Arbor Tel: 403-260-3531 / 3536 / 3534 / 3506 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca / sarbor@mccarthy.ca

Clerk's Stamp

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Clerk's Stamp

LIST OF AUTHORITIES

STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, at section 18.6;
2. *Municipal Government Act*, RSA 2000, c M-26, at sections 344, 346, 348(d), and 348.1;

CASE LAW

3. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10;
4. *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182;
5. *Alphabow Energy Ltd. (Re)*, 2024 ABKB 652;
6. *Bank of Montreal v. 592931 Ontario Inc.*, 2021 ONSC 4412;
7. *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494;
8. *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 (CanLII), [2020] 3 SCR 908;
9. *Clark & Associates Real Estate Ltd. v. Winroc Corp.*, 1990 CanLII 5593 (AB KB);
10. *Laurentian University of Sudbury*, 2021 ONSC 3272;
11. *Nicholson v. Debuse*, 1927 CanLII 288 (AB CA), [1927] 3 W.W.R. 799;
12. *Razor Energy Corp. v Companies' Creditors Arrangement Act*, 2024 ABKB 534;

EVIDENCE

13. Letter from counsel to Arena to counsel to Razor Energy, dated November 15, 2024;
14. Letter from counsel to Razor Energy to its D&O insurers, dated November 22, 2024;
15. Statement of Claim filed on November 22, 2024, by Arena Limited SPV, LLC and 405 Domolite LLC; and,
16. Letter from counsel to Razor Energy to its D&O insurers, dated November 25, 2024.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to October 30, 2024

Last amended on April 27, 2023

À jour au 30 octobre 2024

Dernière modification le 27 avril 2023

Published by the Minister of Justice at the following address:
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http://lois-laws.justice.gc.ca

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to October 30, 2024. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of October 30, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 30 octobre 2024. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 30 octobre 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Decision final

(5) The decision of the Supreme Court of Canada on any appeal under subsection (1) is final and conclusive.

R.S., c. C-25, s. 15; R.S., c. 44(1st Supp.), s. 10.

Order of court of one province

16 Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it.

R.S., c. C-25, s. 16.

Courts shall aid each other on request

17 All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

R.S., c. C-25, s. 17.

18 [Repealed, 2005, c. 47, s. 131]

18.1 [Repealed, 2005, c. 47, s. 131]

18.2 [Repealed, 2005, c. 47, s. 131]

18.3 [Repealed, 2005, c. 47, s. 131]

18.4 [Repealed, 2005, c. 47, s. 131]

18.5 [Repealed, 2005, c. 47, s. 131]

PART III

General

Duty of Good Faith

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Décision finale

(5) La décision de la Cour suprême du Canada sur un tel appel est définitive et sans appel.

S.R., ch. C-25, art. 15; S.R., ch. 44(1er suppl.), art. 10.

Ordonnance d'un tribunal d'une province

16 Toute ordonnance rendue par le tribunal d'une province dans l'exercice de la juridiction conférée par la présente loi à l'égard de quelque transaction ou arrangement a pleine vigueur et effet dans les autres provinces, et elle est appliquée devant le tribunal de chacune des autres provinces de la même manière, à tous égards, que si elle avait été rendue par le tribunal la faisant ainsi exécuter.

S.R., ch. C-25, art. 16.

Les tribunaux doivent s'entraider sur demande

17 Tous les tribunaux ayant juridiction sous le régime de la présente loi et les fonctionnaires de ces tribunaux sont tenus de s'entraider et de se faire les auxiliaires les uns des autres en toutes matières prévues par la présente loi, et une ordonnance du tribunal sollicitant de l'aide au moyen d'une demande à un autre tribunal est réputée suffisante pour permettre à ce dernier tribunal d'exercer, en ce qui concerne les questions prescrites par l'ordonnance, la juridiction que le tribunal ayant formulé la demande ou le tribunal auquel est adressée la demande pourrait exercer à l'égard de questions similaires dans les limites de leurs juridictions respectives.

S.R., ch. C-25, art. 17.

18 [Abrogé, 2005, ch. 47, art. 131]

18.1 [Abrogé, 2005, ch. 47, art. 131]

18.2 [Abrogé, 2005, ch. 47, art. 131]

18.3 [Abrogé, 2005, ch. 47, art. 131]

18.4 [Abrogé, 2005, ch. 47, art. 131]

18.5 [Abrogé, 2005, ch. 47, art. 131]

PARTIE III

Dispositions générales

Obligation d'agir de bonne foi

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

1997, c. 12, s. 125; 2005, c. 47, s. 131; 2019, c. 29, s. 140.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

1997, ch. 12, art. 125; 2005, ch. 47, art. 131; 2019, ch. 29, art. 140.

Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

Réclamations

Réclamations considérées dans le cadre des transactions ou arrangements

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.

Exception

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

a) toute ordonnance d'un tribunal imposant une amende, une pénalité, la restitution ou une autre peine semblable;

b) toute indemnité accordée en justice dans une affaire civile :

TAB 2

Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of October 31, 2024

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Amendments Not in Force

This consolidation incorporates only those amendments in force on the consolidation date shown on the cover. It does not include the following amendments:

2022 c16 s9(63) amends s297; s9(64) amends s298(1)(y); s9(65) repeals and substitutes s354(3.1).

2024 c11 s2(24) amends s317(d); s2(25) amends s363.

2017 c13 s1(4) repeals Division 5 of Part 3; s1(39) repeals and substitutes Division 4 of Part 10 ss380.1 to 380.5; s1(40) amends s410(e); s1(41) amends s437(c); s1(61) (repealed by 2013 cS-19.3 s3 - effective December 31, 2023) amends s666; s1(62) (repealed by 2013 cS-19.3 s3 - effective December 31, 2023) amends s667; s1(63) (repealed by 2013 cS-19.3 s3 - effective December 31, 2023) amends s670(1); s1(64) (repealed by 2013 cS-19.3 s3 - effective December 31, 2023) adds s670.2.

2020 c35 s24 amends s596(1)(b).

(2) A person who wishes to pay taxes by instalments must make an agreement with the council authorizing that method of payment.

(3) When an agreement under subsection (2) is made, the tax notice, or a separate notice enclosed with the tax notice, must state

(a) the amount and due dates of the instalments to be paid in the remainder of the year, and

(b) what happens if an instalment is not paid.

1994 cM-26.1 s340

Deemed receipt of tax payment

341 A tax payment that is sent by mail to a municipality is deemed to have been received by the municipality on the date of the postmark stamped on the envelope.

1994 cM-26.1 s341

Receipt for payment of taxes

342 When taxes are paid to a municipality and the person who paid the tax requests a receipt, the municipality must provide a receipt.

RSA 2000 cM-26 s342;2017 c13 s1(30);2021 c22 s4

Application of tax payment

343(1) A tax payment must be applied first to tax arrears.

(2) If a person does not indicate to which taxable property or business a tax payment is to be applied, a designated officer must decide to which taxable property or business owned by the taxpayer the payment is to be applied.

1994 cM-26.1 s343

Penalty for non-payment in current year

344(1) A council may by bylaw impose penalties in the year in which a tax is imposed if the tax remains unpaid after the date shown on the tax notice.

(2) A penalty under this section is imposed at the rate set out in the bylaw.

(3) The penalty must not be imposed sooner than 30 days after the tax notice is sent out.

1994 cM-26.1 s344

Penalty for non-payment in other years

345(1) A council may by bylaw impose penalties in any year following the year in which a tax is imposed if the tax remains unpaid after December 31 of the year in which it is imposed.

(2) A penalty under this section is imposed at the rate set out in the bylaw.

(3) The penalty must not be imposed sooner than January 1 of the year following the year in which the tax was imposed or any later date specified in the bylaw.

1994 cM-26.1 s345

Penalties

346 A penalty imposed under section 344 or 345 is part of the tax in respect of which it is imposed.

1994 cM-26.1 s346

Cancellation, reduction, refund or deferral of taxes

347(1) If a council considers it equitable to do so, it may, generally or with respect to a particular taxable property or business or a class of taxable property or business, do one or more of the following, with or without conditions:

(a) cancel or reduce tax arrears;

(b) cancel or refund all or part of a tax;

(c) defer the collection of a tax.

(2) A council may phase in a tax increase or decrease resulting from the preparation of any new assessment.

1994 cM-26.1 s347

Tax becomes debt to municipality

348 Taxes due to a municipality

(a) are an amount owing to the municipality,

(b) are recoverable as a debt due to the municipality,

(c) take priority over the claims of every person except the Crown, and

(d) are a special lien

(i) on land and any improvements to the land, if the tax is a property tax, a community revitalization levy, a special tax, a clean energy improvement tax, a local improvement tax or a community aggregate payment levy, or

(ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax

imposed in respect of a designated manufactured home in a manufactured home community.

RSA 2000 cM-26 s348;2005 c14 s12;2018 c6 s5

Special priority lien for tax debt on linear property or machinery and equipment

348.1(1) In this section,

(a) "assessable", in respect of property or improvements, means property or improvements that have been or are subject to being assessed under Part 9;

(b) "debtor" means a person who owes a debt to a municipality for tax on linear property or on machinery and equipment.

(2) Notwithstanding section 348(c) and (d), taxes due to a municipality on linear property or on machinery and equipment

(a) take priority over the claims of every person except the Crown, and

(b) are a special lien on all the debtor's assessable property located within the municipality, including any assessable improvements to that property.

(3) A lien referred to in subsection (2)(b)

(a) arises when the debtor fails to satisfy the debt when due, and

(b) expires on full satisfaction of the debt.

(4) This section applies to a debt for taxes referred to in subsection (2) regardless of whether the debt became due before or after the coming into force of this section.

2021 c22 s5

Fire insurance proceeds

349(1) Taxes that have been imposed in respect of improvements are a first charge on any money payable under a fire insurance policy for loss or damage to those improvements.

(2) Taxes that have been imposed in respect of a business are a first charge on any money payable under a fire insurance policy for loss or damage to any personal property

(a) that is located on the premises occupied for the purposes of the business, and

TAB 3

9354-9186 Québec inc. and 9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

9354-9186 Québec inc. et 9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation *Intervenants*

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation
Intervenants

INDEXED AS: 9354-9186 QUÉBEC INC. *v.* CALLIDUS CAPITAL CORP.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

RÉPERTORIÉ : 9354-9186 QUÉBEC INC. *c.* CALLIDUS CAPITAL CORP.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que

same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

les créanciers non garantis des compagnies débitrices, au motif que sa sûreté ne vaut rien. À peu près au même moment, les compagnies débitrices demandent un financement temporaire sous forme d'un accord de financement de litige par un tiers qui leur permettrait de poursuivre l'instruction des réclamations réservées. Elles sollicitent également l'approbation d'une charge super-prioritaire pour financer le litige.

Le juge surveillant décide que le créancier garanti ne peut voter sur le nouveau plan parce qu'il agit dans un but illégitime. En conséquence, le nouveau plan n'a aucune possibilité raisonnable d'être avalisé et il n'est pas soumis au vote des créanciers. Le juge surveillant accueille la demande des compagnies débitrices et les autorise à conclure un accord de financement de litige par un tiers. À l'issue d'un appel formé par le créancier garanti et certains des créanciers non garantis, la Cour d'appel annule l'ordonnance du juge surveillant, estimant qu'il est parvenu à tort aux conclusions qui précèdent.

Arrêt : Le pourvoi est accueilli et l'ordonnance du juge surveillant est rétablie.

Le juge surveillant n'a commis aucune erreur en empêchant le créancier garanti de voter ou en approuvant l'accord de financement de litige par un tiers. Un juge surveillant a le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement s'il décide que le créancier agit dans un but illégitime. Un juge surveillant peut aussi approuver le financement de litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*. La Cour d'appel n'était pas justifiée de modifier les décisions discrétionnaires du juge surveillant à cet égard et n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport à ces décisions.

La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Elle poursuit un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement catastrophiques qui peuvent découler de l'insolvabilité. Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie. La structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately

Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant, qui a le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas. Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11 de la *LACC*, lequel confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée. Quoique vaste, ce pouvoir discrétionnaire n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC* et tenir compte de trois considérations de base : (1) que l'ordonnance demandée est indiquée, et (2) que le demandeur a agi de bonne foi et (3) avec la diligence voulue. La considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. En conséquence, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Étant donné que le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer ou à miner les objectifs réparateurs de la *LACC* ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un but illégitime — l'art. 11 de la *LACC* confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter. Ce pouvoir discrétionnaire s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *Loi sur la faillite et l'insolvabilité* et favorise l'équité fondamentale qui imprègne le droit et la pratique en matière d'insolvabilité au Canada. La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation que le juge surveillant est le mieux placé pour effectuer.

En l'espèce, la décision du juge surveillant d'empêcher le créancier garanti de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Lorsqu'il a rendu sa décision, le juge surveillant

familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive.

connaissait très bien les procédures en cause, car il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances. Il a tenu compte de l'ensemble des circonstances et a conclu que le vote du créancier garanti viserait un but illégitime. Il savait qu'avant le vote sur le premier plan, le créancier garanti avait choisi de n'évaluer aucune partie de sa réclamation à titre de créancier non garanti et n'avait pas tenté de voter sur ce plan, qui n'a finalement pas reçu l'aval des autres créanciers. Entre l'insuccès du premier plan et la proposition du nouveau plan (identique pour l'essentiel au premier plan), les circonstances factuelles se rapportant aux affaires financières ou commerciales des compagnies débitrices n'avaient pas réellement changé. Pourtant, le créancier garanti a tenté d'évaluer la totalité de sa sûreté à zéro et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si le créancier garanti avait été autorisé à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation à double majorité prévu par le par. 6(1) de la *LACC*. La seule conclusion possible était que le créancier garanti tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. La façon d'agir du créancier garanti était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans une procédure d'insolvabilité, ce qui comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Le créancier garanti a donc été empêché à bon droit de voter sur le nouveau plan.

La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 de la *LACC* et des objectifs réparateurs de la *LACC* de façon plus générale. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Cela ressort du libellé du par. 11.2(1), qui est large et ne prescrit aucune forme ou condition type. Le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur. Dans certaines circonstances, comme en l'espèce, le financement de litige favorise la réalisation de cet objectif fondamental. Les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Ces facteurs

Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

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By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund*

ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant, car ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. En outre, pour qu'un accord de financement de litige par un tiers soit approuvé à titre de financement temporaire, il ne doit pas comporter des conditions qui le convertissent effectivement en plan d'arrangement.

En l'espèce, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'accord de financement de litige à titre de financement temporaire. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par les compagnies débitrices sous le régime de la *LACC*, mène à la conclusion que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'accord de financement de litige à titre de financement temporaire. De plus, l'accord de financement de litige ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou l'existence de leurs droits d'avoir accès aux fonds provenant des actifs des compagnies débitrices, pas plus qu'on ne saurait dire qu'il s'agit d'une transaction à l'égard de leurs droits. Enfin, la charge relative au financement de litige ne convertit pas l'accord de financement de litige en plan d'arrangement. Une conclusion contraire aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers, un résultat qui est expressément prévu par l'art. 11.2 de la *LACC*.

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

Arrêt appliqué : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; **arrêts examinés :** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **arrêts mentionnés :** *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes c. The City of Saint John*, 2016 NBQB 125; *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

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Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* and *Hannah Toledano*, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

Geneviève Cloutier and *Clifton P. Prophet*, for the respondent Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* and *François Alexandre Toupin*, for the respondents International

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Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* et *Hannah Toledano*, pour les appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc.

Neil A. Peden, pour les appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)).

Geneviève Cloutier et *Clifton P. Prophet*, pour l'intimée Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* et *François Alexandre Toupin*, pour les intimés International

Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

Joseph Reynaud and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed

Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier.

Joseph Reynaud et *Nathalie Nouvet*, pour l'intervenante Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* et *Saam Pousht-Mashhad*, pour les intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

[1] Ces pourvois s'inscrivent dans le contexte d'une instance toujours en cours introduite sous le régime de la *Loi sur les arrangements avec les créanciers de compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), dans le cadre de laquelle la quasi-totalité des éléments d'actif des compagnies débitrices ont été liquidés. L'instance a été introduite il y a plus de quatre ans. Depuis, un seul juge surveillant a été chargé de sa supervision. À ce titre, il a rendu de nombreuses décisions discrétionnaires.

[2] Deux de ces décisions du juge surveillant font l'objet du présent pourvoi. Chacune d'elles soulève une question exigeant de notre Cour qu'elle précise la nature et la portée du pouvoir discrétionnaire exercé par les tribunaux dans les instances relevant de la *LACC*. La première est de savoir si le juge surveillant dispose du pouvoir discrétionnaire d'interdire à un créancier de voter sur un plan d'arrangement s'il estime que ce créancier agit dans un but illégitime. La deuxième porte sur le pouvoir du juge surveillant d'approuver le financement du litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*.

[3] Pour les motifs qui suivent, nous sommes d'avis de répondre à ces deux questions par l'affirmative, à l'instar du juge surveillant. Dans la mesure où la

and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues

Cour d'appel s'est dite d'avis contraire et a modifié les décisions discrétionnaires du juge surveillant, nous concluons qu'elle n'était pas justifiée de le faire. Avec égards, la Cour d'appel n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport aux décisions du juge surveillant. C'est pourquoi, comme nous l'avons ordonné à l'issue de l'audience, les pourvois sont accueillis et l'ordonnance du juge surveillant est rétablie.

II. Les faits

[4] En 1994, M. Gérald Duhamel fonde Bluberi Gaming Technologies Inc., qui est devenue l'une des appelantes, 9354-9186 Québec inc. L'entreprise fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. Elle offrait aussi des systèmes de gestion dans le domaine des jeux d'argent. Pendant toute la période pertinente, son unique actionnaire était Bluberi Group Inc., qui est devenue une autre des appelantes, 9354-9178 Québec inc. Par l'entremise d'une fiducie familiale, M. Duhamel contrôlait Bluberi Group inc. et, de ce fait, Bluberi Gaming (collectivement, « Bluberi »).

[5] En 2012, Bluberi demande du financement à l'intimée Callidus Capital Corporation (« Callidus »), qui se décrit comme un [TRADUCTION] « prêteur offrant du financement garanti par des actifs ou du financement à des entreprises en difficulté financière » (m.i., par. 26). Callidus lui consent une facilité de crédit d'environ 24 millions de dollars, que Bluberi garantit partiellement en signant une entente par laquelle elle met en gage ses actions.

[6] Au cours des trois années suivantes, Bluberi perd d'importantes sommes d'argent et Callidus continue de lui consentir du crédit. En 2015, Bluberi doit environ 86 millions de dollars à Callidus — Bluberi affirme que près de la moitié de cette somme est composée d'intérêts et de frais.

A. *L'introduction des procédures sous le régime de la LACC par Bluberi et la vente initiale d'actifs*

[7] Le 11 novembre 2015, Bluberi dépose une requête en délivrance d'une ordonnance initiale sous le régime de la *LACC*. Dans sa requête, Bluberi allègue

were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

que ses problèmes de liquidité découlent du fait que Callidus exerce un contrôle de facto à l'égard de son entreprise et lui dicte un certain nombre de décisions d'affaires dans l'intention de lui nuire. Bluberi prétend que Callidus agit ainsi afin de réduire la valeur des actions dans le but de devenir propriétaire de Bluberi et ultimement de la vendre.

[8] Malgré l'objection de Callidus, la requête de Bluberi est accueillie. Le juge surveillant, le juge Michaud, rend une ordonnance initiale sous le régime de la *LACC*. Celle-ci confirme entre autres que Bluberi est une « compagnie débitrice » au sens du par. 2(1) de la Loi, suspend toute procédure introduite à l'encontre de Bluberi, de ses administrateurs ou dirigeants, et désigne Ernst & Young Inc. pour agir à titre de contrôleur (« contrôleur »).

[9] Travaillant en collaboration avec le contrôleur, Bluberi décide que la vente de ses actifs est nécessaire. Le 28 janvier 2016, elle propose un processus de mise en vente que le juge surveillant approuve. Ce processus débouche sur la conclusion d'une convention d'achat d'actifs entre Bluberi et Callidus. Cette convention prévoit que Callidus obtient l'ensemble des actifs de Bluberi en échange de l'extinction de la presque totalité de la créance garantie qu'elle détient à l'encontre de Bluberi, qui s'élevait à environ 135,7 millions de dollars. Callidus conserve une créance garantie non libérée de 3 millions de dollars contre Bluberi. La convention prévoit aussi que Bluberi se réserve le droit de réclamer des dommages-intérêts à Callidus en raison de l'implication alléguée de celle-ci dans ses difficultés financières (les « réclamations réservées »)[1]. Tout au long de ces procédures, Bluberi affirme que la valeur des réclamations ainsi réservées représente plus de 200 millions de dollars en dommages-intérêts.

[10] Le juge surveillant approuve la convention d'achat d'actifs, et la vente des actifs de Bluberi à Callidus est conclue en février 2017. En conséquence, Callidus acquiert l'entreprise de Bluberi et en poursuit l'exploitation.

[1] Bluberi semble ne pas avoir encore déposé cette action (voir 2018 QCCS 1040, par. 10 (CanLII)).

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the

[11] Depuis la vente, les réclamations réservées sont le seul élément d'actif de Bluberi et représentent donc la seule garantie que possède Callidus pour sa créance de 3 millions de dollars.

B. *Les premiers plans d'arrangement concurrents*

[12] Le 11 septembre 2017, Bluberi dépose une demande par laquelle elle sollicite l'approbation d'un financement provisoire de 2 millions de dollars sous forme de facilité de crédit afin de financer le coût des procédures liées aux réclamations réservées ainsi que d'autres mesures de réparation accessoires. Le prêteur est une coentreprise constituée sous le numéro 9364-9739 Québec inc. Cette demande de financement provisoire devait être instruite le 19 septembre 2017.

[13] Toutefois, la veille de l'audience, Callidus propose un plan d'arrangement (« premier plan ») et demande une ordonnance pour convoquer les créanciers à une assemblée afin qu'ils votent sur ce plan. Le premier plan proposait que Callidus avance la somme de 2,5 millions de dollars (puis plus tard 2,63 millions de dollars) aux fins de distribution aux créanciers de Bluberi, sauf elle-même, en échange de quoi elle serait libérée des réclamations réservées. Cette somme aurait permis d'acquitter entièrement les créances des anciens employés de Bluberi et toutes celles de moins de 3 000 $; les créanciers dont la créance était plus élevée devaient recevoir chacun en moyenne 31 pour 100 du montant de leur réclamation.

[14] Le juge surveillant ajourne donc l'audition des deux demandes au 5 octobre 2017. Entre-temps, Bluberi dépose son propre plan d'arrangement dans lequel elle propose notamment que la moitié de toute somme provenant des réclamations réservées, après paiement des dépenses et acquittement des réclamations des créanciers de Bluberi, soit distribuée aux créanciers non garantis, pourvu que la somme nette ainsi obtenue soit supérieure à 20 millions de dollars.

[15] Le 5 octobre 2017, le juge surveillant ordonne que les plans d'arrangement des parties soient soumis au vote des créanciers. Il ordonne que les honoraires et dépenses découlant de la présentation des

presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded

plans d'arrangement à l'assemblée des créanciers soient partagés entre les parties et qu'il soit interdit à toute partie qui ne dépose pas les fonds nécessaires auprès du contrôleur de présenter son plan d'arrangement. Bluberi choisit de ne pas déposer les fonds nécessaires et, en conséquence, seul le premier plan de Callidus est présenté aux créanciers.

C. *Le vote des créanciers sur le premier plan de Callidus*

[16] Le 15 décembre 2017, Callidus soumet son premier plan au vote des créanciers. Le plan n'obtient pas l'appui nécessaire. Le paragraphe 6(1) de la *LACC* prévoit que, pour être approuvé, le plan doit obtenir la « double majorité » de chaque catégorie de créanciers — c'est-à-dire, la majorité en *nombre* d'une catégorie de créanciers, qui représente aussi les deux tiers en *valeur* des réclamations de cette catégorie de créanciers. Tous les créanciers de Bluberi, hormis Callidus, forment une seule catégorie de créanciers non garantis ayant droit de vote. Des 100 créanciers non garantis, 92 (qui ont ensemble une créance de 3 450 882 $) votent en faveur du plan, et 8 votent contre (qui ont ensemble une créance de 2 375 913 $). Le premier plan échoue parce que les réclamations des créanciers ayant voté en sa faveur ne détiennent que 59,22 p. 100 en valeur des réclamations de ceux ayant voté, ce qui ne respectait pas le seuil établi au par. 6(1). Plus particulièrement, SMT Hautes Technologies (« SMT »), qui détient 36,7 p. 100 de la dette de Bluberi, vote contre le plan.

[17] Callidus ne vote pas sur le premier plan — malgré les propos explicites du contrôleur, selon qui Callidus pouvait [TRADUCTION] « voter [. . .] selon le pourcentage de sa créance qui, de l'avis de Callidus, était non garantie » (dossier conjoint des intimés, vol. III, p. 188).

D. *La demande de financement provisoire de Bluberi et le nouveau plan de Callidus*

[18] Le 6 février 2018, Bluberi dépose une des demandes à l'origine des présents pourvois. Elle demande au tribunal l'autorisation de conclure un accord de financement du litige par un tiers (« AFL »)

litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors.

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

avec un bailleur de fonds de litiges coté en bourse, IMF Bentham Limited ou sa filiale canadienne, Corporation Bentham IMF Capital (collectivement, « Bentham »). Bluberi demande également l'autorisation de grever son actif d'une charge superprioritaire de 20 millions de dollars en faveur de Bentham (« charge liée au financement du litige »).

[19] L'AFL prévoit que Bentham financera le litige relatif aux réclamations réservées de Bluberi et qu'en retour elle recevra un pourcentage de toute somme convenue par règlement ou accordée à l'issue d'un procès. Toutefois, dans l'éventualité où Bluberi serait déboutée, Bentham perdra la totalité des fonds investis. L'AFL prévoit aussi que Bentham peut mettre fin au recours si, agissant de façon raisonnable, elle n'est plus convaincue du bien-fondé du litige ou de sa viabilité commerciale.

[20] Callidus et certains créanciers non garantis qui ont voté en faveur de son plan (qui sont maintenant intimés au présent pourvoi et se font appeler le « groupe de créanciers ») contestent la demande de Bluberi au motif que l'AFL est un plan d'arrangement et qu'à ce titre, il doit être soumis au vote des créanciers[2].

[21] Le 12 février 2018, Callidus dépose l'autre demande qui est à l'origine des présents pourvois, laquelle vise à soumettre un autre plan d'arrangement au vote des créanciers (« nouveau plan »). Le nouveau plan est pour l'essentiel identique au premier plan, sauf que Callidus propose que la somme à distribuer soit augmentée de 250 000 $ (passant de 2,63 millions à 2,88 millions de dollars). Callidus a en outre déposé une preuve de réclamation modifiée qui ramène à *zéro* la valeur de la garantie liée à sa créance de 3 millions de dollars. Callidus considère que cette évaluation est juste parce que Bluberi n'a aucun autre élément d'actif que les revendications réservées. Sur cette base, elle fait valoir qu'elle se trouve dans la situation d'un créancier non garanti et

[2] Fait à remarquer, le groupe de créanciers a informé Callidus qu'il appuierait le nouveau plan. Il lui a aussi demandé de rembourser tous les frais juridiques découlant de cet appui. Par ailleurs, le groupe de créanciers ne s'est pas engagé à voter d'une certaine façon, et a confirmé que chacun de ses membres évaluerait toutes les possibilités qui s'offraient à lui.

Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. *Quebec Superior Court, 2018 QCCS 1040 (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48 (CanLII)). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in

demande au juge surveillant la permission de voter sur le nouveau plan avec les autres créanciers non garantis. Vu l'importance de sa réclamation, le plan serait nécessairement adopté par les créanciers si Callidus était autorisée à voter. Bluberi s'oppose à la demande de Callidus.

[22] Le juge surveillant instruit ensemble la demande de financement provisoire de Bluberi ainsi que la demande présentée par Callidus concernant son nouveau plan. Il est à souligner que le contrôleur appuie la position de Bluberi.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2018 QCCS 1040 (le juge Michaud)*

[23] Le juge surveillant rejette la demande de Callidus et refuse de soumettre le nouveau plan au vote des créanciers. Il accueille la demande de Bluberi, l'autorisant ainsi à conclure un accord de financement du litige avec Bentham aux conditions énoncées dans l'AFL et ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige.

[24] En ce qui a trait à la demande de Callidus, le juge surveillant décide que cette dernière ne peut voter sur le nouveau plan parce qu'elle agit dans un [TRADUCTION] « but illégitime » (par. 48 (CanLII)). Il reconnaît que les créanciers ont habituellement le droit de voter dans leur propre intérêt. Or, étant donné que le premier plan — qui était presque identique au nouveau plan — a été rejeté par les créanciers, le juge surveillant conclut qu'en demandant à voter sur le nouveau plan, Callidus tentait de contourner le résultat du premier vote. Il écrit notamment :

> [TRADUCTION] Tenant compte de leur intérêt, la Cour a accepté à l'automne 2017 que le plan de Callidus soit soumis au vote des créanciers, étant entendu que, en tant que créancière garantie, celle-ci ne voterait pas. Toutefois, si, dans les circonstances actuelles, Callidus était autorisée à voter sur son propre plan, elle le ferait dans un but illégitime d'autant plus qu'il est probable que son vote

the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement

permettrait d'atteindre le seuil de deux tiers nécessaire pour que le nouveau plan soit approuvé en vertu de la LACC.

Comme l'a souligné SMT, la principale créancière non garantie, Callidus souhaite voter afin d'annuler le vote de SMT, qui a empêché que son plan soit approuvé lors de l'assemblée des créanciers.

C'est une chose de laisser les créanciers voter sur un plan présenté par un créancier garanti, c'en est une autre de laisser ce créancier garanti voter sur son propre plan et exercer ainsi un contrôle sur le vote à seule fin d'être libéré de toute responsabilité. [par. 45-47]

[25] Le juge surveillant conclut que, dans les circonstances, permettre à Callidus de voter serait à la fois [TRADUCTION] « injuste et déraisonnable » (par. 47). Il note aussi que, tout au long de la procédure introduite en vertu de la *LACC*, Callidus a « manqué de transparence » (par. 41) et qu'elle « n'est motivée que par le litige [en cours] » (par. 44). En somme, il conclut que la conduite de Callidus est contraire à « l'opportunité, [à] la bonne foi et [à] la diligence » requises, et il ordonne que Callidus ne puisse pas voter sur le nouveau plan (par. 48, citant *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 70).

[26] Puisque Callidus n'a pas été autorisée à voter sur le nouveau plan et que SMT a manifesté sans équivoque son intention de voter contre celui-ci, le juge surveillant conclut que le plan n'a aucune possibilité raisonnable de recevoir l'aval des créanciers. Il refuse donc de le soumettre au vote des créanciers.

[27] Pour ce qui est de la demande de Bluberi, le juge surveillant examine trois questions qui sont pertinentes pour les présents pourvois : (1) si l'AFL devait être soumis au vote des créanciers; (2) dans la négative, si l'AFL devait être approuvé par le tribunal; et (3) le cas échéant, s'il devait ordonner que la charge liée au financement du litige de 20 millions de dollars grève les actifs de Bluberi.

[28] Le juge surveillant décide qu'il n'est pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agit pas d'un plan d'arrangement. Il considère qu'un tel plan suppose [TRADUCTION] « un

or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

arrangement ou une transaction entre un débiteur et ses créanciers » (par. 71, citant *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, par. 92 (« *Crystallex* »)). À son avis, l'AFL est dépourvu de cette caractéristique essentielle. Il conclut aussi qu'il n'est pas nécessaire que l'AFL soit assorti d'un plan étant donné que Bluberi a exprimé l'intention d'en déposer un plus tard.

[29] Après en avoir examiné les modalités, le juge surveillant conclut que l'AFL respecte le critère d'approbation applicable en matière de financement d'un litige par un tiers qui est établi dans les décisions *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, par. 41, et *Hayes c. The City of Saint John*, 2016 NBQB 125, par. 4 (CanLII). Plus particulièrement, il considère que le taux de retour de Bentham est raisonnable eu égard à son niveau d'investissement et de risque. Il rejette en outre l'argument avancé par Callidus et le groupe de créanciers, qui soutenaient que l'AFL donne trop de latitude à Bentham. Il conclut que l'AFL ne permet pas à Bentham d'exercer une influence indue sur le déroulement du litige lié aux réclamations réservées et souligne que des clauses générales semblables à celles qu'il contient ont déjà été approuvées dans le contexte de la *LACC* (par. 82, citant *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, par. 23).

[30] Enfin, le juge surveillant ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige. Il juge que, même s'il est élevé, le montant en question est raisonnable étant donné : le montant des dommages-intérêts qui sont réclamés à Callidus; l'engagement financier de Bentham dans le litige; et le fait que Bentham n'exige aucune provision pour frais ou intérêts (c.-à-d. qu'elle ne tirera profit de l'accord que si le procès ou le règlement est couronné de succès). En termes simples, Bentham prend des risques importants et il est raisonnable qu'elle obtienne certaines garanties en échange.

[31] Callidus, de nouveau appuyée par le groupe de créanciers, interjette appel de l'ordonnance du juge surveillant et met en cause Bentham.

B. *Quebec Court of Appeal, 2019 QCCA 171 (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 (CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted

B. *Cour d'appel du Québec, 2019 QCCA 171 (les juges Dutil et Schrager et le juge Dumas (ad hoc))*

[32] La Cour d'appel accueille l'appel et conclut que [TRADUCTION] « [l]'exercice par le juge de son pouvoir discrétionnaire [n'était] pas fondé en droit, non plus qu'il ne reposait sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il [était] justifié d'intervenir en appel » (par. 48 (CanLII)). En particulier, la cour relève deux erreurs qui sont pertinentes pour les présents pourvois.

[33] D'une part, la cour conclut que le juge surveillant a commis une erreur en concluant que Callidus a agi dans un but illégitime en demandant l'autorisation de voter sur son nouveau plan. À son avis, Callidus aurait dû être autorisée à voter. La cour s'appuie grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. Elle juge que l'exercice du pouvoir discrétionnaire qui consiste à empêcher un créancier de voter dans un but illégitime devrait être [TRADUCTION] « réservé aux cas les plus évidents » (par. 62, renvoyant à *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, par. 45). Selon elle, en tentant de façon transparente d'être libérée des réclamations de Bluberi à son égard, Callidus ne pouvait être considérée comme ayant agi dans un but illégitime. La cour conclut également que la conduite de Callidus, avant et pendant la procédure introduite en vertu de la *LACC*, ne pouvait justifier la conclusion qu'il existe un but illégitime.

[34] D'autre part, la cour conclut que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'est pas lié aux opérations commerciales de Bluberi. Elle conclut que le juge surveillant a [TRADUCTION] « donné à la notion de financement provisoire une interprétation non fondée en droit et qu'il a mal appliqué cette notion aux circonstances factuelles de l'affaire » (par. 78).

[35] À la lumière de ce qu'elle percevait comme une erreur, la cour substitue son opinion selon laquelle l'AFL est un plan d'arrangement et que pour

to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

cette raison, il aurait dû être soumis au vote des créanciers. Elle conclut [TRADUCTION] « [qu'u]n arrangement ou une proposition peut englober une transaction visant les réclamations des créanciers ainsi que le processus suivi pour y donner suite » (par. 85). La cour juge que l'AFL est un plan d'arrangement parce qu'il a une incidence sur la participation des créanciers à l'indemnité susceptible d'être accordée à la suite d'un litige, qu'il oblige ceux-ci à attendre l'issue de tout litige, et qu'il est possible que les créanciers se retrouvent les mains vides. De plus, la cour conclut que le projet de Bluberi « dans son entièreté », soit la poursuite des réclamations réservées et l'AFL, doit être soumis à l'approbation des créanciers (par. 89).

[36] Bluberi et Bentham (collectivement, les « appelantes »), encore une fois appuyées par le contrôleur, se pourvoient maintenant devant notre Cour.

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

(1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?

(2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la *LACC*?

V. Analyse

A. *Considérations préliminaires*

[38] Pour répondre aux questions ci-dessus, nous devons les situer dans le contexte contemporain de l'insolvabilité au Canada, et plus précisément du régime de la *LACC*. Ainsi, avant de passer à ces questions, nous examinons (1) la nature évolutive des procédures intentées sous le régime de la *LACC*; (2) le rôle que joue le juge surveillant dans ces procédures; et (3) la portée du contrôle, en appel, de l'exercice du pouvoir discrétionnaire du juge surveillant.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

(1) La nature évolutive des procédures intentées sous le régime de la *LACC*

[39] La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Les autres sont la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985 c. B-3 (« *LFI* »), qui traite de l'insolvabilité des personnes physiques et des sociétés, et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985 c. W-11 (« *LLR* »), qui traite de l'insolvabilité des institutions financières et de certaines autres personnes morales, telles que les compagnies d'assurance (*LLR*, par. 6(1)). Bien que la *LACC* et la *LFI* permettent toutes deux la restructuration de compagnies insolvables, l'accès à la *LACC* est limité aux sociétés débitrices qui sont aux prises avec des réclamations dont le montant total est supérieur à 5 millions de dollars (*LACC*, par. 3(1)).

[40] Ensemble, les lois canadiennes sur l'insolvabilité poursuivent un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement « catastrophiques » qui peuvent découler de l'insolvabilité (*Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 1). Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie (J. P. Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 4-5 et 14; Comité sénatorial permanent des banques et du commerce, *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[41] Parmi ces objectifs, la *LACC* priorise en général le fait d'« éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70). C'est pourquoi les affaires types qui relèvent de cette loi ont historiquement facilité la restructuration de l'entreprise débitrice qui n'a pas encore déposé de proposition en la maintenant dans un état opérationnel, c'est-à-dire en permettant qu'elle poursuive ses activités. Lorsqu'une telle restructuration n'était pas possible, on considérait qu'il fallait alors procéder à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI*. C'est précisément le résultat qui était recherché dans l'affaire *Century Services* (voir par. 14).

[42] Cela dit, la *LACC* est fondamentalement une loi sur l'insolvabilité, et à ce titre, elle a aussi [TRADUCTION] « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d'exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise [. . .] et d'améliorer le système de crédit de manière générale » (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 14; voir aussi *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (« *Essar* »), par. 103). Afin d'atteindre ces objectifs, les procédures intentées sous le régime de la *LACC* ont évolué de telle sorte qu'elles permettent des solutions qui évitent l'émergence, sous une forme restructurée, de la société débitrice qui existait avant le début des procédures, mais qui impliquent plutôt une certaine forme de liquidation des actifs du débiteur sous le régime même de la Loi (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibium for Insolvency Law », p. 19-21). Ces cas, qualifiés de [TRADUCTION] « procédures de liquidation sous le régime de la *LACC* », sont maintenant courants dans le contexte de la *LACC* (voir *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[43] Les procédures de liquidation sous le régime de la *LACC* revêtent différentes formes et peuvent, entre autres, inclure la vente de la société débitrice à titre d'entreprise en activité; la vente « en bloc » des éléments d'actif susceptibles d'être exploités par un acquéreur; une liquidation partielle de l'entreprise ou une réduction de ses activités; ou encore une vente de ses actifs élément par élément (B. Kaplan, « Liquidating CCAAs : Discretion Gone Awry? » dans J. P. Sarra, dir., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). Les résultats commerciaux ultimement obtenus à l'issue des procédures de liquidation introduites sous le régime de la *LACC* sont eux aussi variés. Certaines procédures peuvent avoir pour résultat la continuité des activités de la débitrice sous la forme d'une autre entité viable (p. ex., les sociétés liquidées dans *Indalex* et *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (C.J. Ont., Div. gén.)), alors que d'autres peuvent simplement aboutir à la vente des actifs et de l'inventaire sans donner naissance à une nouvelle entité (p. ex., la procédure en cause dans *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, par. 7 et 31). D'autres encore, comme dans le dossier qui nous occupe, peuvent donner lieu à la vente de la plupart des actifs de la débitrice en vue de la poursuite de son activité, laissant à la débitrice et aux parties intéressées le soin de s'occuper des actifs résiduaires.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[44] Les tribunaux chargés de l'application de la *LACC* ont d'abord commencé à approuver ces formes de liquidation en exerçant le vaste pouvoir discrétionnaire que leur confère la Loi. L'émergence de cette pratique a fait l'objet de critiques, essentiellement parce qu'elle semblait incompatible avec l'objectif de « restructuration » de la *LACC* (voir, p. ex., *Uti Energy Corp. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, par. 15-16, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204, par. 40-43; A. Nocilla, « The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73, p. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor

[45] Toutefois, depuis que l'art. 36 de la *LACC* est entré en vigueur en 2009, les tribunaux l'utilisent pour consentir à une liquidation sous le régime de la *LACC*. L'article 36 confère aux tribunaux le pouvoir

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

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However,

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires[3]. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la *LACC* et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration] ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités solvables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la *LACC* afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).

[46] En définitive, le poids relatif attribué aux différents objectifs de la *LACC* dans une affaire donnée peut varier en fonction des circonstances factuelles, de l'étape des procédures ou des solutions qui sont présentées à la cour pour approbation. En l'espèce, il est possible d'établir un parallèle avec le contexte de la *LFI*. Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150, par. 67, notre Cour a expliqué que, de façon générale, la *LFI* vise deux objectifs : (1) la réhabilitation financière du failli, et (2) le partage équitable des actifs du failli entre les créanciers. Or, dans les cas où

[3] Mentionnons que, bien que l'art. 36 codifie désormais le pouvoir du juge surveillant de rendre une ordonnance de vente et de dévolution, et qu'il énonce les facteurs devant orienter l'exercice de son pouvoir discrétionnaire d'accorder une telle ordonnance, il est muet quant aux circonstances dans lesquelles les tribunaux doivent approuver une liquidation sous le régime de la *LACC* plutôt que d'exiger des parties qu'elles procèdent à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI* (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 167-168; A. Nocilla, « Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36 » (2012) 52 *Rev. can. dr. comm.* 226, p. 243-244 et 247). Cette question demeure ouverte et n'a pas été soumise à la Cour dans *Indalex* non plus que dans les présents pourvois.

in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

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

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

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

la société débitrice ne s'extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la *LACC*, lorsque la restructuration d'une société débitrice qui n'a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d'exploitation et à maintenir ses activités courantes peut devenir l'objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l'objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l'expliquerons, la structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la *LACC*

[47] Un des principaux moyens par lesquels la *LACC* atteint ses objectifs réside dans le rôle particulier de surveillance qu'elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La *LACC* mise sur la position avantageuse qu'occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s'adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu'il estime indiquée ». Cette disposition a été décrite

Inc. (Re) (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

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

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

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte de la *LACC*. Le tribunal « évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi nº 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent

position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la *LACC* se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la *LACC* (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir *LACC*, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

(3) Le contrôle en appel de l'exercice du pouvoir discrétionnaire du juge surveillant

[53] Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable (voir *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, par. 98; *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, par. 23). Elles doivent prendre garde de ne pas substituer leur propre pouvoir discrétionnaire à celui du juge surveillant (*New Skeena Forest Products Inc.*, *Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, par. 20).

[54] Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la *LACC* dont il assure la supervision. À cet égard, les observations formulées par le juge Tysoe dans *Canadian Metropolitan Properties Corp. c. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (« *Re Edgewater Casino Inc.* »), par. 20, sont pertinentes :

> [TRADUCTION] . . . une des fonctions principales du juge chargé de la supervision de la procédure fondée sur la *LACC* est d'essayer d'établir un équilibre entre les intérêts des différents intéressés durant le processus de restructuration, et il sera bien souvent inopportun d'examiner une des décisions qu'il aura rendues à cet égard isolément des autres. [. . .] Les procédures intentées sous le régime de la *LACC* sont de nature dynamique et le juge surveillant a une connaissance intime du processus de restructuration. La nature du processus l'oblige souvent à prendre des décisions rapides dans des situations complexes.

[55] En gardant ce qui précède à l'esprit, nous passons maintenant aux questions soulevées par le présent pourvoi.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is

B. *Callidus ne devrait pas être autorisée à voter sur son nouveau plan*

[56] En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter (p. ex., par. 22(3)), ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Nous concluons qu'une telle limite découle de l'art. 11 de la *LACC*, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer ce pouvoir dans un cas donné. À notre avis, le juge surveillant n'a, en l'espèce, commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de voter sur le nouveau plan.

(1) Les paramètres du droit d'un créancier de voter sur un plan d'arrangement

[57] L'approbation par les créanciers d'un plan d'arrangement ou d'une transaction est l'une des principales caractéristiques de la *LACC*, tout comme la supervision du processus assurée par le juge surveillant. Lorsqu'un plan est proposé, le juge surveillant peut, sur demande, ordonner que soit convoquée une assemblée des créanciers pour que ceux-ci puissent voter sur le plan proposé (*LACC*, art. 4 et 5). Le juge surveillant a le pouvoir discrétionnaire de décider ou non d'ordonner qu'une assemblée soit convoquée. Pour les besoins du vote à l'assemblée des créanciers, la compagnie débitrice peut établir des catégories de créanciers, sous réserve de l'approbation du tribunal (*LACC,* par. 22(1)). Peuvent faire partie de la même catégorie les créanciers « ayant des droits ou intérêts à ce point semblables [. . .] qu'on peut en conclure qu'ils ont un intérêt commun » (*LACC*, par. 22(2); voir aussi L. W. Houlden, G. B. Morawetz, et J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. (feuilles mobiles)), vol. 4, §149). Si la « double majorité » requise dans chaque catégorie de créanciers — rappelons qu'il s'agit de la majorité en *nombre* d'une catégorie, qui représente aussi les deux-tiers en *valeur* des réclamations de cette catégorie — vote

commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any

en faveur du plan, le juge surveillant peut homologuer celui-ci (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, par. 34; voir la *LACC*, art. 6). Le juge surveillant tiendra ce qu'on appelle communément une [TRADUCTION] « audience d'équité » pour décider, entre autres choses, si le plan est juste et raisonnable (Wood, p. 490-492; Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 529; Houlden, Morawetz et Sarra, §45). Une fois homologué par le juge surveillant, le plan lie chaque catégorie de créanciers qui a participé au vote (*LACC*, par. 6(1)).

[58] Les créanciers qui ont une réclamation prouvable contre le débiteur et dont les intérêts sont touchés par un plan d'arrangement proposé ont habituellement le droit de voter sur un tel plan (Wood, p. 470). En fait, aucune disposition expresse de la *LACC* n'interdit à un créancier de voter sur un plan d'arrangement, y compris sur un plan dont il fait la promotion.

[59] Nonobstant ce qui précède, les appelantes soutiennent qu'une interprétation téléologique du par. 22(3) de la *LACC* révèle que, de façon générale, un créancier ne devrait pas pouvoir voter sur son propre plan. Le paragraphe 22(3) prévoit :

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

Les appelantes font remarquer que le par. 22(3) devait permettre d'harmoniser le régime de la *LACC* avec le par. 54(3) de la *LFI*, qui dispose que « [u]n créancier qui est lié au débiteur peut voter contre, mais non pour, l'acceptation de la proposition. » Elles soulignent que, en vertu du par. 50(1) de la *LFI*, seuls les débiteurs peuvent faire la promotion d'un plan; ainsi, le « débiteur » auquel renvoie le par. 54(3) s'entend de *tous* les promoteurs de plan. Elles soutiennent que, si le par. 54(3) vise tous les promoteurs de plan, le par. 22(3) de la *LACC* doit également les viser. Pour cette raison, les appelantes nous demandent d'étendre la restriction au droit de

creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

voter imposée par le par. 22(3) de manière à ce qu'elle s'applique non seulement aux créanciers « lié[s] à la compagnie », comme le prévoit la disposition, mais aussi à tous les créanciers qui font la promotion d'un plan. Elles soutiennent que cette interprétation donne effet à l'intention sous-jacente aux deux dispositions, intention qui, de dire les appelantes, est de faire en sorte qu'un créancier qui est en conflit d'intérêts ne puisse pas « diluer » ou supplanter le vote des autres créanciers.

[60] Nous n'acceptons pas cette interprétation forcée du par. 22(3). Il n'est nullement question dans cette disposition de conflit d'intérêts entre les créanciers et les promoteurs d'un plan en général. Les restrictions au droit de voter imposées par le par. 22(3) ne s'appliquent qu'aux créanciers qui sont « lié[s] à la compagnie [débitrice] ». Ce libellé est « précis et non équivoque », et il doit ainsi « joue[r] un rôle primordial dans le processus d'interprétation » (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). À notre avis, l'analogie que les appelantes font avec la *LFI* ne suffit pas à écarter le libellé clair de cette disposition.

[61] Bien que les appelantes aient raison de dire que l'adoption du par. 22(3) visait à harmoniser le traitement réservé aux parties liées par la *LACC* et la *LFI*, son historique montre qu'il ne s'agit pas d'une disposition générale relative aux conflits d'intérêts. Avant qu'elle soit modifiée et qu'on y incorpore le par. 22(3), la *LACC* permettait clairement aux créanciers de présenter un plan d'arrangement (voir Houlden, Morawetz et Sarra, §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). À l'opposé, en vertu de la *LFI*, seuls les débiteurs pouvaient déposer une proposition. Il faut présumer que le législateur était au fait de cette différence évidente entre les deux lois (voir *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 59; voir aussi *Third Eye*, par. 57). Le législateur a malgré tout importé dans la *LACC*, avec les adaptations nécessaires, le texte de la disposition de la *LFI* portant sur les créanciers liés. Aller au-delà de ce libellé suppose d'accepter que le législateur n'a pas choisi les bons mots pour donner effet à son intention, ce que nous ne ferons pas.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis* (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed

[62] En fait, le législateur n'a pas reproduit de façon irréfléchie, au par. 22(3) de la *LACC,* le texte du par. 54(3) de la *LFI*. Au contraire, il a apporté deux modifications au libellé du par. 54(3) pour l'adapter à celui employé dans la *LACC*. Premièrement, il a remplacé le terme « proposition » (défini dans la *LFI*) par les mots « transaction ou arrangement » (employés tout au long dans la *LACC*). Deuxièmement, il a remplacé « débiteur » par « compagnie », reconnaissant ainsi que les compagnies sont les seuls débiteurs qui existent dans le contexte de la *LACC*.

[63] Notre opinion est en outre appuyée par Industrie Canada, selon qui l'adoption du par. 22(3) se justifie par la volonté de « réduire la capacité des compagnies débitrices d'établir un plan de restructuration apportant des avantages supplémentaires à des personnes qui leur sont liées » (Bureau du surintendant des faillites Canada, *Projet de loi C-12 : analyse article par article* (en ligne), cl. 71, art. 22 (nous soulignons); voir aussi Comité sénatorial permanent des banques et du commerce, p. 166).

[64] Enfin, nous soulignons que la *LACC* prévoit d'autres mécanismes qui réduisent le risque qu'un créancier en situation de conflit d'intérêts par rapport au plan qu'il propose puisse biaiser le vote des créanciers. Bien que nous rejetions l'interprétation donnée par les appelantes au par. 22(3), ce paragraphe interdit tout de même aux créanciers liés à la compagnie débitrice de voter en faveur de *tout* plan. De plus, les créanciers qui n'ont pas suffisamment d'intérêts en commun pourraient être contraints de voter dans des catégories distinctes (par. 22(1) et (2)); et, comme nous l'expliquerons, le juge surveillant peut empêcher un créancier de voter si ce dernier agit dans un but illégitime.

(2) Le pouvoir discrétionnaire d'interdire à un créancier de voter dans un but illégitime

[65] Il est acquis aux débats que la *LACC* ne contient aucune disposition énonçant les circonstances dans lesquelles un créancier, autrement admissible à voter sur un plan, peut être empêché de le faire. Toutefois, les juges chargés d'appliquer la *LACC* sont souvent appelés à « sanctionner des mesures non expressément prévues par la *LACC* »

a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: ". . . courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the

(*Century Services*, par. 61; voir aussi par. 62). Dans l'arrêt *Century Services*, notre Cour a souscrit à l'approche « hiérarchisée » qui vise à déterminer si le tribunal a compétence pour sanctionner une mesure proposée : « . . . les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* » (par. 65). Dans la plupart des cas, une interprétation téléologique et large des dispositions de la *LACC* suffira à « justifier les mesures nécessaires à la réalisation de ses objectifs » (par. 65).

[66] Après avoir appliqué cette approche, nous concluons que l'art. 11 de la *LACC* confère au tribunal le pouvoir d'interdire à un créancier de voter sur un plan d'arrangement ou une transaction s'il agit dans un but illégitime.

[67] Les tribunaux reconnaissent depuis longtemps que le libellé de l'art. 11 de la *LACC* indique que le législateur a sanctionné « l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence » (*Century Services*, par. 68). L'article 11 est ainsi libellé :

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

Selon le libellé clair de la disposition, le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.

[68] Lorsqu'une partie sollicite une ordonnance relativement à une question qui entre dans le champ de compétence du juge surveillant, mais pour laquelle aucune disposition de la *LACC* ne confère plus

provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia

précisément compétence, l'art. 11 est nécessairement la disposition à laquelle on peut recourir d'emblée pour fonder la compétence du tribunal. Comme l'a dit le juge Blair dans l'arrêt *Stelco*, l'art. 11 [TRADUCTION] « fait en sorte que la plupart du temps, il est inutile de recourir à la compétence inhérente » dans le contexte de la *LACC* (par. 36).

[69] La supervision des négociations entourant le plan, tout comme le vote et le processus d'approbation, relève nettement de la compétence du juge surveillant. Comme nous l'avons dit, aucune disposition de la *LACC* ne vise le cas où un créancier par ailleurs admissible à voter sur un plan peut néanmoins être empêché de le faire. Il n'existe non plus aucune disposition de la *LACC* selon laquelle le droit que possède un créancier de voter sur un plan est absolu et que ce droit ne peut pas être écarté par l'exercice légitime du pouvoir discrétionnaire du tribunal. Toutefois, étant donné le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Autrement dit, il faut nécessairement procéder à un examen discrétionnaire axé sur les circonstances propres à chaque situation.

[70] L'article 11 constitue donc manifestement la source de la compétence du juge surveillant pour rendre une ordonnance discrétionnaire empêchant un créancier de voter sur un plan d'arrangement. L'exercice du pouvoir discrétionnaire doit favoriser la réalisation des objets réparateurs de la *LACC* et être fondé sur les considérations de base que sont l'opportunité, la bonne foi et la diligence. Cela signifie que, lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner ces objectifs ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un « but illégitime » — le juge surveillant a le pouvoir discrétionnaire d'empêcher le créancier de voter.

[71] Le pouvoir discrétionnaire d'empêcher un créancier de voter dans un but illégitime au sens de la *LACC* s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *LFI*, lequel a été reconnu dans l'arrêt *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R.

Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this

(2d) 296. Dans *Laserworks*, la Cour d'appel de la Nouvelle-Écosse a conclu que le pouvoir discrétionnaire d'empêcher un créancier de voter de cette façon découlait du pouvoir du tribunal, inhérent au régime établi par la *LFI*, de superviser [TRADUCTION] « [c]haque étape du processus de faillite » (par. 41), comme l'indiquent les par. 43(7), 108(3) et 187(9) de la Loi. La cour a expliqué que le par. 187(9) confère expressément le pouvoir de remédier à une « injustice grave », laquelle se produit « lorsque la *LFI* est utilisée dans un but illégitime » (par. 54). La cour a statué que « [l]e but illégitime est un but qui est accessoire à l'objet pour lequel la loi en matière de faillite et d'insolvabilité a été adoptée par le législateur » (par. 54).

[72] Bien qu'elle ne soit pas déterminante, l'existence de ce pouvoir discrétionnaire en vertu de la *LFI* étaye l'existence d'un pouvoir discrétionnaire semblable en vertu de la *LACC* pour deux raisons.

[73] D'abord, cette conclusion serait compatible avec le fait que la Cour a reconnu que la *LACC* « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire » que sous le régime de la *LFI* (*Century Services*, par. 14 (nous soulignons)).

[74] Ensuite, la Cour a reconnu les bienfaits de l'harmonisation, dans la mesure du possible, des deux lois. À titre d'exemple, dans l'arrêt *Indalex*, la Cour a souligné que « pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère [. . .] aux créanciers [des droits analogues] » à ceux dont ils jouissent en vertu de la *LFI* (par. 51; voir également *Century Services*, par. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, par. 34-46). Ainsi, lorsque les lois permettent une interprétation harmonieuse, il y a lieu de retenir cette interprétation [TRADUCTION] « afin d'écarter les embûches pouvant découler du choix des créanciers de "recourir à la loi la plus favorable" [en matière d'insolvabilité] » (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, par. 78; voir aussi par. 73). À notre avis, la manière dont a été formulé le « but illégitime » dans l'arrêt *Laserworks* — c'est-à-dire un but accessoire à l'objet de la loi en

discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

matière d'insolvabilité — s'harmonise parfaitement avec la nature et la portée du pouvoir discrétionnaire judiciaire que confère la *LACC*. En effet, comme nous l'avons expliqué, ce pouvoir discrétionnaire doit être exercé conformément aux objets de la *LACC* en tant que loi en matière d'insolvabilité.

[75] Nous soulignons également que la reconnaissance de l'existence de ce pouvoir discrétionnaire sous le régime de la *LACC* favorise l'équité fondamentale qui [TRADUCTION] « imprègne le droit et la pratique en matière d'insolvabilité au Canada » (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 27; voir également *Century Services*, par. 70 et 77). Comme le fait observer la professeure Sarra, l'équité commande que les juges surveillants soient en mesure de reconnaître les situations où les parties empêchent la réalisation des objectifs de la loi et de prendre des mesures utiles à leur égard :

> [TRADUCTION] Le régime d'insolvabilité canadien repose sur la présomption que les créanciers et le débiteur ont pour objectif commun de maximiser les recouvrements. L'aspect substantiel de la justice dans le régime d'insolvabilité repose sur la présomption que toutes les parties concernées sont exposées à de réels risques économiques. L'injustice réside dans les situations où seules certaines personnes sont exposées aux risques, tandis que d'autres tirent en fait avantage de la situation. [. . .] Si l'on veut que la *LACC* reçoive une interprétation téléologique, les tribunaux doivent être en mesure de reconnaître les situations où les gens ont des intérêts opposés et s'emploient activement à contrecarrer les objectifs de la loi. [Nous soulignons.]

(« The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 30)

Dans le même ordre d'idées, la surveillance du régime de droit de vote prévu par la *LACC* qu'exerce le juge surveillant ne doit pas seulement assurer une application stricte de la Loi, mais doit aussi favoriser la réalisation de ses objectifs. Nous estimons que la réalisation des objectifs de politique de la *LACC* nécessite la reconnaissance du pouvoir discrétionnaire d'empêcher un créancier de voter s'il agit dans un but illégitime.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so.[4] The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

[76] La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC*. Comme le démontre le présent dossier, le juge surveillant est le mieux placé pour procéder à cette analyse.

(3) Le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter

[77] À notre avis, la décision du juge surveillant d'empêcher Callidus de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Comme nous l'avons expliqué, il faut adopter l'attitude de déférence appropriée à l'égard des décisions discrétionnaires de ce genre. Il convient de mentionner que, lorsqu'il a rendu sa décision, le juge surveillant connaissait très bien les procédures fondées sur la *LACC* relatives à Bluberi. Il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances.

[78] Le juge surveillant a tenu compte de l'ensemble des circonstances et a conclu que le vote de Callidus viserait un but illégitime (par. 45 et 48). Nous sommes d'accord avec cette conclusion. Il savait qu'avant le vote sur le premier plan, Callidus avait choisi de n'évaluer *aucune partie* de sa réclamation à titre de créancier non garanti et s'était par la suite abstenue de voter — bien que le contrôleur l'ait expressément invité à le faire[4]. Le juge surveillant savait aussi que le premier plan de Callidus n'avait pas reçu l'aval des autres créanciers à l'assemblée des créanciers tenue le 15 décembre 2017, et que Callidus avait choisi de ne pas profiter de l'occasion pour modifier ou augmenter la valeur de son plan à ce moment-là, ce qu'elle était en droit de faire (voir *LACC*, art. 6 et 7; contrôleur, m.i., par. 17). Entre l'insuccès du premier plan et la proposition du nouveau plan — qui était identique au premier plan, hormis la modeste augmentation de 250 000 $ — les

[4] Il convient de souligner que la déclaration du contrôleur à cet égard ne permettait pas de décider si Callidus aurait finalement eu le droit de voter sur le premier plan. Comme Callidus n'a même pas essayé de voter sur le premier plan, cette question n'a jamais été soumise au juge surveillant.

affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, "[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at

circonstances factuelles se rapportant aux affaires financières ou commerciales de Bluberi n'avaient pas réellement changé. Pourtant, Callidus a tenté d'évaluer la *totalité* de sa sûreté à *zéro* et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si Callidus avait été autorisée à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation prévu par le par. 6(1). Dans ces circonstances, la seule conclusion possible était que Callidus tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. En termes simples, Callidus cherchait à « se donner une seconde chance » et à manipuler le vote sur le nouveau plan. Le juge surveillant n'a pas commis d'erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de le faire.

[79] En effet, comme le fait observer le contrôleur, [TRADUCTION] « [u]ne fois que le plan d'arrangement ou la proposition ont été présentés aux créanciers du débiteur aux fins d'un vote, le fait d'ordonner la tenue d'une seconde assemblée des créanciers pour voter sur un plan à peu près semblable ne favoriserait pas la réalisation des objectifs de politique de la LACC, pas plus qu'il ne servirait ou n'accroîtrait la confiance du public dans le processus ou ne servirait par ailleurs les fins de la justice » (m.i., par. 18). C'est particulièrement le cas en l'espèce étant donné que la tenue d'une autre assemblée pour voter sur le nouveau plan aurait coûté plus de 200 000 $ (voir les motifs du juge surveillant, par. 72).

[80] Ajoutons que la façon d'agir de Callidus était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité — ce qui, à notre avis, comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Pendant toute la période pertinente, les réclamations retenues de Bluberi ont constitué les seuls éléments d'actif garantissant la réclamation de Callidus. Cette dernière n'a rien relevé dans le dossier qui indique que la valeur des réclamations retenues a changé. Si Callidus estimait que les réclamations retenues n'avaient aucune valeur, on se serait attendu à ce qu'elle ait évalué sa sûreté en conséquence avant

such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to

le vote sur le premier plan, voire même plus tôt. Nous ouvrons une parenthèse pour souligner que, peu importe le moment, la tentative d'évaluer ainsi la sûreté aurait pu fort bien échouer. Cela aurait empêché Callidus de voter à titre de créancier non garanti même si elle ne poursuivait pas de but illégitime.

[81] Comme nous l'avons indiqué, les décisions discrétionnaires appellent une norme de contrôle empreinte d'une grande déférence. La déférence commande que l'examen d'une décision discrétionnaire commence par la qualification appropriée du fondement de la décision. Soit dit en tout respect, la Cour d'appel a échoué à cet égard. La Cour d'appel s'est saisie des commentaires quelque peu critiques formulés par le juge surveillant à l'égard de l'objectif de Callidus d'être libérée des réclamations retenues et de la conduite de celle-ci tout au long des procédures pour affirmer qu'il ne s'agissait pas de considérations pouvant donner lieu à une conclusion de but illégitime. Toutefois, comme nous l'avons expliqué, ce ne sont pas ces considérations qui ont amené le juge surveillant à tirer sa conclusion. Sa conclusion reposait nettement sur la tentative de Callidus de manipuler le vote des créanciers pour faire en sorte que son nouveau plan soit retenu alors que son premier plan ne l'avait pas été (voir les motifs du juge surveillant, par. 45-48). Nous ne voyons rien dans les motifs de la Cour d'appel qui s'attaque à cette irrégularité déterminante, qui va beaucoup plus loin que le simple fait pour un créancier d'agir dans son propre intérêt.

[82] En résumé, nous ne voyons rien dans les motifs du juge surveillant sur ce point qui justifie l'intervention d'une cour d'appel. Callidus a été à juste titre empêchée de voter sur le nouveau plan.

[83] Avant de passer au prochain point, soulignons que la Cour d'appel a abordé deux questions supplémentaires : Callidus est-elle « liée » à Bluberi au sens du par. 22(3) de la *LACC*? Si Callidus est autorisée à voter, convient-il de lui ordonner de voter dans une catégorie distincte des autres créanciers de Bluberi (voir la *LACC*, par. 22(1) et (2))? Vu notre conclusion que le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter sur le nouveau plan au motif qu'elle avait agi dans un but illégitime, il n'est

address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing

pas nécessaire de se prononcer sur l'une ou l'autre de ces questions. Cependant, rien dans les présents motifs ne doit être interprété comme souscrivant à l'analyse que la Cour d'appel a faite de ces questions.

C. *L'AFL de Bluberi devrait être approuvé à titre de financement temporaire*

[84] À notre avis, le juge surveillant n'a commis aucune erreur en approuvant l'AFL à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Comme nous l'expliquerons, le financement d'un litige par un tiers peut constituer l'une de ces formes. La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 et des objectifs réparateurs de la *LACC* de façon plus générale.

(1) Le financement temporaire et l'art. 11.2 de la *LACC*

[85] Bien qu'il soit expressément prévu par l'art. 11.2 de la *LACC*, le financement temporaire n'est pas défini dans la Loi. La professeure Sarra l'a décrit comme [TRADUCTION] « vis[ant] principalement le fonds de roulement dont a besoin la société débitrice pour continuer de fonctionner pendant la restructuration ainsi que les fonds nécessaires pour payer les frais liés au processus de sauvetage » (*Rescue! The Companies' Creditors Arrangement Act*, p. 197). Utilisé de cette façon, le financement temporaire — parfois appelé financement de [TRADUCTION] « débiteur-exploitant » — protège la valeur d'exploitation de la compagnie débitrice pendant qu'elle met au point une solution viable à ses problèmes d'insolvabilité (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont. (Div. gén.)), par. 7, 9 et 24; *Boutiques San Francisco Inc. c. Richter & Associés Inc.*, 2003 CanLII 36955 (C.S. Qc), par. 32). Cela dit, le financement temporaire ne se limite pas à fournir un fonds de roulement

at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

immédiat aux compagnies débitrices. Conformément aux objectifs réparateurs de la *LACC*, le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur.

[86] Depuis 2009, le par. 11.2(1) de la *LACC* a codifié le pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire et d'accorder une charge ou une sûreté correspondante, d'un montant qu'il estime indiqué, en faveur du prêteur :

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

[87] L'étendue du pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire ressort du libellé du par. 11.2(1). Abstraction faite des protections concernant le préavis et les sûretés constituées avant le dépôt des procédures, le par. 11.2(1) ne prescrit aucune forme ou condition type[5]. Il prévoit simplement que le financement doit être d'un montant qui est « indiqué » et qui tient compte de « l'état de l'évolution de l'encaisse et des besoins de [la compagnie] ».

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

[5] Une autre exception a été codifiée dans les modifications apportées en 2019 à la *LACC* qui créent le par. 11.2(5) (voir *Loi nº 1 d'exécution du budget de 2019*, art. 138). Cet article prévoit que, lorsqu'une ordonnance relative à la demande initiale a été demandée, « le tribunal ne rend l'ordonnance visée au paragraphe [11.2](1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période ». Cette disposition ne s'applique pas en l'espèce, et les parties ne l'ont pas invoquée. Toutefois, il se peut qu'elle ait pour effet d'empêcher les juges surveillants d'approuver des AFL à titre de financement temporaire au moment où l'ordonnance relative à la demande initiale est rendue.

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-29 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-104).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA*

[88] Le juge surveillant peut également accorder au prêteur une « charge super prioritaire » qui aura priorité sur toute réclamation des créanciers garantis, en vertu du par. 11.2(2) :

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

[89] Ces charges, également appelées « superprivilèges », réduisent les risques des prêteurs, les incitant ainsi à aider les compagnies insolvables (Innovation, Sciences et Développement économique Canada, *Archivé — Projet de loi C-55 : analyse article par article*, dernière mise à jour le 29 décembre 2016 (en ligne), cl. 128, art. 11.2; Wood, p. 387). Sur le plan pratique, ces charges constituent souvent le seul moyen d'encourager ce type de prêt. Généralement, le prêteur se protège contre le risque de crédit en prenant une sûreté sur les éléments d'actifs de l'emprunteur. Or, les compagnies débitrices qui sont sous la protection de la *LACC* ont souvent donné en gage la totalité ou la presque totalité de leurs actifs à d'autres créanciers. En l'absence d'une charge super prioritaire, le prêteur qui accepte d'apporter un financement temporaire prendrait rang derrière les autres créanciers (McElcheran, p. 298-299). Bien que la charge super prioritaire subordonne les sûretés des créanciers garantis à celle du prêteur qui apporte un financement temporaire — un résultat qui a suscité la controverse en common law — le législateur a signifié son acceptation générale des transactions allant de pair avec ces charges en adoptant le par. 11.2(2) (voir M. B. Rotsztain et A. Dostal, « Debtor-In-Possession Financing », dans S. Ben-Ishai et A. Duggan, dir., *Canadian Bankruptcy and Insolvency Law : Bill C-55, Statute c. 47 and Beyond* (2007), 227, p. 228-229 et 240-250). En effet, cet équilibre a été expressément pris en considération par le Comité sénatorial permanent des banques et du commerce, qui a recommandé la codification du financement temporaire dans la *LACC* (p. 111-115).

[90] Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le

sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges

mieux placé pour répondre. La *LACC* énonce un certain nombre de facteurs qui encadrent l'exercice de ce pouvoir discrétionnaire. L'inclusion de ces facteurs dans le par. 11.2 reposait sur le point de vue du Comité sénatorial permanent des banques et du commerce selon lequel ils permettraient de respecter les « principes fondamentaux » ayant guidé la conception des lois en matière d'insolvabilité au Canada, notamment « l'équité, la prévisibilité et l'efficience » (p. 115; voir également Innovation, Sciences et Développement économique Canada, cl. 128, art. 11.2). Pour décider s'il y a lieu d'accorder le financement temporaire, le juge surveillant doit prendre en considération les facteurs non exhaustifs suivants :

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

(*LACC*, par. 11.2(4))

[91] Avant l'entrée en vigueur en 2009 des dispositions susmentionnées, les tribunaux utilisaient le pouvoir discrétionnaire général que confère l'art. 11 pour autoriser le financement temporaire

(*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and

et la constitution des charges super prioritaires s'y rattachant (*Century Services*, par. 62). L'article 11.2 codifie en grande partie les approches adoptées par ces tribunaux (Wood, p. 388; McElcheran, p. 301). En conséquence, il est possible, le cas échéant, de s'inspirer de la jurisprudence relative au financement temporaire antérieure à la codification.

[92] Comme c'est le cas pour les autres mesures susceptibles d'être prises sous le régime de la *LACC*, le financement temporaire est un outil souple qui peut revêtir différentes formes ou faire intervenir différentes considérations dans chaque cas. Comme nous l'expliquerons plus loin, le financement d'un litige par un tiers peut, dans les cas qui s'y prêtent, constituer l'une de ces formes.

(2) Les juges surveillants peuvent approuver le financement d'un litige par un tiers à titre de financement temporaire

[93] Le financement d'un litige par un tiers met généralement en cause [TRADUCTION] « un tiers, n'ayant par ailleurs aucun lien avec le litige, [qui] accepte de payer une partie ou la totalité des frais de litige d'une partie, en échange d'une portion de la somme recouvrée par cette partie au titre des dommages-intérêts ou des dépens » (R. K. Agarwal et D. Fenton, « Beyond Access to Justice : Litigation Funding Agreements Outside the Class Actions Context » (2017), 59 *Rev. can. dr. comm.* 65, p. 65). Le financement d'un litige par un tiers peut revêtir diverses formes. Un modèle courant met en cause un bailleur de fonds de litiges qui s'engage à payer les débours du demandeur et à indemniser ce dernier dans l'éventualité d'une adjudication des dépens défavorable, en échange d'une partie de la somme obtenue dans le cadre d'un procès ou d'un règlement couronné de succès (voir *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] En dehors du cadre de la *LACC*, l'approbation des accords de financement d'un litige par un tiers a été quelque peu controversée. Une partie de cette controverse découle de la possibilité que ces accords portent atteinte aux doctrines de common

maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

law concernant la champartie (*champerty*) et le soutien abusif (*maintenance*)[6]. Le délit de soutien abusif interdit [TRADUCTION] « l'immixtion trop empressée dans une action avec laquelle on n'a rien à voir » (L. N. Klar et autres, *Remedies in Tort* (feuilles mobiles), vol. 1, par L. Berry, dir., p. 14-11, citant *Langtry c. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), p. 661). La champartie est une sorte de soutien abusif qui comporte un accord prévoyant le partage de la somme obtenue ou de tout autre profit réalisé dans le cadre d'une action réussie (*McIntyre Estate c. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (C.A. Ont.), par. 26).

[95] S'appuyant sur la jurisprudence voulant que les conventions d'*honoraires conditionnels* ne constituent pas de la champartie lorsqu'elles ne sont pas motivées par un but illégitime (p. ex., *McIntyre Estate*), les tribunaux d'instance inférieure en sont venus progressivement à reconnaître que les accords de *financement d'un litige* ne constituent pas non plus de la champartie *en soi*. Cette évolution s'est opérée surtout dans le contexte des recours collectifs, en réaction aux obstacles, comme les adjudications de dépens défavorables, qui entravaient l'accès des parties à la justice (voir *Dugal*, par. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915, par. 43-44 (CanLII); *Houle c. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, par. 52, conf. par 2018 ONSC 6352, 429 D.L.R. (4th) 739 (C. div.); voir également *Stanway c. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, par. 13). La jurisprudence relative à l'approbation des accords de financement de litige par un tiers dans le contexte des recours collectifs — et même les paramètres de leur légalité en général — continue d'évoluer, et aucune des parties au présent pourvoi ne nous a invités à l'analyser.

[6] L'ampleur de la controverse varie selon les provinces. En Ontario, les accords de champartie sont interdits par la loi (voir *An Act respecting Champerty*, R.S.O. 1897, c. 327). Au Québec, les questions relatives à la champartie et au soutien abusif ne se posent pas de façon aussi aiguë parce que la champartie et le soutien abusif ne font pas partie du droit comme tel (voir *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, « New Frontier : The Emergence of Litigation Funding in the Canadian Insolvabilité Landscape » dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 221, p. 231).

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[96] Cela dit, dans la mesure où les accords de financement de litige par un tiers ne sont pas illégaux *en soi*, il n'y a aucune raison de principe qui permet d'empêcher les juges surveillants d'approuver ce type d'accord à titre de financement temporaire dans les cas qui s'y prêtent. Nous reconnaissons que cette forme de financement diffère des formes plus courantes de financement temporaire qui visent simplement à aider le débiteur à [TRADUCTION] « payer les frais courants » (voir *Royal Oak*, par. 7 et 24). Toutefois, dans des circonstances semblables à celles en l'espèce, lorsqu'il existait un seul élément d'actif susceptible de monétisation au bénéfice des créanciers, l'objectif visant à maximiser le recouvrement des créanciers a occupé le devant de la scène. En pareilles circonstances, le financement de litige favorise la réalisation de l'objectif fondamental du financement temporaire : permettre au débiteur de réaliser la valeur de ses éléments d'actif.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[97] Nous concluons que les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Cela dit, ces facteurs ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant. En effet, ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. Des enseignements supplémentaires peuvent être tirés d'autres domaines où des accords de financement de litige par un tiers ont été approuvés.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection,

[98] Ce qui précède est compatible avec la pratique qui a déjà cours devant les tribunaux d'instance inférieure. Plus particulièrement, dans *Crystallex*, la Cour d'appel de l'Ontario a approuvé un accord de financement de litige par un tiers dans des circonstances très semblables à celles en l'espèce. Cette affaire mettait en cause une société minière ayant le droit d'exploiter un grand gisement d'or au Venezuela. Crystallex est finalement devenue insolvable, et (comme Bluberi) il ne lui restait plus qu'un seul élément d'actif important : une réclamation

Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word

d'arbitrage de 3,4 milliards de dollars américains contre le Venezuela. Après s'être placée sous la protection de la *LACC*, Crystallex a demandé l'approbation d'un accord de financement de litige par un tiers. L'accord prévoyait que le prêteur avancerait des fonds importants pour financer l'arbitrage en échange, notamment, d'un pourcentage de la somme nette obtenue à la suite d'une sentence ou d'un règlement. Le juge surveillant a approuvé l'accord à titre de financement temporaire en vertu de l'art. 11.2. La Cour d'appel a conclu à l'unanimité que le juge surveillant n'avait commis aucune erreur dans l'exercice de son pouvoir discrétionnaire. Elle a conclu que l'art. 11.2 [TRADUCTION] « n'empêche pas le juge surveillant d'approuver, s'il y a lieu, avant qu'un plan soit approuvé, l'octroi d'une charge garantissant un financement qui pourra continuer après que la compagnie aura émergé de la protection de la *LACC* » (par. 68).

[99] Dans *Crystallex*, l'un des principaux arguments soulevés par les créanciers — et l'un de ceux qu'ont soulevés Callidus et le groupe de créanciers dans le présent pourvoi — était que l'accord de financement de litige en cause était un plan d'arrangement et non pas un financement temporaire. Il s'agissait d'un argument important car, si l'accord était en fait un plan, il aurait dû être soumis à un vote des créanciers conformément aux art. 4 et 5 de la *LACC* avant de recevoir l'aval du tribunal. La cour, dans *Crystallex*, a rejeté cet argument, et nous en faisons autant.

[100] La *LACC* ne définit pas le plan d'arrangement. En fait, la *LACC* ne fait aucunement allusion aux plans — elle fait uniquement état d'un « arrangement » ou d'une « transaction » (voir art. 4 et 5). S'appuyant sur l'ancienne jurisprudence anglaise, les auteurs de *Bankruptcy and Insolvency Law of Canada* proposent la définition générale suivante de ces termes :

> [TRADUCTION] La « transaction » suppose d'emblée l'existence d'un différend au sujet des droits visés par la transaction et d'un règlement de ce différend selon des conditions jugées satisfaisantes par le débiteur et le créancier. L'accord visant à accepter une somme inférieure à 100 ¢ par dollar constituerait une transaction lorsque

than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least

le débiteur conteste la dette ou n'a pas les moyens de la payer. Le mot « arrangement » a un sens plus large que le mot « transaction » et ne se limite pas à quelque chose qui ressemble à une transaction. Il viserait tout plan de réorganisation des affaires du débiteur : *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (C.P.).

(Houlden, Morawetz et Sarra, §33)

[101] Malgré leur vaste portée apparente, ces termes connaissent quand même certaines limites. Selon une jurisprudence plus récente, ils exigeraient, à tout le moins, une certaine transaction à l'égard des droits des créanciers. Dans *Crystallex*, par exemple, on a conclu que l'accord de financement de litige en cause (également appelé [TRADUCTION] « facilité de DE Tenor ») ne constituait pas un plan d'arrangement parce qu'il ne comportait pas [TRADUCTION] « une transaction visant les conditions [des] dettes envers [des créanciers] ni ne [. . .] privait [ceux-ci] de [. . .] leurs droits reconnus par la loi » (par. 93). La Cour d'appel a fait sien le raisonnement suivant du tribunal de première instance, auquel nous souscrivons pour l'essentiel :

[TRADUCTION] Le « plan d'arrangement » et la « transaction » ne sont pas définis dans la *LACC*. Il doit toutefois s'agir d'un arrangement ou d'une transaction entre un débiteur et ses créanciers. La facilité de DE Tenor ne constitue pas, à première vue, un arrangement ou une transaction entre Crystallex et ses créanciers. Fait important, les détenteurs de billets ne sont pas privés de leurs droits par la facilité de DE Tenor. Les détenteurs de billets sont des créanciers non garantis. Leurs droits se résument à poursuivre en vue d'obtenir un jugement et à faire exécuter ce jugement. S'ils ne sont pas payés, ils ont le droit de demander une ordonnance de faillite en vertu de la LFI. Sous le régime de la *LACC*, ils ont le droit de voter sur un plan d'arrangement ou une transaction. La facilité de DE Tenor ne les prive d'aucun de ces droits.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, par. 50)

[102] Il n'est pas nécessaire de définir exhaustivement les notions de plan d'arrangement ou de transaction pour trancher les présents pourvois. Il suffit de conclure que les plans d'arrangement doivent au

some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing.

moins comporter une certaine transaction à l'égard des droits des créanciers. Il s'ensuit que l'accord de financement de litige par un tiers visant à apporter un financement à la compagnie débitrice pour réaliser la valeur d'un élément d'actif ne constitue pas nécessairement un plan d'arrangement. Nous sommes d'avis de laisser aux juges surveillants le soin de déterminer si, compte tenu des circonstances particulières de l'affaire dont ils sont saisis, l'accord de financement de litige par un tiers comporte des conditions qui le convertissent effectivement en plan d'arrangement. Si l'accord ne comporte pas de telles conditions, il peut être approuvé à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*.

[103] Ajoutons que, dans certaines circonstances, l'accord de financement de litige par un tiers peut contenir ou incorporer un plan d'arrangement (p. ex., s'il contient un plan prévoyant la distribution aux créanciers des sommes obtenues dans le cadre du litige). Subsidiairement, le juge surveillant peut décider que, bien que l'accord lui-même ne constitue pas un plan d'arrangement, il y a lieu de l'accompagner d'un plan et de le soumettre à un vote des créanciers. Cela dit, nous le répétons, les accords de financement de litige par un tiers ne constituent pas nécessairement, ni même généralement, des plans d'arrangement.

[104] Rien de ce qui précède n'est sérieusement contesté en l'espèce. Les parties s'entendent essentiellement pour dire que les accords de financement de litige par un tiers *peuvent* être approuvés à titre de financement temporaire. Le différend qui les oppose porte sur la question de savoir si le juge surveillant a commis une erreur en exerçant son pouvoir discrétionnaire d'approuver l'AFL en l'absence d'un vote des créanciers, soit parce qu'il constituait un plan d'arrangement, soit parce qu'il aurait dû être accompagné d'un plan d'arrangement. Nous abordons maintenant cette question.

(3) Le juge surveillant n'a pas commis d'erreur en approuvant l'AFL

[105] À notre avis, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de

The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors

financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs (par. 74, citant *Bayens*, par. 41; *Hayes*, par. 4), le juge surveillant a estimé que l'AFL était juste et raisonnable. Plus particulièrement, il a examiné soigneusement les conditions selon lesquelles les avocats de Bentham et de Bluberi seraient payés si le litige était couronné de succès, les risques qu'ils prenaient en investissant dans le litige et l'étendue du contrôle qu'exercerait désormais Bentham sur le litige (par. 79 et 81). Le juge surveillant a également pris en compte les objectifs uniques des procédures fondées sur la *LACC* en établissant une distinction entre l'AFL et des accords apparemment semblables qui n'avaient pas été approuvés dans le contexte des recours collectifs (par. 81-82, établissant une distinction avec l'affaire *Houle*). Sa prise en compte de ces objectifs ressort également du fait qu'il s'est fondé sur *Crystallex*, qui, comme nous l'avons expliqué, portait sur l'approbation d'un financement temporaire dans des circonstances très semblables à celles en l'espèce (voir par. 67 et 71). Nous ne voyons aucune erreur de principe ni rien de déraisonnable dans cette approche.

[106] Certes, le juge surveillant n'a pas examiné à fond chacun des facteurs énoncés au par. 11.2(4) de la *LACC* de façon individuelle avant de tirer sa conclusion, mais cela ne constituait pas une erreur en soi. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par Bluberi sous le régime de la *LACC*, nous mène à conclure que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il convient de rappeler qu'au moment où il a rendu sa décision, le juge surveillant était saisi des procédures en question depuis plus de deux ans et avait pu bénéficier de l'aide du contrôleur. En ce qui a trait à chacun des facteurs énoncés au par. 11.2(4), nous soulignons ce qui suit :

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la *LACC* ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers

appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion.

(al. 11.2(4)a) et c)), mais nous constatons que ces facteurs semblent revêtir beaucoup moins d'importance que les autres dans le contexte de la présente affaire (voir par. 96);

- l'AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));
- le juge surveillant était d'avis que l'AFL favoriserait la conclusion d'un plan viable, car il a accepté (1) le fait que Bluberi avait l'intention de présenter un plan et (2) l'argument de Bluberi selon lequel l'approbation de l'AFL l'aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d'actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));
- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));
- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, la seule possibilité de recouvrement réside dans l'action que vont intenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));
- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s'est appuyé sur le plus récent d'entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l'approbation de l'AFL à titre de financement temporaire.

[107] À notre avis, il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Nous ne pouvons affirmer qu'il a commis une erreur

Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

dans l'exercice de son pouvoir discrétionnaire. Nous ne savons pas avec certitude si l'AFL était aussi favorable aux créanciers de Bluberi qu'il aurait pu l'être — dans une certaine mesure, il donne priorité au recouvrement de Bentham sur le leur — mais nous nous en remettons néanmoins à l'exercice par le juge surveillant de son pouvoir discrétionnaire.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[108] Dans la mesure où la Cour d'appel a conclu le contraire, en toute déférence, nous ne sommes pas d'accord. De façon générale, nous estimons que la Cour d'appel a encore une fois omis de faire preuve de la déférence nécessaire à l'égard du juge surveillant. Plus particulièrement, nous souhaitons faire des observations sur trois des erreurs qu'aurait décelées la Cour d'appel dans la décision du juge surveillant.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[109] Premièrement, il découle de notre conclusion selon laquelle les AFL peuvent constituer un financement temporaire que la Cour d'appel a eu tort de conclure que l'approbation de l'AFL à titre de financement temporaire [TRADUCTION] « transcendait la nature de ce type de financement » (par. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[110] Deuxièmement, à notre avis, la Cour d'appel a eu tort de conclure que l'AFL était un plan d'arrangement, et qu'il était possible d'établir une distinction entre l'espèce et les faits de l'affaire *Crystallex*. La Cour d'appel a conclu que l'AFL et la charge relative au financement de litige super prioritaire s'y rattachant constituaient un plan parce qu'ils subordonnaient les droits des créanciers de Bluberi à ceux de Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that

[111] Nous souscrivons à l'opinion du juge surveillant selon laquelle l'AFL ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Pour reprendre la formule qu'a employée la Cour d'appel dans *Crystallex*, la réclamation de Bluberi s'apparente à une [TRADUCTION] « marmite d'or » (par. 4). Les plans d'arrangement établissent la façon dont le contenu de cette marmite sera distribué. Ils n'indiquent généralement pas ce que la compagnie débitrice devra faire pour la remplir. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou

is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
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> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New

l'existence de leurs droits d'avoir accès à la marmite une fois qu'elle est remplie, pas plus qu'on ne saurait dire qu'il s'agit d'une « transaction » à l'égard de leurs droits. Lorsque la « marmite d'or » aura été obtenue — c'est-à-dire dans l'éventualité d'une action ou d'un règlement — les sommes nettes seront distribuées aux créanciers. En l'espèce, si les réclamations retenues permettent de recouvrer des sommes qui dépassent le total des dettes de Bluberi, les créanciers seront payés en entier; si les sommes sont insuffisantes, un plan d'arrangement ou une transaction établira la façon dont les sommes seront distribuées. Bluberi s'est engagée à proposer un tel plan (voir les motifs du juge surveillant, par. 68, établissant une distinction avec *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] C'est exactement la même conclusion qui a été tirée dans *Crystallex* dans des circonstances semblables :

> [TRADUCTION] Les faits de l'espèce sont inhabituels : la « marmite d'or » ne contient qu'un seul élément d'actif qui, s'il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J'estime que l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver le prêt de DE Tenor était raisonnable et approprié, bien qu'il ait eu pour effet de limiter la position de négociation des créanciers.
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> . . . L'approbation du prêt de DE Tenor a certes amoindri l'influence que pouvaient exercer les détenteurs de billets lors de la négociation d'un plan, et rendu plus complexe la négociation d'un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l'un de leurs droits reconnus par la loi. Il ne s'agit donc pas d'un arrangement, et un vote des créanciers n'était pas nécessaire. [par. 82 et 93]

[113] Nous ne souscrivons pas à l'opinion de la Cour d'appel selon laquelle il y a lieu d'établir une distinction avec *Crystallex* parce que, dans cette affaire, les créanciers disposaient d'un seul moyen de recouvrement (c.-à-d. l'arbitrage) tandis que, dans la

Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement

présente affaire, il y en a deux (c.-à-d. l'introduction d'une action à l'égard des réclamations retenues et le nouveau plan de Callidus). Étant donné que le juge surveillant avait conclu que Callidus ne pouvait pas voter sur le nouveau plan, ce plan ne constituait pas une solution de rechange viable à l'AFL. La [TRADUCTION] « seule possibilité de recouvrement » qui s'offrait aux créanciers de Bluberi résidait donc dans l'AFL et l'introduction d'une action à l'égard des réclamations retenues (motifs du juge surveillant, par. 91). Fait peut-être plus important, même si les créanciers avaient disposé de plusieurs moyens de recouvrement, tant dans l'affaire *Crystallex* que dans la présente affaire, la simple existence de ces moyens n'aurait pas nécessairement modifié la nature des accords de financement de litige par un tiers en cause ni n'aurait eu pour effet de les convertir en plans d'arrangement. La question que doit se poser le juge surveillant dans chaque affaire est de savoir si l'accord qui lui est soumis doit être approuvé à titre de financement temporaire. Certes, les autres moyens de recouvrement dont disposent les créanciers peuvent entrer en ligne de compte dans la prise de cette décision discrétionnaire, mais ils ne sont pas déterminants.

[114] Ajoutons que la charge relative au financement de litige ne convertit pas l'AFL en plan d'arrangement en [TRADUCTION] « subordonn[ant] » les droits des créanciers (motifs de la Cour d'appel, par. 90). Nous reconnaissons que cette charge aurait pour effet de placer les créanciers garantis comme Callidus derrière Bentham dans l'ordre de priorité, mais ce résultat est expressément prévu par l'art. 11.2 de la *LACC*. Cette « subordination » ne convertit pas le financement temporaire autorisé par la loi en plan d'arrangement. Retenir cette interprétation aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers en vertu du par. 11.2(2).

[115] Troisièmement, nous estimons que la Cour d'appel a eu tort de conclure que le juge surveillant aurait dû soumettre l'AFL accompagné d'un plan à l'approbation des créanciers (par. 89). Comme nous l'avons indiqué, la décision d'exiger que le débiteur accompagne d'un plan son accord de financement

with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

de litige par un tiers est une décision discrétionnaire qui appartient au juge surveillant.

[116] Enfin, sur les instances des appelantes, nous soulignons que l'affirmation de la Cour d'appel selon laquelle l'AFL [TRADUCTION] « s'apparente [en quelque sorte] à un placement à échéance non déterminée » était inutile et pouvait prêter à confusion (par. 90). Cela dit, il s'agissait manifestement d'une remarque incidente. Dans la mesure où la Cour d'appel s'est fondée sur cette qualification pour conclure que l'AFL constituait un plan d'arrangement, nous avons déjà expliqué pourquoi nous croyons que la Cour d'appel a fait erreur sur ce point.

VI. Conclusion

[117] Pour ces motifs, à l'issue de l'audience, nous avons accueilli les pourvois et rétabli l'ordonnance du juge surveillant. Les dépens devant notre Cour et la Cour d'appel ont été adjugés aux appelantes.

Pourvois accueillis avec dépens devant la Cour et la Cour d'appel.

Procureurs des appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc. : Davies Ward Phillips & Vineberg, Montréal.

Procureurs des appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) : Woods, Montréal.

Procureurs de l'intimée Callidus Capital Corporation : Gowling WLG (Canada), Montréal.

Procureurs des intimés International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Ernst & Young Inc. : Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Procureurs des intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Norton Rose Fulbright Canada, Montréal.

TAB 4

Court of Queen's Bench of Alberta

Citation: Accel Canada Holdings Limited (Re), 2020 ABQB 182

Date: 20200311
Docket: 1901 16581
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

In the Matter of Accel Canada Holdings Limited and Accel Energy Canada Limited

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Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner

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[1] On March 6, 2020 I delivered an Oral Decision in these Applications and noted that written Reasons would follow. These are those Reasons.

[2] In these proceedings the Applicants, Accel Canada Holdings Limited and Accel Energy Canada Limited (collectively Accel and separately Holdings and Energy) applied on November 22, 2019 to this court for an Order in proceedings they had commenced under Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] to continue under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*] which was granted. On November 27, 2019 that Order was amended and restated with the Stay granted therein extended to January 31, 2020 and then on January 21, 2020, further extended to March 13, 2020.

[3] There are currently before this court Applications of four different stakeholders in these Arrangement proceedings, informally referred to as the Gross Overriding Royalty Applications. They involve applications for determination and if appropriate Declarations with respect to the following issues:

1. Whether the Gross Overriding Royalties ("GOR") held by ARC Resources Ltd ("ARC") and B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership (collectively "BEST"):

a) Are interests in land or contractual security for payment;
b) Can be vested off title pursuant to a Sale Approval/Vesting Order;
c) Can be redeemed for a specific sum; and
d) Have priority over other security interests held by other stakeholders.

Background

[4] Pursuant to an Asset Purchase and Sale Agreement dated May 10, 2018 (the "APA") ARC as vendor sold certain assets (the "Redwater Assets") to Holdings as purchaser. The purchase price ("PP") in the APA was $154M. Holdings did not pay the whole of the PP but rather Holdings granted to ARC a GOR under a Gross Overriding Royalty Agreement ("ARC GOR"), with royalty payments by Holdings to ARC triggered by certain events to occur in the future, namely payment by Holdings to ARC of the remaining PP of $40M (the "DPP") on or before January 1, 2020 or July 1, 2020.

[5] Holdings financed that portion of the PP that ARC did receive on closing with monies borrowed from Third Eye Capital Corporation ("TEC"). The loan by TEC was secured by way of a first ranking security interest in all of Holdings' property, including those assets purchased from ARC and in particular the assets underlying the ARC GOR.

[6] TEC (which includes itself and as agent for others) is the largest secured lender of Holdings and is currently owed over $300M. TEC has made significant loans to Accel beginning in June 2017. The loans were predominantly used by Holdings to pursue acquisitions including the Redwater Assets under the APA. In return, Holdings granted to TEC a variety of security agreements including credit agreements and fixed and floating charge debentures over all present and after acquired property, security interests in all of its present and after acquired personal property and fixed charges over certain lands, leases and/or agreements.

[7] TEC made numerous registrations of its security beginning in 2017, as will be discussed further in the consideration of the priorities issues. As at September, 2019 it also held first ranking security on Energy, which security is itself the subject of a further validity court challenge, but which may have $12.5M outstanding to TEC.

[8] The APA contains a clause whereby ARC acknowledged the first ranking security of TEC in the underlying ARC GOR assets. All three parties, namely Holdings, TEC and ARC also entered into an Acknowledgement Agreement ("Acknowledgement") that was supposed to record this understanding, but the effect of which is itself a component of this dispute.

[9] On August 29, 2018 and October 12, 2018, BEST entered into Royalty Purchase Agreements ("RPA") and GOR Agreements with Energy and Holdings respectively. These are referred to as GOR#1 and GOR#2 (collectively the "BEST GORs"). The purchase price for GOR#1 was $3M and for GOR#2 was $5M. Both sets of agreements were structured in an identical manner. Should either Energy or Holdings repurchase the Royalty by a set date for a stated amount, November 1, 2018 and $3.5M for GOR#1 or December 1, 2018 and $6M for GOR#2, the GOR would terminate. The stated amounts were not paid by either Holdings or Energy on the set dates contracted for.

[10] If the stated amount was not paid by the respective Accel entity by the set date, then the BEST GORs were payable by the respective Accel entity until an Aggregate Proceeds Amount ("Payout") had been paid pursuant to the royalty payments due under the GOR Agreements. In

the case of GOR#1, the Payout was the greater of $4M or an amount equal to $3M and interest at a rate of 59.4% per annum calculated and compounded monthly. In the case of GOR#2, the Payout was the greater of $6M or an amount equal to $5M and interest at a rate of 59.4% per annum calculated and compounded monthly. The term of each BEST GOR continues until the date that BEST has received sufficient royalty payments to reach Payout.

[11] The Monitor applied for and was granted an Order Approving Sale and Investment Solicitation Process ("SISP") over all or nearly all of the Assets of Accel on December 13, 2019. Phase one of the SISP has ended. The Monitor and Accel have therefore requested that this court accelerate its determination of the issues in these Applications in order to assist it and the potential purchasers and/or investors with certainty surrounding the nature of the assets offered for sale and this court's jurisdiction to vest off interests.

[12] I will address each issue in turn and will deal with additional facts as they are relevant to the discussion and determination.

1. Interest in land or contract for payment

[13] The current leading decision in this area in Canada remains the Supreme Court decision in ***Bank of Montreal v Dynex Petroleum Ltd***., 2002 SCC 7. That decision has more recently been the subject of application in similar circumstances to these by the Court of Appeal in Ontario in ***Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc***, 2018 ONCA 253 [***Dianor 2018***]. The ***Dianor 2018*** decision was itself the subject of discussion and application by this court in ***Manitok Energy Inc (Re)***, 2018 ABQB 488.

[14] These cases make it clear and the parties agree the test for determining whether a royalty is an interest in land is whether:

1. the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
2. the interest, out of which the royalty is carved, is itself an interest in land.

[15] These facts do not engage part 2 of the test. All parties are agreed that Accel's interests underlying the royalties in issue are themselves interests in land.

[16] Part 1 of the test, however, requires that the court determine the parties' intention in making the contracts that are outlined above. Our court of Appeal in ***Bank of Montreal v Dynex Petroleum Ltd***, 1999 ABCA 363 at para 73, aff'd 2002 SCC 7, quoted with approval in ***Dianor 2018*** at para 63, set out the approach of a court in determining the parties' intention in these circumstances which is to "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words."

[17] When interpreting an agreement, a court must read the contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": ***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 at para 47. Nonetheless, while surrounding circumstances are important considerations, they must not overwhelm the words of the contract or effectively create a new agreement contrary to the wording of the agreement itself: ***Sattva*** at para 57.

[18] It is important to consider the surrounding circumstances, also referred to as the "factual matrix", of an agreement because "words alone do not have an immutable or absolute meaning": Sattva at para 47. Therefore, courts must consider the surrounding circumstances regardless of whether or not a contract is ambiguous; failing to consider the surrounding circumstances when interpreting a contract is a reversible error: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at paras 57, 58, leave to appeal to SCC refused 37712 (5 April 2018).

[19] The parole evidence rule, which prevents the admission of outside evidence that alters the words of a contract, does not apply when considering the surrounding circumstances as to the intent of parties to an agreement. The primary concern of the parole evidence rule is to ensure certainty and finality in contractual arrangements by precluding evidence beyond the contract itself; however, because evidence of surrounding circumstances must necessarily be within the knowledge of both parties at or before the time of agreement, those concerns of improperly varying or contradicting the agreement do not apply: ***Sattva*** at para 59.

[20] The evidence that can be relied upon to determine the "surrounding circumstances" varies from case to case: ***Sattva*** at para 58. Evidence of surrounding circumstances should only consist of objective evidence about the background facts at the time of the contract execution. The evidence must have been, or reasonably ought to have been, within the knowledge of both parties at the time of or prior to the contract execution: ***Sattva*** at para 58.

[21] Determining what constitutes surrounding circumstances is a question of fact: ***IFP Technologies*** at para 83. Surrounding circumstances are relevant background facts that are likely not controversial to the parties and are capable of affecting how a reasonable person would understand the language of the document: ***Alberta Union of Provincial Employees v Alberta Health Services***, 2020 ABCA 4 at para 25 [***AUPE***]. Relevant background facts include those that speak to:

1) the genesis, aim or purpose of the contract;
2) the nature of the relationship created by the contract; and
3) the nature or custom of the market or industry in which the contract was executed: ***IFP Technologies*** at para 83.

[22] The type of evidence that can be used is broad, and can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": ***Sattva*** at para 58, citing Lord Hoffman in ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society*** (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at 913.

[23] In a commercial contract, the Court should know the commercial purpose of the contract, which assumes knowledge of the genesis of the transaction and the background, context, and market in which the parties are operating: ***AUPE*** at para 24. Contractual interpretation is "an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context": ***IFP Technologies*** at para 89.

[24] In ***IFP Technologies***, the Court considered an antecedent agreement and written evidence of negotiations proceeding the agreement: at paras 84, 85. As further discussed below, negotiations preceding a contractual agreement are often not permissible evidence of surrounding circumstances. However, where written evidence of negotiations can provide a

relatively objective indication of relevant background facts, such as the genesis and aim of the contract, it may be permissible: ***IFP Technologies*** at para 85.

[25] Overall, the evidence that can be used to show the surrounding circumstances of an agreement is largely left to the Court's discretion, considering the circumstances of the case. The key requirements are that the evidence speaks to objective intentions relating to the background of the agreement that was known to all parties at the time of agreement.

[26] Conversely, evidence that is not objective or known to the parties at the time of the agreement is not permissible evidence of surrounding circumstances. Therefore, evidence of subjective intentions is always inadmissible: ***AUPE*** at para 27; ***Sattva*** at para 58.

[27] Evidence of pre-contract negotiations, including prior drafts, is generally inadmissible as subjective evidence about what the parties intended: ***AUPE*** at para 27. However, the issue of whether all pre-contract negotiations are admissible is unclear. The Alberta Court of Appeal stated in ***AUPE*** at para 32 that ***Sattva*** should not be interpreted broadly so as to define surrounding circumstances to include all pre-contract negotiations as long as they do not include subjective intentions. The Court of Appeal determined that where evidence of pre-contract negotiations overlaps with evidence of surrounding circumstances, it may provide an objective interpretive aid where not speaking to subjective intentions and as long as it doesn't overwhelm the meaning of the written contract: ***AUPE*** at para 3; ***IFP Technologies*** at paras 85–87.

[28] Post-contract conduct is not admissible in regard to determining the intentions of the parties. The only instance where evidence of post-contract conduct is admissible is where it is permitted as an exception to the parole evidence rule because of an ambiguity in the contract. A contract is only ambiguous where the words can be reasonably interpreted to have more than one meaning: ***IFP Technologies*** at para 87; ***AUPE*** at para 44.

[29] In summary, the central feature of evidence that is not proper to consider as an aspect of the surrounding circumstances is that which only proves the subjective intentions of the parties. Clear examples of evidence based on subjective intentions include a bald statement by one party as to their interpretation of the agreement or pre-contract negotiations that speak only to the subjective intent of a party and/or overwhelm the resulting written agreement. Post-contract conduct is also inadmissible for the purpose of proving the surrounding circumstances at the time of the agreement.

[30] In the context of the present proceedings, any evidence in the affidavits that speaks to the circumstances leading to the agreements at issue is admissible. If the Court is satisfied that the information was known to both parties at the time of the agreements and is evidence of an objective intent, rather than mere statements about an individual's subjective beliefs, then that evidence can be considered. Considering the interrelated nature of some of the entities in this proceeding and the commercial reality of these types of agreements, evidence of interrelated occurrences and negotiations may be relevant as long as all the parties to the specific agreements were aware of it.

[31] This court's review of the permissible surrounding circumstances then will be directed at determining the genesis, aim and purpose of the contract, the nature of the relationship created by the contract and the custom of the market in which the contract was executed.

[32] As our Court of Appeal put it so succinctly in ***AUPE*** at para 30; "Obviously there would be no dispute if there was consensus on the intent, so the lack of consensus does not assist in interpretation."

[33] With these principles in mind, I then turn to a consideration of the wording of the ARC GOR and the BEST GORs together with the circumstances surrounding each transaction.

[34] Accel has filed an Application asking this court to find that the interests granted in each case are not interests in land but rather security for payment or performance and, as such, are contracts that do not run with the land.

[35] TEC similarly submits that the respective GORs are personal in nature and not interests in land.

[36] Each of the GOR holders, ARC and BEST, urge the court to find that the parties used clear language in the appropriate respective contracts to vest interests in land.

[37] What is really at stake now that the grantor or debtor, Holdings and Energy, have entered insolvency proceedings is priority concerns with all stakeholders taking positions most advantageous to their interests and, in particular, in sharing in any sale proceeds that may be realized by the SISP. It is from this perspective that the court reviews the evidence and arguments put forward.

ARC GOR

[38] ARC makes several arguments in favour of this court determining that its GOR is an interest in land. They are, in summary:

1. ARC was the owner of the Redwater Assets prior to the transfer to Holdings and, as owner, reserved the GOR share out of the of the Redwater Assets that were transferred, such that ARC remains both the owner of the assets subject to the ARC GOR and the payee under the ARC GOR;
2. The APA and the ARC GOR manifest by their language a clear intention of the parties that ARC be the owner of the ARC GOR at the conclusion of the transaction; and
3. The parties intended the ARC GOR to be an interest in land as evidenced by the wording of the APA and the ARC GOR.

[39] TEC and Accel submit that the ARC GOR, when read in conjunction with the APA and the Acknowledgment, clearly contemplate that the GOR is itself a security interest, albeit one that is a charge on land within the definition of same provided by the *Law of Property Act*, RSA 2000, c L-7 [*LPA*]. Section 64(1) of the *LPA* defines a charge on land as "an interest, whether arising immediately or in the future, in real property given by a corporation, that secures payment or the performance of an obligation.

[40] Although the APA and ARC GOR do not in the language of either couch the grant as a security interest, TEC and Accel submit that when the entirety of the documents and the transaction is viewed as a whole it is clear that the ARC GOR is security for the payment of the DPP. It is the mechanism used by ARC to secure its right to payment under the APA.

[41] When considering the intention of the APA and ARC GOR, I find that the agreements are capable of more than one meaning. On one hand, the ARC GOR could be interpreted as creating an interest in land, considering the potential for a royalty interest in perpetuity and plain wording of the provision stating that the ARC GOR creates an interest in land. On the other hand, the APA envisions the GOR as a mechanism of ensuring payment and could be read to establish a contractual agreement to pay secured by a royalty interest. Accordingly, I am permitted to consider some evidence of post-contract conduct in order to address that ambiguity.

[42] I will begin by considering the words of the ARC GOR and the APA, and then address the surrounding circumstances.

[43] Several components of the APA are particularly relevant to determining the intention of the parties in creating the ARC GOR. The Deferred Purchase Price Amount ("DPP") of $40M outlined in the ARC APA is to bear interest at the rate of 6% per annum calculated daily. The DPP and combined interest are the Deferred Obligations ("DO"). Pursuant to para 2.4 of the APA, the DO is due and payable by Holdings on January 2, 2020 (the "Maturity Date").

[44] As per para 2.8(c) of the APA, Holdings was also to make monthly payments of interest to ARC following closing. As per para 2.8(g) of the APA, Holdings agreed to provide a GOR to ARC which would be triggered only if the DO were not paid by January 2,2020 and would only bind the Petroleum and Natural Gas Rights as defined in the APA from and after that date.

[45] As per para 2.8(g)(i) of the APA, the DO that remain outstanding after January 2,2020 comprise the Unpaid Amount ("UP"). If the UP is paid after January 2, 2020 but before July 2, 2020 the GOR will terminate as per para 2.8(g)(iii).

[46] If the DO are not paid on January 2, 2020 and the GOR is triggered and enforceable, then six months after that date (July 2020) ARC must calculate the GOR Elimination Amount ("GEA") as per para 2.8(g)(v) and Schedule "S" of the APA and then give notice to Holdings of the GEA (para 1.1(cccc) "Payout Amount"; para 2.8(g)(v)(A) and Schedule "S").

[47] The GEA is calculated by taking the UP and deducting any payments received by ARC under the GOR as per para 2.8(g)(v)(A) and Schedule S. If Holdings pays the GEA within ten business days of receiving Notice of the GEA, the GOR terminates. If the GEA is not paid within the ten days period then the GOR is to continue in perpetuity as per para 2.8(g)(v)(B) of the APA. As per para 2.8(g)(vi) of the APA, ARC agreed to grant Holdings a Right of First Refusal in respect of a disposition by ARC of the ARC GOR.

[48] The ARC GOR was executed on the closing of the sale of the Redwater Assets under the APA dated August 15, 2018. Holdings has made no payments to ARC either of interest, the DO or the UP.

[49] The provisions that ARC submits support its position are:

1. The ARC GOR is to exist in perpetuity if Holdings does not pay the GEA within the time contracted for (yet to occur);

2. Para 2.2 of the ARC GOR Agreement uses the following language that makes it clear the parties intended the ARC GOR to be an interest in land:

> "....Shall constitute, and is to be construed as, an interest in land .....All terms, covenants, provisions and conditions of this Agreement shall run with and

> be binding upon the Royalty Lands and Title Documents, and the estates affected thereby for the duration of this Agreement.";

3. Para 2.3(c) of the GOR appoints Holdings as the agent and trustee of ARC with respect to proceeds;

4. Para 2.3(g)(i – iii) provide that ARC's prior written consent is to be obtained by Holdings prior to Holdings entering into a pooling unitization or other combination. Further para 3.1 provides that Holdings may not convert a well covered by the ARC GOR to another type of well. Para 3.4(c) requires Holdings to obtain ARC's consent to the surrender of title documents for the abandonment of a well covered by the ARC GOR;

5. Para 2.5(a) and para 4 provides ARC, upon the default of Holdings, with the right to take in kind its GOR, which ARC submits illustrates a strong badge of ownership as it means ARC may exert the right to take possession of its property;

6. Para 6.2 restricts Holdings from proceeding with certain types of transactions without ARC's consent; and

7. None of the language in the APA or the ARC GOR creates or talks of a security interest, charge or mortgage.

[50] Certain aspects of these provisions weigh toward the ARC GOR creating an interest in land, such as provisions that: refer to the creation of an interest in land; provide ARC with a right to take in kind the Petroleum Substances comprising the GOR, including upon default of payment by Accel; create the potential for an interest in perpetuity; and prevent Accel from proceeding with certain transactions that would affect the ARC GOR, such as particular assignments of interest.

[51] However, other aspects of the APA and ARC GOR point toward the ARC GOR being a security interest, including that the ARC GOR: predominantly ensures payment of the PP under the APA, plus interest; terminates upon full payment of the DO; does not exist in perpetuity unless Accel fails to meet its payment obligations, in which case only then additional funds would be paid to ARC by virtue of a continuing royalty interest; and is provided to ARC in exchange for payment of the APA's DO, and not in exchange for consideration from ARC beyond permitting Accel more time to meet its payment obligations.

[52] Accel points out that various cases in Alberta that have held that a significant feature of a security interest as opposed to an absolute transfer of an interest in land is whether the debtor or grantor retains a right of redemption: ***Alberta (Treasury Branches) v M.N.R; Toronto-Dominion Bank v MNR***, [1996] 1 SCR 963, ***Sharma v 643454 Alberta Ltd***, 2006 ABQB 119 and ***Equitable Trust Company v 604 1st Street SW Inc***, 2014 ABCA 427, rev'd on other grounds 2016 SCC 19.

[53] As Accel points out, the APA provides that the ARC GOR can be redeemed prior to January 2, 2020 as well as at any time after that to the expiration of the Notice of the GEA.

[54] Additionally, evidence of the surrounding circumstances at the time of the agreements also indicates that the ARC GOR was intended to be a security interest and not an interest in land.

[55] ARC was aware at all times that TEC was providing the financing to Holdings for the acquisition of the Redwater Assets in the APA. At the request of Holdings' counsel and 2 days prior to the closing of the scheduled APA the parties, TEC, ARC and Holdings entered into the Acknowledgment dated August 15, 2018.

[56] While it suffers from some ambiguous wording, reading the Acknowledgment in conjunction with correspondence between counsel during the drafting of and the drafts of the document themselves as well as considering the surrounding circumstances and giving the document commercial sense, it is clear that it subordinates the priority of whatever security interests ARC has that secure the payment by Holdings of the DPP and interest accruing due thereunder to the payment by Holdings to TEC of whatever security interests TEC has.

[57] It makes no commercial sense in the circumstances that were present when the APA and the TEC financing were negotiated that a lender in TEC's position would agree to subordinate its security to ARC for the DPP, as ARC would have the court read the Acknowledgement.

[58] Further, the second paragraph of the Acknowledgment, again given the circumstances surrounding the drafting and execution of it, make it clear that the subordination of ARC's security interests include the ARC GOR and that Holdings would not grant to ARC any "other" security interest as security for the DPP and accruing interest.

[59] The Acknowledgement therefore provides that the ARC GOR is subordinated to the TEC security interests. Priorities between the stakeholders to these Applications will be dealt with later in these reasons.

[60] After the APA, ARC GOR, and Acknowledgement were entered into, ARC continued to treat the ARC GOR as a security interest obtained to secure payment for the Redwater Assets under the APA.

[61] On May 6, 2019 ARC registered a security agreement and a land charge at the Personal Property Registry ("PPR") which identified ARC as the secured party, Holdings as the Debtor and the collateral as all the Debtor's right, title, estate and interest in the Petroleum Substances produced from the Royalty Lands as defined in the Royalty Agreement dated August 15, 2018 between the Debtor and the Secured Party.

[62] ARC also prepared and released public disclosure documents following the closing of the APA, in which the sale of the Redwater Assets was described as a disposition with the ARC GOR as security for the deferred portion of the PP.

[63] The evidence as a whole speaks to the objective intention of the parties that the ARC GOR provide a security interest for payment of the DO to ARC by Accel. Considering all of the evidence and submissions this Court is of the view that the ARC GOR is not an interest in land but rather is a security interest that does not run with the land.

[64] ARC applies in the alternative for this court to lift the Stay, currently set to expire March 13, 2020, and allow it to enforce the ARC GOR by invoking the take in kind provisions.

[65] TEC submits and this court agrees that the DPP, the UP and the GEA were all future debts to which Holdings was subject to on the initial filing date in October 2019 under both the *CCAA* and the *BIA*.

[66] In considering an application for the lifting of a Stay under the CCAA, the court is to consider the balance of convenience, the relative prejudice to the parties, the merits of the proposed action, the prejudice to the applicant of the continuation of the Stay and whether lifting the Stay is in the interests of justice.

[67] Beginning in at least March 2019, Accel began experiencing what would become sustained liquidity issues culminating in each entity filing a Notice of Intention to Make a Proposal under the *BIA* on October 21, 2019, resulting in a Stay of stakeholder's rights for a 10-day period, later extended.

[68] To allow ARC to proceed with its intended enforcement actions would have the effect of reversing the purpose of the Acknowledgement by allowing ARC to receive payments when Holdings' obligations to TEC are stayed.

[69] More importantly, the interests of justice are not served by allowing one of the stake holders to enforce its security interest and not the others. Lifting the stay would have the effect of draining finances from Holdings at a time when the status quo is the priority while it attempts to proceed with an orderly distribution of its assets. It would in effect prefer ARC over all the other Holdings stakeholders without equitable reason.

[70] ARC provides no evidence of prejudice other than the same prejudice that all stakeholders with security interests have and will suffer.

[71] The application to lift the Stay by ARC is accordingly denied.

[72] In the further alternative, ARC claims that para 2.3(c) of the GOR creates an express trust in its favour and asks this court to direct that Holdings or the Monitor hold the proceeds attributable to the Redwater lands that underlie its ARC GOR in trust for it.

[73] While para 2.3(c)(i) uses trust language, the ARC GOR as a whole must be reviewed to determine if the parties intended to great a true trust relationship.

[74] TEC submits that when the ARC GOR is considered on all of its terms it establishes a debtor-creditor relationship rather than a trustee-beneficiary relationship. TEC points to three indicia to support its interpretation:

1. The ARC GOR supports payments of interest to ARC;
2. The ARC GOR is silent on co-mingling of proceeds attributable to the ARC GOR with Holdings' own funds; and
3. The GOR does not restrict Holdings' use of the those proceeds between the periodic payments due to ARC.

[75] Again, in examining the true nature of the ARC GOR in light of the provisions of the APA and the surrounding circumstances present at the time of the execution of the agreements, it is clear that the ARC GOR is a security interest which secures the payment by Holdings to ARC of the DPP and does not give rise to a trustee beneficiary relationship.

[76] The application to hold the proceeds in trust is accordingly denied.

BEST GORs

[77] BEST relies predominantly on the language of the respective RPAs and BEST GORs to establish that Energy and Holdings granted to it interests in land and not security interests.

[78] As has already been reviewed in these reasons, the language used in the agreement is but one factor that the court considers in determining the intention of the parties to it.

[79] In August 2018, Accel sought short-term financing from BEST in order to bridge their capital requirements and to close a loan agreement with J.P. Morgan. Pursuant to a term sheet formalized on August 29, 2018, the parties entered into the RPA, whereby BEST agreed to purchase GOR#1 on Energy's lands for a purchase price of $3M, although Energy could repurchase GOR#1 at any time before November 1, 2018 for a purchase price of $3.5M. If GOR#1 was not repurchased by Energy before Nov 1, 2018, then GOR#1 was to remain effective until it expired. The Expiration Date is defined as the earlier of (i) the demand for payment by BEST, (ii) BEST receiving the greater of $4M OR the sum of $3M and an amount equal to interest of 59.4% per annum calculated and compounded monthly (the Aggregate Proceeds) and (iii) December 31, 2018.

[80] Payments under the RPA and GOR#1 were to commence November 1, 2018 if the repurchase option for $3.5M had not been exercised by Energy before that date.

[81] Pursuant to GOR#1, the payments to be made by Energy were to be that portion of the production equal to the Aggregate Proceeds amount and were to continue until the Aggregate Proceeds was paid. In other words, $3M plus interest at the rate of 59.4% until paid.

[82] BEST was entitled to demand payment at any time for any reason. The term of GOR#1 was until BEST received payment of the Aggregate Proceeds in full. If Energy defaulted in payment, then BEST was entitled to be reimbursed all out-of-pocket expenses incurred to enforce its rights under the RPA and GOR#1, which included professional fees of a certain stated kind.

[83] As security for the term sheet, Energy was to provide BEST with GOR#1.

[84] On October 12, 2018, BEST entered into a further RPA and GOR#2 whereby BEST purchased GOR#2 for $5M from Holdings. BEST was advised that the purpose of the advance was to complete an acquisition of strategic value. The terms of the RPA and GOR#2 are identical in all material respects to the RPA and GOR#1 entered into between the parties in August, 2018.

[85] No monies have been paid by Energy or Holdings to BEST under either transaction.

[86] As previously stated, in considering the BEST GORs, the real question is whether the transactions granted to BEST an interest in land or a contractual right to a portion of the Petroleum Substances recovered from the land by way of security for the payment to it of a stated amount.

[87] BEST submits that in addition to the clear grant of land language, a take in kind provision in each GOR signifies an interest in land. BEST also indicates other factors that support the creation of an interest in land, including that the BEST GORs provide a right to payment to BEST that is tied to production of the substances; create an interest capable of lasting for the duration of Accel's estate; and prevent Accel from an assignment without BEST's consent, for example.

[88] However, other factors indicate the intention of the parties to create a security interest. The overall aim and essence of the transaction support the creation of a security interest. In fact, BEST acknowledges the intention of the parties to create a security interest by also making the conflicting argument that the BEST GORs are registerable security interests capable of achieving priority over TECs interests.

[89] Further, the BEST GORs create limited, revisionary interests that terminate upon repayment of the Aggregate Proceeds. While Accel requires BEST's permission to assign its interests and obligations under the BEST GORs, Accel is entitled to pool or unitize the lands without express consent of BEST and is not generally limited in its decisions with respect to the substances, including its use of the substances as required for its operations. Finally, no further consideration was provided by BEST to attain an interest in the land beyond the funds provided to Accel which the BEST GORs function to provide repayment for from Accel. There is no further nexus between BEST and Accel's interest in the land.

[90] With respect to BEST's submissions, it is clear that when both sets of agreements and the surrounding circumstances of each transaction are considered, the agreements document a short-term financing agreement secured by a time-limited and extinguishable GOR. This conclusion is supported by the extremely high rate of interest, the demand nature of the repayment terms, and the repurchase amounts being the loan amounts rather than a calculation of the real value of the royalty, which would be tied to the underlying reserves of the land it is granted over.

[91] The BEST GORs are therefore determined to be security interests and not interests in land.

[92] BEST also applies to lift the Stay to allow it to take in kind sufficient Petroleum Substances under the GOR to repay the loan amounts. For similar reasons given with respect to the ARC application of the same nature, that Application fails and is dismissed.

2. Vesting Off the ARC and BEST Interests/Redemption

[93] As this court has determined that all three GORs before the court are not interests in land, but rather are security interests, there is no issue that the court can vest off the interests represented by the respective registrations. See ***Third Eye Capital Corporation v Ressources Dianor Inc/ Dianor Resources Inc***, 2019 ONCA 508.

[94] Given that each set of agreements provides for payout calculations it should be a simple matter to determine what those amounts are when these proceedings have reached a point where funds are ready for distribution among the stakeholders.

[95] The priorities of the various stake holders before this court on these applications based on those registrations will be dealt with below.

3. Priorities

[96] TEC, ARC, and BEST each registered multiple security interests related to their respective interests against Energy and Holdings, including security interests related to the TEC Financing Agreements with Accel as well as the ARC GOR and BEST GORs. The TEC Financing Agreements provided funding to ACCEL for the purchase of various petroleum and natural gas assets, including the Redwater Assets.

[97] TEC first registered security interests at the Personal Property Registry (PPR) on June 29, 2017, against Holdings in relation to the TEC Financing Agreements. TEC made other related registrations in the PPR against Holdings on October 31, 2017, June 27, 2018, August 15, 2018, and November 12, 2018. TEC registered each of those interests as both a land charge and as a security interest against all present and after acquired personal property of Holdings. TEC also registered interests in the PPR against Energy on September 20, 2019, including an interest against all present and after acquired property of ACCEL Energy and a land charge, which relates to a subsequent application in these proceedings.

[98] TEC registered security notices at Alberta Energy against Holdings on January 24, 2019, in relation to the financing of Accel's purchase of the Redwater Assets.

[99] BEST registered security interests through the PPR on October 18, 2018 as a land charge and a security interest against all of Holdings' right, title, estate and interest in the petroleum substances produced from the lands defined in the GOR#2 Agreement.

[100] BEST also registered a security notice against Holdings on November 15, 2018, at Alberta Energy with respect to multiple Crown mineral leases. BEST subsequently registered another security notice at Alberta Energy on January 9, 2019, against Energy.

[101] ARC registered a land charge and security agreement against Holdings' right, title, estate and interest in the Petroleum Substances produced from the royalty lands in the PPR on May 6, 2019. ARC also registered caveats against title to Holding's freehold oil and gas leases.

[102] In summary, TEC and BEST both hold multiple first in time registrations at Alberta Energy regarding Holdings' Crown mineral leases, while TEC has first in time registrations at the PPR against Holdings for land charges relative to both ARC and BEST.

[103] There are two key statutory regimes governing the security interests at issue in this circumstance: the *LPA* and the *Mines and Minerals Act*, RSA 2000, c M-17 [*MMA*].

[104] The *LPA* section 64(2) governs priority for registration through the PPR of charges on land and any right to payment arising in connection with an interest in land.

[105] Section 64(1)(b) of the *LPA* defines "charge on land" as "an interest, whether arising immediately or in the future, in real property given by a corporation, that secures payment or performance of an obligation". Real property is defined in section 64(1)(c) of the *LPA* to mean land, an interest in land, and a right to payment arising in connection with an interest in land but not a right to payment evidenced by a security or an instrument to which the *Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*] applies. The *PPSA* does not apply to the creation of an interest in a right to payment that arises in connection with an interest in land: *PPSA* s 4(g).

[106] Under the *LPA*, priority of successive charges on land affecting the same interest are determined under section 64(2) as follows:

> **(2)** Subject to subsections (8) and (12), except in the case of fraud, priority among successive charges on land affecting the same interest shall be determined as follows:
>
> (a) priority between registered charges on land shall be determined by the order of registration without regard to the order of creation of the charges or execution of the agreements providing for the charges;

(b) a registered charge on land has priority over an unregistered charge on land;

(c) priority between unregistered charges on land shall be determined by the order of execution of the agreements providing for the charges.

[107] Registering under the *LPA* means, for the purposes of section 64, "registered by means of a financing statement in the Personal Property Registry in accordance with *the Personal Property Security Act* and the regulations made under that *Act*.": *LPA*, s 64(1)(d).

[108] Since 64(2) of the *LPA* is subject to subsections 10 and 12, it is necessary to consider those provisions as well. Subsection (12) relates to interests registered between 1990 and 1992, which is not relevant in this case.

[109] Subsection (8) states that:

> **(8)** This section is subject in all respects to the *Land Titles Act* and the *Mines and Minerals Act*, and the priority of any interest registered or filed under either Act shall be determined pursuant to that Act.

[110] Therefore, *LPA* registrations are subject to registrations undertaken pursuant to the *MMA*. The MMA permits secured parties to register a security notice in relation to security interests in a lease of Crown minerals: *MMA*, ss 2(a), 95. Section 95(4) establishes priorities under the *MMA* such that:

> **(4)** A security interest in respect of which a security notice is registered has priority
>
> (a) over any other security interest acquired before the registration of that security notice unless a security notice in respect of that other security interest is registered before the registration of the first mentioned security notice, ... and
>
> (b) (d) over any interest, right or charge acquired after the registration of that security notice.

[111] "Registered" in section 95 is defined as "registered under Division 2 of Part 6, in relation to a security notice or any other document registrable under that Division": *MMA* s 1(1)(ii). Registration under the *MMA* occurs through the registry operated by Alberta Energy.

[112] Under section 94(1) of the *MMA*, the following definitions apply to the registration of a Crown mineral lease:

> (e) "security interest" means an interest in or charge on collateral if the interest or charge secures
>
> (i) the payment of an indebtedness arising from an existing or future loan or advance, …
>
> and
>
> (a) "collateral" means
>
> (i) the interest of the lessee or of any of the lessees in an agreement, or

> (ii) an interest in an agreement derived directly or indirectly from the lessee or any of the lessees of the agreement or from a former lessee or any of the former lessees of the agreement;

[113] In summary, the *LPA* and the *MMA* govern registration of security interests in land or payment arising in land. The *LPA* provides for a registration-based priority system through the PPR, while the *MMA* provides a registration-based priority system through the Alberta Energy registry system for security interests relating to Crown mineral leases. PPR registrations in accordance with the *LPA* are subject to registrations that relate to Crown mineral leases under the *MMA*.

ARC GOR

[114] ARC argues that the ARC GOR is an interest in land, and that there is no registration system or statutory requirement for royalty holdings to register interests in land or interests against crown oil and gas leases.

[115] As previously discussed, the ARC GOR created a security interest, which is connected with the land making up the Redwater Assets. That security interest falls within the definition of "charge on land" within the meaning of the *LPA*, and also affects certain Crown mineral leases that fall within the meaning of the *MMA*. As such, it is governed by the statutory registration schemes under the *LPA* and *MMA*.

[116] TEC submits that it has first priority security interests based on registration under the *LPA* with respect to the Redwater Assets that are subject to the ARC GOR. Further, TEC submits that it also has priority over the land through its registration in accordance with the *MMA*.

[117] TEC registered security interests in Holdings present and after-acquired personal property and land charges in respect of its real property in the PPR on June 29, 2017. ARC did not register its security interest and land charge in the same property until May 6, 2019. TEC also registered security interests with Alberta Energy in accordance with the *MMA*. ARC did not register its security interest with Alberta Energy.

[118] TEC and Accel also argue that TEC's security interest ranks above the ARC GOR by virtue of the Acknowledgement. Conversely, ARC argues that that the Acknowledgement subordinates TEC's interest behind ARC's right to payment for the GOR.

[119] As previously discussed, applying the necessary principles of interpretation to the Acknowledgement indicates that the parties intended it to be interpreted as a full subordination of the ARC GOR, except for payments made in the ordinary course, which are currently stayed by the Orders in these proceedings.

[120] Therefore, priority is governed by date of registration for the security interests at issue. Accordingly, I find that TEC holds first in time registration in the Redwater Assets with respect to the ARC GOR pursuant to both the *PPSA*, in accordance with the *LPA*, and under the *MMA* with respect to the Crown mineral leases.

BEST GORs

[121] TEC and BEST are largely in agreement as to the state of registration regarding the Crown mineral leases related to the BEST GORs, but they disagree as to the effect of those registrations.

[122] BEST says that it holds first in time registrations with Alberta Energy against 88% of the Crown Mineral Leases subject to GOR#1 Agreement, and 43.6% of the Crown Mineral Leases subject to GOR#2.

[123] However, TEC submits that it has prior security interests over all of Accel's personal real property in the PPR, despite not having total first in time registrations under both the *LPA* and the *MMA* as compared to the BEST security interests. TEC therefore argues that BEST knew, or ought to have known, about TEC's security interests in the mineral leases, as registered first in time in the PPR prior to the BEST GORs, and that BEST's security interests should therefore be subordinated to TEC's security interests on the basis of that knowledge.

[124] Specifically, TEC argues that the *MMA* has a gap in its priority scheme that is not present in other property registries in Alberta. TEC says that the *MMA* is silent as to the effect of actual or constructive knowledge of a pre-existing interest on a secured party's right to rely on the priority rules set out in the *MMA* or as to the principles of the common law or equity.

[125] By way of contrast, TEC notes that the priorities in section 64(2) of the *LPA* are only effective "except in the case of fraud", and that section 64(9) further elaborates that:

> **(9)** For the purposes of subsection (2) and the *Land Titles Act*, a person does not act fraudulently merely because the person acts with knowledge of a charge on land, regardless of whether it has been registered under this section or not. [emphasis added]

[126] Similarly, the *PPSA* states that a "person does not act in bad faith merely because the person acts with knowledge of the interest of some other person": *PPSA* s 66(2). Further, the *PPSA* section 66(3) states that the "principles of common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply".

[127] TEC suggests that the Court must look to the common law to address the legislative gap, being the *MMA*'s failure to explicitly address knowledge. TEC claims that BEST was, or should have been, aware of its pre-existing security interests in the property and therefore should be subject to its interest despite the fact that TEC did not register its entire interest under the *MMA* prior to BEST. To that end, TEC relies on pre-PPSA case law to support the premise that actual knowledge of a prior unregistered interest can defeat a subsequent claim to title.

[128] BEST disagrees that there is a legislative gap. BEST submits that the *MMA* establishes a priority system based on registration, and that knowledge is not mentioned because knowledge is not relevant.

[129] As the Supreme Court of Canada stated in ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***, 2006 SCC 4 at para 51, a court must determine and apply the intention of the legislation "without crossing the line between judicial interpretation and legislative drafting". A court's role in filling in legislative gaps is described in Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc, 2016) at 301 as follows:

> ...the courts have a jurisdiction to cure drafter's errors. However, gaps in the legislative scheme are attributed to the legislature. Gaps may be the result of a considered decision or the result of an oversight or mistake, but in either case the court normally claims that it has no jurisdiction to cure the problem. The

> technique required to remedy it, namely, reading in, is generally perceived as going beyond interpretation and impinging on the legislative role.

[130] It is for the legislature to address the statutory scheme for registration, not for this Court. The *MMA* establishes a clear priority ranking scheme in section 95(4), based on registration with Alberta Energy. If the Legislature was concerned with knowledge in creating a registration scheme under the *MMA*, it would have said so. Accordingly, I find that the *MMA* priority system is based solely upon registration as specified in section 95(4), without regard to knowledge.

[131] TEC and Accel also both argue that the principle of *nemo dat quod non habet* (*nemo dat*) should apply. *Nemo dat* is the principle that, as between legal interests in property, the first party to take a legal interest in a property takes priority: ***Innovation Credit Union v Bank of Montreal***, 2010 SCC 47 at para 51 [***Innovation***]. TEC suggests that Accel could not grant priority interests to BEST because it was prohibited from doing so under the Credit Agreement with Accel, which requires Accel to gain consent from TEC before incurring, among other things, new debts or liens against the land. TEC says that for this reason, Accel did not have the authority to grant a subsequent security interest to BEST.

[132] BEST argues that *nemo dat* doesn't apply to the *LTA* or the *MMA*.

[133] The Supreme Court's discussion of *nemo dat* in ***Innovation*** is indicative of the type of circumstances where the *nemo dat* principle may apply in relation to security interests. Those circumstances are distinguishable from the present circumstances. In Innovation, the Supreme Court of Canada applied the principle of *nemo dat* when considering two competing security interests. The competing interests were between an unperfected security interest subject to the *PPSA* and a subsequently acquired *Bank Act* security interest. *Nemo dat* was necessarily invoked in Innovation because the *Bank Act* gave priority over security interests acquired after the *Bank Act* security interest, without addressing whether or not a prior unperfected interest took priority. The Court noted that because the *Bank Act* establishes that a *Bank Act* security interest is subject to prior acquired interests, the Bank can receive no greater interest in the property than the debtor has, similar to the principle of *nemo dat*: ***Innovation*** at para 51. The Bank in ***Innovation*** asked the Court to adopt a rule that would give priority based on registration rather than relying on principles of *nemo dat*, and the Court recognized that it would be open to Parliament, rather than the Court, to do so: at paras 52, 53.

[134] The circumstances in ***Innovation*** are distinguishable from the present circumstances, where the statutory schemes of the *LPA* and *MMA* both establish priority schemes based on registration. Here, the Legislature has created priority schemes under the *MMA* and the *LPA*, and therefore the principles of *nemo dat* are not applicable as to determining priority between security interests in the same property.

[135] Registration systems provide commercial certainty. The registration schemes in the *LPA* and *MMA* establish priority for security interests based on registration. It is neither necessary nor would it provide certainty to commercial parties to create additional obligations beyond those contemplated within the statutory regimes, such as by limiting that priority system based on knowledge or preventing a party from providing funding in exchange for a security interest based on *nemo dat*.

[136] Accordingly, the statutory registration schemes, as established in the *LPA* with regard to the freehold leases and the *MMA* with regard to the Crown mineral leases, apply to determine

which interests are first in time as between TEC and the BEST GORs. Therefore, priority with respect to the BEST and TEC interests is also governed by date of registration for the security interests at issue. The Crown mineral leases have priority based on date of registration under the *MMA*, and any remaining leases have priority based on registration under the *PPR*.

[137] Should the parties wish to address costs of these applications, their respective right to do is reserved.

Heard on the 20th and 21st days of February, 2020. Oral Reasons given on the 6th day of March, 2020.
Dated at the City of Calgary, Alberta this 11th day of March, 2020.

K.M. Horner
J.C.Q.B.A.

Appearances:

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TAB 5

Court of King's Bench of Alberta

Citation: Alphabow Energy Ltd. (Re), 2024 ABKB 652

Date: 20241107
Docket: 2401 05179
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

In the matter of a Plan of Arrangement of AlphaBow Energy Ltd.

Oral Decision
of the
Honourable Justice M.H. Bourque

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[1] AlphaBow Energy Ltd. (**AlphaBow**) is a privately-owned company in the business of acquisition, development, and production of oil and natural gas in Alberta. It holds licenses issued by the AER to operate 3,785 wells, 4,038 pipelines and 321 facilities across Alberta.

[2] On March 28, 2024, AlphaBow filed a notice of intention (**NOI**) to make a proposal under the Bankruptcy and Insolvency Act, RSC 1985 c B-3 (BIA) with KSV Restructuring Inc. (**KSV**) consenting to act as proposal trustee in the NOI proceedings.

[3] On April 26, 2024, AlphaBow sought and obtained an initial order continuing the NOI proceedings under the *Companies' Creditors Arrangement Act* (**CCAA**), staying all proceedings, rights and remedies against or in respect of AlphaBow until May 6, 2024, and granting an administration charge in respect of the fees and disbursements of KSV, who became the Monitor, and AlphaBow's legal counsel.

[4] On the same date, the Court granted several additional orders, extending the stay period to July 31, 2024, increasing the amount of the administration charge, approving a sales and investment solicitation process (**SISP**), and approving a sale transaction to Cascade Capture Ltd.

[5] Subsequent orders of the Court extended the stay period to August 31, 2024, September 30, 2024, October 31, 2024, and November 4, 2024.

[6] On September 20, 2024, the Court granted a sale approval and vesting order approving a sale transaction to Cenovus Energy Inc. and an order authorizing a claims process to ascertain the quantum of cure costs associated with certain assets included in the SISP.

[7] On Monday, November 4, 2024, I granted an order extending the stay period to November 29, 2024. In addition, I granted AlphaBow's application for a sale approval and vesting order for two proposed sales transactions under the SISP: one involving the sale of assets to Culloden Resources Ltd. and Rayberg Holdings Ltd. and another involving the sale of assets to Durham Creek Energy Ltd. I adjourned AlphaBow's application for a sale approval and vesting order for its proposed sales transaction to Resistance Energy Ltd. pending the resolution of AlphaBow's application for a declaration that certain royalty agreements between AlphaBow and Avance Drilling Ltd. (**Advance**) do not create an interest in land and may be vested off to facilitate the sale of AlphaBow's assets. Following submissions from counsel on November 5, 2024, I reserved my decision. These are my reasons.

[8] The legal test for determining whether a royalty is an interest in land is well known and is often referred to as the two-part Dynex test, in reference to the Supreme Court of Canada's decision in ***Bank of Montreal v Dynex Petroleum Ltd.***, 2002 SCC 7:

a. Is the language used in describing the interest sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substance recovered from the land, and

b. Is the interest, out of which the royalty is carved, itself an interest in land.

[9] Determining the parties' intentions requires examining the agreement as a whole, along with the surrounding circumstances, instead of searching for some magic words. The decision-maker's role is to ascertain the interpretation of the royalty agreement that promotes or advances the parties' true intentions at the time of contracting on an objective basis, focusing on what a reasonable person would infer from the terms of the agreement, consistent with the surrounding circumstances known to the parties at the time of formation. The assessment of the surrounding circumstances includes the genesis, aim or purpose of the agreement, the nature of the relationship created by the agreement, and the nature or custom of the particular industry. Lastly, royalty agreements must be interpreted according to sound commercial principles and business sense to avoid results that are unrealistic, absurd, or unreasonable with respect to the commercial realities of the industry. See authorities cited in ***Prairiesky Royalty Ltd. v. Yangarra Resources Ltd.***, 2023 ABKB 11, at paras 59-62.

[10] On November 23, 2018, AlphaBow and Advance entered into a Master Drilling and Completion Contract (**MDCC**) to govern the execution of AlphaBow's multi-year drilling and completion plan and to confirm the obligations and liabilities of each party. In particular, the MDCC provided that upon completion of drilling for each well, Advance would invoice AlphaBow at the beginning of the following month. Of particular interest to this application is section 6.6 of the MDCC, the relevant portions of which provided as follows (Throughout these reasons, when I am quoting from documents in evidence, I will use AlphaBow or Advance, as the case may be, instead of generic defined terms used for those parties):

6.6 Overriding Royalty

> (a) Concurrently with the execution of this Contract, AlphaBow has executed and delivered a Gross Overriding Royalty Agreement ... effective the date of execution, granting to Advance an overriding royalty as described in the GORR Agreement ...
>
> (b) **To ensure the performance of AlphaBow's covenants herein, and in particular, the payment of the outstanding amounts hereunder by AlphaBow to Advance**, AlphaBow and Advance agree that in the event of a Royalty Payor Default, as such term is defined in the GORR Agreement, or if AlphaBow fails to pay amounts due under an invoice issued pursuant to section 6.1 hereof ... within 30 days of receiving notice from Advance of failure to pay, **the Overriding Royalty shall ... immediately become payable to Advance all in accordance with Article 5 of the GORR Agreement**. ...
>
> (c) AlphaBow acknowledges that the Overriding Royalty ... grants to Advance the Overriding Royalty which shall be an interest in land and is carved out of the AlphaBow's petroleum and natural working gas working interests in the Chigwell property and Green Glades, Amisk, and Choice properties ...
>
> (d) The Parties agree that each of the Wells drilled hereunder shall constitute additional Royalty Lands [burdened by the Overriding Royalty] ...
>
> (f) Upon termination of the GORR Agreement in accordance with its terms, the Overriding Royalty shall automatically terminate and revert to AlphaBow, and Advance agrees that it shall take any such action as may be required in order to terminate the GORR Agreement and cause the reversion of the Overriding Royalty, including the discharge of any registrations relating thereto ...
>
> [emphasis added]

[11] As mentioned in Clause 6 of the MDCC, AlphaBow and Advance also entered into a Gross Overriding Royalty Agreement on November 23, 2018 (**2018 GORR Agreement**) the preamble of which cross-references the MDCC, and the fact that AlphaBow and Advance entered into the 2018 GORR Agreement "to better secure the payment" of costs incurred by Advance pursuant to the MDCC. According to the 2018 GORR Agreement, AlphaBow and Advance agreed to execute and enter into [the 2018 GORR Agreement] for the reservation and grant of an Overriding Royalty (**2018 GORR**) to satisfy unpaid amounts, including those under the MDCC and to encumber [AlphaBow's] working interest in the petroleum substances. Section 2.1 of the 2018 Agreement grants the 2018 GORR to Advance, and section 2.2 contains the standard-language clause that it is the express intention of the parties that the 2018 GORR is carved out of AlphaBow's interest in the Royalty Lands, and that it constitutes and is to be construed as an interest in land. Notwithstanding the presence of the standard-language intention-of-the-parties-to-create-an-interest-in-land clause, section 5.1 of the 2018 GORR Agreement provides that the 2018 GORR would only become payable if, among other reasons, AlphaBow failed to pay amounts owing under the MDCC. Upon invocation of section 5.1, payment of the 2018 GORR would continue for as long as amounts remained owing by AlphaBow to Advance under the MDCC.

[12] Despite the presence of the standard intention-of-the-parties-to-create-an-interest-in-land clause, the parties agree that the 2018 GORR created a security interest and not an interest in land (***Accel Canada Holdings Limited***, 2020 ABKB 182).

[13] By July 2020, AlphaBow defaulted on its payment obligations under the MDCC. At that point, AlphaBow was indebted to Advance for approximately $12.5MM. AlphaBow and Advance agreed to a payment plan contemplating minimum monthly payments to tackle the indebtedness, and those payments varied depending on an adjusted average price of WTI. This arrangement worked for a few months, but by October 2020, AlphaBow stopped making payments towards its indebtedness.

[14] On November 12, 2020, Advance invoked its right under the 2018 GORR Agreement to receive the 2018 GOOR, though it proposed that the applicable percentage would be reduced from 17.5% to 2.5% per month, and capped monthly payments at $50,000 if the formula exceeded that amount. Despite agreeing to Advance's proposed payment terms, AlphaBow failed to make the first payment. By then, AlphaBow's indebtedness to Advance had grown to approximately $13.2MM. Advance demanded payment of all amounts due, including those under the MDCC and the 2018 GORR Agreement.

[15] In May 2021, Advance notified AlphaBow that the adjusted average price of WTI exceeded $60, resulting in AlphaBow being required to pay not less than $350,000 towards its indebtedness, failing which the temporary royalty rate reduction would come to an end, and the original 17.5% rate would apply. By May 31, 2021, AlphaBow's indebtedness to Advance increased to approximately $14.5MM.

[16] In June 2021, Advance commenced an action seeking relief against AlphaBow, including judgment in the amount of $14,523,038 and a declaration that Advance was entitled to be paid the 17.5% royalty under the 2018 GORR Agreement. In August 2021, Advance served AlphaBow with a Notice to Admit, to which AlphaBow did not respond. On September 3, 2021, AlphaBow applied for partial summary judgment. The application for summary judgment culminated in a Consent Judgment dated October 29, 2021, a Royalty Agreement made as of October 28, 2021 (**2021 GORR Agreement**) and a Settlement Agreement and Release made effective as of November 12, 2021 (**Settlement Agreement**).

[17] The Consent Judgment is relatively straightforward, awarding judgment against AlphaBow for $12,944,339.21, allowing Advance to continue its action against AlphaBow as it pertained to pre- and post-judgment interest, and awarding Schedule C costs to Advance.

[18] Under the 2021 GORR Agreement, AlphaBow grants a gross overriding royalty (**2021 GORR**) to Advance but, unlike the comprehensive stand-alone 2018 GORR Agreement, the 2021 GORR Agreement is modeled on the more prevalent Canadian Association of Petroleum Landmen (**CAPL**) Overriding Royalty Procedure. The 2021 GORR Agreement incorporates two Schedules: Schedule A setting forth and describing the lands burdened by the Overriding Royalty, and Schedule B showing the elections and amendments to the CAPL standard form Royalty Agreement, including, in this case, a 17.5% royalty rate on all produced substances. Although the parties dispute whether a Schedule A was ever attached to the 2021 GORR Agreement or if one was, when and what it contained, for the purposes of this application, I don't need to determine which of AlphaBow's lands were intended to be burdened by the 2021 GORR. That said, the evidence on the application appears to strongly suggest that it was the exact same

lands as those initially burdened by the 2018 GORR and those that became burdened by it as a result of Advance providing drilling services.

[19] As mentioned, the 2021 GORR Agreement incorporates by reference the CAPL Overriding Royalty Procedure, including section 2.01, which states that "the Overriding Royalty is an interest in land." Before turning to the Settlement Agreement, I note that the 2021 GORR Agreement is unclear regarding the consideration which flowed back to AlphaBow for granting the 2021 GORR. In submissions, Advance's counsel suggested forbearance was the consideration flowing back. However, consideration to AlphaBow in the form of forbearance appears to be all or part of the consideration flowing under the Settlement Agreement and the new indebtedness repayment schedule. Clause 11 of the Settlement Agreement states:

> The Parties have entered into a new payment schedule and AlphaBow has requested that Advance forebear from exercising its right to enforce the Consent Judgment, or further prosecute the Action. Advance has acceded to AlphaBow's request subject to the terms of this agreement.

[20] Indeed, despite being called a Settlement Agreement (and Release), it is unclear what the Settlement Agreement purports to settle between AlphaBow and Advance. A better characterization of the document is that it (i) sets forth a summary of the events that have transpired between AlphaBow and Advance since the beginning of their commercial relationship; (ii) confirms the continued "full force and effect" of various agreements between the parties, including the MDCC, the 2018 GORR Agreement, the 2021 GORR Agreement and a yet-to-be-negotiated General Security Agreement; (iii) sets, as of October 31, 2021, the amount of AlphaBow's indebtedness at $15,657,020.89 (to which interest at the rate of 18% continues to accrue); and (iv) establishes a repayment plan of AlphaBow's indebtedness, calculated as a percentage of AlphaBow's production proceeds, the percentage increasing as the realized per barrel sale price increases, albeit capping any monthly repayment at $350,000.

[21] In support of its application, AlphaBow relies on the affidavit of Ben Li, who joined AlphaBow as Chief Executive Officer on April 12, 2022, and the affidavit of Quan Li, who was the interim Chief Executive Officer of AlphaBow from December 7, 2020 to April 12, 2022. Ben Li had no role in the 2021 GOR Agreement, and his affidavit offers nothing more than his understanding of the circumstances that led to its formation. Accordingly, I give his affidavit evidence little weight. On the other hand, Quan Li was directly involved in the 2021 GOR Agreement, and his evidence was tested by out-of-court cross-examination. Although several portions of Quan Li's evidence contain his subjective views of the surrounding circumstances (e.g. the representative from Advance "took an aggressive approach"; Advance was unwilling to back down from its position) or self-serving statements (If I knew of Advance's intention for the 2021 GORR Agreement to continue in perpetuity, I would not have proceeded with the Royalty Agreement, etc.), his evidence largely corroborates the surrounding circumstances as I have described them thus far.

[22] In opposing AlphaBow's application, Advance relies on the affidavit of Jiang Fan, who was Advance's President from June 2013 to April 2022. In his affidavit, Mr. Fan explains that he understood that "as a result of the legal developments [respecting GORRs], the 2018 GOR would likely not have been considered an interest in land, and would not have protected Advance's interests in the event of AlphaBow's insolvency". He adds that "if Advance obtained judgment against AlphaBow via the Summary Judgment Application, and proceeded to enforce that

judgment against AlphaBow, Advance was likely to recover, at most, only one month's worth of production proceeds from AlphaBow before it went into receivership, after which time, Advance was unlikely to realize any additional funds from the distribution of AlphaBow's assets, given the regulator's priority in insolvency proceedings."

[23] Mr. Fan explains that Advance then had to make a choice: take what Advance, as an unsecured creditor, might get in an AlphaBow receivership or agree to a payment plan whereby Advance might recover the totality of AlphaBow's indebtedness, albeit over a significantly long period, provided AlphaBow remained solvent. Mr. Fan describes the payment plan option as "unwise" and that Advance needed to be induced to take that risk with additional consideration in the form of a GOR interest "that would amount to an interest in land, which would be preserved in the event of AlphaBow's insolvency." In essence, Mr. Fan and Advance wanted a backup plan to recover AlphaBow's indebtedness in the event of its demise. Mr. Fan and Advance were indifferent about whether that repayment came directly from AlphaBow or a subsequent lease or working interest owner. I find that Advance and Mr. Fan believed that using the CAPL standard form of agreement would suffice to achieve their goal of creating an interest in land because, unlike the 2018 GORR Agreement, payments under the 2021 GORR Agreement did not require an event of default by AlphaBow and the standard form also did not specify a termination date. That said, Mr. Fan acknowledges that "Advance has not sought to strictly enforce its rights under the 2021 GORR Agreement because if it did, AlphaBow would be in the same position as it was during the Summary Judgment" but insists that Advance's omission to insist on payments was not a waiver pursuant to the terms of the Settlement Agreement.

[24] In my view, the circumstances surrounding the 2021 GORR Agreement reveal that Advance's true and only intention in entering the 2021 GORR Agreement was to give itself a backup collection tool if AlphaBow became insolvent. I find Mr. Fan's evidence that "the granting of a GOR interest that would amount to an interest in land was of utmost importance to Advance" to be entirely self-serving. In the same paragraph, Mr. Fan says that "ultimately, the parties resolved the Summary Judgment Application on the basis of the terms set out in my October 28, 2021 email to Mr. Lam, including the execution of the CAPL GOR agreement referred to therein". If the creation of an interest in land was "of utmost importance" to Advance, I would have expected Mr. Fan's October 28, 2021 email to say so. It does not. Not even close.

[25] I was not provided with any evidence regarding the life of AlphaBow's working interests, that is, whether they will deplete in 18 months or 18 years. But it seems to me that AlphaBow's granting of a 17.5% GORR on its then extant producing assets makes little to no commercial sense in the context of AlphaBow's circumstances in fall 2021 – especially since Mr. Fan acknowledges that requiring AlphaBow to pay such large amounts would render it insolvent. Indeed, Mr. Fan estimated that AlphaBow's monthly production proceeds were between $2MM and $4MM per month, equating to $24MM to $48MM annually. In my view, it seems unlikely that a rational commercial party would commit itself, subject to the eventual depletion of the resources, to paying $4.2 to $8.4 MM per year in exchange for a creditor forbearing enforcement of a $15MM debt.

[26] For all these reasons, I find that the parties to the 2021 GORR Agreement did not intend to create an interest in land. Accordingly, AlphaBow's application for a declaration that the 2021 GORR Agreement did not create an interest in land is granted.

[27] Had I found that the 2021 GORR Agreement created an interest in land, I would have vested it off pursuant to the broad discretionary authority granted to the Court by section 11 of the CCAA. I do not accept the submission that the 2021 GORR is "much more" than a fixed monetary interest that attaches to the property. In my view, a GORR resembles a fixed monetary interest more closely than a fee simple. A GORR is a future right that may or may not come into existence because the GORR holder only becomes entitled to anything of value if the leaseholder or working interest holder chooses to extract substances from the land. A 17.5% GOR would very likely detract producers from acquiring these assets.

[28] While it is understood that Advance is unlikely to consent to vesting off if the 2021 GORR was an interest in land, I would give little weight to that factor in determining whether vesting it off would be appropriate given the circumstances in which they obtained it. In essence, obtaining the 2021 GORR was nothing more than an attempt by Advance to improve its debt's status to others' detriment.

[29] Returning to AlphaBow's application for a sale approval and vesting order for its proposed sales transaction to Resistance Energy Ltd., that order is granted for the same reasons I gave earlier this week regarding the other two sale approval and vesting orders.

[30] That concludes my reasons.

Heard on the 4th and 5th of November, 2024.
Delivered at the City of Calgary, Alberta this 7th day of November, 2024.

M.H. Bourque
J.C.K.B.A.

Appearances:

K. Cameron / S. Aaron, Counsel for AlphaBow Energy Ltd.

A. Naveed / C. Zhu, Counsel for Advance Drilling Ltd.

J. Oliver, Counsel for the Monitor KSV Restructuring Inc.

R. Jones, KC and S. Rhydderch, Counsel for Flagstaff County, Ponoka County, Lamont County, Stettler County, Starland County, County of Warner No. 5, and Municipal District of Provost

M. Swanberg, Counsel for Red Deer County and Municipal District of Greenview

M. McIntosh, Counsel for the Orphan Well Association

R. Algar, Counsel for North 40 Resources Ltd.

M. Panenka, Counsel for Indian Oil and Gas Canada

TAB 6

CITATION: Bank of Montreal v. 592931 Ontario Inc., 2021 ONSC 4412
COURT FILE NO.: CV-21-00658033-00CL
DATE: 20210618

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: BANK OF MONTREAL, Applicant

AND:

2592931 ONTARIO INC., W.G.K. FITNESS INC., 2039675 ONTARIO INC., WGWINDSOR 2 FITNESS INC., WG BRAMPTON FITNESS INC., WGH FITNESS INC., CFC WELLAND INC., W.G.C. FITNESS INC., 2014595 ONTARIO INC., CFC BRANTFORD INC., CFC WATERDOWN INC., CFC LONDON SOUTH INC., W.G.G. FITNESS INC., WGWINDSOR FITNESS INC., W.G.W FITNESS INC., WGLONDON FITNESS INC., and WG ORILLIA INC., Respondents

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and Section 101 of the *Courts of Justice Act,* R.S.O. 1990, c. c-43, as amended

BEFORE: S.F. Dunphy J.

COUNSEL: *David Ward, Erin Craddock* and *Tony Van Klink,* for Applicant, Bank of Montreal

Clifton Prophet and *Thomas Gertner* for the Monitor, Richter Advisory Group Inc.

David Ullmann, for 2839203 Ontario Inc.

Jason Squire, Earl Cherniak QC and *Domenico Magisano for 2592931 Ontario Inc., et al*

Matthew Gottlieb and *Crystal Li,* for 2837083 Ontario Inc.

Chenyang Li, for 6917194 Canada Inc.

Sandra Johnston, for ALK Limited Partnership

Aiden Nelms, for McCowan & Associates Ltd.

Max Prince, for N&D Supermarket Limited

Chris Burr, for Johnson Health Technologies Canada Commercial Inc.

HEARD at Toronto: June 8, 2021

REVISED REASONS FOR DECISION

[1] These motions were heard and decided on June 8, 2021. I issued written reasons that evening that were subject to non-substantial revision and correction. I have made minor clerical changes – correcting a typographical error or inserting an obviously missing word – in the text of the reasons below. Such amplification as I have thought necessary to these reasons are contained at the end to make it clear what parts of these reasons were the "original" and what part was "supplementary".

[2] There are three motions before me, all concerning the fate of a related group of companies that I shall identify as the Crunch Group. The Crunch Group operate fitness clubs at a variety of locations in Ontario. It will escape the attention of none that fitness clubs have been among the hardest hit businesses by the variety of lock-downs and closure orders issued by the Government of Ontario in connection with the pandemic. These motions come just as it appears that a thaw in the lockdown may permit cautious optimism that the fitness clubs will be given permission to open and help Ontarians shed their Covid pounds.

[3] Following a series of defaults on approximately $12 million in credit facilities and various refinancing discussions throughout the second half of 2020, Bank of Montreal applied to the Court for a Receiver pursuant to the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 on March 2, 2021. As often happens in such cases, the Bank's application gave rise to a flurry of negotiations and activity. As happens much less often in such cases, that activity actually resulted in something of a deal emerging to avoid receivership.

[4] When the Bank's receivership application came on for a hearing on March 4, 2021, it was adjourned *sine die* on the terms set forth in the order. A Monitor was appointed to monitor the debtors' affairs and finances but not to take control of them. The debtors were to remain in possession of their property, to carry on business in the usual and ordinary course and not to dissipate their property. The Monitor was given a number of enumerated powers incidental to its role. Among them was the authority "as agent for the [Bank]" to undertake a sale and investment solicitation process (a "SISP" as these things are commonly called). The debtors and their officers and directors were ordered to cooperate with the Monitor in carrying out the SISP but little more was provided in the order of March 4, 2021 regarding the actual details of the SISP. This was left to the Monitor "as agent of the Bank" to determine.

[5] While the receivership application remained adjourned *sine die*, a stay of proceedings was put in place.

[6] What was the nature of the deal that caused this about-face? On March 3, 2021 the debtor companies signed a letter agreement drafted by the Bank confirming the following details among others:

a. The debtors or their nominee would make an irrevocable offer to the Bank for the sale by the Bank of the indebtedness of the companies at a stipulated minimum price without conditions beyond standard ones which offer must be open for acceptance until 5:00pm on April 29, 2021;

b. The debtors would consent to an order adjourning the receivership application and appointed the Monitor to run the SISP;

c. The debtors would provide their full co-operation in the SISP;

d. The SISP would run until to April 16, 2021 subject to possible extension on the recommendation of the Monitor to April 29, 2021; and

e. The companies would consent to a receivership order in the form provided by the Bank's lawyers to be held in escrow.

[7] The irrevocable offer mentioned in the Bank's letter was provided and was also dated March 3, 2021. For convenience sake, I shall refer to the Bank's counterparts in that agreement – entitled "Assignment of Debt and Security" - as the "purchaser". The purchaser is in fact two individuals and a corporation. It is sufficient to note that the purchaser is not at arm's length to the debtors.

[8] The recitals to this agreement mention the amount of the debt, the security held for it and that BMO "*has agreed to assign* and transfer the Loan Agreements (including the Indebtedness), together with its interest in the Collateral….to the *Assignee on the terms set forth herein*" (emphasis added). Among other features of this agreement to be noted (emphasis added to quotes by me where italics appear):

a. S. 1.1 – the parties agree that the recitals are true and correct and an integral part of the Agreement;

b. S. 1.2 "in consideration of the sum of [redacted] paid by the Assignee to BMO *by the end of business on April 30, 2021* (the Closing Date), BMO hereby does sell, assign and transfer" the debt and security;

c. S. 1.4 the parties "shall, from time to time, *take all reasonable steps necessary* to execute, acknowledge and deliver…such further instruments, transfers and other documents to give effect to this Agreement".

[9] The Agreement was amended on April 19, 2021. The recitals to that amending agreement note that the Agreement of March 3, 2021 had been signed by the purchaser and that it was "open for acceptance by BMO up to April 29, 2021 at 5:00pm". The

amending agreement increased the purchase price, amended the Closing Date from April 30 to the end of business on May 14, 2021 and added a requirement for the payment by the purchaser of a material deposit that would be non-refundable should the purchaser fail to close.

[10] The bank got exactly what it bargained for. The Monitor ran a full SISP. A number of interested parties participated in it. The debtors cooperated fully including to the point of assisting potential competitors to kick tires and look inside the operation.

[11] One potential bidder was involved in last minute negotiations with the Monitor right up until minutes before the 5:00pm expiry of the purchaser's offer – an expiry time, it might be recalled, that the Bank itself had inserted in the March 3, 2021 letter agreement the debtors and purchaser agreed to abide by.

[12] On April 29, 2021 the Bank accepted the offer of the purchaser as amended. The bank was not obliged to accept it – it could have continued to negotiate with the other potential purchaser if it wished, but it would have lost the backstop that the Agreement provided. The Bank's acceptance technically came half an hour late via a lawyer's email that asked for confirmation that the small delay would not be objected to (it was not).

[13] The Bank took two steps in the following days that have caused the purchaser and debtor companies to question the Bank's good faith, particularly in the context of growing pressure being applied by a disappointed bidder in the SISP. Unfortunately, I am persuaded that their fears are not without foundation. One of the two incidents created a distraction but did not in and of itself prevent a successful closing. The other one undeniably did.

[14] The March 3, 2021 letter agreement contained undertakings of the Bank regarding the operation of the debtors' bank accounts during the SISP period. Since the transaction was originally slated to be closed the day after the expiry of the SISP period (prior to the amendment on April 19, 2021 that extended Closing), this was originally of no particular moment. For whatever reason, nobody had thought to extend the assurances regarding the ordinary course operation of the banking accounts after April 29, 2021 when the Closing Date was extended to May 14, 2021. A number of the debtors' bank accounts were closed for a period of time with little warning on April 30, 2021. This was eventually sorted out but the debtors and purchaser contend (and I agree) a degree of confusion and distraction was caused by this issue arising as it did when the purchaser and management were expecting to be focused on closing. Given the continued court-ordered stay of proceedings, the presence of the Monitor and an agreed deal less than 24 hours old, some consultation and discussion before peremptory action might have been the preferable course for the Bank to adopt. Some accounts were re-opened the next day – one was not re-opened until May 6, 2021.

[15] I cannot find that the account closure incident is the reason why the purchaser failed to close on May 14, 2021 but it was certainly a contributing factor.

[16] Viewed in isolation, I should be loathed to attribute bad faith to actions of a bank for which clumsiness, ham-fistedness or obduracy are available and normally adequate explanations. However there was more at work here.

[17] The purchaser had raised money from a variety of sources to fund the purchase price. The assignment agreement was not conditional on financing but that does not mean that the purchaser had funds sitting in a dark bank vault waiting to be summoned. Financing had been arranged but like all financing it had some conditions.

[18] One material tranche of the financing had a condition that the purchaser provide a fully executed copy of the underlying agreement prior to the advance of funds. That condition strikes me as neither rare nor unreasonable. Whatever my opinion may be, it was the investor's condition and it was one that ought not to have been difficult to satisfy.

[19] On May 4, 2021, the purchaser requested a copy of the fully executed assignment agreement. It will be recalled that this agreement – and the amendment to it – had been fully executed on the part of the purchaser and debtors while waiting for the Bank to accept it by the deadline the Bank stipulated and agreed to.

[20] Later that same day, the Bank's lawyer wrote back saying that he "was planning on having the agreement signed and delivered on closing" and that he did "not want a fully signed copy floating around if the assignment doesn't actually proceed".

[21] The Bank's position was both mystifying and wrong. The agreement as amended had a fixed closing date: May 14, 2021. By the terms of the amending agreement, it was open for acceptance by BMO no later than fifteen days prior to the Closing Date and acceptance of a written contract is normally signified by signing in the place provided below the line "in witness whereof the parties have set their hand on the day and year first above written". Although s. 1.1 of the agreement uses language of present conveyance ("hereby does sell"), this language is found in a sentence which itself is future looking – referencing as it does the future payment of the purchase price by the end of business on the Closing Date. The Closing Date, it will be recalled, is necessarily later than the last day for acceptance of the agreement. The "consideration clause" does not reference actual receipt of the purchase price on or before signature but "the promises and mutual agreements and premises herein".

[22] Read as a whole – for that is how contracts are read – the agreement was unambiguously an executory contract rather than a simple present conveyance. The suggestion that the Bank might somehow be held to have agreed to waive receipt of the purchase price by delivering a fully executed copy of the agreement when acceptance was *intended* to precede closing is far-fetched. Were that distant prospect to have been a significant and *bona fide* concern, a party acting in good faith and actually desirous of closing the transaction it had just accepted might have addressed the concern in any one of a hundred ways. Belts and suspenders have never been in short supply in the desks

of commercial solicitors. Faced with the choice of being reasonable and flexible or crossing its arms and saying “No”, the Bank chose the latter course.

[23] The purchaser wrote back to the Bank’s lawyer on May 6, 2021 and explained why this refusal to deliver up an executed counterpart of the agreement already signed by the purchaser was proving problematic. They explained that some of the investors in the assignee required a fully executed agreement before advancing and offered to hold the fully executed agreement in escrow subject to being returned should the agreement fail to be completed. The same request was repeated via a telephone call on Monday May 10, 2021. The Bank’s lawyer wrote back the next day acknowledging that the Bank understood that the “agreements signed by BMO are being requested as part of the efforts to secure the necessary funds to complete the assignment” but repeating that the agreement as amended would not be provided prior to closing and that the agreement “is not conditional on financing” adding (wrongly) that the “agreements are the operative assignment documents”.

[24] The purchaser lost the commitment of the financier who had requested to see the executed copy of the agreement between the purchaser and the Bank instead of a mere lawyer’s email before funding. That loss was not necessary had the Bank been acting in good faith to compete the transaction and was the proximate cause why the transaction failed in fact to close by the close of business on May 14, 2021. The purchaser tried to cobble together a Plan B that has given rise to some controversy that I shall address below. Ultimately that too failed to get the job done.

[25] Just before 2pm on May 14, 2021, the Bank’s counsel wrote to the purchaser’s counsel indicating that the Bank was ready willing and able to close by 5:00 pm but that the “closing funds must be received by 5:00 pm today”. This email was written after the purchaser’s counsel wrote to indicate that funds were arriving but they were having administrative difficulties in getting them all cleared on time. A short extension of time to Monday to allow the funds to clear was requested.

[26] I have reviewed purchaser’s counsel’s trust ledger and I am satisfied that the difficulties mentioned were real. The funds were being gathered from a number of sources. One investor, for example, tendered a bank draft but the actual deposit of it did not show up in the firm’s trust ledger until the following business day (in this case, Monday morning).

[27] There is significant dispute as to how ready willing and able to close the purchaser was by the close of business on May 14, 2021. A big part of that dispute has to do with the debtors’ funds that were loaned to the purchaser in what was intended to be an overnight loan to facilitate closing following the loss of an investor on the theory that the investor would fund post-closing once satisfied that the Bank had indeed gone through with the transaction.

[28] I am satisfied that including the disputed funds loaned on a short-term basis by the debtor, the purchaser had the funds on hand and in the trust account ready to transfer by the next business day (Monday the 17th). There is however no getting round the fact that the funds required to press “send” and close the transaction were not deposited and cleared in the solicitor’s trust account of the purchaser by 5:00pm on Friday May 14, 2021. The loan from the debtors is thus something of a red herring here.

[29] It is also undisputed that the Bank never delivered an executed copy of the assignment agreement that it purported to accept via lawyer’s email on April 29,2021. The Bank advised through its lawyers that it finally signed the document on April 29, 2021 at approximately 1:30pm on May 14, 2021 but would not deliver it until after the purchaser was in funds and in a position to transfer same prior to 5:00pm on that day. It is not clear that the Bank ever indicated that it did not intend to sign the document - that on its face (as amended) required acceptance by a date and time well in advance of closing - until a few hours before closing. It does not appear that the purchaser learned of that position before May 4, 2021.

[30] Time is short and a decision needs to be rendered in a time frame that makes it relevant. I find that the Bank bears the responsibility for this agreement failing to close on May 14, 2021.

[31] I was urged to find that the Bank set about to sabotage the agreement drawn by the prospect of a richer deal from the bidder with whom it negotiated until the 11th hour on April 29, 2021. It was also suggested that there had perhaps been some leaking of information to a bidder. I do not find any need to infer the tiniest breach of protocol or duty in the bidder having become convinced that it potentially held a winning hand. Mr. Gottlieb was not born yesterday and if his client was in the running up until the very last second, it took no great leap of intuition on his part to infer that his client’s offer – even if not fully finalized – was one the Bank found attractive enough to try to massage into a binding format right up to the wire. His interventions in the days that followed – and they were in my view entirely proper and above-board – did have an effect. They were effective in applying just enough pressure on the Bank to dampen its enthusiasm towards working to complete the agreement it had bound itself to close.

[32] The Bank was not of course required to be enthusiastic. The common law requirement of good faith in the execution of contractual agreements, the explicit requirement in the contract to “take all reasonable steps necessary” to give effect to the Agreement and the recent addition of s. 4.2(1) of the *BIA* under which statute the receiver was appointed and the Notice of Application was initiated all provide me with ample grounds to hold the Bank to a higher standard than passive resistance to completing a deal it has agreed to and entered into under the protection of a process at least partly supervised by the Court.

[33] In assessing the Bank’s conduct, I attach some weight to the Bank’s surprising and abrupt decisions with regard to closing the operating bank accounts. As I have said,

these steps were not decisive in preventing closing but they were an utterly unnecessary irritant that might easily have been talked through and resolved short of unilateral damaging actions followed by negotiated resumption of activities.

[34] I attach far more weight to the baffling decision to leave the agreement unsigned and undelivered until hours before closing after the Bank unambiguously signified its acceptance of it via email. The tiniest degree of flexibility in maintaining a position that was as stubbornly held to as it was clumsily advanced would have prevented the purchaser's loss of critical financing from which all else flows. The Bank knew full well that the purchaser's financing hung in the balance and chose not to lift a finger to prevent it from being lost. It stuck to its guns holding to a position that it must objectively have understood to be at least debatable when solutions at zero cost and risk to the Bank could be had with the application of a few minutes thought and a modicum of common sense and good will.

[35] Our courts are still wrestling with the boundaries of what "good faith" in the execution of obligations means in practice. Whatever the boundaries may be, I am satisfied that this conduct is well outside of them. The Bank's lack of flexibility and willingness to compromise on an issue that could easily be addressed with no risk whatsoever to the Bank leads me to conclude that the Bank was consciously or unconsciously trying to free itself from the Agreement it made.

[36] I reach that conclusion without casting any stones in the direction of a party I was urged to call a bitter bidder. Mr. Gottlieb did not have all of the information the parties had and as I have said, I don't find the positions he took to have crossed any lines. His client's interest lay in exploring the opportunities to have a new process take place with only partial information about all that had in fact taken place to which his client was not privy. I find no fault in the way he pursued that interest nor can any have failed to appreciate what his client's interests were at every step of the way.

[37] The purchaser and debtors would have been able to close on time on May 14, 2021 but for the Bank's unreasonable actions when it should have been working in good faith towards closing.

[38] The commercial necessity for a resolution now rather than months from now – from the perspective of all of the parties- is quite clear. The status of the agreement between the Bank and the purchaser must be resolved before any consideration of a second SISP or any other process can be fairly considered. Further delay when these businesses are on the cusp of reopening could have unforeseen risks.

[39] The purchaser and debtors advise that they are ready willing and able to close if I so order. I do so order. I am ordering the Bank to be ready, willing and able to close the transaction by Friday June 11, 2021 at 3:00pm and to do so if the purchaser tenders the stipulated purchase price in readily available funds. The parties had already identified the documents needed and steps to be taken for closing on May 14, 2021 so I do not

think that I need to provide paint by number instructions. Should further direction by me be needed, I am prepared to provide it.

[40] The parties shall close on June 11 precisely as they were preparing to close on May 14 but for the funds transfer issues that arose at that time. There shall be no adjustment to the purchase price to account for the small delay – whatever order I may make on costs will not fully compensate for the loss of this last few weeks in preparing to re-open as the lock-down is ending and I find the delay was caused by the Bank. The equities divide reasonably evenly on that score.

[41] If and only if the transaction fails to close on June 11, 2021, I shall address the other two motions that were before me today (the matter of the transfer to Blaney McMurtry and the matter of approving the "run-off" SISP). There will be no excuses for failure to close – I require only a binary "yes or no" answer on June 11, 2021 as to whether I am required to address the other two motions or not. This is a simple transaction with sparse terms. I expect it to close if the money is there and I am taking the purchaser at its word that it will be.

[42] The parties will understand that these reasons have been assembled in a very short time frame following argument which itself was preceded by extensive evidence and facta. I invite them to provide me with a consolidated list of the nits, gremlins and typos that slipped through my fingers as I put this together. I shall issue any necessary corrections next week. I shall not alter the substance, but I reserve the right to supplement my reasons or to clarify the wording.

[43] I have not addressed costs and I do not intend to until after the matter has either closed or failed to close. I am not thereby encouraging anyone to start inflating their expectations nor indeed have I determined to award any costs to anyone – more the normal outcome of Commercial Court motions. I shall advise of the procedure if any to be followed after I am notified of the fate of the closing.

[44] The Monitor has kindly volunteered to take on the distribution of this endorsement. I ask the Monitor to assume the responsibility of reporting to me whether closing occurs on Friday on time as per my order.

[45] I thank the parties for their ably focused submissions in the best "real time litigation" traditions of the Commercial List.

[46] The following paragraphs are supplementary or clarifying remarks that go beyond clerical clean-up of the reasons as originally issued by me.

[47] My description of the facts was deliberately general so as not to disclose information regarding purchase price that might prove deleterious should the transaction fail to close. Among the figures that I did not disclose was the amount of the deposit paid by the purchaser in trust following the April 19, 2021 amending agreement. I do not wish it to be supposed that I did not take the fact that the Bank stood to retain – at least

potentially – a quite material deposit amount into account in assessing the actions of the bank against the standard of good faith that the common law, s. 4.2 of the BIA and the further assurances of the Agreement itself all impose.

[48] It is not necessary for me to attribute lack of good faith to any particular motive and I do not. I mentioned three background facts as supplying an indication that lack of good faith may be at play. These were (i) the potentially non-refundable deposit; (ii) the intense negotiations with another bidder up until the last minute prior to acceptance of the Agreement; and (iii) the pressures exerted by that same bidder in the following days which provided some assurances of continuing interest of that same bidder regarding terms the Bank had clearly indicated its interest in. Lack of good faith (a term that should not be casually equated with "bad faith") is an assessment made regarding actual objective facts of things done or not done and is not premised solely on questionable motives. I have had regard to the circumstances suggesting motive, but I do not purport to be reading the Bank's corporate mind. I can however infer that the three factors mentioned may have played a role in hindering the Bank from focusing on the first order of business which was to work in good faith to close the Agreement that it had voluntarily agreed to without being distracted by visions of what might be were it not to close.

[49] Regarding the closure of the bank accounts, as indicated above, this was eventually sorted out but it contributed to the overall problem. It should not have happened, particularly where there was a court-ordered stay of proceedings in effect at the Bank's request and which the Bank evidently thought did not apply to its own actions.

[50] As regards the executed Agreement issue, I have expressed my views regarding the executory nature of the Agreement on acceptance and prior to Closing. I do not wish to be taken as finding fault with counsel for adopting a position that had at least some foundation in the awkward wording of the Agreement itself simply because a judge subsequently disagreed with that position. These things happen. Where I found that the good faith standard came into play was in the failure of the Bank to address the issue reasonably when it arose. At the very least, it should have been clear that there was at least some chance that the Bank was wrong in its insistence that it had no obligation to deliver the executed Agreement after an unambiguous acceptance of it. Clinging to that position in the face of objectively reasonable doubt as to its correctness coupled with clear indications that it was *needlessly* placing the completion of the Agreement in jeopardy is where I found the behaviour veered past the boundaries of good faith conduct. The means of satisfying the Bank's concerns about delivery of an executed Agreement were numerous and risk-free. The purchaser's counsel immediately offered one of them to accommodate the Bank. In the world of good faith, some discussion about how to resolve the concern ought to have followed.

[51] Since writing this supplement, I have been advised that the Agreement was closed per my order on June 11, 2021. I withheld release of these reasons in the event the parties had noticed errors that escaped my attention. Evidently, they did not, a fact more

likely due to their being busy with getting the deal done rather than any tribute to my typing accuracy.

S.F. Dunphy J.

Date: June 8 and June 18, 2021

TAB 7

SUPREME COURT OF CANADA

CITATION: Bhasin *v.* Hrynew, 2014 SCC 71, [2014] 3 S.C.R. 494 **DATE:** 20141113
DOCKET: 35380

BETWEEN:

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

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

REASONS FOR JUDGMENT: (paras. 1 to 112) Cromwell J. (McLachlin C.J. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring)

Harish Bhasin, carrying on business as Bhasin & Associates *Appellant*

v.

Larry Hrynew and
Heritage Education Funds Inc.

(formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited) *Respondents*

Indexed as: Bhasin *v.* Hrynew

2014 SCC 71

File No.: 35380.

2014: February 12; 2014: November 13.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Contracts — Breach — Performance — Non-renewal provision — Duty of good faith — Duty of honest performance — Agreement governing relationship between company and retail dealer providing for automatic contract renewal at end of three-year term unless parties giving six months' written notice to contrary — Company deciding not to renew dealership agreement — Retail dealer lost value of business and majority of sales agents solicited by competitor agency — Retail dealer suing company and competitor agency — Whether common law requiring new general duty of honesty in contractual performance — Whether company breaching that duty.

Damages — Quantum — Contracts — Breach — Performance — Non-renewal provision — Duty of good faith — Duty of honest performance — Agreement governing relationship between company and retail dealer providing for automatic contract renewal at end of three-year term unless parties giving six months' written notice to contrary — Company deciding not to renew dealership agreement — Retail dealer lost value of business and majority of sales agents solicited by competitor agency — Retail dealer suing company and competitor agency — What is appropriate measure of damages.

C markets education savings plans to investors through retail dealers, known as enrollment directors, such as B. An enrollment director's agreement that took effect in 1998 governed the relationship between C and B. The term of the contract was three years. The applicable provision provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

H was another enrollment director and was a competitor of B. H wanted to capture B's lucrative niche market and previously approached B to propose a merger of their agencies on numerous occasions. He also actively encouraged C to force the merger. B had refused to participate in such a merger. C appointed H as the provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C's enrollment directors. The role required H to conduct

audits of C's enrollment directors. B objected to having H, a competitor, review his confidential business records.

During C's discussions with the Commission about compliance, it was clear that C was considering a restructuring of its agencies in Alberta that involved B. In June 2000, C outlined its plans to the Commission and they included B working for H's agency. None of this was known by B. C repeatedly misled B by telling him that H, as PTO, was under an obligation to treat the information confidentially. It also responded equivocally when B asked in August 2000 whether the merger was a "done deal". When B continued to refuse to allow H to audit his records, C threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement. At the expiry of the contract term, B lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by H's agency.

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

Held: The appeal with respect to C should be allowed and the appeal with respect to H dismissed. The trial judge's assessment of damages should be varied to $87,000 plus interest.

Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear. Two incremental steps are in order to make the common law more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second step is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations. Taking these two steps will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

There is an organizing principle of good faith that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. An organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations. It is a standard that helps to understand and develop the law in a coherent and principled way.

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

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

The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties.

The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

The objection to C's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty

of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step.

This new duty of honest performance is a general doctrine of contract law that imposes as a contractual duty a minimum standard of honesty in contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability. However, the precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements.

The duty of honest performance should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner

in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.

In this case, the trial judge did not make a reversible error by adjudicating the issue of good faith. C breached the 1998 Agreement when it failed to act honestly with B in exercising the non-renewal clause. The trial judge concluded that C acted dishonestly with B throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to H's role as PTO. The trial judge's detailed findings amply support this overall conclusion.

C is liable for damages calculated on the basis of what B's economic position would have been had C fulfilled its duty. While the trial judge did not assess damages on that basis given the different findings in relation to liability, the trial judge made findings that permit this Court to do so. These findings permit damages to be assessed on the basis that if C had performed the contract honestly, B would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to H. It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. B is entitled to damages in the amount of $87,000. The Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy. As such, it follows that the claims against H were rightly dismissed.

Cases Cited

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Canada Inc. v. Keays, 2008 SCC 39, [2008] 2 S.C.R. 362; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3; *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595; *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Yam Seng Pte Ltd. v. International Trade Corporation Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm.) 1321; *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (BAILII); *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R. 234; *Burger King Corporation v. Hungry Jack's Pty Ltd.*, [2001] NSWCA 187, 69 N.S.W.L.R. 558; *R. v. Jones*, [1994] 2 S.C.R. 229; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177; *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533; *GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd.*, [2003] FCA 50 (AustLII); *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429; *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79 (1933); *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Bank of Montreal v. Bail Ltée*, [1992]

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APPEAL from a judgment of the Alberta Court of Appeal (Côté and Paperny JJ.A. and Belzil J. (*ad hoc*)), 2013 ABCA 98, 84 Alta. L.R. (5th) 68, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, [2013] 11 W.W.R. 459, [2013] A.J. No. 395 (QL), 2013 CarswellAlta 822, setting aside a decision of Moen J., 2011 ABQB 637, 526 A.R. 1, 96 B.L.R. (4th) 73, [2012] 9 W.W.R. 728, [2011] A.J. No. 1223 (QL), 2011 CarswellAlta 1905. Appeal allowed in part.

Neil Finkelstein, *Brandon Kain*, *John McCamus* and *Stephen Moreau*, for the appellant.

Eli S. Lederman, *Jon Laxer* and *Constanza Pauchulo*, for the respondents.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

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

II. Facts and Judicial History

Overview and Issues

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

[3] Can-Am markets education savings plans ("ESPs") to investors through retail dealers, known as enrollment directors, such as Mr. Bhasin. It pays the enrollment directors compensation and bonuses for selling ESPs. The enrollment directors are in effect small business owners and the success of their businesses depends on them building a sales force. It took Mr. Bhasin approximately 10 years to build his sales force, but his business thrived and Can-Am gave him numerous awards and prizes recognizing him as one of their top enrollment directors in Canada: 2011 ABQB 637, 526 A.R. 1, at paras. 51, 238 and 474.

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

[5] That said, there were some features of the 1998 Agreement that are similar to provisions typically found in franchise agreements. Mr. Bhasin was obliged to sell Can-Am investment products exclusively and owed it a fiduciary duty. Can-Am owned the client lists, was responsible for branding and implemented central policies that applied to all enrollment directors: see cls. 4.1, 5.2, 5.3 and 4.7. Mr.

Bhasin could not sell, transfer, or merge his operation without Can-Am's consent, which was not to be withheld unreasonably: see cls. 4.5 and 11.4.

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

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

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

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

[10] The Alberta Securities Commission raised concerns about compliance issues among Can-Am's enrollment directors. In late 1999, the Commission required Can-Am to appoint a single provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws: trial reasons, at paras. 149, 152 and 160. Can-Am appointed Mr. Hrynew to that position in September of that year. The role required him to conduct audits of Can-Am's enrollment directors. Mr. Bhasin and Mr. Hon, another enrollment director, objected to having Mr. Hrynew, a competitor, review their confidential business records: paras. 189-96.

[11] Can-Am became worried that the Commission might revoke its licence and, in 1999 and 2000, it had many discussions with the Commission about compliance. During those discussions, it was clear that Can-Am was considering a restructuring of its agencies in Alberta that involved Mr. Bhasin. In June 2000, Can-Am outlined its plans to the Commission and they included Mr. Bhasin working for

Mr. Hrynew's agency. The trial judge found that this plan had been formulated before June 2000: para. 256. None of this was known by Mr. Bhasin: paras. 243-46.

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

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

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

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

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

[17] The appeal raises four issues:

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

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

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

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

III. Analysis

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

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

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

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

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

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

(1) Decisions and Positions of the Parties

(a) *Decisions*

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

[23] First, the trial judge decided that the 1998 Agreement was a type of agreement which as a matter of law requires good faith performance. She recognized that the 1998 Agreement did not fall within any of the existing categories of contract, such as employment, insurance and franchise agreements, which have been held to require good faith performance. She concluded, however, that the Agreement was

analogous to a franchise or employment contract, and so by analogy to these cases, she implied a term of good faith performance as a matter of law. The contract was not balanced from its inception and the relationship placed the enrollment director in a position of inherent and predictable vulnerability: paras. 67-86.

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

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

[26] Turning to the issue of breach, the trial judge found that Can-Am had breached the agreement, first by requiring Mr. Bhasin to submit to an audit by Mr. Hrynew and to provide the latter with access to his business records, and second by exercising the non-renewal clause in a dishonest and misleading manner and for an

improper purpose. The non-renewal clause was not intended to permit Can-Am to force a merger of the Bhasin and Hrynew agencies, but that was the purpose for which Can-Am exercised this power: para. 261. The trial judge also found both respondents liable for unlawful means conspiracy and found Mr. Hrynew liable for inducing Can-Am's breach of its contract with Mr. Bhasin.

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

[28] Moreover, the Court of Appeal held that a term cannot be implied where it goes against an express term of the contract. Here, the parties did not intend a perpetual contract, since they included a term allowing either party to unilaterally trigger its expiration prior to the end of each three-year term. The trial judge's approach was inconsistent with the non-renewal provision of the contract. The motive for triggering expiration was not restricted under the Agreement. The

implication of a term of good faith also violated the entire agreement clause. The court held that the evidence of assurances given by Can-Am as to how the non-renewal power would be exercised fell afoul of the parol evidence rule and should not have been considered. Since the Court of Appeal held there was no breach of contract, the basis for the claims in unlawful means conspiracy and inducing breach of contract also disappeared.

(b) *Positions of the Parties*

[29] Mr. Bhasin advances two related positions on appeal. His broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power without regard for that objective: A.F., at para. 51. This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations. Mr. Bhasin contends that common law in Canada is increasingly isolated as other jurisdictions embrace a greater role for good faith in contract law: A.F., at paras. 27-32. The recognition of a general duty of good faith would constitute an incremental advance in the law, given the numerous specific situations that already give rise to a duty of good faith. Mr. Bhasin relies on the findings of the trial judge that the respondents improperly and dishonestly used their non-renewal right to compel Mr. Bhasin to merge with his competitor. Mr. Bhasin

contends that the respondents had no legitimate business reason for not renewing the contract. He also says that the entire agreement clause should be construed narrowly, and that express language is needed for such a clause to derogate from a duty of good faith: A.F., at para. 83.

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

[31] Unsurprisingly, the respondents see things very differently. While they accept that good faith plays a role in Canadian contract law, they submit that this role is much more modest than Mr. Bhasin suggests. They say that such a duty arises only in certain classes of contract, such as employment contracts, and in contracts involving discretionary powers: R.F., at para. 52. In the employment context, the duty applies only to the manner in which a contract is terminated. The contract in this case was negotiated between commercial parties to whom the policy considerations underlying employment law doctrine do not apply. Mr. Bhasin is alleging a right to a perpetual, or at least indefinite, contract with the respondents. The contract in this

case could not be said to be discretionary, because it provided simply that on six months' notice, either party could terminate the Agreement. The respondents submit that there is no ambiguity in the wording of the non-renewal clause of the contract and so there is no basis for implying other terms or for relying on extrinsic evidence of the parties' intentions. The entire agreement clause specifically precluded the implication of any terms other than the express terms of the contract.

(2) Analysis

(a) *Overview*

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

[33] In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing

principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

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

(b) *Good Faith as a General Organizing Principle*

(i) Background

[35] The doctrine of good faith traces its history to Roman law and found acceptance in early English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634, at p. 637, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (H.C.A.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113, "in contracts of all kinds, it is of the highest

importance that courts of law should compel the observance of honesty and good faith": p. 113-14. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162, at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts; see also *Herbert v. Mercantile Fire Ins. Co.* (1878), 43 U.C.Q.B. 384; R. Powell, "Good Faith in Contracts" (1956), 9 *Curr. Legal Probs.* 16.

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

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

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

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

[39] Other courts are of the view that there exists no such general duty of good faith in all contracts: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at paras. 53-54; *Mesa Operating Limited Partnership v. Amoco*

Canada Resources Ltd. (1994), 149 A.R. 187 (C.A.), at paras. 15-19, *per* Kerans J.A., *dubitante*; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15, at para. 131; see G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 338-46. The detractors of such a general duty of good faith have accepted a limited role for good faith in certain contexts but have held that it would create commercial uncertainty and undermine freedom of contract to recognize a general duty of good faith that would permit courts to interfere with the express terms of a contract.

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

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

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

[42] Anglo-Canadian common law has developed a number of rules and doctrines that call upon the notion of good faith in contractual dealings; it is a concept that underlies many elements of modern contract law: S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at para. 550; J. D. McCamus *The Law of Contracts* (2nd ed. 2012), at pp. 835-38; OLRC, at p. 165; Belobaba, at pp. 75-76; J. F. O'Connor, *Good Faith in English Law* (1990), at pp. 17-49; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev*. 433. The approach, not unfairly, has been characterized as developing "piecemeal solutions in response to demonstrated problems": *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] 1 Q.B. 433 (C.A.), at p. 439, *per* Bingham L.J. (as he then was). Thus we see, for example, that good faith notions have been applied to

particular types of contracts, particular types of contractual provisions and particular contractual relationships. It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability, and plays a role in interpreting and implying contractual terms. The difficulty with this "piecemeal" approach, however, is that it often fails to take a consistent or principled approach to similar problems. A brief review of the current landscape of good faith will show the extent to which this is the case.

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

[44] Good faith also plays a role in the law of implied terms, particularly with respect to terms implied by law. Terms implied by law redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at p. 457, *per* McLachlin J. (as she then was); see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, *per* McLachlin J., concurring. The implication

of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions by filling in gaps in the written agreement of the parties: *Chitty on Contracts*, at para. 1-051. In *Mesa Operating*, the Alberta Court of Appeal implied a term that a power of pooling properties for the purpose of determining royalty payments be exercised reasonably. The court implied this term in order to give effect to the intentions of the parties rather than as a requirement of good faith, but Kerans J.A. stated that "[t]he rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith": para. 22. Many other examples may be found in Waddams, *The Law of Contracts*, at paras. 499-506.

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

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

[47] There have been many attempts to bring a measure of coherence to this piecemeal accretion of appeals to good faith: see, among many others, McCamus, at pp. 835-68; S. K. O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007), 86 *Can. Bar Rev*. 193, at pp. 196-204; Waddams, *The Law of Contracts*, at paras. 494-508; R. S. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 *Va. L. Rev*. 195; S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1981), 94 *Harv. L. Rev*. 369. By way of example, Professor McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: (1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties (pp. 840-56; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43, at paras. 49-50).

[48] While these types of cases overlap to some extent, they provide a useful analytical tool to appreciate the current state of the law on the duty of good faith.

They also reveal some of the lack of coherence in the current approach. It is often unclear whether a good faith obligation is being imposed as a matter of law, as a matter of implication or as a matter of interpretation. Professor McCamus notes:

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

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

[50] *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187, is an example of the second type of situation (exercise of contractual discretion). The lease of a helicopter included an option to buy at the "reasonable fair market value of the helicopter as established by Lessor": para. 2. This Court held, at para. 34, that, "[c]learly, the lessor is not in a position, by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option." The Court did not discuss the basis for implying the term, but suggested that in the absence of a reasonableness requirement, the option would be a mere agreement to agree and thus would be unenforceable, which means that the implication of the term was necessary to give business efficacy to the agreement.

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

permit "a capricious or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner": p. 487.

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

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

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

employee: para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 98. Good faith in this context did not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce: *Wallace*, at para. 76.

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

[56] This Court has also recognized that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids: *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R.

860, at para. 88; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 58-59; A. C. McNeely, *Canadian Law of Competitive Bidding and Procurement* (2010), at pp. 245-54.

[57] Developments in the United Kingdom and Australia point to enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine. Good faith in contract performance has received increasing prominence in English law, despite its "traditional . . . hostility" to the concept: *Yam Seng Pte Ltd. v. International Trade Corporation Ltd.*, [2013] EWHC 111, [2013] 1 AII E.R. (Comm.) 1321 (Q.B.), at para. 123, citing E. McKendrick, *Contract Law* (9th ed. 2011), at pp. 221-22; see also *Chitty on Contracts*, at para. 1-039. In *Yam Seng*, Leggatt J. held that a number of specific duties embodying good faith can be implied based on the presumed intentions of the parties according to the traditional approach for implying terms: para. 131. Leggatt J. identified a number of these implied duties, including honesty, fidelity to the parties' bargain, cooperation, and fair dealing: paras. 135-50. Leggatt J. stated that "[a] paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust": para. 135; see D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract" (2014), 77 *Mod. L. Rev*. 475. The Court of Appeal considered the *Yam Seng* decision in *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (BAILII), where it confirmed that good faith was

not a general principle of English law, but that it could be an implied term in certain categories of cases: paras. 105 and 150.

[58] Australian courts have also moved towards a greater role for good faith in contract performance: *Cheshire and Fifoot's Law of Contract* (9th Australian ed. 2008), at paras. 10.43-10.47. The duty of good faith in its modern form was recognized by Priestley J.A. in *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R. 234 (C.A.). There is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances. The duty of good faith can be implied as a matter of law or as a matter of fact, although the cases are not always clear on the basis on which the term is being implied. Australian courts have taken a broad view of what constitutes good faith: see, e.g., *Burger King Corporation v. Hungry Jack's Pty Ltd.*, [2001] NSWCA 187, 69 N.S.W.L.R. 558. The law of good faith performance in Australia is still developing and remains unsettled: E. Peden, "Good faith in the performance of contract law" (2004), 42 *L.S.J.* 64, at p. 64. However, it is clear that the duty of good faith requires adherence to standards of honest conduct: A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev*. 66, at p. 76; *Burger King*, at paras. 171 and 189.

(iii) The Way Forward

[59] This selective survey supports the view that Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear:

Belobaba; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 95; B. J. Reiter, "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev*. 705, at pp. 711-12. It also shows that in Canada, as well as in the United Kingdom and Australia, there is increasing attention to the notion of good faith, particularly in the area of contractual performance. Opponents of any general obligation of good faith prefer the traditional, organic development of solutions to address particular problems as they arise: see, e.g., M. G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385; D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435, at pp. 436 and 440. However, foreclosing some incremental development of the law at the level of principle would go beyond what prudent caution requires and evidence an almost "perverted pride" — to use Swan's term, at p. 148 — in the law's failings.

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

[61] The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev*. 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev*. 55, at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev*. 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

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

(iv) Towards an Organizing Principle of Good Faith

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

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

[65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those

interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

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

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

> This case presents the Court with the difficult task of mediating between, if not resolving, the conflicting views of the proper scope of the doctrine of unjust enrichment. It is my conclusion that we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery . . . .

. . .

> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

[68] The flexible approach that was taken in *Peel* recognizes that "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain": p. 788. In that case, this Court further developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what I propose to do with regards to the organizing principle of good faith.

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

obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

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

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

(v) Should There Be a New Duty?

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

[73] In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in

Contractual Performance: Recent Developments", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

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

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

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

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

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

[78] Certainly, any modification of the duty of honest performance would need to be in express terms. A generically worded entire agreement clause such as cl. 11.2 of the Agreement does not indicate any intention of the parties to depart from the basic tenets of honest performance: see *GEC Marconi Systems Pty Ltd. v. BHP*

Information Technology Pty Ltd., [2003] FCA 50 (AustLII), at para. 922, *per* Finn J.; see also O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 96.

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

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

7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

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

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

[83] The *Civil Code of Québec* recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: see arts. 6, 7 and 1375. While this is not the place to expound in detail on good faith in the Quebec civil law, it is worth noting that good faith is seen as having two main aspects. The first is the subjective aspect, which is concerned with the state of mind of the actor, and addresses conduct that is, for example, malicious or intentional. The second is the objective aspect which is concerned with whether conduct is unacceptable according to the standards of reasonable people. As J.-L. Baudouin and P.-G. Jobin explain, [TRANSLATION] "a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of

conduct that are generally accepted in society": *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 132. The notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract: *ibid.*, at para. 161; *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429, at p. 436.

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

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

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

material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

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

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

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

[88] The duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel, but it is not subsumed by them. Unlike promissory estoppel and estoppel by representation, the contractual duty of honest performance

does not require that the defendant intend that his or her representation be relied on and it is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 5; *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; Waddams, *The Law of Contracts*, at paras. 195-203; B. MacDougall, *Estoppel* (2012), at pp. 142-44. As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on, and breach of it supports a claim for damages according to the contractual rather than the tortious measure: see, e.g., *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, cited with approval in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 19.

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

Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts: *Wallace*, at para. 76.

[90] It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr. Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para. 32. Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.

[91] I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (N.J. Super. Ct. 1972), aff'd 307 A.2d 598 (N.J. 1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (Pa. 1978), at pp. 741-42. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F.Supp. 1173 (D. Mass. 1984), at p. 1184; *Pitney-Bowes, Inc. v. Mestre*, 517 F.Supp. 52 (S.D. Fla. 1981), cert. denied, 464 U.S. 893 (1983).

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

[93] A summary of the principles is in order:

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

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

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

(3) Application

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

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

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

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

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

Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

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

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

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

trial judge concluded that the official was "not honest with [Mr.] Bhasin" at that meeting: para. 247.

[101] When Mr. Bhasin complained about Mr. Hrynew's conflict of interest in being both auditor and competitor, Can-Am in effect blamed the Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was not truthful. Can-Am failed to mention that it had proposed to appoint a non-resident of Alberta who was clearly not qualified according to the Commission's criteria or that it had decided to appoint Mr. Hrynew even though he did not meet the Commission's criteria either: trial reasons, at paras. 195 and 221. It also misrepresented — repeatedly — to Mr. Bhasin that Mr. Hrynew was bound by duties of confidentiality and segregation of activities in the course of an audit, when in fact there was no such requirement. Can-Am did not even finalize its PTO contract with Mr. Hrynew until March 2001 and, notwithstanding its assurances to Mr. Bhasin, it failed to include such a provision in the contract: paras. 190-221. As the trial judge found, Can-Am "could not possibly have missed this honestly in the PTO agreement, given that [Mr. Bhasin's] very protests about [Mr.] Hrynew's appointment as PTO were about confidentiality and segregation of activities": para. 221. The judge also found that Can-Am repeated these "lies" about Mr. Hrynew's supposed obligations of confidentiality even after the PTO agreement, without these protections, had been signed: para. 204.

[102] Can-Am pushed on with the requirement that Mr. Hrynew audit Mr. Bhasin's agency as if it were required to do so by the Commission even though it had arranged to have one of its employees conduct the audit of Mr. Hrynew's agency: trial reasons, at para. 198.

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

C. *Liability for Civil Conspiracy and Inducing Breach of Contract*

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

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

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

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

D. *What Is the Appropriate Measure of Damages?*

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

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

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

noted that the trial judge had accepted the evidence of their expert witness, Mr. Bailey, that the value was $87,000.

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

IV. Disposition

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

Appeal allowed in part.

Solicitors for the appellant: McCarthy Tétrault, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto.

TAB 8

C.M. Callow Inc. *Appellant*

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
Respondents

and

Canadian Federation of Independent Business and
Canadian Chamber of Commerce
Interveners

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, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Breach — Performance — Duty of honest performance — Clause in winter maintenance agreement permitting unilateral termination of contract without cause upon 10 days' notice — Contract terminated by condominium corporations with required notice to contractor — Contractor suing for breach of contract — Trial judge finding that statements and conduct by condominium

C.M. Callow Inc. *Appelante*

c.

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
et
Carleton Condominium Corporation No. 877
Intimées

et

Fédération canadienne de l'entreprise indépendante et
Chambre de commerce du Canada
Intervenantes

RÉPERTORIÉ : C.M. CALLOW INC. *c.* ZOLLINGER

2020 CSC 45

N° du greffe : 38463.

2019 : 6 décembre; 2020 : 18 décembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Contrats — Violation — Exécution — Obligation d'exécution honnête — Clause d'un contrat d'entretien hivernal permettant la résiliation unilatérale du contrat sans motif moyennant un préavis de 10 jours — Résiliation du contrat par des associations condominiales avec remise du préavis requis à l'entrepreneur — Poursuite pour violation de contrat par l'entrepreneur — Conclusion de la juge

corporations actively deceived contractor and led it to believe contract would not be terminated — Trial judge awarding damages for breach of contract — Whether exercise of termination clause constituted breach of duty of honest performance.

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

In early 2013, Baycrest decided to terminate the winter maintenance agreement but chose not to inform Callow of its decision at that time. Throughout the spring and summer of 2013, Callow had discussions with Baycrest regarding a renewal of the winter maintenance agreement. Following those discussions, Callow thought that it was likely to get a two-year renewal of the winter maintenance contract and that Baycrest was satisfied with its services. During the summer of 2013, Callow performed work above and beyond the summer maintenance contract at no charge, which it hoped would act as an incentive for Baycrest to renew the winter maintenance agreement.

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

de première instance portant que les déclarations et la conduite des associations condominiales ont activement induit l'entrepreneur en erreur et l'ont amené à croire que le contrat ne serait pas résilié — Dommages-intérêts octroyés par la juge du procès pour violation de contrat — Le recours à la clause de résiliation a-t-il constitué un manquement à l'obligation d'exécution honnête?

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

Au début de 2013, Baycrest a décidé de résilier le contrat d'entretien hivernal, mais a choisi de ne pas informer Callow de sa décision à ce moment-là. Au cours du printemps et de l'été 2013, Callow a eu des discussions avec Baycrest sur le renouvellement du contrat d'entretien hivernal. À la suite de ces discussions, Callow croyait qu'elle allait probablement obtenir un renouvellement de deux ans du contrat d'entretien hivernal et que Baycrest était satisfaite de ses services. Pendant l'été 2013, Callow a exécuté des travaux à titre gratuit qui dépassaient ce qui était prévu dans le contrat d'entretien estival, et qui, souhaitait-elle, inciteraient Baycrest à renouveler le contrat d'entretien hivernal.

Baycrest a informé Callow de sa décision de résilier le contrat d'entretien hivernal en septembre 2013. Callow a déposé une déclaration alléguant une violation de contrat, soutenant que Baycrest avait agi de mauvaise foi. La juge de première instance a statué que le principe directeur d'exécution de bonne foi et l'obligation d'exécution honnête étaient en jeu. Elle était convaincue que Baycrest avait activement trompé Callow à compter du moment où la décision de résilier le contrat avait été prise jusqu'en septembre 2013. Elle a en outre conclu que Baycrest avait agi de mauvaise foi en retenant cette information pour faire en sorte que Callow exécute le contrat d'entretien estival et en continuant de laisser entendre que le contrat n'était pas en péril, même en sachant que Callow assumait des tâches additionnelles pour accroître ses chances d'obtenir le renouvellement du contrat d'entretien hivernal. La juge a accordé des dommages-intérêts à Callow, afin de la placer dans la même situation que si le manquement n'avait pas eu lieu. La Cour d'appel a annulé le jugement de première

terms of the winter maintenance agreement. Further, it held that any deception in the communications during the summer of 2013 related to a new contract not yet in existence, namely the renewal that Callow hoped to negotiate, and therefore was not directly linked to the performance of the winter contract.

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

Per Wagner C.J. and Abella, Karakatsanis, Martin and Kasirer JJ. : The duty to act honestly in the performance of the contract precluded the active deception by Baycrest by which it knowingly misled Callow into believing that the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied. Accordingly, the Court of Appeal should not have interfered with the conclusions of the trial judge.

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

The organizing principle of good faith recognized in *Bhasin* is not a free-standing rule, but instead manifests itself through existing good faith doctrines. While the duty of honest performance and the duty to exercise discretionary powers in good faith are distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. The duty of honest performance shares a common

instance, statuant que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal. Par ailleurs, la Cour d'appel a statué que toute tromperie dans les communications au cours de l'été 2013 avait trait à un nouveau contrat qui n'existait pas encore, soit le renouvellement que Callow espérait négocier, de sorte qu'elle n'était pas directement liée à l'exécution du contrat d'entretien hivernal.

Arrêt (la juge Côté est dissidente) : Le pourvoi est accueilli et le jugement de la juge de première instance est rétabli.

Le juge en chef Wagner et les juges Abella, Karakatsanis, Martin et Kasirer : L'obligation d'agir honnêtement dans l'exécution du contrat empêchait Baycrest de se livrer à une tromperie active par laquelle elle a intentionnellement induit Callow en erreur, l'amenant ainsi à croire que le contrat d'entretien hivernal ne serait pas résilié. En se prévalant malhonnêtement de la clause de résiliation, elle a manqué à l'obligation d'honnêteté au sujet d'une question directement liée à l'exécution du contrat, même si le délai de préavis de 10 jours a été respecté. Par conséquent, la Cour d'appel n'aurait pas dû modifier les conclusions de la juge de première instance.

L'obligation d'exécution honnête des contrats, énoncée dans l'arrêt *Bhasin* c. *Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, s'applique à tous les contrats et oblige les parties à ne pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat. Lorsqu'il s'agit de décider si la malhonnêteté est liée à un contrat en particulier, la question pertinente est de savoir si un droit prévu au contrat a été exercé, ou si une obligation qui y est décrite a été exécutée de manière malhonnête. Bien qu'il ne faille pas assimiler l'obligation d'exécution honnête à une obligation positive de divulgation, dans une situation où une partie contractante ment ou induit intentionnellement l'autre partie en erreur, l'absence d'obligation positive de divulgation ne fait pas obstacle à une obligation pour la première de corriger une fausse impression créée par ses propres gestes.

Le principe directeur de bonne foi reconnu dans l'arrêt *Bhasin* n'est pas une règle autonome, mais il se manifeste plutôt par les doctrines existantes en matière de bonne foi. Bien que l'obligation d'exécution honnête et l'obligation d'exercer des pouvoirs discrétionnaires de bonne foi soient distinctes, à l'instar de chacune des diverses manifestations du principe directeur, elles ne doivent pas être considérées comme étant déconnectées l'une de l'autre. L'obligation

methodology with the duty to exercise contractual discretionary powers in good faith by fixing on the wrongful exercise of a contractual prerogative. Each of the specific legal doctrines derived from the organizing principle rest on a requirement of justice that a contracting party have appropriate regard to the legitimate contractual interests of their counterparty. They need not subvert their own interests to those of the counterparty by acting as a fiduciary or in a selfless manner. This requirement of justice reflects the notion that the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract. Those rights and obligations must be exercised and performed honestly and reasonably and not capriciously or arbitrarily where recognized by law.

The duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right since the duty, irrespective of the intention of the parties, applies to the performance of all contracts, and by extension, to all contractual obligations and rights. Instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest. This focus on the manner in which the termination right was exercised should not be confused with whether the right could be exercised. No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith.

The requirements of honesty in performance can go further than prohibiting outright lies. Whether or not a party has knowingly misled its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. One can mislead through action, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct.

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

d'exécution honnête partage une méthodologie avec l'obligation d'exercer les pouvoirs discrétionnaires de nature contractuelle de bonne foi en se concentrant sur l'exercice fautif d'une prérogative contractuelle. Chacune des règles de droit particulières tirées du principe directeur repose sur une exigence de justice voulant qu'une partie contractante prenne en compte comme il se doit les intérêts contractuels légitimes de son cocontractant. Elle n'a pas à subordonner ses propres intérêts à ceux du cocontractant en agissant comme un fiduciaire ou d'une manière altruiste. Cette exigence de justice est le reflet de la notion selon laquelle le marché conclu — les droits et les obligations convenus — est la source première d'équité entre les parties à un contrat. Ces droits et obligations doivent être exercés et exécutés de manière honnête et raisonnable, et non de façon abusive ou arbitraire.

L'obligation d'honnêteté, en tant que doctrine du droit des contrats, a une fonction restrictive sur l'exercice d'un droit par ailleurs complet et clair. Il en est ainsi puisque l'obligation, sans égard à l'intention des parties, s'applique à l'exécution de tous les contrats et, par extension, à toutes les obligations et à tous les droits contractuels. Plutôt que de restreindre la décision de résilier en soi, l'obligation d'exécution honnête donne lieu à des dommages-intérêts lorsque le droit a été exercé de manière malhonnête. Il ne faut pas confondre cette attention portée sur la manière dont le droit de résiliation a été exercé avec la question de savoir si le droit pouvait être exercé. Aucun droit contractuel, y compris un droit de résilier, ne peut être exercé malhonnêtement et, de par le fait même, contrairement aux exigences de la bonne foi.

Les exigences d'honnêteté dans l'exécution du contrat peuvent aller plus loin que l'interdiction de mensonges éhontés. Répondre à la question de savoir si une partie a intentionnellement induit en erreur son cocontractant est une décision éminemment factuelle et peut comprendre des mensonges, des demi-vérités, des omissions et même du silence, selon les circonstances. On peut induire en erreur activement, en disant quelque chose directement à son cocontractant, ou passivement, en omettant de corriger une méprise causée par sa propre conduite trompeuse.

L'obligation d'exécution honnête est une doctrine du droit des contrats, y manquer ne constitue pas un délit civil et, par conséquent, il doit y avoir un lien avec la relation contractuelle. Un manquement doit être directement lié à l'exécution du contrat. Le cadre d'analyse de l'abus de droit au Québec est utile afin d'illustrer le lien direct exigé entre la malhonnêteté et l'exécution dont il est question dans l'arrêt *Bhasin*. Les sources québécoises servent d'autorités persuasives et la comparaison entre la common

and familiar exercise for the Court. Like in the Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to the requirements of good faith. The direct link exists when the party performs their obligation or exercises their right under the contract dishonestly. While the duty of honest performance has similarities with civil fraud and estoppel, it is not subsumed by them. Unlike estoppel and civil fraud, the duty of honest performance does not require a defendant to intend that the plaintiff rely on their representation or false statement.

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

In the instant case, Baycrest knowingly misled Callow in the manner in which it exercised clause 9 of the winter maintenance agreement and this wrongful exercise of the termination clause amounts to a breach of contract. Even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days' notice, the right had to be exercised in keeping with the duty to act honestly. Baycrest's deception was directly linked to this contract, because its exercise of the termination clause was dishonest. It may not have had a free-standing obligation to disclose its intention to terminate, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. Baycrest had to refrain from false representations in anticipation of the notice period. If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early. Having failed to correct Callow's misapprehension that arose due to these

law et le droit civil, au fil de leur évolution au Canada, est un exercice qui est particulièrement utile pour la Cour et qu'elle connaît bien. Tout comme en droit civil québécois, aucun droit contractuel ne peut être exercé malhonnêtement, ce qui reviendrait à contrevenir aux exigences de la bonne foi. Le lien direct existe lorsqu'une partie s'acquitte de son obligation ou exerce son droit prévu au contrat de façon malhonnête. L'obligation d'exécution honnête offre des similitudes avec la fraude civile et la préclusion, sans toutefois être subsumée sous ces notions. Contrairement à la préclusion et à la fraude civile, l'obligation d'exécution honnête ne requiert pas qu'un défendeur ait l'intention que le demandeur s'appuie sur ses assertions ou fausses déclarations.

L'obligation d'exécution honnête donne lieu à des dommages-intérêts suivant ce qui est habituellement accordé en matière contractuelle. D'ordinaire, on accorde en matière contractuelle des dommages-intérêts correspondant à la perte du profit escompté. Cela signifie que les dommages-intérêts doivent placer la partie lésée dans la situation où elle se serait trouvée s'il avait été satisfait à l'obligation. Même si les dommages-intérêts fondés sur la confiance, qui sont habituellement accordés en matière délictuelle, et les dommages-intérêts fondés sur l'attente seront les mêmes dans plusieurs circonstances, voire toutes, ils sont distincts sur le plan conceptuel, et il n'y a aucune raison justifiant de conclure qu'un manquement à l'obligation d'exécution honnête devrait généralement être réparé au moyen de dommages-intérêts fondés sur la confiance.

En l'espèce, Baycrest a sciemment induit Callow en erreur dans la manière dont elle a eu recours à la clause 9 du contrat d'entretien hivernal et ce recours fautif à la clause de résiliation équivaut à une violation de contrat. Même si Baycrest avait ce qui était, à première vue, un droit absolu de résilier le contrat d'entretien hivernal moyennant un préavis de 10 jours, ce droit devait être exercé dans le respect de l'obligation d'agir honnêtement. La tromperie de Baycrest était directement liée à ce contrat, parce que son recours à la clause de résiliation a été malhonnête. Elle n'avait peut-être pas d'obligation autonome de divulguer son intention de résilier, elle avait néanmoins l'obligation de ne pas induire Callow en erreur dans le recours à cette clause. Baycrest devait s'abstenir de faire de fausses représentations en prévision de la période de préavis. Si on fait croire à quelqu'un que son cocontractant est satisfait de son travail et que son contrat en vigueur va vraisemblablement être renouvelé, il est raisonnable que cette personne en déduise que le contrat en vigueur n'est pas en péril et qu'il ne sera pas résilié

false representations, Baycrest breached its duty of good faith in the exercise of its right of termination. Damages thus flow for the consequential loss of opportunity. While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference. Had it done so, Callow would have had the opportunity to secure another contract for the upcoming winter.

Per Moldaver, Brown and Rowe JJ.: As a universally applicable minimum standard, all contracts must be performed honestly. Contracting parties may therefore not lie to, or otherwise knowingly mislead, each other about matters directly linked to performance. If a plaintiff suffers loss in reliance on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole. It does not, however, impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract. The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure has been clearly demarcated by cases addressing misrepresentation and the same settled principles apply to the duty of honest performance, although it also applies (unlike misrepresentation) to representations made after contract formation.

There is, in the context of misrepresentation, a rich law accepting that sometimes silence or half-truths amount to a statement. Although contracting parties have no duty to disclose material information, a contracting party may not create a misleading picture about its contractual performance by relying on half-truths or partial disclosure. Representations need not take the form of an express statement. So long as it is clearly communicated, it may comprise other acts or conduct on the part of the defendant. The entire context, which includes the nature of the parties' relationship, is to be considered in determining, objectively, whether the defendant made a representation to the plaintiff. The question is whether the defendant's active conduct contributed to a misapprehension that could be corrected only by disclosing additional information. Contracting parties are required to correct representations that are subsequently rendered false, or which the representor later discovers were erroneous. The question of whether a representation has been made is a question

hâtivement. Puisqu'elle a omis de corriger la méprise de Callow engendré par ses fausses représentations, Baycrest a manqué à son obligation d'agir de bonne foi dans l'exercice de son droit de résiliation. La perte d'occasion qui en a résulté donne donc droit à des dommages-intérêts. Bien que ceux-ci doivent être calculés en fonction du mode d'exécution le moins onéreux pour le défendeur, ce mode en l'espèce aurait consisté à corriger la méprise dès que Baycrest a su que Callow avait tiré une déduction erronée. Si elle l'avait fait, Callow aurait eu l'occasion de conclure un autre contrat pour l'hiver qui s'en venait.

Les juges Moldaver, Brown et Rowe : Selon la norme minimale universelle applicable, tous les contrats doivent être exécutés de manière honnête. Les parties contractantes ne doivent donc pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat. Si le demandeur subit une perte parce qu'il a fait confiance à la conduite trompeuse de l'autre partie, l'obligation d'exécution honnête sert à rétablir la situation du demandeur. Toutefois, cette obligation n'impose pas un devoir de loyauté ou de divulgation ni n'exige d'une partie qu'elle renonce à des avantages découlant du contrat. La ligne de démarcation entre (1) une conduite activement trompeuse et (2) une non-divulgation permissible a été clairement démarquée dans les cas portant sur des déclarations inexactes, et les mêmes principes établis s'appliquent à l'obligation d'exécution honnête, même si elle s'applique aussi (contrairement à la doctrine des déclarations inexactes) aux déclarations faites après la conclusion du contrat.

Il existe, dans le contexte des déclarations inexactes, une jurisprudence riche qui accepte que, parfois, le silence ou des demi-vérités constituent une déclaration. Même si les parties contractantes ne sont pas tenues de divulguer des renseignements importants, une partie contractante ne peut pas dresser un portrait trompeur de l'exécution de ses obligations contractuelles en se fondant sur des demi-vérités ou sur une divulgation partielle. Il n'est pas nécessaire que la déclaration prenne la forme d'une déclaration expresse. Tant qu'elle est communiquée clairement, elle peut prendre la forme d'autres actes ou conduites de la part du défendeur. Le contexte dans son entièreté — ce qui inclut la nature de la relation entre les parties — doit être pris en considération pour déterminer objectivement si le défendeur a fait une déclaration au demandeur. La question est de savoir si la conduite active du défendeur a contribué à une méprise qui ne peut être corrigée que par la divulgation de renseignements supplémentaires. Les parties contractantes sont tenues de corriger les déclarations

of mixed fact and law, subject to appellate review only for palpable and overriding error.

The legal aim in remedying a breach of contract is to give the innocent party the full benefit of the bargain by placing it in the position it would have occupied had the contract been performed. But the justification for awarding expectation damages does not apply to breach of the duty of honest performance. In such cases, the issue is not that the defendant has failed to perform the contract, thereby defeating the plaintiff's expectations. It is, rather, that the defendant has performed the contract, but has also caused the plaintiff loss by making dishonest extra-contractual misrepresentations concerning that performance, upon which the plaintiff relied to its detriment. The plaintiff's complaint is not lost value of performance, but detrimental reliance on dishonest misrepresentations. The interest being protected is not an expectation interest, but a reliance interest. And just as these are unrelated interests, an expectation measure of damage is unrelated to the breach of the duty of honest performance.

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

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

qui se révèlent subséquemment fausses ou dont l'auteur se rend compte plus tard qu'elles étaient erronées. La question de savoir si une déclaration a été faite est une question mixte de fait et de droit susceptible de révision en appel seulement en cas d'erreur manifeste et déterminante.

La réparation d'une violation de contrat a pour objectif en droit que la partie innocente puisse jouir de tous les avantages que lui confère le marché conclu, en la mettant dans la position où elle se serait trouvée si le contrat avait été exécuté. Cependant, la justification de l'attribution de dommages-intérêts fondés sur l'attente ne s'applique pas au manquement à l'obligation d'exécution honnête. Dans de tels cas, ce qui est en cause, ce n'est pas le fait que le défendeur a omis d'exécuter le contrat, frustrant ainsi les attentes du demandeur; c'est plutôt le fait que le défendeur a exécuté le contrat, mais a aussi causé la perte subie par le demandeur par ses déclarations extracontractuelles malhonnêtes et inexactes concernant cette exécution et auxquelles s'est fié le demandeur, à son détriment. Sa demande n'est pas fondée sur la perte de la valeur de l'exécution, mais plutôt sur la confiance préjudiciable qu'il a accordée aux déclarations inexactes et malhonnêtes. L'intérêt qui est protégé n'est pas un intérêt lié à l'attente, mais bien un intérêt lié à la confiance. De la même façon que ces intérêts ne sont pas liés, un montant de dommages-intérêts fondés sur l'attente n'est pas lié au manquement à l'obligation d'exécution honnête.

À l'instar de la préclusion et de la fraude civile, l'obligation d'exécution honnête protège l'intérêt du demandeur lié à la confiance. Une partie contractante qui manque à cette obligation doit indemniser son cocontractant des pertes prévisibles subies du fait de la confiance que ce dernier a accordée aux affirmations trompeuses. L'obligation d'exécution honnête n'est pas subsumée sous la préclusion et la fraude civile; elle protège plutôt l'intérêt lié à la confiance d'une manière distincte et plus large puisque le défendeur peut être tenu responsable même lorsqu'il n'a pas l'intention que le demandeur s'appuie sur l'affirmation trompeuse. Peu importe l'intention du défendeur, un demandeur n'a qu'à établir que, n'eût été la confiance qu'il a accordée à l'affirmation trompeuse, il n'aurait pas subi la perte.

Pour disposer du présent pourvoi, il suffit d'appliquer l'arrêt *Bhasin* de la Cour; la demande de Callow devrait être résolue en appliquant uniquement l'obligation d'exécution honnête. Il n'y a aucune raison de modifier les conclusions de la juge de première instance. La conduite de Baycrest ne relevait pas de la non-divulgation innocente. La juge de première instance a conclu que les

Callow. Baycrest identifies no palpable and overriding error to justify overturning these conclusions. The proper measure of damages represents the loss Callow suffered in reliance on Baycrest's misleading representations.

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

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

Per Côté J. (dissenting): The appeal should be dismissed. Callow's recourse cannot be based on a breach of the duty of honest performance. Although Baycrest's conduct may not be laudable, it does not fall within the category of active dishonesty prohibited by that duty.

The duty of honest performance is described in *Bhasin* as a simple requirement not to lie or knowingly mislead about matters directly linked to performance of the contract. The requirement that parties not lie is straightforward; however, the kind of conduct covered by the requirement that they not otherwise knowingly mislead each other is not. The law imposes neither a duty of loyalty

communications actives entre les parties ont induit Callow en erreur. Baycrest ne relève aucune erreur manifeste et déterminante justifiant que ces conclusions soient infirmées. Les dommages-intérêts appropriés représentent la perte subie par Callow du fait de la confiance qu'elle a accordée aux déclarations trompeuses de Baycrest.

Les juges majoritaires se fondent sur la notion civiliste d'« abus de droit » dans leur analyse. Or, ce faisant, ils s'écartent de la pratique acceptée de la Cour à l'égard de l'exercice de droit comparé. Les principes qui s'appliquent au présent pourvoi sont déterminants et bien établis. Les systèmes canadiens de common law et de droit civil ont adopté des approches très différentes à l'égard de la place de la bonne foi en droit des contrats. Le fait que les juges majoritaires se fondent sur la notion d'abus de droit en droit civil fausse l'analyse décrite dans l'arrêt *Bhasin* et gomme la distinction entre l'exécution honnête et la bonne foi dans l'exercice d'un pouvoir discrétionnaire contractuel.

Les tribunaux devraient s'inspirer des notions juridiques externes seulement lorsque le droit interne ne fournit pas de réponse ou lorsque cela est nécessaire pour modifier ou autrement préciser une règle de droit existante. Les tribunaux peuvent également s'inspirer de l'expérience d'autres systèmes juridiques lorsqu'ils examinent la question de savoir si la solution éventuelle à une question juridique entraînera des conséquences néfastes, ou encore afin de noter qu'un concept juridique interne est à l'image d'un concept reconnu par un autre système. Même dans les situations où une analyse comparative est appropriée, cette dernière doit être entreprise avec soin et circonspection. Lorsqu'on a recours aux préceptes d'un des systèmes juridiques du Canada pour modifier l'autre, la règle d'or consiste en ce que la solution proposée doit être capable de s'intégrer complètement et de façon cohérente dans la structure du système qui les adopte.

La juge Côté (dissidente) : Le pourvoi devrait être rejeté. Le recours de Callow ne saurait être fondé sur un manquement à l'obligation d'exécution honnête. Même si la conduite de Baycrest n'était pas louable, elle ne tombe pas dans la catégorie de la conduite malhonnête prohibée par cette obligation.

L'obligation d'exécution honnête est décrite dans l'arrêt *Bhasin* comme une simple exigence de ne pas se mentir ni de s'induire intentionnellement en erreur sur des questions directement liées à l'exécution du contrat. L'obligation faite aux parties de ne pas se mentir ne nécessite aucun commentaire; toutefois, ce n'est pas le cas du type de conduite qui relève de l'obligation de ne pas

or of disclosure nor a requirement to forego advantages flowing from the contract on a contracting party. Absent a duty to disclose, it is far from obvious when exactly one's silence will knowingly mislead the other contracting party or at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract. In any event, the duty of honest performance should remain clear and easy to apply.

The obligations flowing from the duty of honest performance are negative obligations. Extending the duty beyond that scope would detract from certainty in commercial dealings. Therefore, silence cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak. Such an obligation does not arise simply because a party to a contract realizes that his counterparty is operating under a mistaken belief. Absent a duty of disclosure, a party to a contract has no obligation to correct his counterparty's mistaken belief unless the party's active conduct has materially contributed to it. What constitutes a material contribution will obviously depend upon the context, which includes the nature of the parties' relationship as well as the relevant provisions of the contract. Parties that prefer not to disclose certain information — which they are entitled not to do — are not required to adopt a new line of conduct in their contractual relationship simply because they chose silence over speech.

In the context of a right to terminate a contract without cause, a party that intends to end an agreement does not have to convey hints in order to alert his counterparty that their business relationship is in danger. No obligation to speak arises when a party becomes aware of his counterparty's mistaken belief that the contract will not be terminated unless the party has taken positive action that materially contributed to that belief. If one party leads another to believe that their contract will be renewed, it follows that the other party can reasonably expect their business relationship to be extended rather than terminated. But an inference to that effect cannot be drawn in the abstract. In order to infer that one party, through discussions about renewal, led the other party to think that there was no risk their existing agreement would be terminated, the inference-drawing process must obviously take into account the nature of the risk at stake and what was actually communicated during those discussions. Otherwise,

s'induire intentionnellement en erreur. Le droit n'impose pas à une partie contractante de devoir de loyauté ou de divulgation ni d'obligation de renoncer à des avantages découlant du contrat. Étant donné l'absence d'une obligation de divulguer des renseignements, il est difficile de déterminer à partir de quand le silence d'une partie induira intentionnellement l'autre partie en erreur, ou à quel moment un silence acceptable se transforme en un silence inacceptable susceptible de constituer une violation de contrat. Quoi qu'il en soit, l'obligation d'exécution honnête doit demeurer claire et d'application simple.

Les obligations découlant de l'exécution honnête sont négatives. Étendre davantage la portée de l'obligation d'exécution honnête écarterait la stabilité des opérations commerciales. Par conséquent, le silence ne saurait être considéré comme malhonnête au sens de l'arrêt *Bhasin*, à moins qu'il n'y ait une obligation positive de parler. Une telle obligation ne naît pas du seul fait qu'une partie au contrat s'aperçoit que son cocontractant agit sur le fondement d'une croyance erronée. En l'absence d'une obligation de divulgation, une partie à un contrat ne saurait être tenue de corriger la croyance erronée de son cocontractant à moins d'y avoir contribué de façon significative par sa conduite. Pour déterminer si une contribution est significative, il faudra bien entendu examiner le contexte, y compris la nature de la relation entre les parties, de même que les dispositions contractuelles pertinentes. Les parties qui préfèrent ne pas divulguer certains renseignements — comme cela leur est permis — ne sont pas tenues d'adopter une nouvelle ligne de conduite dans leur relation contractuelle simplement parce que le silence leur a paru préférable à la parole.

Dans le contexte d'un droit contractuel de résilier un contrat sans motif, cela signifie qu'une partie désireuse de mettre fin à une entente n'a pas besoin de transmettre de signaux d'alerte pour amener son cocontractant à comprendre que leur relation d'affaires est en danger. Une obligation de divulgation ne naît pas lorsqu'une partie apprend que son cocontractant croit à tort que le contrat ne sera pas résilié, à moins que cette partie n'ait posé un acte concret qui a contribué à cette croyance de façon significative. Si une partie amène l'autre à croire que leur contrat sera renouvelé, il s'ensuit que cette dernière peut raisonnablement s'attendre à ce que leur relation d'affaires soit prolongée plutôt que résiliée. Toutefois, une inférence en ce sens ne peut être tirée dans l'abstrait. Pour conclure qu'une partie, par des discussions sur un renouvellement, a amené l'autre partie à penser qu'aucun risque de résiliation ne menaçait le contrat en vigueur, le processus inférentiel doit évidemment tenir compte de la nature du

the inference would entail a palpable and overriding error that would be subject to appellate review.

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

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risque en jeu et de ce qui a été communiqué pendant ces discussions. Autrement, l'inférence donnerait lieu à une erreur manifeste et dominante qui serait susceptible de contrôle en appel.

En l'espèce, Baycrest a négocié un droit de résilier son contrat hivernal pour toute raison et à tout moment moyennant un préavis de 10 jours. Lors de son examen de la conduite de Baycrest, la juge de première instance n'a pas cherché à savoir si Baycrest avait menti à Callow ou l'avait autrement induit intentionnellement en erreur au sujet de l'exercice de son droit à la résiliation du contrat hivernal pour toute raison autre qu'une insatisfaction liée aux services rendus. Elle a insisté à tort sur la nécessité pour Baycrest d'aborder les problèmes de rendement allégués malgré le fait que le contrat hivernal pouvait être résilié même si les services rendus par Callow étaient satisfaisants. Aucune considération n'a été accordée au fait que la tromperie active devait être directement liée à l'exécution du contrat. Il est clair que les déclarations faites par Baycrest n'étaient pas directement liées à l'exécution du contrat hivernal. La compréhension erronée par la juge de première instance des principes juridiques applicables a vicié le processus d'appréciation des faits.

Jurisprudence

Citée par le juge Kasirer

Arrêt appliqué : *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494; **arrêts mentionnés :** *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021; *Deloitte & Touche c. Livent Inc. (Séquestre de)*, 2017 CSC 63, [2017] 2 R.C.S. 855; *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Farber c. Cie Trust Royal*, [1997] 1 R.C.S. 846; *Ciment du Saint-Laurent inc. c. Barrette*, 2008 CSC 64, [2008] 3 R.C.S. 392; *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 CSC 9, [2011] 1 R.C.S. 214; *Potter c. Commission des services d'aide juridique du Nouveau-Brunswick*, 2015 CSC 10, [2015] 1 R.C.S. 500; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *Churchill Falls (Labrador) Corp. c. Hydro-Québec*, 2018 CSC 46, [2018] 3 R.C.S. 101; *Houle c. Banque Canadienne Nationale*, [1990] 3 R.C.S. 122; *Mayor of Bradford c. Pickles*, [1895] A.C. 587; *Allen c. Flood*, [1898] A.C. 1; *United Roasters, Inc. c. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981); *IFP Technologies (Canada) Inc. c. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta. L.R. (6th) 96; *Xerex Exploration Ltd. c. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6; *Yam Seng Pte Ltd. c. International Trade Corp. Ltd.*, [2013] E.W.H.C. 111, [2013] 1 All

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Citée par le juge Brown

Arrêt appliqué : *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494; **arrêts mentionnés :** *Alevizos c. Nirula*, 2003 MBCA 148, 180 Man. R. (2d) 186; *Xerex Exploration Ltd. c. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6; *Opron Construction Co. c. Alberta* (1994), 151 A.R. 241; *Peek c. Gurney* (1873), L.R. 6 H.L. 377; *Outaouais Synergest Inc. c. Lang Michener LLP*, 2013 ONCA 526, 116 O.R. (3d) 742; *C.R.F. Holdings Ltd. c. Fundy Chemical International Ltd.* (1981), 33 B.C.L.R. 291; *Queen c. Cognos Inc.*, [1993] 1 R.C.S. 87; *Styles c. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214; *Mohamed c. Information Systems Architects Inc.*, 2018 ONCA 428, 423 D.L.R. (4th) 174; *Greenberg c. Meffert* (1985), 50 O.R. (2d) 755; *Mesa Operating Ltd. Partnership c. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38; *Fidler c. Sun Life du Canada, compagnie d'assurance-vie*, 2006 CSC 30, [2006] 2 R.C.S. 3; *Hamilton c. Open Window Bakery Ltd.*, 2004 CSC 9, [2004] 1 R.C.S. 303; *Wood c. Grand Valley Rway. Co.* (1915), 51 R.C.S. 283; *Lamb c. Kincaid* (1907), 38 R.C.S. 516; *Renvoi relatif à la Loi sur la Cour suprême, art. 5 et 6*, 2014 CSC 21, [2014] 1 R.C.S. 433; *Caisse populaire des Deux Rives c. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu*, [1990] 2 R.C.S. 995; *Gilles E. Néron Communication Marketing inc. c. Chambre des notaires du Québec*, 2004 CSC 53, [2004] 3 R.C.S. 95; *Moses c. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676; *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629; *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021; *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 CSC 9, [2011] 1 R.C.S. 214; *Saadati c. Moorhead*, 2017 CSC 28, [2017] 1 R.C.S. 543; *Deloitte & Touche c. Livent Inc. (Séquestre de)*, 2017 CSC 63, [2017] 2 R.C.S. 855; *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Ciment du Saint-Laurent inc. c. Barrette*, 2008 CSC 64, [2008] 3 R.C.S. 392; *Sport Maska Inc. c. Zittrer*, [1988] 1 R.C.S. 564; *Colonial Real Estate Co. c. La Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 R.C.S. 585; *Birdair inc.*

Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19, [2020] 2 S.C.R. 420.

By Côté J. (dissenting)

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c. Danny's Construction Co., 2013 QCCA 580; *Bhasin c. Hrynew*, 2011 ABQB 637, 526 A.R. 1; *Société des loteries de l'Atlantique c. Babstock*, 2020 CSC 19, [2020] 2 R.C.S. 420.

Citée par la juge Côté (dissidente)

Bhasin c. Hrynew, 2014 CSC 71, [2014] 3 R.C.S. 494; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

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2017 CarswellOnt 18587 (WL Can.). Appeal allowed, Côté J. dissenting.

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

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

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

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

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

KASIRER J. —

I. Introduction

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

[2] In *Bhasin*, Cromwell J. recognized a general organizing principle of good faith, which means that "parties generally must perform their contractual duties honestly and reasonably and not capriciously

[2017] O.J. No. 6176 (QL), 2017 CarswellOnt 18587 (WL Can.). Pourvoi accueilli, la juge Côté est dissidente.

Brandon Kain, *Adam Goldenberg*, *Vivian Ntiri* et *Miriam Vale Peter*s, pour l'appelante.

Anne Tardif, *Rodrigue Escayola* et *David Plotkin*, pour les intimées.

Catherine Beagan Flood et *Nicole Henderson*, pour l'intervenante la Fédération canadienne de l'entreprise indépendante.

Jeremy Opolsky et *Winston Gee*, pour l'intervenante la Chambre de commerce du Canada.

Version française du jugement du juge en chef Wagner et des juges Abella, Karakatsanis, Martin et Kasirer rendu par

LE JUGE KASIRER —

I. Introduction

[1] Le présent pourvoi porte sur la clause d'un contrat commercial d'entretien hivernal qui permettait aux clients de résilier unilatéralement le contrat, sans motif, en donnant à l'entrepreneur un préavis de 10 jours. Il ne s'agit pas ici de savoir si la clause constituait un marché équitable entre les parties. Son sens n'est pas en cause non plus. Le débat porte plutôt sur la façon dont les intimés (collectivement « Baycrest ») ont exercé la clause de résiliation en question. Reconnaissant que le préavis de 10 jours a été donné, l'appelante, C.M. Callow Inc. (« Callow »), soutient que Baycrest se serait prévalue de la clause de résiliation contrairement aux exigences de la bonne foi établies par notre Cour dans l'arrêt *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, notamment à l'obligation d'exécution honnête du contrat.

[2] Dans l'arrêt *Bhasin*, le juge Cromwell a reconnu un principe directeur général de bonne foi, qui implique que « les parties doivent, de façon générale, exécuter leurs obligations contractuelles de manière

or arbitrarily" (para. 63). This organizing principle, he explained, "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations" (para. 64). The organizing principle of good faith manifests itself through "existing doctrines" addressing "the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance" (para. 66).

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

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

honnête et raisonnable, et non de façon abusive ou arbitraire » (par. 63). Ce principe directeur, a-t-il expliqué, « est [. . .] non pas une règle autonome, mais plutôt une norme qui sous-tend des règles de droit particulières, qui se manifeste dans ces règles et à laquelle on peut accorder plus ou moins d'importance selon chaque situation » (par. 64). Le principe directeur de bonne foi se manifeste par les « règles existantes » portant sur « les types de situations et de relations dans lesquelles la loi exige, à certains égards, une exécution contractuelle honnête, franche ou raisonnable » (par. 66).

[3] Dans le présent pourvoi, la doctrine de la bonne foi applicable est celle de l'obligation d'honnêteté en matière d'exécution des contrats. Comme le juge Cromwell l'a expliqué au par. 73 de l'arrêt *Bhasin*, cette obligation s'applique à tous les contrats en tant que doctrine du droit des contrats, ce qui signifie « simplement que les parties ne doivent pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat ». Callow affirme que le manquement par Baycrest à son obligation impérative d'exécution honnête dans son recours à la clause de résiliation équivalait à une violation de contrat. Elle invoque les conclusions de la juge de première instance selon lesquelles Baycrest a dissimulé que le contrat risquait d'être résilié. De fait, cette dernière a continué à affirmer que le contrat n'était pas en péril et a intentionnellement refusé de corriger la fausse impression qu'elle avait créée et en vertu de laquelle agissait Callow. Cette malhonnêteté a continué pendant plusieurs mois [TRADUCTION] « en prévision de la période de préavis », écrit la juge de première instance, ce qui, aux dires de Callow, l'a amené à renoncer à l'occasion de présenter des soumissions en vue d'obtenir d'autres contrats d'entretien hivernal, ce qui justifie l'octroi de dommages-intérêts (2017 ONCS 7095, par. 67 (CanLII)).

[4] Pour sa part, rappelant que le juge Cromwell a explicitement affirmé dans l'arrêt *Bhasin* que l'obligation d'exécution honnête n'équivaut pas à une obligation de divulgation, Baycrest soutient que son silence ne constituait pas de la malhonnêteté. Elle fait en outre valoir que la malhonnêteté alléguée

submission, the impugned communications related to the possibility of a future contract not yet executed. The Court of Appeal agreed and overturned the trial judge's decision (2018 ONCA 896, 429 D.L.R. (4th) 704).

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

II. Background

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

[7] At the conclusion of the two-year term in 2012, the corporations entered into two new agreements with Callow. Joseph Peixoto — president of one of

n'était pas liée au contrat en vigueur à l'époque, car, selon ses prétentions, les communications en cause portaient sur la possibilité d'un contrat futur non encore conclu. La Cour d'appel a souscrit à ce point et a infirmé le jugement de première instance (2018 ONCA 896, 429 D.L.R. (4th) 704).

[5] Soit dit en tout respect, je suis en désaccord avec la Cour d'appel sur la question de savoir si la manière dont Baycrest s'est prévalue de la clause de résiliation contrevenait à la norme minimale d'honnêteté. L'obligation d'agir honnêtement dans l'exécution du contrat empêche de se livrer à une tromperie active. Baycrest a manqué à son obligation en induisant intentionnellement Callow en erreur, l'amenant ainsi à croire que le contrat d'entretien hivernal ne serait pas résilié. En se prévalant malhonnêtement de la clause de résiliation, elle a manqué à l'obligation d'honnêteté au sujet d'une question directement liée à l'exécution du contrat, même si le délai de préavis de 10 jours a été respecté et sans égard aux raisons ayant motivé la résiliation. Pour les motifs qui suivent, je suis d'avis d'accueillir le pourvoi et de rétablir le jugement de la Cour supérieure de justice de l'Ontario.

II. Contexte

[6] Baycrest comprend 10 associations condominiales gérées par le Condominium Management Group et un gestionnaire immobilier désigné. Chaque association a son propre conseil d'administration chargé de gérer ses affaires et, collectivement, elles ont établi un comité d'utilisation conjointe (« CUC »). Le CUC prend des décisions concernant les avoirs communs et partagés des condominiums. En 2010, les associations condominiales ont conclu un contrat d'entretien hivernal d'une durée de deux ans avec Callow, une société exploitée par Christopher Callow, son propriétaire. Selon le contrat, Callow fournissait aux associations condominiales des services d'entretien hivernal, dont le déneigement.

[7] À l'arrivée du terme de deux ans en 2012, les associations ont conclu deux nouveaux contrats avec Callow. Joseph Peixoto — président d'une des

the condominium corporations, and representative on the JUC — negotiated the main pricing terms with Mr. Callow for the renewal of the winter maintenance contract, which also added a separate summer maintenance services contract.

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

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

[10] A few months later — still in the first year of the agreement — respondent Tammy Zollinger became the property manager. About three weeks after Ms. Zollinger's arrival, another JUC meeting was held, this time without Mr. Callow present. During the meeting, Ms. Zollinger advised the JUC to terminate the winter maintenance agreement with Callow

associations condominiales et un représentant du CUC — a négocié les principales conditions relatives au prix avec M. Callow pour le renouvellement du contrat d'entretien hivernal, auquel s'est ajouté un contrat distinct de services d'entretien estival.

[8] Dans le présent pourvoi, c'est le contrat d'entretien hivernal conclu pour un nouveau terme de deux hivers, du 1er novembre 2012 au 30 avril 2014, qui est en cause. En vertu de la clause 9, les associations avaient le droit de résilier ce contrat si Callow ne rendait pas un service satisfaisant, conformément aux dispositions du contrat. De plus, la clause 9 prévoyait que [TRADUCTION] « si, pour quelque autre raison que ce soit, les services [de Callow] n'étaient plus requis pour les immeubles visés par le contrat ou pour toute partie de ces immeubles, [les associations condominiales] p[ouvai]ent résilier le présent contrat en donnant à [Callow] un préavis écrit de dix (10) jours » (d.a., vol. III, p. 10).

[9] Au cours du premier des deux hivers visés par le contrat, des occupants de divers condominiums ont déposé des plaintes, dont plusieurs concernaient le déneigement de places de stationnement individuelles. En janvier 2013, M. Callow a assisté à une réunion du CUC pour dissiper les préoccupations. Il ressort du compte-rendu que cette réunion s'est déroulée positivement, puisqu'il consigne ceci : [TRADUCTION] « [l]e comité confirme que [Callow] s'est attaqué à ce problème avec toute la diligence à laquelle on pouvait s'attendre, vu la nature des tempêtes que nous avons connues récemment » (d.a., vol. III, p. 35). Après la réunion, la gestionnaire immobilière de l'époque a en outre envoyé un courriel de suivi aux membres du CUC : [TRADUCTION] « Je sais que votre comité s'est montré généralement satisfait du déneigement — il n'y a donc rien d'autre à signaler ici » (p. 39).

[10] Quelques mois plus tard — toujours durant la première année du contrat —, l'intimée Tammy Zollinger est devenue la gestionnaire immobilière. Environ trois semaines après le début de son mandat, le CUC a tenu une autre réunion, cette fois sans que M. Callow soit présent. Pendant la réunion, Mme Zollinger a conseillé au CUC de résilier le

"due to poor workmanship in the 2012-13 winter" (A.R., vol. III, at p. 43). The minutes went on to indicate that Ms. Zollinger had reviewed the contract and advised the JUC members that they could terminate the contract with Callow with no financial penalty. Ms. Zollinger further advised that she would get quotes from other snow removal contractors. The JUC voted to terminate the winter maintenance agreement shortly thereafter, "in either March or April" of 2013 (trial reasons, at para. 51). Baycrest chose not to inform Mr. Callow of its decision to terminate the winter maintenance agreement at that time.

[11] Although only one winter of the two-winter term had been completed, Callow began discussions throughout the spring and summer of 2013 with Baycrest regarding a renewal of the winter maintenance agreement. Specifically, Mr. Callow had various exchanges with two condominium corporations' board members, one of whom was Mr. Peixoto. Following these conversations, wrote the trial judge, "Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and they were satisfied with his services" (para. 41).

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

[13] Conversations between Callow and Mr. Peixoto continued into July 2013, at which time Callow decided to improve the appearance of two

contrat d'entretien hivernal avec Callow [TRADUCTION] « en raison de la piètre qualité du travail au cours de l'hiver 2012-2013 » (d.a., vol. III, p. 43). Il ressort ensuite du compte-rendu de la réunion que M^me^ Zollinger avait examiné le contrat conclu avec Callow et informé les membres du CUC qu'ils pouvaient le résilier sans pénalité financière. De plus, M^me^ Zollinger a dit qu'elle obtiendrait des soumissions d'autres entrepreneurs en déneigement. Le CUC a voté en faveur de la résiliation du contrat d'entretien hivernal peu de temps après, [TRADUCTION] « en mars ou en avril » 2013 (motifs de première instance, par. 51). Baycrest a choisi de ne pas informer M. Callow à ce moment-là de sa décision de résilier le contrat en question.

[11] Bien qu'un seul hiver sur deux du contrat se fût écoulé, Callow a entrepris des discussions avec Baycrest sur le renouvellement du contrat d'entretien hivernal au cours du printemps et de l'été 2013. Plus particulièrement, M. Callow a eu divers échanges avec des membres des conseils de deux associations condominiales, dont M. Peixoto. À la suite de ces conversations, a écrit la juge de première instance, [TRADUCTION] « M. Callow croyait qu'il allait probablement obtenir un renouvellement de deux ans de son contrat de services d'entretien hivernal et qu'ils étaient satisfaits de ses services » (par. 41).

[12] Entretemps, Callow a continué de s'acquitter des obligations qui lui incombaient en application des contrats d'entretien hivernal et estival. En exécution de ce dernier contrat, elle a notamment terminé le [TRADUCTION] « ménage du printemps », et continué à tondre la pelouse une fois par semaine ainsi qu'à faire la cueillette des ordures. De plus, pendant l'été 2013, Callow [TRADUCTION] « a exécuté des travaux qui dépassaient ce qui était prévu dans [son] contrat de services d'entretien estival » (par. 42), effectuant même ce que M. Callow a décrit comme des travaux « en prime » qui, souhaitait-il, inciteraient Baycrest à renouveler le contrat d'entretien hivernal au terme de l'hiver qui s'en venait.

[13] Des conversations entre Callow et M. Peixoto se sont poursuivies jusqu'en juillet 2013, lorsque Callow a décidé d'embellir deux jardins. Dans un

gardens. In an email dated July 17, 2013, Mr. Peixoto wrote to another condominium corporation board member regarding this "freebie" work, writing in part: "It's nice he's doing it but I am sure it's an attempt at us keeping him. Btw, I was talking to him last week as well and he is under the impression we're keeping him for winter again. I didn't say a word to him cuz I don't wanna get involved but I did tell [Ms. Zollinger] that [Mr. Callow] thinks we're keeping him for winter" (A.R., vol. III, at p. 73).

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

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

[16] Callow sought damages in the amount of $81,383.68 for breach of contract, an amount equivalent to the one year remaining on the winter

courriel daté du 17 juillet 2013, M. Peixoto a écrit à un membre du conseil d'une autre association condominiale à propos de ces travaux « en prime », affirmant notamment : [TRADUCTION] « C'est bien qu'il fasse ça, mais je suis certain que c'est une tentative de faire en sorte qu'on le garde. Au fait, je lui ai aussi parlé la semaine dernière et il a l'impression que nous le gardons pour l'hiver encore une fois. Je ne lui ai pas dit un mot, parce que je ne veux pas m'en mêler, mais j'ai dit à [M^me^ Zollinger] que [M. Callow] croit qu'on le garde pour l'hiver » (d.a., vol. III, p. 73).

[14] Ce n'est que le 12 septembre 2013 que Baycrest a informé Callow de la décision de résilier le contrat d'entretien hivernal. En effet, M^me^ Zollinger a alors informé Callow par courriel [TRADUCTION] « que Baycrest ne fera pas appel à ses services pour le contrat hivernal de la saison 2013/2014, conformément à l'article 9 du contrat, Baycrest doit donner à l'entrepreneur un préavis de 10 jours » (d.a., vol. III, p. 49).

[15] Par la suite, Callow a déposé une déclaration alléguant une violation de contrat, soutenant que Baycrest avait agi de mauvaise foi en acceptant des services gratuits, tout en sachant que Callow les offrait pour maintenir leur relation contractuelle future. En outre, Callow a allégué que Baycrest savait ou aurait dû savoir qu'elle n'allait pas chercher à obtenir d'autres contrats d'entretien hivernal en s'appuyant sur les déclarations selon lesquelles elle offrait un service satisfaisant et le contrat ne serait pas résilié prématurément. Par conséquent, [TRADUCTION] « [e]n raison de ces déclarations inexactes ou de cette conduite de mauvaise foi, [M. Callow, au nom de Callow,] n'a pas répondu à d'autres appels d'offres de contrats d'entretien hivernal. Baycrest est maintenant responsable du préjudice subi par Callow au titre de la perte d'occasion » (d.a., vol. I, p. 45, par. 30). Enfin, Callow a allégué que Baycrest s'était injustement enrichie par suite des services gratuits qu'elle avait fournis au cours de l'été 2013.

[16] Callow a sollicité des dommages-intérêts de 81 383,68 $ pour violation de contrat — un montant équivalent à l'année qui restait à courir sur le contrat

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

III. Prior Decisions

A. *Ontario Superior Court of Justice (O'Bonsawin J.), 2017 ONSC 7095*

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

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

[19] The trial judge dismissed both arguments. First, she found that Callow's work met the requisite standard. While there were complaints about Callow's work, she observed that "a significant portion related to the clearing of parking stalls,

d'entretien hivernal —, des dommages-intérêts pour entrave intentionnelle aux relations contractuelles, incitation à violation de contrat et déclaration inexacte faite par négligence. Elle a aussi sollicité des dommages-intérêts de 5 000 $ pour enrichissement injustifié — un montant équivalant aux travaux « en prime » —, l'intérêt antérieur et postérieur au jugement, ainsi que les dépens sur une base d'indemnisation substantielle.

III. Décisions antérieures

A. *Cour supérieure de justice de l'Ontario (la juge O'Bonsawin), 2017 ONSC 7095*

[17] Dans son examen des circonstances du litige, la juge de première instance a commenté les témoignages de plusieurs témoins clefs, concluant que M. Callow était un témoin crédible. En revanche, elle a jugé que les témoins de Baycrest — dont un ancien gestionnaire immobilier, ainsi que M^me^ Zollinger et M. Peixoto — [TRADUCTION] « s'étaient livré à plusieurs exagérations et amplifications et [qu'ils] avaient constamment formulé des commentaires contraires à la preuve écrite » (par. 11). La juge de première instance a donc préféré la version des événements de M. Callow à celle de Baycrest.

[18] En première instance, Baycrest a fait valoir deux arguments principaux. D'abord, elle a soutenu que sur le plan de la simple interprétation contractuelle, la clause 9 prévoit clairement et sans équivoque qu'elle pouvait résilier le contrat pour n'importe quel motif en donnant à Callow un préavis écrit de 10 jours. Ensuite, même s'il n'était pas nécessaire d'établir un motif pour invoquer la clause 9, Baycrest a plaidé que la preuve dont disposait la juge de première instance démontrait que la qualité du service fourni par Callow ne respectait pas les spécifications contractuelles et n'était pas à son entière satisfaction.

[19] La juge de première instance a rejeté les deux arguments. Premièrement, elle a conclu que le travail de Callow répondait à la norme applicable. Bien que ce travail ait fait l'objet de plaintes, elle a observé que [TRADUCTION] « bon nombre d'entre elles

which was the fault of owners/tenants who did not move their vehicles". "Was the quality of Callow's work below standard?" asked the trial judge, "[t]he evidence leads me", she wrote, "to answer no" (para. 55).

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

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

concernaient le déneigement de places de stationnement, un problème causé par des propriétaires ou locataires qui ne déplaçaient pas leurs véhicules ». [TRADUCTION] « La qualité du travail de Callow était-elle en deçà de la norme? » a demandé la juge de première instance, à quoi elle a répondu : « La preuve m'amène à répondre à cette question par la négative » (par. 55).

[20] Deuxièmement, la juge de première instance a statué que la présente cause n'est pas une simple affaire d'interprétation contractuelle. À son avis, le principe directeur d'exécution de bonne foi et l'obligation d'exécution honnête étaient en jeu. La juge de première instance a expliqué que, comme le juge Cromwell l'avait noté dans l'arrêt *Bhasin*, il ne faut pas confondre l'obligation d'exécution honnête et une obligation de divulgation. [TRADUCTION] « Toutefois », a-t-elle écrit, « les parties contractantes doivent pouvoir s'attendre au respect d'une norme minimale d'honnêteté » pour qu'elles aient « l'assurance d'une possibilité raisonnable de protéger leurs intérêts s'il n'est pas donné suite au contrat » (par. 60, citant *Bhasin*, par. 86). Pour faire la distinction entre l'omission de révéler un fait important et la conduite malhonnête active, la juge de première instance a fait remarquer qu'à [TRADUCTION] « moins qu'il n'y ait tromperie active, il n'existe pas d'obligation unilatérale de divulgation de renseignements avant la période de préavis » (par. 61).

[21] La juge de première instance était convaincue que Baycrest a [TRADUCTION] « activement trompé » Callow à compter du moment où la décision de résilier a été prise en mars ou avril 2013 jusqu'au moment où l'avis a été donné le 12 septembre 2013. Plus particulièrement, elle a conclu que Baycrest [TRADUCTION] « a agi de mauvaise foi (1) en retenant l'information pour faire en sorte que Callow exécute le contrat de services d'entretien estival et (2) en continuant de laisser entendre que le contrat n'était pas en péril, même si [elle] savait que Callow assumait des tâches additionnelles pour accroître les chances de renouveler le contrat de services d'entretien hivernal » (par. 65). Compte tenu des communications actives entre les parties pendant l'été 2013 [TRADUCTION] « qui ont induit Callow en erreur », la juge de première instance « n'[a] pas [accepté]

standard of honesty", she concluded, "would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (para. 67).

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

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

[24] The trial judge was also satisfied that Baycrest was unjustly enriched due to the "freebie" work performed by Callow during the summer of 2013. She declined, however, to award damages for the unjust

l'argument [de Baycrest] selon lequel il n'existait aucune obligation de divulguer la décision de résilier le contrat avant le préavis » (par. 66). [TRADUCTION] « La norme minimale d'honnêteté » a-t-elle conclu, « aurait été d'aborder les problèmes de rendement allégués, de donner un préavis dans les plus brefs délais ou de s'abstenir de faire des assertions en prévision de la période de préavis » (par. 67).

[22] La juge de première instance a lié la malhonnêteté de Baycrest à la façon dont elle a retardé le moment où elle a invoqué le délai de préavis de 10 jours prévu à la clause 9, pendant qu'elle induisait activement Callow à croire à tort que le contrat n'était pas en péril. Ses motifs s'appuyaient, par analogie, sur la règle de droit reconnaissant une obligation d'agir de bonne foi lors du congédiement d'un employé. Elle a noté que Baycrest [TRADUCTION] « avait intentionnellement retenu l'information de mauvaise foi » (par. 69). Elle a expressément reconnu que le recours à la clause de résiliation n'est pas, en soi, la preuve d'un manquement à la bonne foi. Cependant, elle a jugé que, en l'espèce, Baycrest avait induit intentionnellement Callow en erreur au sujet de la résiliation, ce qui constituait un manquement à l'obligation d'exécution honnête.

[23] En raison de ce manquement contractuel, la juge de première instance a accordé des dommages-intérêts à Callow, afin de la placer dans la même situation que si le manquement n'avait pas eu lieu. Ces dommages-intérêts s'élevaient à 64 306,96 $, une somme équivalente à la valeur du contrat d'entretien hivernal pour un an, moins les dépenses que Callow aurait normalement engagées; un montant additionnel de 14 835,14 $ représentant la valeur sur un an d'un bail d'équipement que Callow n'aurait pas loué si elle avait su que le contrat d'entretien hivernal allait être résilié; et 1 600 $ au titre de la facture finale pour les travaux d'été que Baycrest n'avait pas payée à Callow. Les dépens ont été octroyés à Callow.

[24] La juge de première instance était également convaincue que Baycrest s'était injustement enrichie en raison des travaux exécutés « en prime » par Callow durant l'été 2013. Cependant, comme cette

enrichment since Callow failed to provide evidence of its expenses.

B. *Court of Appeal for Ontario (Lauwers, Huscroft and Trotter JJ.A.), 2018 ONCA 896, 429 D.L.R. (4th) 704*

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

[26] The Court of Appeal unanimously agreed with Baycrest on the first point, and set aside the judgment at first instance. The Court of Appeal recognized, as the trial judge had found, that the "[d]irectors of two of the condominium corporations and members of the JUC were aware that Mr. Callow was performing 'freebie' work, and knew he was under the impression that the contracts were likely to be renewed" (para. 5). Nonetheless, the court stressed that *Bhasin* was a modest, incremental step, and good faith is to be applied in a manner so as to avoid commercial uncertainty. As such, the duty of honesty "does not impose a duty of loyalty or of disclosure or to require a party to forego advantages flowing from the contract" (para. 12, citing *Bhasin*, at para. 73).

[27] The Court of Appeal further emphasized that Callow had made two concessions in its factum. First, Callow acknowledged that Baycrest was not contractually required to disclose its decision to terminate the winter maintenance agreement prior to the 10-day notice period. Second, Callow acknowledged that the failure to provide notice on a more timely basis was not, in and of itself, evidence of bad faith. Because there is "no unilateral duty to disclose information relevant to termination", the

dernière n'avait pas fourni de preuve de ses dépenses, la juge a refusé d'accorder des dommages-intérêts pour enrichissement injustifié.

B. *Cour d'appel de l'Ontario (les juges Lauwers, Huscroft et Trotter), 2018 ONCA 896, 429 D.L.R. (4th) 704*

[25] Baycrest a interjeté appel, soutenant que la juge de première instance s'était trompée à deux égards. D'abord, elle a allégué que la juge avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal. Ensuite, elle a plaidé que la juge de première instance s'était trompée dans l'évaluation des dommages-intérêts.

[26] À l'unanimité, la Cour d'appel a donné raison à Baycrest sur la première question et a annulé le jugement de première instance. Elle a reconnu, comme l'avait conclu la juge de première instance, que [TRADUCTION] « [l]es administrateurs de deux des associations condominiales et des membres du CUC savaient que M. Callow exécutait des travaux "en prime", et qu'il avait l'impression que les contrats allaient vraisemblablement être renouvelés » (par. 5). Néanmoins, la cour a souligné que l'arrêt *Bhasin* représentait une étape modeste, élaborée de façon progressive, et qu'il y avait lieu d'appliquer la notion de bonne foi d'une manière qui permet d'éviter l'instabilité commerciale. Par conséquent, selon elle, l'obligation d'honnêteté [TRADUCTION] « n'impose pas de devoir de loyauté ou de divulgation ni n'exige d'une partie qu'elle renonce à des avantages découlant du contrat » (par. 12, citant *Bhasin*, par. 73).

[27] La Cour d'appel a souligné de plus que Callow a fait deux concessions dans son mémoire. Premièrement, elle a reconnu que Baycrest n'était pas contractuellement tenue de divulguer sa décision de résilier le contrat d'entretien hivernal avant la période de préavis de 10 jours. Deuxièmement, elle a reconnu que le fait que Baycrest n'ait pas donné de préavis en temps plus opportun n'était pas, en soi, une preuve de mauvaise foi. Puisqu'il n'existe [TRADUCTION] « aucun devoir unilatéral de divulguer des

court reasoned Baycrest "[was] free to terminate the winter contract with [Callow] provided only that [it] informed him of [its] intention to do so and gave the required notice. That is all that [Callow] bargained for, and all that he was entitled to" (para. 17). While the trial judge's findings "may well suggest a failure to act honourably," the Court of Appeal expressed its view that the findings "do not rise to the high level required to establish a breach of the duty of honest performance" (para. 16).

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

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

IV. Analysis

A. *Overview of the Appeal*

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

[31] Before this Court, Callow does not dispute the meaning of clause 9. Nor does Callow's argument on appeal concern the adequacy of the bargain struck with Baycrest or whether the termination was unjustified. Callow is not saying, for instance, that it should have been afforded more notice because

renseignements ayant trait à la résiliation », la cour a raisonné qu'il était « loisible à Baycrest de résilier le contrat d'entretien hivernal conclu avec [Callow], à la seule condition qu'elle l'informe de [son] intention de le faire et qu'[elle] donne le préavis nécessaire. C'est tout ce que [Callow] a négocié, et c'est tout ce à quoi [elle] avait droit » (par. 17). Bien que les conclusions de la juge de première instance [TRADUCTION] « puissent très bien laisser entendre qu'il y a eu omission d'agir honorablement », la Cour d'appel s'est dite d'avis que les conclusions « ne sont pas suffisantes pour établir un manquement à l'obligation d'exécution honnête » (par. 16).

[28] Quoi qu'il en soit, la Cour d'appel a affirmé que toute tromperie dans les communications au cours de l'été 2013, le cas échéant, avait trait à un nouveau contrat qui n'existait pas encore, soit le renouvellement que Callow espérait négocier. Par conséquent, à son avis, on ne saurait dire que la tromperie, s'il en est, était directement liée à l'exécution du contrat d'entretien hivernal (par. 18).

[29] Vu la conclusion de la Cour d'appel, elle n'a pas traité de la question des dommages-intérêts.

IV. Analyse

A. *Survol du pourvoi*

[30] Le présent pourvoi offre à la Cour l'occasion de clarifier ce que constitue un manquement à l'obligation d'exécution honnête lorsqu'il se manifeste en lien avec une clause de résiliation accordant un droit unilatéral et apparemment absolu. Relevant ce qu'elle appelle la tromperie active de Baycrest dans son recours à la clause, Callow affirme que cette conduite était un manquement à l'obligation d'exécution honnête reconnue dans l'arrêt *Bhasin*.

[31] Devant notre Cour, Callow ne conteste pas le sens de la clause 9. Dans le présent pourvoi, elle ne plaide pas non plus que le marché conclu avec Baycrest était inadéquat et ne demande pas si la résiliation était injustifiée. Callow ne soutient pas, par exemple, qu'elle aurait dû bénéficier d'un délai

the 10-day period was unfair in the circumstances. I recognize that, at trial, there was some question as to whether the termination was fitting given Callow's work record. Indeed, the trial judge found in Callow's favour on this point, concluding that it had provided satisfactory services. But the suggestions that Callow was terminated for some improper purpose or motive, or even that the termination was unreasonable, need not be determined on this appeal. The narrow question addressed here is whether Baycrest failed to satisfy its duty not to lie or knowingly deceive Callow about matters directly linked to the performance of the winter maintenance agreement, specifically by exercising the termination clause as it did.

de préavis plus long parce que la période de 10 jours était inéquitable dans les circonstances. Je reconnais qu'en première instance, on s'est demandé si la résiliation était appropriée, vu le dossier de travail de Callow. De fait, la juge de première instance a statué en faveur de Callow sur ce point, concluant que cette dernière avait fourni des services satisfaisants. Toutefois, dans le cadre du présent pourvoi, la Cour n'a pas à se prononcer sur la thèse selon laquelle Callow a vu son contrat résilié dans un but ou pour un motif illégitimes quelconques, voire que la résiliation était déraisonnable. La question précise en litige est de savoir si Baycrest a omis de s'acquitter de son obligation de ne pas mentir à Callow ou de ne pas l'induire intentionnellement en erreur sur des questions directement liées à l'exécution du contrat d'entretien hivernal, plus précisément en ayant recours à la clause de résiliation comme elle l'a fait.

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

[32] En l'espèce, Callow soutient en fait que Baycrest a induit M. Callow en erreur quant au renouvellement possible du contrat d'entretien hivernal et, en conséquence, qu'elle l'a intentionnellement amené à croire à tort qu'elle était satisfaite de la prestation par Callow du contrat alors en vigueur pour la saison hivernale à venir. Callow affirme avoir présumé à tort, en conséquence de cette malhonnêteté, qu'il n'y avait aucun risque que le contrat d'entretien hivernal en vigueur soit résilié en application de la clause 9 du contrat. Selon Callow, Baycrest était parfaitement consciente de cette méprise et elle ne l'a pas détrompé, ce qui équivalait à un manquement à l'obligation d'exécution honnête. Bref, selon Callow, cette conduite trompeuse signifiait que le recours à la clause de résiliation était fautif en ce qu'il avait fait l'objet d'un manquement, même si, à proprement parler, le préavis applicable avait été donné. Ainsi, à son avis, ce manquement devrait donner lieu aux dommages-intérêts compensatoires habituellement octroyés comme la juge de première instance l'a ordonné, à savoir des dommages-intérêts correspondants à la perte de profits, aux dépenses engagées inutilement et à une facture impayée.

[33] In addition to the duty of honest performance, Callow invokes a free-standing duty to exercise

[33] Outre l'obligation d'exécution honnête, Callow invoque une obligation indépendante

contractual discretionary powers in good faith, which, it argues, Cromwell J. also recognized in *Bhasin* and which would justify the same award in damages. Furthermore, in the event the Court disagrees that there has been a breach of one or another of those existing duties, Callow submits, alternatively, that this Court should recognize a new duty of good faith, which would prohibit "active non-disclosure".

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

[35] In any event, Baycrest emphasizes the conclusion reached by the Court of Appeal that any discussions in the spring and summer of 2013 that may have misled Callow were connected to pre-contractual

d'exercer les pouvoirs discrétionnaires de nature contractuelle de bonne foi, une obligation, soutient-elle, que le juge Cromwell a également reconnue dans l'arrêt *Bhasin* et qui justifierait le même octroi de dommages-intérêts. Qui plus est, advenant que la Cour ne souscrive pas à l'argument selon lequel il y a eu manquement à l'une ou l'autre de ces obligations existantes, Callow plaide, subsidiairement, que notre Cour devrait reconnaître une nouvelle obligation d'agir de bonne foi qui interdirait la [TRADUCTION] « non-divulgation active ».

[34] En réponse, Baycrest souligne les concessions faites par Callow devant la Cour d'appel, en particulier que la clause 9, à première vue, ne l'obligeait pas à donner un préavis additionnel. Baycrest est d'accord avec la Cour d'appel pour dire que, quelles qu'aient pu être les communications entre les parties, elles portaient sur un contrat futur et n'étaient pas directement liées à l'exécution du contrat d'entretien hivernal alors en vigueur. Le contrat lui accordait un droit absolu de résilier le contrat pour n'importe quel motif moyennant un préavis, et c'est exactement ce qui s'est produit. Rappelant que l'obligation d'agir honnêtement dans l'exécution du contrat n'est pas un devoir de divulgation et n'impose pas de devoir de loyauté semblable à celui d'un fiduciaire, Baycrest affirme que Callow veut faire en sorte qu'elle subordonne son propre intérêt au sien en exigeant qu'elle l'informe de son intention de mettre fin au contrat d'entretien hivernal avant le délai de préavis stipulé de 10 jours. Selon elle, la Cour d'appel a ainsi eu raison de décider que le marché conclu par les parties lui donnait le droit de mettre fin au contrat comme elle l'a fait. Pareillement, en ce qui concerne l'obligation d'exercer des pouvoirs discrétionnaires de bonne foi, Baycrest affirme que, parce qu'elle a respecté les conditions du contrat, la question de l'exercice fautif du pouvoir discrétionnaire de nature contractuelle ne se pose pas compte tenu des faits l'espèce.

[35] Quoi qu'il en soit, Baycrest souligne la conclusion de la Cour d'appel selon laquelle toutes les discussions qui ont eu lieu au printemps et à l'été 2013, et qui auraient pu induire Callow en erreur,

negotiations. Thus, any dishonesty cannot be said to be directly linked to the performance of the winter maintenance agreement.

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

[37] First, *Bhasin* is clear that even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days' notice, the right had to be exercised in keeping with the duty to act honestly, i.e. Baycrest could not "lie or otherwise knowingly mislead" Callow "about matters directly linked to the performance of the contract". According to the Court of Appeal, any dishonesty was about a renewal, which was in turn connected to pre-contractual negotiations to which the duty as stated in *Bhasin* does not apply. I respectfully disagree. In my view, the Court of Appeal may have erroneously framed the trial judge's findings at para. 6, writing that she found that Baycrest had represented "that the winter contract was not in danger of non-renewal" (emphasis added). Referring instead to the ongoing winter services agreement, the trial judge had found Baycrest misrepresented "that the contract was not in danger despite [Baycrest's] knowledge that Callow was taking on extra tasks to bolster the chances of renewing the winter maintenance services contract" (para. 65). In determining whether dishonesty is connected to a given contract, the relevant question is generally whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly. As I understand it, the trial judge's finding was that the dishonesty in this case was related not to a future contract but to the termination of the winter maintenance agreement. If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early. This is what the trial judge found. Simply said, Baycrest's alleged deception was directly linked to

étaient liées à des négociations précontractuelles. Par conséquent, quand bien même il y aurait eu malhonnêteté, on ne saurait affirmer qu'elle était directement liée à l'exécution du contrat d'entretien hivernal.

[36] Je suis d'avis d'accueillir le pourvoi. En tout respect, je suis en désaccord avec la Cour d'appel relativement à deux points principaux.

[37] En premier lieu, il ressort clairement de l'arrêt *Bhasin* que même si Baycrest avait ce qui était, à première vue, un droit absolu de résilier le contrat d'entretien hivernal moyennant un préavis de 10 jours, ce droit devait être exercé dans le respect de l'obligation d'agir honnêtement; cela signifie que Baycrest ne pouvait pas « mentir ni autrement [. . .] induire [Callow] intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat ». Selon la Cour d'appel, la malhonnêteté, s'il y a en a eu, avait pour objet un renouvellement qui était, à son tour, lié à des négociations précontractuelles auxquelles l'obligation telle qu'énoncée dans l'arrêt *Bhasin* ne s'applique pas. Soit dit respectueusement, je ne suis pas d'accord. À mon avis, il se peut que la Cour d'appel ait mal formulé les conclusions de la juge de première instance au par. 6, écrivant que celle-ci avait conclu que Baycrest avait déclaré [TRADUCTION] « que le contrat d'hiver ne risquait pas de ne pas être renouvelé » (je souligne). Parlant plutôt du contrat de services hivernaux en vigueur, la juge de première instance avait conclu que Baycrest avait faussement déclaré [TRADUCTION] « que le contrat n'était pas en péril, et ce, même si [elle] savait que Callow accomplissait des tâches supplémentaires pour accroître les chances de renouveler le contrat de services d'entretien hivernal » (par. 65). Lorsqu'il s'agit de décider si la malhonnêteté est liée à un contrat en particulier, la question pertinente est en général de savoir si un droit prévu au contrat a été exercé ou si une obligation qui y est décrite a été exécutée de manière malhonnête. Selon ma compréhension, la juge de première instance a conclu que la malhonnêteté en l'espèce était liée, non pas à un contrat futur, mais à la résiliation du contrat d'entretien hivernal. Si on fait croire à quelqu'un que son

this contract because its exercise of the termination clause in this contract was dishonest.

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

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

cocontractant est satisfait de son travail et que son contrat en vigueur va vraisemblablement être renouvelé, il est raisonnable que cette personne en déduise que le contrat en vigueur n'est pas en péril et qu'il ne sera pas résilié hâtivement. C'est ce qu'a conclu la juge de première instance. En termes simples, la tromperie alléguée de Baycrest était directement liée à ce contrat, parce que son recours à la clause de résiliation qui y était prévue a été malhonnête.

[38] En deuxième lieu, la Cour d'appel a commis une erreur lorsqu'elle a statué que les conclusions de la juge de première instance ne revenaient pas à dire qu'il y avait eu un manquement à l'obligation d'exécution honnête. Bien qu'il ne faille pas assimiler l'obligation d'exécution honnête à une obligation positive de divulgation, cela n'épuise pas non plus la question de savoir si la conduite de Baycrest constituait, en tant que manquement à l'obligation d'honnêteté, un recours fautif à la clause de résiliation. Baycrest n'avait peut-être pas d'obligation autonome de divulguer son intention de résilier le contrat avant le délai de préavis de 10 jours prescrit, elle avait néanmoins l'obligation de ne pas induire Callow en erreur dans le recours à cette clause. Dans une situation où une partie ment ou induit intentionnellement l'autre partie en erreur, l'absence d'obligation positive de divulgation ne fait pas obstacle à une obligation pour la première de corriger une fausse impression créée par ses propres gestes.

[39] À la lumière de ces points, j'estime que la présente affaire ne constitue ni une simple affaire d'interprétation contractuelle portant sur le sens à donner à la clause 9, ni une affaire où il y a eu omission passive de divulguer un fait important. En effet, comme l'a reconnu la Cour d'appel, [TRADUCTION] « [n]on seulement [Baycrest] a-t-elle omis d'informer [Callow] de [sa] décision de résilier, [. . .] mais [elle] a activement induit Callow en erreur quant à [ses] intentions et accepté le travail qu'[elle] avait fourni "en prime", sachant que ce travail supplémentaire était exécuté dans l'intention ou l'espoir de convaincre [Baycrest] d'attribuer des contrats additionnels à [Callow] lorsque les contrats en vigueur arriveraient à échéance » (par. 15 (je souligne)). Bien

winter services agreement, it could not, as it did, "undermine those interests in bad faith" (*Bhasin*, at para. 65).

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

B. *The Duty of Honest Performance*

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

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

[42] Callow relies on the duty of honest performance in contract formulated in *Bhasin*. This duty, which applies to all contracts, "requires the parties to be honest with each other in relation to the performance of their contractual obligations" (para. 93). While this formulation of the duty refers explicitly to the performance of contractual obligations, it

que Baycrest ne fût pas tenue de subordonner ses intérêts contractuels légitimes à ceux de Callow en ce qui concerne le contrat de services d'entretien hivernal en vigueur, elle ne pouvait pas, comme elle l'a fait, « de mauvaise foi […] nuire [aux] intérêts » de Callow (*Bhasin*, par. 65).

[40] Pour les motifs qui suivent, le présent litige peut être réglé sur le fondement du premier moyen d'appel lié à l'obligation d'exécution honnête. Baycrest a intentionnellement induit Callow en erreur dans la manière dont elle a eu recours à la clause 9 du contrat et ce recours fautif à la clause de résiliation équivaut à une violation de contrat suivant l'arrêt *Bhasin*. Dans les circonstances, je conclus qu'il est inutile de répondre à l'argument de Callow selon lequel, sans égard à la question d'honnêteté, Baycrest a manqué à une obligation d'exercer un pouvoir discrétionnaire de bonne foi. Il n'est pas non plus nécessaire d'étendre la teneur de l'arrêt *Bhasin* pour reconnaître une nouvelle obligation d'agir de bonne foi liée à ce que Callow a décrit comme étant une « non-divulgation active » d'information ayant trait à l'exécution.

B. *L'obligation d'exécution honnête*

(1) La malhonnêteté est directement liée à l'exécution du contrat

[41] Je vais d'abord examiner l'argument de Callow selon lequel la Cour d'appel aurait eu tort de conclure que la malhonnêteté n'était pas liée au contrat [TRADUCTION] « alors en vigueur » (motifs de la C.A., par. 18). Comme je m'efforcerai de l'expliquer, bien que Baycrest ait eu le droit de résilier le contrat, elle a manqué à son obligation d'exécution honnête en ayant recours à ce droit comme elle l'a fait.

[42] Callow s'appuie sur l'obligation d'exécution honnête des contrats énoncée dans l'arrêt *Bhasin*. Cette obligation, qui s'applique à tous les contrats, « oblige les parties à faire preuve d'honnêteté l'une envers l'autre dans le cadre de l'exécution de leurs obligations contractuelles » (par. 93). Même si cette formulation de l'obligation renvoie explicitement

applies, of course, both to the performance of one's obligations and to the exercise of one's rights under the contract. Cromwell J. concluded, at paras. 94 and 103, that the finding that the non-renewal clause had been exercised dishonestly made out a breach of the duty:

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

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

[43] I begin by recognizing the debate as to the extent to which good faith, beyond the duty of honesty, should substantively constrain a right to terminate, in particular one found in a contract (see, e.g., W. Courtney, "Good Faith and Termination: The English and Australian Experience" (2019), 1 *Journal of Commonwealth Law* 185, at p. 189; M. Bridge, "The Exercise of Contractual Discretion" (2019), 135 *L.Q.R.* 227, at p. 247). For some, the right to terminate is in the nature of an "absolute

à l'exécution des obligations contractuelles, elle s'applique bien sûr tant à l'exécution des obligations qu'à l'exercice des droits prévus au contrat. Le juge Cromwell a statué, aux par. 94 et 103, que la conclusion selon laquelle le recours à la clause de non-renouvellement avait été malhonnête revenait à conclure à la violation de l'obligation :

> La juge de première instance a tiré une conclusion de fait claire selon laquelle Can-Am [TRADUCTION] « a agi malhonnêtement envers M. Bhasin en recourant à la clause de non-renouvellement » : par. 261; voir également par. 271. Aucune raison ne permet de modifier cette conclusion en appel. Il s'ensuit que Can-Am a violé son obligation d'exécution honnête du contrat.
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> . . .
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> Ainsi que l'a conclu la juge de première instance, la malhonnêteté de Can-Am était directement et intimement liée à son exécution du contrat conclu avec M. Bhasin et au recours à la clause de non-renouvellement. Je conclus que Can-Am a rompu le contrat de 1998 lorsqu'elle n'a pas agi honnêtement envers M. Bhasin en recourant à la clause de non-renouvellement. [Je souligne.]

Ce même cadre d'analyse s'applique au présent pourvoi. En l'espèce, la juge de première instance a tiré une conclusion de fait claire selon laquelle Baycrest avait agi de manière malhonnête envers Callow en faisant des représentations selon lesquelles le contrat n'était pas en péril, même si la décision de résilier le contrat avait déjà été prise (par. 65 et 67). Rien ne justifie de modifier cette conclusion en appel. Comme je l'expliquerai, il s'ensuit que Baycrest a induit Callow en erreur et a ainsi manqué à son obligation d'exécution honnête.

[43] Je débute en reconnaissant l'existence d'un débat quant à la mesure dans laquelle la bonne foi, au-delà de l'obligation d'honnêteté, devrait limiter un droit de résiliation sur le plan substantiel, en particulier celui prévu dans un contrat (voir, p. ex., W. Courtney, « Good Faith and Termination : The English and Australian Experience » (2019), 1 *Journal of Commonwealth Law* 185, p. 189; M. Bridge, « The Exercise of Contractual Discretion » (2019), 135 *L.Q.R.* 227, p. 247). Pour certains, le droit de résilier

right" insulated from judicial oversight, unlike the exercise of contractual discretion (see E. Peel, *The Law of Contract* (15th ed. 2020), at para. 18-088). To this end, I recall that Cromwell J. observed that "[c]lassifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation" (*Bhasin*, at para. 72). I need not and do not seek to resolve this debate in this case. I emphasize that Cromwell J. himself recognized that, regardless of this debate, the non-renewal clause could not be exercised dishonestly (para. 94). Whatever the full range of circumstances to which good faith is relevant to contract law in common law Canada, it is beyond question that the duty of honesty is germane to the performance of this contract, in particular to the way in which the unilateral right to terminate for convenience set forth in clause 9 was exercised.

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

[45] While these two existing doctrines are indeed distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. Cromwell J.

est de la nature d'un « droit absolu » qui est à l'abri de tout contrôle judiciaire, contrairement à l'exercice d'un pouvoir discrétionnaire de nature contractuelle (voir E. Peel, *The Law of Contract* (15e éd. 2020), par. 18-088). À cet égard, je rappelle que, selon le juge Cromwell, « [f]aire entrer la décision de ne pas renouveler le contrat dans la catégorie de l'exercice d'un pouvoir discrétionnaire de nature contractuelle aurait pour effet d'élargir sensiblement la jurisprudence applicable à ce type de situation » (*Bhasin*, par. 72). Je n'ai pas à régler ce débat en l'espèce, et je ne cherche pas à le faire. Je souligne plutôt que le juge Cromwell a lui-même reconnu que, sans égard à ce débat, la clause de non-renouvellement ne pouvait pas être exercée de façon malhonnête (par. 94). Quel que soit l'éventail complet des circonstances où la bonne foi est pertinente en droit des contrats dans les ressorts canadiens de common law, il ne fait aucun doute que l'obligation d'honnêteté est pertinente dans le contexte de l'exécution du contrat en cause ici, en particulier quant à la manière dont a été exercé le droit unilatéral de le résilier pour raisons de commodité prévu à la clause 9.

[44] Toujours à titre de commentaire préliminaire, je rappelle que le principe directeur de bonne foi reconnu par le juge Cromwell n'est pas une règle autonome, mais qu'il se manifeste plutôt par les doctrines existantes en matière de bonne foi, dont la liste peut être graduellement étendue s'il y a lieu. En l'espèce, Callow invoque deux règles existantes : l'obligation d'exécution honnête et l'obligation d'exercer des pouvoirs discrétionnaires de bonne foi. À mon avis, bien comprise, l'obligation d'agir honnêtement au sujet de questions directement liées à l'exécution du contrat — soit ici le recours à la clause de résiliation — suffit pour trancher le présent pourvoi. Il n'est pas nécessaire d'étendre la portée de la règle de droit énoncée dans l'arrêt *Bhasin* pour donner gain de cause à Callow. Le présent pourvoi offre plutôt l'occasion d'illustrer cette doctrine existante qui, je le dis respectueusement, a été mal interprétée par la Cour d'appel.

[45] Bien que ces deux règles existantes soient effectivement distinctes, à l'instar de chacune des diverses manifestations du principe directeur, elles ne doivent pas être considérées comme étant

explained that good faith contractual performance is a shared "requirement of justice" that underpins and informs the various rules recognized by the common law on obligations of good faith contractual performance (*Bhasin*, at para. 64). The organizing principle of good faith was intended to correct the "piecemeal" approach to good faith in the common law, which too often failed to take a consistent or principled approach to similar problems and, instead, develop the law in this area in a "coherent and principled way" (paras. 59 and 64).

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

[47] The specific legal doctrines derived from the organizing principle rest on a "requirement of justice" that a contracting party, like Baycrest here in respect of the contractual duty of honest performance, have appropriate regard to the legitimate contractual interests of their counterparty (*Bhasin*, at paras. 63-64). It need not, according to *Bhasin*, subvert its own interests to those of Callow by acting as a fiduciary or in a selfless manner that would confer a benefit on Callow. To be sure, this requirement of justice reflects the notion that the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract. But by the same token, those rights and obligations must be exercised and performed, as stated by the organizing principle, honestly and reasonably and not capriciously or arbitrarily where recognized by law. This requirement of justice, rooted in a contractual ideal of corrective

déconnectées l'une de l'autre. Le juge Cromwell a expliqué que l'exécution contractuelle de bonne foi est une « exigence de justice » partagée, qui sous-tend et détermine les diverses règles reconnues par la common law portant sur des obligations d'exécuter les contrats de bonne foi (*Bhasin*, par. 64). Le principe directeur de bonne foi visait à corriger l'approche « fragmentaire » à l'égard de la bonne foi en common law — qui trop souvent ne permettait pas d'appliquer à des problèmes similaires une approche cohérente ou raisonnée —, et à plutôt élaborer le droit en cette matière « de façon cohérente et rationnelle » (par. 59 et 64).

[46] En insistant sur le fil qui relie en un tout les doctrines de la bonne foi — exprimé par le principe directeur —, les tribunaux mettront fin à l'élaboration fragmentaire et incohérente de la doctrine de la bonne foi en common law que le juge Cromwell voulait justement éviter. Bien que l'obligation d'exécution honnête puisse ressembler à certains égards au droit en matière de déclarations inexactes, par exemple, ce que la bonne foi peut ne pas faire dans d'autres contextes, l'arrêt *Bhasin* nous encourage à examiner comment d'autres règles relatives à la bonne foi existantes, distinctes, mais liées, peuvent être utilisées comme outils d'analyse utiles pour comprendre comment l'obligation d'exécution honnête, relativement nouvelle, s'applique en pratique.

[47] Les règles de droit particulières tirées du principe directeur reposent sur une « exigence de justice » voulant qu'une partie contractante — comme Baycrest en l'espèce relativement à l'obligation contractuelle d'exécution honnête — prenne en compte comme il se doit les intérêts contractuels légitimes de son cocontractant (*Bhasin*, par. 63-64). Selon l'arrêt *Bhasin*, elle n'a toutefois pas à subordonner ses propres intérêts à ceux de Callow en agissant comme un fiduciaire ou d'une manière altruiste qui conférerait un avantage à cette dernière. Certes, cette exigence de justice est le reflet de la notion selon laquelle le marché conclu — les droits et les obligations convenus — est la source première d'équité entre les parties à un contrat. Ces droits et obligations doivent tout de même être exercés et exécutés, comme le veut le principe directeur, de manière honnête et raisonnable, et non de façon abusive

justice, ties the existing doctrines of good faith, including the duty to act honestly, together. The duty of honest performance is but an exemplification of this ideal. Here, based on its failure to perform clause 9 honestly, Baycrest committed a breach of contract, a civil wrong, for which it has to answer.

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

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

[50] The duty of honest performance is a contract law doctrine, setting it apart from other areas of the law that address the legal consequences of deceit with which it may share certain similarities.

ou arbitraire. Cette exigence de justice — qui s'inscrit dans un idéal contractuel de justice corrective — relie entre elles les doctrines existantes relatives à la bonne foi, y compris l'obligation d'agir honnêtement. L'obligation d'exécution honnête n'est qu'une manifestation de cet idéal. En l'espèce, parce qu'elle n'a pas eu recours à la clause 9 de manière honnête, Baycrest a commis une violation de contrat — une faute civile — dont elle doit répondre.

[48] Lorsque, dans l'arrêt *Bhasin*, le juge Cromwell a reconnu une obligation d'agir honnêtement dans l'exécution des contrats, il a expliqué que cette obligation « devrait être considérée non pas comme une condition implicite, mais comme une doctrine générale du droit des contrats imposant, à titre d'obligation contractuelle, une norme minimale d'exécution honnête du contrat » (par. 74). Selon le juge Cromwell, il convenait de caractériser cette nouvelle obligation de doctrine du droit des contrats « puisque les parties ne s'attendent que très peu souvent à ce que leurs contrats les autorisent à exécuter leurs obligations de façon malhonnête » (par. 76). En conséquence, l'obligation s'applique même lorsque, comme en l'espèce, les parties ont expressément prévu les modalités de résiliation, puisque l'obligation d'agir de bonne foi « trouve application sans égard aux intentions des parties » (par. 74). Aucun droit contractuel, y compris un droit de résilier, ne peut être exercé malhonnêtement et, de par le fait même, contrairement aux exigences de la bonne foi.

[49] Le libellé choisi par le juge Cromwell est révélateur. Il ne suffit pas de conclure que, sur le plan chronologique, la malhonnêteté s'est produite alors que les deux parties exécutaient les obligations qui leur incombaient en vertu du contrat : la conduite malhonnête ou trompeuse doit plutôt être directement liée à l'exécution. Autrement, il y aurait simplement une obligation de ne pas mentir, avec peu pour limiter la grande étendue que pourrait avoir la responsabilité.

[50] L'obligation d'exécution honnête est une doctrine du droit des contrats, ce qui la place à part des autres domaines du droit relatif aux conséquences juridiques de la tromperie avec lesquels elle pourrait

One could imagine analyzing the facts giving rise to a duty of honest performance claim through the lens of other existing legal doctrines, such as fraudulent misrepresentation giving rise to rescission of the contract or the tort of civil fraud (see, e.g., B. MacDougall, *Misrepresentation* (2016), at §§ 1.144-1.145). However, in *Bhasin*, Cromwell J. wrote explicitly that while the duty of honest performance has similarities with civil fraud and estoppel "it is not subsumed by them" (para. 88). For instance, unlike estoppel and civil fraud, the duty of honest performance does not require a defendant to intend that the plaintiff rely on their representation or false statement. Cromwell J. explicitly defined the duty as a new and distinct doctrine of contract law, not giving rise to tort liability or tort damages but rather resulting in a breach of contract when violated (paras. 72-74, 90, 93 and 103). We are not asked by the parties to depart from this approach.

[51] In light of *Bhasin*, then, how is the duty of honest performance appropriately limited? The breach must be directly linked to the performance of the contract. Cromwell J. observed a contractual breach because Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause" (para. 94). He pointed, in particular, to the trial judge's conclusion that Can-Am "acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause" (para. 98; see also para. 103). Accordingly, it is a link to the performance of obligations under a contract, or to the exercise of rights set forth therein, that controls the scope of the duty. In a comment on *Bhasin*, Professor McCamus underscored this connection: "Cromwell J was of the view that the new duty of honesty could be breached in the context of the exercise of a right of non-renewal. That was the holding in *Bhasin*" ("The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law" (2015), 32 *J.C.L.* 103, at p. 115).

avoir certaines similarités. On pourrait imaginer analyser les faits donnant lieu à une demande fondée sur l'obligation d'exécution honnête à travers le prisme d'autres doctrines juridiques existantes, telles celles relatives aux déclarations inexactes frauduleuses donnant lieu à l'annulation du contrat ou aux délits de fraude civile (voir, p. ex., B. MacDougall, *Misrepresentation* (2016), §1.144-1.145). Toutefois, dans l'arrêt *Bhasin*, le juge Cromwell a précisé explicitement que l'obligation d'exécution honnête offre des similitudes avec la fraude civile et la préclusion, « sans toutefois être subsumée sous ces notions » (par. 88). À titre d'exemple, contrairement à la préclusion et à la fraude civile, l'obligation d'exécution honnête ne requiert pas qu'un défendeur ait l'intention que le demandeur s'appuie sur ses assertions ou fausses déclarations. Le juge Cromwell a explicitement défini l'obligation comme une doctrine du droit des contrats nouvelle et distincte ne donnant lieu ni à une responsabilité délictuelle ni à des dommages-intérêts en cette matière, mais entraînant plutôt une violation de contrat lorsque celui qui y est tenu ne s'en acquitte pas (par. 72-74, 90, 93 et 103). Les parties ne nous demandent pas de nous écarter de cette approche.

[51] À la lumière de l'arrêt *Bhasin*, comment alors l'obligation d'exécution honnête est-elle limitée de façon appropriée? Le manquement doit être directement lié à l'exécution du contrat. Le juge Cromwell a observé un manquement contractuel du fait que Can-Am avait « agi malhonnêtement envers M. Bhasin en recourant à la clause de non-renouvellement » (par. 94). Il a souligné tout particulièrement la conclusion de la juge de première instance selon laquelle Can-Am « avait agi malhonnêtement envers M. Bhasin pendant la période précédant le recours à la clause de non-renouvellement » (par. 98; voir aussi le par. 103). Par conséquent, c'est un lien avec l'exécution des obligations découlant d'un contrat ou avec l'exercice de droits qui y sont prévus dont dépend la portée de l'obligation. Dans un commentaire sur l'arrêt *Bhasin*, le professeur McCamus a souligné ce lien : [TRADUCTION] « Le juge Cromwell était d'avis que la nouvelle obligation d'honnêteté pouvait être violée dans le contexte de l'exercice d'un droit de non-renouvellement. Voilà ce qui a été jugé dans

While the abuse of discretion was not the basis of the damages awarded in *Bhasin*, the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing, at least in circumstances like ours, on the wrongful exercise of a contractual prerogative.

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

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

[54] The issue, then, is not whether the clause was properly interpreted, or whether the bargain itself is inadequate. Moreover, what is important is not the failure to act honestly in the abstract but whether Baycrest failed to act honestly in exercising clause 9.

l'arrêt *Bhasin* » (« The New General "Principle" of Good Faith Performance and the New "Rule" of Honesty in Performance in Canadian Contract Law » (2015), 32 *J.C.L.* 103, p. 115). Bien que les dommages-intérêts accordés dans cet arrêt n'aient pas eu pour fondement l'abus d'un pouvoir discrétionnaire, l'obligation d'exécution honnête partage une méthodologie avec l'obligation d'exercer les pouvoirs discrétionnaires de nature contractuelle de bonne foi en se concentrant, du moins dans les circonstances comme celles dont nous sommes saisies, sur l'exercice fautif d'une prérogative contractuelle.

[52] Fait important, Callow ne cherche pas à empêcher Baycrest de recourir à la clause de résiliation en l'espèce; comme dans l'arrêt *Bhasin*, elle ne cherche qu'à obtenir des dommages-intérêts découlant du fait que Baycrest a eu recours à la clause de façon malhonnête. Autrement dit, selon l'argument de Callow, formulé correctement, Baycrest ne pouvait pas avoir recours à la clause 9 d'une manière qui violait l'obligation d'honnêteté, aussi absolu ce droit apparût-il à première vue.

[53] La bonne foi n'est donc pas invoquée en l'espèce pour créer, implicitement, une nouvelle disposition contractuelle ou pour servir de guide d'interprétation du libellé de ce qui était en quelque sorte une affirmation ambiguë de l'intention des parties. L'obligation d'honnêteté, en tant que doctrine du droit des contrats, a plutôt une fonction restrictive sur l'exercice d'un droit par ailleurs complet et clair. Il en est ainsi puisque l'obligation, sans égard à l'intention des parties, s'applique à l'exécution de tous les contrats et, par extension, à toutes les obligations et à tous les droits contractuels. Ceci veut simplement dire que plutôt que de restreindre la décision de résilier en soi, l'obligation d'exécution honnête donne lieu à des dommages-intérêts lorsque le droit a été exercé de manière malhonnête.

[54] Ainsi, la question en litige n'est pas celle de savoir si la clause a été correctement interprétée ou si le marché lui-même est inadéquat. Qui plus est, ce qui importe, ce n'est pas l'omission d'avoir agi honnêtement dans l'abstrait, c'est plutôt de savoir

Stated simply, no contractual right can be exercised in a dishonest manner because, pursuant to *Bhasin*, that would be contrary to an imperative requirement of good faith, i.e. not to lie or knowingly deceive one's counterparty in a matter directly linked to the performance of the contract.

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

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

si Baycrest a omis d'agir avec honnêteté dans son recours à la clause 9. Pour dire les choses simplement, aucun droit contractuel ne peut être exercé de manière malhonnête, parce que, en application de l'arrêt *Bhasin*, cela serait contraire à une exigence impérative de bonne foi — soit celle de ne pas mentir à son cocontractant ni d'autrement l'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat.

[55] Cet argument invite la Cour à expliquer si Baycrest a eu recours incorrectement à la clause de résiliation et comment, le cas échéant, indépendamment de toute obligation en matière de préavis. J'ajouterais qu'il ne faut pas confondre cette attention portée sur la *manière* dont le droit de résiliation a été exercé avec la question de savoir *si* le droit pouvait être exercé. Callow n'allègue pas que Baycrest n'avait pas le droit de résilier le contrat; ce droit de le faire moyennant un préavis de 10 jours, conformément à la clause 9, n'est pas en cause en l'espèce. Cependant, selon elle, ce droit a été exercé de façon malhonnête, en contravention de l'obligation reconnue dans l'arrêt *Bhasin*, ce qui oblige Baycrest à payer des dommages-intérêts par suite de son comportement. Ainsi, je ferais la même distinction que celle avancée par le juge Cromwell dans l'arrêt *Bhasin* en ce qui concerne l'exercice de la clause de non-renouvellement en cause dans cette dernière affaire : Can-Am a agi malhonnêtement envers M. Bhasin en ayant recours à la clause de non-renouvellement comme elle l'a fait et elle pouvait donc être tenue de verser des dommages-intérêts. Toutefois, rien ne l'empêchait d'exercer sa prérogative de ne pas renouveler le contrat.

[56] Au soutien de son argument selon lequel Baycrest aurait manqué à l'obligation d'exécution honnête dans son recours à la clause 9 du contrat, Callow invoque les références au droit québécois dans l'arrêt *Bhasin* (par. 32, 35, 41, 44, 82 et 85) et en particulier celle que fait le juge Cromwell à la théorie de l'abus de droits contractuels énoncée aux art. 6, 7 et 1375 du *Code civil du Québec* (« *C.c.Q.* » ou « *Code civil* ») (par. 83). Callow fait remarquer que l'obligation de ne pas recourir de façon abusive

faith performance in Quebec. It submits that the allusion to the doctrine of abuse of rights was an indication of the requirements of good faith in *Bhasin* and argues that the same framework can usefully illustrate how the common law duty of honesty constrains the termination clause in this case.

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

[58] Mindful no doubt of its unique vantage point which offers an occasion to observe developments in both the common law and the civil law in its work, this Court has often drawn on this country's bijural environment to inform its decisions, principally in

aux droits contractuels est reconnue comme une des caractéristiques des devoirs d'exécuter les obligations de bonne foi au Québec. Elle soutient que le renvoi à la théorie de l'abus de droit dans l'arrêt *Bhasin* était une indication des exigences de la bonne foi, et plaide que le même cadre d'analyse peut illustrer utilement comment l'obligation d'honnêteté de common law restreint la clause de résiliation en l'espèce.

[57] Je conviens qu'un examen du droit québécois est utile en l'espèce. Le lien direct entre la conduite malhonnête et le recours à la clause 9 n'a pas été établi correctement par la Cour d'appel dans le présent dossier et le droit québécois aide à illustrer que, selon l'arrêt *Bhasin*, il doit exister un tel lien. À mon avis, la conduite malhonnête de Baycrest n'est pas une faute qui se manifeste indépendamment de la clause de résiliation, elle constitue plutôt une violation de contrat qui, comprise comme il se doit, s'est manifestée dans le contexte du recours à la clause 9. C'est en fonction du lien direct entre la malhonnêteté et le recours à la clause que la conduite est jugée contraire aux exigences de la bonne foi. Cela ressort encore plus clairement lorsque l'enjeu est examiné à la lumière de la conception civiliste de la bonne foi en matière contractuelle à laquelle l'arrêt *Bhasin* fait allusion, soit précisément du fait qu'au Québec « [l]a notion de bonne foi comprend (notamment) l'exigence de l'honnêteté en matière d'exécution du contrat » (par. 83). De fait, tout comme en droit civil québécois, aucun droit contractuel ne peut être exercé malhonnêtement, ce qui reviendrait à contrevenir aux exigences de la bonne foi. Évoqué à juste titre par le juge Cromwell, ce cadre d'analyse qui consiste à établir un lien entre le recours à une clause contractuelle et les exigences de la bonne foi est une illustration utile pour la common law du lien établi par l'arrêt *Bhasin* et qui a échappé à la Cour d'appel en l'espèce.

[58] Sans aucun doute consciente de sa position unique qui lui offre l'occasion d'observer dans le contexte de ses travaux l'évolution de la common law et du droit civil, la Cour a souvent puisé dans le cadre bijuridique du pays pour éclairer ses décisions,

private law appeals. While this practice has varied over time and has been most prevalent in civil law cases in which common law authorities are considered, the influence of bijuralism is not and need not be confined to appeals from Quebec or to matters relating to federal legislation (see J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada* (2007), at pp. 7-22). In its modern jurisprudence, this Court has recognized the value of looking to legal sources from Quebec in common law appeals, and has often observed how these sources resolve similar legal issues to those faced by the common law (see, e.g., *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at pp. 1143-44; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 138; see also *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at para. 41). Used in this way, authorities from Quebec do not, of course, bind this Court in its disposition of a private law appeal from a common law province, but rather serve as persuasive authority, in particular, by shedding light on how the jurisdictionally applicable rules work. In my respectful view, it is uncontroversial that, when done carefully, sources of law may be used in this way (*Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 32, citing J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975), 53 *Can. Bar Rev.* 715, at p. 726). As Robert J. Sharpe put it, writing extra-judicially, judges "should strive to maintain the coherence and integrity of the law as defined by the binding authorities, using persuasive authority to elaborate and flesh out its basic structure" (*Good Judgment: Making Judicial Decisions* (2018), at pp. 171-72).

[59] This does not mean the appropriate use of these sources is limited to cases where there is a gap in the law of the jurisdiction in which the appeal

principalement dans le cadre de pourvois en droit privé. Bien que cette pratique ait changé au fils du temps et que la Cour y ait eu davantage recours dans des causes de droit civil où des sources de common law ont été examinées, l'influence du bijuridisme n'est pas limitée aux pourvois émanant du Québec ou aux questions relatives à la législation fédérale et elle n'a pas à l'être (voir J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada* (2007), p. 7-22). Dans sa jurisprudence moderne, la Cour a reconnu la valeur de l'étude des sources et autorités juridiques du Québec dans des pourvois émanant des provinces de common law et elle a souvent examiné comment ces sources permettent de résoudre des questions juridiques similaires à celles auxquelles fait face la common law (voir, p. ex., *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021, p. 1143-1144; *Deloitte & Touche c. Livent Inc. (Séquestre de)*, 2017 CSC 63, [2017] 2 R.C.S. 855, par. 138; voir aussi *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, par. 41). Lorsqu'on y a recours de cette façon, les sources québécoises ne lient évidemment pas la Cour dans sa détermination de l'issue d'un pourvoi de droit privé provenant d'une province de common law; elles servent plutôt d'autorités persuasives, notamment en éclairant la façon dont fonctionnent les règles applicables dans la juridiction en cause. Selon moi, il est non controversé que, lorsque cela est fait avec soin, des sources de droit et autorités du droit peuvent être utilisées de cette manière (*Farber c. Cie Trust Royal*, [1997] 1 R.C.S. 846, par. 32, citant J.-L. Baudouin, « L'interprétation du Code civil québécois par la Cour suprême du Canada » (1975), 53 *R. du B. can.* 715, p. 726). Comme l'a affirmé Robert J. Sharpe dans un texte extra-judiciaire, [TRADUCTION] : « les juges doivent s'efforcer de maintenir la cohérence et l'intégrité du droit tel qu'il est défini par les autorités contraignantes, en se servant d'autorités persuasives pour en élaborer et en étoffer la structure de base » (*Good Judgment : Making Judicial Decisions* (2018), p. 171-172).

[59] Cela ne signifie pas que le recours approprié à ces sources se limite aux causes où le droit de la juridiction d'où émane le pourvoi comporte des

originates, in the sense that there is no answer to the legal problem in that law, or where a court contemplates modifying an existing rule. Respectfully said, I am aware of no authority of this Court supporting so restrictive an approach and note that, while unresolved, there are serious debates in both the common law and the civil law as to what exactly a "gap" in the law might be (see, e.g., J. Gardner, "Concerning Permissive Sources and Gaps" (1988), 8 *Oxford J. Leg. Stud.* 457; J. E. C. Brierley, "Quebec's 'Common Laws' (*Droits Communs*): How Many Are There?", in E. Caparros et al., eds., *Mélanges Louis-Philippe Pigeon* (1989), 109). Taking this approach would unduly inhibit the ability of this Court to understand the law better in reference to how comparable problems are addressed elsewhere in Canada. It would be wrong to disregard potentially helpful material in this way merely because of its origin.

[60] In private law, comparison between the common law and civil law as they evolve in Canada is a particularly useful and familiar exercise for this Court. This exercise of comparison between legal traditions for the purposes of "explanation" and "illustration" has been described as "worthwhile", "useful" and "helpful" (*Farber*, at paras. 32 and 35; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 76; *Norsk*, at p. 1174, per Stevenson J. (concurring)). Principles from the common law or the civil law may serve as a "source of inspiration" for the other, precisely because these "two legal communities have the same broad social values" (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 38). The common law and the civil law are not the only legal traditions relevant to the work of the Court; yet, the opportunity for dialogue between these legal traditions is arguably a special mandate for this Court given the breadth and responsibilities of its bijural jurisdiction. This opportunity has been underscored in scholarly commentary, including in the field of good faith performance of contracts (e.g., L. LeBel and P.-L. Le Saunier, "L'interaction du droit civil et

lacunes — en ce sens que ce droit ne répond pas au problème juridique en cause — ou aux circonstances où un tribunal envisage de modifier une règle existante. Soit dit en tout respect, à ma connaissance, aucune décision de la Cour ne soutient une approche aussi restrictive. Je note en outre que, bien qu'ils ne soient pas résolus, des débats sérieux ont cours tant en common law qu'en droit civil sur ce que peut bien être une « lacune » dans le droit (voir, p. ex., J. Gardner, « Concerning Permissive Sources and Gaps » (1988), 8 *Oxford J. Leg. Stud.* 457; J. E. C. Brierley, « Quebec's "Common Laws" (*Droits Communs*) : How Many Are There? », dans E. Caparros et autres, dir., *Mélanges Louis-Philippe Pigeon* (1989), 109). Adopter une telle approche limiterait indument la capacité de la Cour de comprendre le droit en se référant à la façon dont des problèmes comparables sont traités ailleurs au Canada. Il serait mal avisé de ne pas tenir compte de sources et d'autorités potentiellement utiles uniquement en raison de leur origine.

[60] En droit privé, la comparaison entre la common law et le droit civil, au fil de leur évolution au Canada, est un exercice qui est particulièrement utile pour la Cour et qu'elle connaît bien. Cet exercice de comparaison de traditions juridiques, aux fins de « valeur de raison » et d'« illustration », a été décrit comme « intéressant », « [ayant] une valeur » et « utile » (*Farber*, par. 32 et 35; *Ciment du Saint-Laurent inc. c. Barrette*, 2008 CSC 64, [2008] 3 R.C.S. 392, par. 76; *Norsk*, p. 1174, le juge Stevenson (motifs concordants)). Les principes tirés de la common law ou du droit civil peuvent servir de « source d'inspiration » pour l'autre tradition juridique, précisément parce que les « deux communautés juridiques partagent les mêmes grandes valeurs sociales » (*Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 CSC 9, [2011] 1 R.C.S. 214, par. 38). La common law et le droit civil ne sont pas les seules traditions juridiques pertinentes pour le travail de la Cour; il n'en demeure pas moins que l'occasion d'établir un « dialogue » entre elles constitue sans doute un mandat particulier pour la Cour étant donné l'étendue de sa compétence bijuridique et les responsabilités qui en découlent.

de la common law à la Cour suprême du Canada" (2006), 47 *C. de D.* 179, at p. 206; R. Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019), 1 *Journal of Commonwealth Law* 83).

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

Cette occasion a été soulignée par des auteurs, y compris dans le domaine de l'exécution contractuelle de bonne foi (p. ex., L. LeBel et P.-L. Le Saunier, « L'interaction du droit civil et de la common law à la Cour suprême du Canada » (2006), 47 *C. de D.* 179, p. 206; R. Jukier, « Good Faith in Contract : A Judicial Dialogue Between Common Law Canada and Québec » (2019), 1 *Journal of Commonwealth Law* 83).

[61] Dans des écrits extrajudiciaires, le juge LeBel a souligné que cet exercice relève des fonctions de la Cour en tant que cour d'appel nationale. Il a ajouté que « parce qu'elle en possède maintenant la capacité, en raison de ses ressources institutionnelles, la Cour suprême assume désormais la responsabilité symbolique de l'ouverture à une culture de dialogue entre les deux grandes traditions juridiques » (« Les cultures de la Cour suprême du Canada : vers l'émergence d'une culture dialogique? », dans J.-F. Gaudreault-DesBiens et al., dir., *Convergence, concurrence et harmonisation des systèmes juridiques* (2009), 1, p. 7). Cette capacité institutionnelle unique de la Cour à titre de cour de dernière instance pour les appels de common law et de droit civil au Canada lui permet d'engager un dialogue qui en fait « plus qu'un tribunal d'appel pour chaque province » (F. Allard, *La Cour suprême du Canada et son impact sur l'articulation du bijuridisme* (2001), p. 22). L'occasion d'établir un dialogue se présente tout particulièrement lorsqu'il est question des théories de la common law relatives à la bonne foi. Renvoyant aux propos du juge LeBel et à la façon dont la Cour a fait appel aux sources québécoises dans l'arrêt *Bhasin*, une chercheuse en droit comparé a écrit récemment que s'il faut [TRADUCTION] « maintenir et protéger jalousement » le caractère distinctif des traditions juridiques du Canada, « cela n'a pas à [les] empêcher d'apprendre [l'une de l'autre] » (R. Jukier, « The Legacy of Justice Louis LeBel : The Civilian Tradition and Procedural Law » (2015), 70 *S.C.L.R.* (2d) 27, p. 45). Le professeur Waddams a également signalé que la référence au droit québécois dans l'arrêt *Bhasin* était une [TRADUCTION] « invitation » à examiner les concepts de droit civil, y compris l'abus de droit, pour élaborer la common law relative à la bonne foi (voir « Unfairness and Good Faith in Contract Law : A New Approach » (2017), 80

increasingly prominent in [this Court's] judgments" (Allard, at p. 22).

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

S.C.L.R. (2d) 309, p. 330-331). Cette approche serait conforme à une démarche plus large « [d']influence réciproque plus marquée entre [les] traditions par le biais d'une analyse comparative qui prend de plus en plus de place dans les jugements [de la Cour] » (Allard, p. 22).

[62] De fait, la Cour s'est livrée à cet exercice dans des pourvois de common law et de droit civil dans lesquels les principes relatifs à la bonne foi entraient en jeu, notamment dans l'arrêt *Bhasin* lui-même (voir aussi *Potter c. Commission des services d'aide juridique du Nouveau-Brunswick*, 2015 CSC 10, [2015] 1 R.C.S. 500, par. 30; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701, par. 75 et 96, citant *Farber*). Le juge Cromwell a souligné que le droit civil québécois peut rassurer, par exemple, les avocats de common law qui craignent qu'une nouvelle obligation d'exécution honnête puisse « engendrer l'instabilité ou faire obstacle à la liberté contractuelle » (*Bhasin*, par. 82). Le juge Cromwell a également évoqué des éléments de comparaison substantiels au soutien de son analyse sur la similarité entre les conditions implicites en common law et la bonne foi au Québec de même que sur le fait que la bonne foi en droit québécois comprend aussi une exigence d'honnêteté en matière d'exécution du contrat (par. 44 et 83). Fait à souligner, dans un exemple québécois récent de ceci qui est particulièrement pertinent en l'espèce, le juge Gascon, au nom des juges majoritaires de la Cour, a cité l'arrêt *Bhasin* quant au degré auquel le principe directeur de bonne foi illustre bien qu'une partie contractante doit « [prendre] en compte comme il se doit » les intérêts contractuels légitimes de son cocontractant. Il a noté que « [c]ette affirmation se transpose tout aussi bien à l'obligation de bonne foi en droit civil québécois » (*Churchill Falls (Labrador) Corp. c. Hydro-Québec*, 2018 CSC 46, [2018] 3 R.C.S. 101, par. 117). J'en prends note uniquement à titre d'exemple de raisonnement judiciaire accepté dans ce domaine, où l'on dit à juste titre que les comparaisons sont difficiles à faire. Les juges majoritaires de la Cour ont néanmoins invoqué une décision de common law qui fait autorité sur la bonne foi pour donner un éclairage sur le traitement distinct qu'en fait le droit civil, ayant jugé qu'il était à la fois utile et persuasif de le faire.

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

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

[65] These diverging conclusions in this case are unsurprising given that this Court recognized the duty of honest performance as a "new" good faith doctrine relatively recently (*Bhasin*, at para. 93). Nevertheless, the reasons in *Bhasin* indicate how the required connection between the dishonesty and performance is made manifest. When Cromwell J. summarized the new duty, he suggested that it required honesty "about matters directly linked to the performance of the contract" and, later, "in relation

[63] De la même manière, je fais référence au droit civil québécois dans le présent pourvoi pour illustrer ce que signifie le fait que la malhonnêteté soit directement liée à l'exécution du contrat. Comme je l'expliquerai, le cadre d'analyse du droit civil en matière d'abus de droit aide à faire porter l'analyse de la question de savoir s'il y a eu manquement à l'obligation d'exécution honnête en common law sur ce que l'on pourrait appeler l'exercice fautif d'un droit contractuel.

[64] Le présent pourvoi met en évidence la nécessité de clarifier les circonstances dans lesquelles la malhonnêteté est directement liée à l'exécution d'un contrat. La Cour d'appel a reconnu l'obligation d'exécution honnête, mais a conclu que les communications en cause n'étaient pas directement liées à l'exécution du contrat en vigueur : [TRADUCTION] « Il se peut que les communications entre les parties aient amené M. Callow à croire qu'il y aurait un nouveau contrat, mais ces communications n'empêchaient pas [Baycrest] d'exercer [son] droit de résilier le contrat d'entretien hivernal alors en vigueur » (par. 18). La Cour d'appel a aussi conclu que Baycrest pouvait recourir à la clause de résiliation [TRADUCTION] « à la seule condition qu'elle informe [Callow] de [son] intention de le faire et qu'elle donne le préavis nécessaire. C'est tout ce que [Callow] a négocié, et c'est tout ce à quoi [elle] avait droit » (par. 17). La Cour d'appel n'a apparemment pas tenu compte du fait que la manière dont le droit de résiliation a été exercé équivalait à un manquement à l'obligation d'agir honnêtement. Aux yeux de la juge de première instance en l'espèce, il s'agissait là de la question directement liée à l'exécution du contrat dans le litige avec Callow.

[65] Ces conclusions divergentes en l'espèce ne sont guère surprenantes puisque la Cour n'a reconnu l'obligation d'exécution honnête comme « nouvelle » doctrine de la bonne foi qu'assez récemment (*Bhasin*, par. 93). Cependant, les motifs de l'arrêt *Bhasin* indiquent comment le lien requis entre la malhonnêteté et l'exécution est mis en évidence. Lorsque le juge Cromwell a résumé la nouvelle obligation, il a suggéré qu'elle exigeait de faire preuve d'honnêteté « au sujet de questions directement liées

to the performance of their contractual obligations" (paras. 73 and 93). But this latter formulation does not of course comprehensively describe the required link, not least of all because it speaks of honesty in the performance of an obligation, and says nothing about the exercise of a right. Yet, in applying the duty to the facts in *Bhasin*, this Court concluded that there was a breach of the duty on the basis of the trial judge's finding that Can-Am acted dishonestly in the exercise of the non-renewal clause (paras. 94 and 103).

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

[67] In my view, the required direct link between dishonesty and performance from *Bhasin* is made plain, by way of simple comparison, when one considers how the framework for abuse of rights in Quebec connects the manner in which a contractual right is exercised to the requirements of good faith. Specifically, the direct link exists when the party performs their obligation or exercises their right under the contract dishonestly. When read together, arts. 6, 7 and 1375 *C.C.Q.* point to this connection by providing that no contractual right may be exercised abusively without violating the requirements of good faith. Article 7 in particular provides "[n]o right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore

à l'exécution du contrat » et, plus loin, « dans le cadre de l'exécution [des] obligations contractuelles » (par. 73 et 93). Cela dit, bien entendu, cette dernière formulation ne décrit pas complètement le lien requis, surtout parce qu'elle parle d'honnêteté dans l'exécution d'une obligation et ne dit rien de l'exercice d'un droit. Toutefois, lorsqu'elle a appliqué l'obligation aux faits dans l'arrêt *Bhasin*, la Cour a conclu à un manquement à l'obligation sur le fondement de la conclusion de la juge de première instance selon laquelle Can-Am avait agi malhonnêtement dans son recours à la clause de non-renouvellement (par. 94 et 103).

[66] En outre, je note que même si l'obligation d'exécution honnête a des similitudes avec les doctrines de common law préexistantes de fraude civile et de préclusion, ces doctrines n'aident pas à l'analyse du lien requis à l'exécution du contrat. L'obligation d'exécution honnête est une doctrine du droit des contrats (*Bhasin*, par. 74). Y manquer ne constitue pas un délit civil. C'est sa nature de doctrine du droit des contrats qui donne naissance à l'exigence d'un lien avec la relation contractuelle. Bien que certains aspects d'autres domaines du droit relatif à la malhonnêteté puissent être utiles pour comprendre ce que signifie être malhonnête, ils ne fournissent aucune aide évidente pour déterminer ce qui est ou non directement lié à l'exécution d'un contrat.

[67] À mon avis, le lien direct exigé entre la malhonnêteté et l'exécution dont il est question dans l'arrêt *Bhasin* est clairement mis en évidence, par voie de simple comparaison, lorsqu'on considère comment le cadre d'analyse de l'abus de droit au Québec lie la manière dont un droit contractuel est exercé aux exigences de la bonne foi. Plus précisément, le lien direct existe lorsqu'une partie s'acquitte de son obligation ou exerce son droit prévu au contrat de façon malhonnête. Lus ensemble, les art. 6, 7 et 1375 du *C.c.Q.* mettent ce lien en exergue en prévoyant qu'aucun droit contractuel ne peut être exercé de façon abusive sans violer les exigences de la bonne foi. L'article 7 en particulier prévoit qu'« [a]ucun droit ne peut être exercé en vue de nuire

contrary to the requirements of good faith." While the substantive content of this article is not relevant to the common law analysis, the framework is illustrative. This article shows how the requirements of good faith can be tied to the exercise of a right, including a right under a contract. It is the exercise of the right that is scrutinized to assess whether the action has been contrary to good faith.

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

à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de la bonne foi ». Bien que le contenu de cet article ne soit pas pertinent pour l'analyse de la common law, le cadre qu'il décrit est utile à titre d'illustration. En effet, cet article illustre comment les exigences de la bonne foi peuvent être liées à l'exercice d'un droit, y compris un droit découlant d'un contrat. C'est l'exercice du droit qui est examiné pour évaluer si l'action a été contraire à la bonne foi.

[68] Selon le cadre d'analyse de droit civil en matière d'abus de droit, il ne sert à rien d'affirmer que, parce qu'un droit est absolu à première vue, il est à l'abri de tout contrôle quant à la manière dont il a été exercé. Qui plus est, la théorie de l'abus de droit n'empêche pas le titulaire d'exercer le droit contractuel en question. Comme l'ont écrit les professeurs Jobin et Vézina quant à l'abus des droits contractuels au Québec, « [l]a théorie de l'abus de droit n'entraîne nullement la négation du droit en soi, mais elle s'attaque plutôt à l'usage qu'en fait son titulaire » (J.-L. Baudouin et P.-G. Jobin, *Les obligations* (7e éd. 2013), par P.-G. Jobin et N. Vézina, no 156). On a dit que la bonne foi en droit civil a une « *fonction limitative* » en dictant les normes de conduite éthiques auxquelles les parties doivent se conformer, à titre de règle de droit impérative, dans l'exécution du contrat : « elle [c.-à-d. la fonction limitative de la bonne foi] vise donc à sanctionner le comportement inapproprié d'une partie dans l'exercice de ses prérogatives contractuelles » (M. A. Grégoire, *Liberté, responsabilité et utilité : la bonne foi comme instrument de justice* (2010), p. 225). C'est ce qui est en jeu en l'espèce : savoir si la norme éthique exprimée dans l'obligation de common law d'agir honnêtement dans l'exécution du contrat, en tant que manifestation du principe directeur de bonne foi reconnu dans l'arrêt *Bhasin*, limite la manière dont Baycrest peut exercer son droit de résilier le contrat d'entretien hivernal. En se concentrant sur l'exercice d'un droit en particulier prévu dans un contrat en particulier, on peut établir utilement un lien avec l'exécution de ce contrat.

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

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

[71] An additional reason is the common law's fabled reluctance to embrace the standard associated with the civilian idea of "abuse of rights", including abuse of contractual rights, a doctrine to which *Bhasin* alluded in para. 83 (see, e.g., the survey in H. C. Gutteridge, "Abuse of Rights" (1933), 5

[69] Ainsi, dans l'arrêt *Houle c. Banque Canadienne Nationale*, [1990] 3 R.C.S. 122 — un arrêt émanant du Québec cité dans l'arrêt *Bhasin*, par. 85 —, le droit de la partie contractante d'exiger le remboursement du prêt comme le stipulait le contrat a été confirmé (p. 169). L'« abus de droit » identifié par la Cour portait sur la manière dont le droit avait été exercé. Comme je l'ai noté, cette situation ressemble dans les grandes lignes à celle en cause dans *Bhasin*. Dans cette affaire, Can-Am avait un droit contractuel de non-renouvellement, mais elle a exercé ce droit de manière malhonnête, manquant ainsi à l'obligation d'exécution honnête (par. 94). Il s'agissait d'un exercice fautif du droit en ce qu'il a été exercé en contravention de l'exigence impérative d'exécution de bonne foi.

[70] Bien entendu, il y a des raisons particulières de faire preuve de prudence en entreprenant l'exercice comparatif que Callow nous invite à mener en l'occurrence. Une première raison découle du fait qu'il existe d'importantes différences entre le traitement civiliste de l'abus des droits contractuels et l'état actuel de la common law. Le *Code civil* prévoit qu'aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, ce qui irait à l'encontre des exigences de la bonne foi. Cela oblige les parties à agir de bonne foi, en particulier au moment de s'acquitter d'une obligation. Bien que le principe directeur visé par l'arrêt *Bhasin* traduise l'idée connexe que les parties doivent de façon générale exécuter leurs obligations contractuelles de manière honnête et raisonnable, et non de façon abusive ou arbitraire, ce principe, à la différence du droit québécois, n'est pas une règle autonome, mais plutôt une norme qui sous-tend des règles plus particulières et s'y manifeste. Qui plus est, dans l'arrêt *Bhasin*, le droit positif n'a été formellement étendu qu'en reconnaissant une obligation générale d'honnêteté applicable à l'exécution des contrats.

[71] Une raison supplémentaire relève de la fameuse réticence de la common law à adopter la norme liée à la notion civiliste « d'abus de droit », y compris l'abus de droits contractuels, une notion mentionnée dans l'arrêt *Bhasin*, par. 83 (voir, p. ex., la recherche faite dans H. C. Gutteridge, « Abuse

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

[72] It is true that LeBel J., writing extra-judicially prior to this Court's decision in *Bhasin*, in which he concurred, noted that in the dialogue between the common law and the civil law in this Court's jurisprudence, good faith offered an example of [TRANSLATION] "coexistence" rather than "convergence" or "divergence" (LeBel, at pp. 12-15). Yet as he noted, comparison in this field that respects the [TRANSLATION] "intellectual integrity" of distinctive traditions remains a viable part of the dialogue between common law and the civil law at this Court (p. 15). While

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".

of Rights » (1933), 5 *Cambridge L.J.* 22, p. 22 et 30-31)[1]. Conscient de ceci, le juge Cromwell a rappelé les « engagements fondamentaux du droit des contrats en common law » envers la « liberté des parties contractantes dans la poursuite de leur intérêt personnel » et — fait important pour ce qui est la théorie de l'abus de droit — que le principe directeur qu'il a reconnu « ne devrait pas servir de prétexte à un examen approfondi des intentions des parties contractantes » (par. 70). D'autres ont fait remarquer que la notion civiliste des droits juridiques — c'est-à-dire les droits subjectifs dans la tradition française — est conceptuellement différente de celle des « *rights* » en common law, voire que le souci à l'égard de la dimension « sociale » des limites aux droits — par opposition à l'aspect purement « économique » d'un marché librement négocié — est propre au droit civil (voir, p. ex., F. H. Lawson, *Negligence in the Civil Law* (1950), p. 15-20). D'autres encore ont relevé que la common law et le droit civil appliquent des techniques divergentes dans la genèse de nouvelles règles de droit (voir, p. ex., P. Daly, « La bonne foi et la common law : l'arrêt *Bhasin c. Hrynew* », dans J. Torres-Ceyte, G.-A. Berthold et C.-A. M. Péladeau, dir., *Le dialogue en droit civil* (2018), 89, p. 101-102). Il ne faut pas perdre de vue que, en tant que traditions intellectuelles et historiques, la common law et le droit civil représentent, à bien des égards, des manières distinctes de connaître le droit.

[72] Il est vrai que, dans un écrit extrajudiciaire antérieur à la décision de la Cour dans *Bhasin*, à laquelle il a souscrit, le juge LeBel a noté que dans le dialogue entre la common law et le droit civil dans la jurisprudence de la Cour, la bonne foi fournit un exemple de « coexistence » plutôt que de « convergence » ou de « divergence » (LeBel, p. 12-15). Toutefois, comme il l'a signalé, une comparaison dans ce domaine qui respecte l'« intégrité intellectuelle » de traditions distinctes demeure une partie viable du dialogue entre la common law et le droit

1 Le professeur Gutteridge a souligné en particulier l'influence de *Mayor of Bradford c. Pickles*, [1895] A.C. 587 (H.L.) et, dans le contexte contractuel, *Allen c. Flood*, [1898] A.C. 1 (H.L.), citant le passage à la p. 46 de ce dernier arrêt : [TRADUCTION] « . . . celui à qui un droit est conféré par contrat peut exercer ce droit contre celui qui le lui a conféré, aussi malveillant, cruel ou mesquin que puisse être le mobile qui détermine l'exécution du droit ».

the requirements of honest contractual performance in the two legal traditions may be rooted in distinct histories, they have come together to address similar issues, at least in the context of dishonest performance (*Bhasin*, at para. 83). The civil law provides a useful analytical guide to illustrating the relatively recent common law duty. Two reasons in particular underlie the usefulness of the comparative exercise here.

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

civil engagé devant la Cour (p. 15). Bien que les exigences d'exécution honnête du contrat dans les deux traditions juridiques puissent avoir des origines historiques distinctes, elles se sont unies pour traiter de problèmes semblables, du moins dans le contexte de l'exécution malhonnête (*Bhasin*, par. 83). Le droit civil fournit un guide d'analyse utile pour illustrer l'obligation de common law, relativement récente. Deux raisons en particulier sous-tendent l'utilité de l'exercice comparatif en l'espèce.

[73] Premièrement, je souligne que je ne me fonde pas sur le droit civil en l'espèce pour les règles spécifiques qui régiraient une demande similaire au Québec. Je m'inspire plutôt, dans les limites prescrites par la Cour dans le précédent établi par l'arrêt *Bhasin* et dans le contexte plus large de la common law, de l'abus de droit comme cadre pour comprendre l'obligation d'exécution honnête de la common law. Deuxièmement, il n'y a pas sérieusement lieu de s'inquiéter en l'espèce que le fait d'examiner le droit québécois ait pour effet de précipiter la common law dans un état d'incertitude. Comme l'a souligné le juge Cromwell dans l'arrêt *Bhasin*, l'expérience québécoise peut rassurer la Cour en illustrant que l'application de ce cadre d'analyse général de l'exercice fautif de droits n'engendrera pas d'instabilité commerciale ni ne fera obstacle de manière inappropriée à la liberté contractuelle. En dépit de leurs différences, la common law et le droit civil du Québec partagent, eu égard à la bonne foi, certaines « grandes valeurs sociales », ce qui justifie généralement d'en faire la comparaison (*Bou Malhab*, par. 38). Comme il a été noté, la Cour a signalé l'existence d'un souci commun de limiter la portée de la bonne foi, puisqu'elle « n'oblige pas les parties à servir [les] intérêts [de leurs cocontractants] dans tous les cas », de même que le fondement dans les deux traditions juridiques de ces mesures de redressement dans la justice corrective plutôt que distributive (*Churchill Falls*, par. 117, citant *Bhasin*, par. 65). Comme l'a écrit le professeur Moore, avant son accession à la magistrature, « la valeur de l'autonomie individuelle, de même que la crainte de l'imprécision de la bonne foi ne sont pas exclusives de la common law. On les retrouve abondamment dans le discours doctrinal et jurisprudentiel civiliste » (« Brèves remarques spontanées sur l'arrêt *Bhasin*

where it can be said that the exercise of a right or the performance of an obligation under that contract has been dishonest.

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

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

(2) Baycrest's Conduct Constitutes Dishonesty

[76] The second issue to be resolved is whether Baycrest's conduct amounts to dishonesty within the meaning of the duty of honest performance in

c. Hrynew », dans J. Torres-Ceyte, G.-A. Berthold et C.-A. M. Péladeau, dir., *Le dialogue en droit civil* (2018), 81, p. 84). Pour ces raisons, il n'est pas inapproprié d'illustrer l'obligation d'exécution honnête en utilisant le cadre applicable à l'exercice fautif d'un droit. La malhonnêteté est directement liée à l'exécution d'un contrat donné lorsqu'on peut affirmer que l'exercice d'un droit ou l'exécution d'une obligation prévus au contrat en question a été malhonnête.

[74] En appliquant l'arrêt *Bhasin* à la présente cause, et en m'inspirant de l'illustration fournie par les sources et autorités du droit civil québécois citées par le juge Cromwell lui-même, je suis d'avis que la Cour d'appel a commis une erreur en concluant que la malhonnêteté en l'espèce ne concernait qu'un contrat futur. Comprise comme il se doit, la malhonnêteté alléguée en l'espèce était directement liée à l'exécution du contrat parce que l'exercice par Baycrest du droit de résiliation que lui conférait le contrat a été malhonnête.

[75] Selon la juge de première instance, le droit de résiliation a été exercé de façon malhonnête en l'espèce, et ce, même si ses modalités — le préavis de 10 jours — ont par ailleurs été respectées. Soulignant les déclarations malhonnêtes quant au risque pour le contrat, et faites en prévision du délai de préavis, elle a statué que l'obligation d'agir honnêtement était liée à la résiliation du contrat et que l'exercice de ce droit dans les circonstances constituait une violation de contrat. La juge de première instance n'a pas nié le droit de Baycrest de résilier le contrat. Elle a toutefois conclu que la manière dont celle-ci s'est prévalue de ce droit a été fautive — en contravention de l'obligation d'honnêteté — et que, pour avoir agi ainsi, Baycrest devait des dommages-intérêts à Callow. Fait important, cette conclusion ne nie pas l'existence du droit de résiliation, mais elle s'attache à la manière fautive dont il a été exercé.

(2) La conduite de Baycrest constitue de la malhonnêteté

[76] La deuxième question à résoudre est celle de savoir si la conduite de Baycrest équivalait à de la malhonnêteté au sens où il faut l'entendre suivant

Bhasin. Callow takes issue with the Court of Appeal's conclusion that while the facts may have suggested a failure to act honourably, they did not rise to the level of a breach of this duty. To dispose of this appeal, then, we must determine what standard of honesty was expected of Baycrest in its exercise of clause 9.

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

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

[79] Baycrest submits that "active deception" — a term invoked by the trial judge, as well as both parties — requires actual dishonesty, in the sense that an

l'obligation d'exécution honnête établie dans l'arrêt *Bhasin*. Callow conteste la conclusion de la Cour d'appel selon laquelle même si les faits peuvent avoir suggéré que Baycrest n'a pas agi honorablement, ils n'équivalaient pas à un manquement à cette obligation. Pour disposer du présent pourvoi, nous devons donc déterminer à quelle norme d'honnêteté on pouvait s'attendre que satisfasse Baycrest dans son recours à la clause 9.

[77] Il est acquis au débat que les parties à un contrat ne peuvent pas carrément mentir ou dire des demi-vérités d'une manière qui induit un cocontractant intentionnellement en erreur. Il est également acquis ici que l'omission de divulguer un fait important, sans plus, ne serait pas contraire à la norme. Outre ces points de convergence, les parties continuent de diverger d'opinion sur ce que pourrait constituer une conduite qui induit intentionnellement en erreur, comme cette idée a été mentionnée dans l'arrêt *Bhasin*.

[78] Selon Callow, bien que dans l'arrêt *Bhasin* la Cour ait jugé que l'obligation d'exécution honnête n'impose pas une obligation de divulgation, elle n'a pas écarté la possibilité qu'une omission d'informer puisse néanmoins induire intentionnellement en erreur dans certaines circonstances. Callow reconnaît qu'il n'est pas toujours facile de faire la distinction entre une déclaration inexacte et l'omission innocente de divulguer des renseignements. Toutefois, en « induisant activement [M. Callow] en erreur », lui faisant ainsi croire que le contrat d'entretien hivernal allait probablement être renouvelé en 2014, celui-ci a été amené à déduire, à tort et au su de Baycrest, qu'il n'avait pas été décidé de résilier le contrat en vigueur en 2013. De l'avis de Callow, le fait que Baycrest n'ait pas fait de démarches afin de corriger cette fausse impression constituait un manquement à son obligation d'agir honnêtement dans l'exécution du contrat d'entretien hivernal. Il s'ensuit que la clause 9 n'a pas été appliquée en respectant l'obligation d'exécuter le contrat honnêtement prescrite par l'arrêt *Bhasin*.

[79] Baycrest prétend que la [TRADUCTION] « tromperie active » — un terme employé par la juge de première instance, ainsi que par les deux

outright lie is necessary. "Silence", said its counsel at the hearing, "can only constitute misrepresentation when there is a duty to speak". Since the duty of honest performance does not bring with it a duty of disclosure, "silence cannot constitute dishonesty or an act of misrepresentation, whether done intentionally or, I suppose, accidentally" (transcript, at p. 37).

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

[81] One might well understand that courts would shy away from imposing a free-standing positive duty to disclose information to a counterparty where it would serve to upset the corrective justice orientation of contract law. Whether or not a positive duty to cooperate of this character should be associated with the principle of good faith performance in the common law, a party to a contract has no general duty to subordinate their interests to that of the other party in the law as it now stands (see *Bhasin*, at para. 86). Requiring a party to speak up in service of the requirements of good faith where nothing in the parties' contractual relationship brings a duty to do so could be understood to confer an unbargained-for benefit on the other that would stand outside the

parties — exige une malhonnêteté réelle, en ce sens qu'un mensonge éhonté est nécessaire. Le [TRADUCTION] « silence », a fait valoir son avocat à l'audience, « ne peut constituer une déclaration inexacte que lorsqu'il y a une obligation de parler ». Puisque l'obligation d'exécution honnête n'entraîne pas avec elle une obligation de divulgation, [TRADUCTION] « le silence ne peut pas être malhonnête ou constituer une déclaration inexacte, et ce, qu'il soit intentionnel ou, je suppose, accidentel » (transcription, p. 37).

[80] Baycrest a raison d'affirmer que l'obligation d'agir honnêtement « n'impose pas un devoir de loyauté ou de divulgation ni n'exige d'une partie qu'elle renonce à des avantages découlant du contrat » (*Bhasin*, par. 73; voir aussi A. Swan, J. Adamski et A. Y. Na, *Canadian Contract Law* (4e éd. 2018), p. 347). Le juge Cromwell s'est référé à *United Roasters, Inc. c. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), au soutien de sa conclusion selon laquelle l'obligation d'exécution honnête est distincte d'une obligation indépendante de divulguer des renseignements (par. 87). Dans la décision *United Roasters*, la partie ayant mis fin au contrat avait décidé antérieurement à la période de préavis requise qu'elle allait mettre fin au contrat. Le tribunal a conclu qu'aucune divulgation de cette intention, autre que celle prévue dans le contrat, n'était requise. De l'avis du juge Cromwell, cet arrêt « indique clairement qu'il n'existe pas d'obligation unilatérale de divulgation de renseignements lorsqu'il s'agit de mettre fin au contrat » (par. 87).

[81] On peut aisément comprendre que les tribunaux soient réticents à imposer une obligation positive indépendante de divulguer des renseignements à un cocontractant lorsque cela aurait pour effet de dénaturer l'orientation de justice corrective du droit des contrats. Qu'une obligation positive de collaborer de cette nature doive ou non être liée au principe d'exécution de bonne foi en common law, il n'en demeure pas moins que, dans l'état actuel du droit, une partie à un contrat n'a aucune obligation générale de subordonner ses intérêts à ceux de l'autre partie (voir *Bhasin*, par. 86). Obliger une partie à s'exprimer pour répondre aux exigences de la bonne foi alors que rien dans la relation contractuelle des parties n'impose une telle obligation pourrait être vu comme conférant

usual compass of contractual justice. Yet where the failure to speak out amounts to active dishonesty in a manner directly related to the performance of the contract, a wrong has been committed and correcting it does not serve to confer a benefit on the party who has been wronged. To this end, Cromwell J. clarified that the "situation is quite different . . . when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87). In such circumstances, contractual parties should be mindful to correct misapprehensions, lest a contractual breach of the *Bhasin* duty be found.

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

un avantage non négocié à l'autre partie qui se situerait en dehors du champ d'application habituel de la justice contractuelle. Cependant, lorsque l'omission de s'exprimer équivaut à de la malhonnêteté active d'une manière qui est directement liée à l'exécution du contrat, une faute est commise et sa réparation n'a pas pour effet de conférer un avantage à la partie lésée. À cet égard, le juge Cromwell a précisé que la « situation est assez différente [. . .] lorsqu'il s'agit d'induire en erreur ou de tromper activement l'autre partie contractante au sujet de l'exécution du contrat » (par. 87). Dans de telles circonstances, les parties à un contrat doivent se soucier de corriger les méprises, sous peine d'être reconnues coupables d'un manquement contractuel à l'obligation établie dans l'arrêt *Bhasin*.

[82] En soulignant que la responsabilité découle de la malhonnêteté active et non d'une obligation unilatérale de divulguer des renseignements, le juge Cromwell indiquait que l'obligation d'honnêteté est conforme aux principes ordinaires de la justice contractuelle : le fait que l'arrêt *Bhasin* n'impose pas une obligation de divulguer ou une obligation de type fiduciaire signifie que l'exécution honnête d'un contrat n'est pas un acte désintéressé ou altruiste. On pourrait très bien dire que l'exécution honnête par un contractant de sa part du marché va de pair avec la poursuite de son intérêt personnel tant qu'il est possible de compter sur le droit pour obliger son cocontractant à agir avec la même honnêteté. Quelles que soient les contraintes qu'elle justifie quant à la faculté de Baycrest de résilier le contrat sur le fondement des valeurs d'honnêteté liées à la bonne foi, l'exécution honnête ne l'oblige pas à conférer un avantage à Callow dans l'exercice de ce droit. Comme l'a expliqué le juge Cromwell, la prise en compte comme il se doit des intérêts contractuels légitimes des parties contractantes « n'oblige pas la partie à servir ces intérêts dans tous les cas » (par. 65). Ceci explique, à mon sens, le caractère limité de l'obligation d'honnêteté : il ne s'agit pas d'un moyen qui permet au tribunal, au nom d'une notion de bonne foi reposant sur la justice distributive, d'obliger la partie qui doit recourir à un droit ou à un pouvoir contractuel à le faire de manière « à servir » l'intérêt de l'autre partie aux dépens des siens.

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

[84] That said, I emphasize once again that it is unquestionable that the duty is imposed as a matter of contractual doctrine rather than by implication or interpretation, and, by virtue of its status as contractual doctrine, parties are "not free to exclude" the duty altogether (*Bhasin*, at para. 75). Even if the parties,

[83] Selon moi, cette insistance sur le fondement de justice corrective de l'obligation d'agir honnêtement dans l'exécution du contrat est utile pour comprendre pourquoi un droit apparemment absolu est néanmoins restreint par l'exigence impérative de bonne foi expliquée dans l'arrêt *Bhasin*. Je rappelle que le juge Cromwell a tenté de rassurer ceux qui craignaient l'instabilité commerciale résultant de la reconnaissance de cette nouvelle obligation d'exécution honnête en expliquant qu'elle « porte très peu atteinte à la liberté contractuelle » (par. 76). Après tout, on peut d'ores et déjà s'attendre à ce que le fait qu'un contrat soit exécuté sans mensonge ou tromperie soit considéré comme une norme minimale faisant partie du marché. Je souscris à l'opinion suivante exprimée par la juge en chef de l'Alberta dans un jugement qui s'appuyait sur les arrêts *Bhasin* et *Potter* : [TRADUCTION] « Les sociétés sont en droit de s'attendre à ce que les parties avec qui elles contractent soient honnêtes » dans leurs rapports contractuels (*IFP Technologies (Canada) Inc. c. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta L.R. (6th) 96, par. 4). En ce sens, bien que l'obligation soit une règle de droit impérative, dans la plupart des cas on peut considérer qu'elle laisse intactes l'entente et les attentes des deux parties — la première source de justice entre elles. Par extension, exiger qu'une partie exerce un droit en exécution d'un contrat en respectant cette norme minimale ne fait qu'empêcher la commission d'une faute, si bien que la réparation de ce manquement, lorsqu'un préjudice en a résulté, peut sembler conforme aux principes de justice corrective. Lorsqu'une partie a menti ou autrement induit intentionnellement l'autre partie contractante en erreur quant à un sujet auquel l'exécution du contrat est directement liée, cela équivaut à une violation de contrat à laquelle il doit être remédié. Les avantages du marché n'ont toutefois pas à être réaffectés autrement entre les parties en cause.

[84] Cela dit, je souligne encore une fois qu'il ne fait aucun doute que l'obligation est imposée en tant que doctrine du droit des contrats, plutôt que par déduction ou interprétation et que, à ce titre, les parties « n'ont pas la faculté [d']exclure » l'obligation complètement (*Bhasin*, par. 75). Même si les parties,

as here, have agreed to a term that provides for an apparently unfettered right to terminate the contract for convenience, that right cannot be exercised in a manner that transgresses the core expectations of honesty required by good faith in the performance of contracts.

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

[86] Moreover, I note that Cromwell J. described the requirements of the duty of honesty negatively: while the duty of honest performance does not require parties to act angelically by subordinating their own interests to that of their counterparty (*Bhasin*, at para. 86), they must *refrain* from lying or knowingly misleading their counterparty (para. 73). As a "negative" obligation — that is, in the absence of a recognized duty to act, the injunction it imposes is one not to act dishonestly — it sits more plainly with the ordinary objectives of corrective justice and what one scholar sees as the traditional posture of the common law in favour of contractual autonomy and individual freedom in private law. [TRANSLATION] "It is clear", wrote Professor Daly in a comment on the common law method consecrated in *Bhasin*, "that the duty of honesty recognized in *Bhasin* is a negative obligation — not to lie — rather than a positive obligation — to act in good faith" (pp. 101-2). This same orientation has been observed as animating the analogous contractual duty of good faith in the civil law. While positive obligations to cooperate in performance may be otherwise required by the law of good faith, scholars have observed that the notional equivalent of the duty of honest performance in Quebec civil law most typically imposes negative obligations — to refrain from lying, for

comme en l'espèce, ont convenu d'une condition qui prévoit un droit apparemment absolu de résilier le contrat pour raison de commodité, ce droit ne peut pas être exercé d'une manière qui transgresse les attentes fondamentales d'honnêteté exigées par la bonne foi dans l'exécution des contrats.

[85] Ce cadre d'analyse pour apprécier l'exercice fautif du droit de résiliation ne repose pas sur le motif qu'avait Baycrest pour recourir à la clause 9, au-delà de l'observation qu'elle l'a fait malhonnêtement. Le droit de résiliation pouvait, à première vue, être exercé en l'absence de motifs : il se peut que Baycrest ait eu des griefs légitimes envers Callow ou quelque motif secret pour sa tromperie consciente — cela n'a toutefois pas d'importance. L'opinion négative que la gestionnaire immobilière a pu avoir à l'égard de Callow à laquelle a fait allusion la juge de première instance (au par. 14) n'était pas la source du manquement à l'obligation d'exécution honnête.

[86] Qui plus est, je note que le juge Cromwell a décrit les exigences de l'obligation d'honnêteté par la négative : bien que l'obligation d'exécution honnête n'exige pas que les parties agissent de manière angélique, en subordonnant leurs propres intérêts à ceux de leur cocontractant (*Bhasin*, par. 86), elles doivent *s'abstenir* de lui mentir ou de l'induire intentionnellement en erreur (par. 73). En tant qu'obligation « négative » — c'est-à-dire qu'en l'absence d'obligation reconnue d'agir, l'injonction qu'elle impose est celle de ne pas agir de façon malhonnête —, elle s'inscrit plus naturellement du côté des objectifs ordinaires de la justice corrective et de ce qu'un auteur conçoit comme l'attitude traditionnelle de la common law favorable à l'autonomie contractuelle et à la liberté individuelle en droit privé. « Force est de constater », écrit le professeur Daly dans un commentaire sur la méthode de common law consacrée par l'arrêt *Bhasin*, « que l'obligation d'honnêteté reconnue dans *Bhasin* est une obligation négative — ne pas mentir — plutôt qu'une obligation positive — agir de bonne foi » (p. 101-102). On a observé que cette même orientation de justice corrective anime l'obligation contractuelle analogue de bonne foi en droit civil. Bien que les règles de droit relatives à la bonne foi puissent autrement imposer des obligations positives de coopération à l'exécution, des auteurs ont

example — in the measure of the abuse of a contractual right (Baudouin and Jobin, at No. 161). Care must be taken, I hasten to say, not to confuse the [TRANSLATION] "duty to act faithfully" recognized in this regard, with the fiduciary duty of loyalty that stands outside of good faith in both legal traditions.

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

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

[89] I recognize that in cases where there is no outright lie present, like the case before us, it is not always obvious whether a party "knowingly misled" its counterparty. Yet, Baycrest is wrong to suggest that nothing stands between the outright lie and silence. Elsewhere, as in the law of misrepresentation, for instance, one encounters examples of courts

observé que l'équivalent théorique de l'obligation d'exécution honnête en droit civil québécois impose le plus souvent des obligations négatives — s'abstenir de mentir, par exemple — dans l'appréciation de l'abus d'un droit contractuel (Baudouin et Jobin, nº 161). Je m'empresse de dire qu'il faut prendre garde de ne pas confondre l'« obligation de loyauté » reconnue à cet égard et l'obligation fiduciaire de loyauté qui est distincte de la bonne foi dans les deux traditions juridiques.

[87] J'ajouterais que, comme l'a précisé le juge Cromwell, la reconnaissance de l'obligation d'agir honnêtement dans l'exécution du contrat ne veut pas nécessairement dire que l'idéal évoqué par le principe directeur de bonne foi énoncé dans l'arrêt *Bhasin* n'est pas susceptible de se manifester autrement. Même dans le cadre limité de la justice corrective, il peut y avoir des circonstances dans lesquelles le principe directeur favoriserait le point de vue voulant que les droits contractuels doivent être exercés d'une manière qui ne soit ni abusive ni arbitraire, par exemple, ou qu'une certaine obligation de collaborer entre les parties soit imposée, tout en reconnaissant que, contrairement aux obligations fiduciaires, « l'exécution de bonne foi ne fait pas entrer en jeu les devoirs de loyauté envers l'autre partie contractante ou une obligation de veiller en priorité aux intérêts de l'autre partie contractante » (*Bhasin*, par. 65). Toutefois, pour les fins du présent pourvoi, il n'est pas nécessaire de franchir ce pas supplémentaire : je suis d'avis que lorsque l'exercice d'un droit contractuel est entrepris malhonnêtement, cet exercice est en contravention du contrat et ce tort doit être réparé. C'est ce qui s'est produit en l'espèce.

[88] La question qui subsiste est celle de savoir si Baycrest a menti à Callow ou l'a intentionnellement induite en erreur, manquant ainsi à l'obligation d'agir honnêtement.

[89] Je reconnais que dans les affaires où il n'y a pas eu de mensonge éhonté, comme en l'espèce, il n'est pas toujours évident de savoir si une partie a « intentionnellement induit en erreur » son cocontractant. Pourtant, Baycrest a tort de prétendre qu'il ne se trouve rien entre le mensonge éhonté et le silence. Ailleurs, comme en droit en matière de

determining whether a misrepresentation was present, regardless of whether there was some direct lie (see A. Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*" (2015), 56 *Can. Bus. L.J.* 395, at p. 402). As Professor Waddams has written, "[a]n incomplete statement may be as misleading as a false one, and such half-truths have frequently been treated as legally significant misrepresentations." Ultimately, he wrote, "it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statements into misrepresentations" (*The Law of Contracts* (7th ed. 2017), at No. 441). Similarly, where a party makes a statement it believes to be true, but later circumstances affect the truth of that earlier statement, courts have found, in various contexts, that the party has an obligation to correct the misrepresentation (see *Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6, at para. 58; see also C. Mummé, "*Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?" (2016), 32 *Intl J. Comp. Lab. L. & Ind. Rel.* 117, at p. 123).

déclaration inexacte, par exemple, on trouve des exemples où les tribunaux ont statué sur la question de savoir s'il y avait eu déclaration inexacte, sans égard à celle de savoir s'il y avait eu un mensonge direct (voir A. Swan, « The Obligation to Perform in Good Faith : Comment on *Bhasin v. Hrynew* » (2015), 56 *Rev. can. dr. comm.* 395, p. 402). Comme l'a écrit le professeur Waddams, [TRADUCTION] « [u]ne déclaration incomplète peut être aussi trompeuse qu'une fausse déclaration, et ces demi-vérités ont fréquemment été traitées comme des déclarations inexactes ayant une portée sur le plan juridique ». En définitive, a-t-il écrit, [TRADUCTION] « il est loisible au tribunal de statuer que la dissimulation de faits importants peut, lorsqu'elle est considérée avec des déclarations générales, véridiques en elles-mêmes, mais incomplètes, transformer ces déclarations en déclarations inexactes » (*The Law of Contracts* (7e éd. 2017), no 441). Pareillement, lorsqu'une partie fait une déclaration qu'elle croit être vraie, mais que des circonstances ultérieures ont une incidence sur la véracité de cette déclaration, les tribunaux ont conclu, dans divers contextes, que la partie a une obligation de corriger la déclaration inexacte (voir *Xerex Exploration Ltd. c. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6, par. 58; voir aussi C. Mummé, « *Bhasin v. Hrynew* : A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins? » (2016), 32 *Intl. J. Comp. Lab L. & Ind. Rel.* 117, p. 123).

[90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., *Yam Seng Pte Ltd. v. International Trade Corp. Ltd.*, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (Q.B.), at para. 141).

[90] Ces exemples favorisent le point de vue voulant que les exigences d'honnêteté dans l'exécution du contrat peuvent, et vont souvent, aller plus loin que l'interdiction de mensonges éhontés. De fait, la notion « d'induire en erreur » son cocontractant — l'expression invoquée séparément par le juge Cromwell — englobe dans certaines circonstances des formes de silence ou d'omissions. On peut induire en erreur activement, par exemple, en disant quelque chose directement à son cocontractant, ou passivement, en omettant de corriger une méprise causée par sa propre conduite trompeuse. À mon sens, ce sont là des cousins germains dans l'éventail de pratiques contractuelles trompeuses (voir, p. ex., *Yam Seng Pte Ltd. c. International Trade Corp. Ltd.*, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (B.R.), par. 141).

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

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

[93] It is helpful for our purposes to recall that on the facts in *Bhasin*, part of the dishonest conduct concerned the respondent Can-Am's plans to reorganize its activities in Alberta. Its plan contemplated invoking its contractual right of non-renewal to force a merger between Mr. Bhasin and his competitor, Mr. Hrynew. In effect, this reorganization would have given Mr. Bhasin's business to Mr. Hrynew.

[91] En fin de compte, répondre à la question de savoir si une partie a « intentionnellement induit en erreur » son cocontractant est une décision éminemment factuelle et peut comprendre des mensonges, des demi-vérités, des omissions et même du silence, selon les circonstances. Je souligne que cette liste n'est pas exhaustive : elle ne fait qu'illustrer que la malhonnêteté ou la conduite trompeuse ne se limite pas aux mensonges directs. Aucune erreur susceptible de révision n'a été établie quant à la conclusion de malhonnêteté qui a prévalu en prévision du recours à la clause 9 en l'espèce. Je ne modifierais pas l'opinion de la juge de première instance en l'espèce sur une question à l'égard de laquelle il faut faire preuve de déférence. Or, il faut faire ainsi preuve de déférence à l'endroit de la juge lorsqu'il est question de contrôler l'exercice de son pouvoir discrétionnaire de soupeser la preuve, tout particulièrement du fait, comme elle l'a expliqué, que la crédibilité a joué un rôle dans son analyse.

[92] À la lecture du jugement de première instance dans son ensemble, je ne relève aucune erreur fondamentale dans la manière dont la juge a formulé le droit relatif à l'obligation d'exécution honnête. Elle n'a pas fondé ses conclusions sur une quelconque obligation indépendante de divulguer des renseignements. Elle a plutôt examiné la question de savoir si Baycrest avait intentionnellement induit Callow en erreur quant à ce qu'il adviendrait du contrat d'entretien hivernal, exerçant ainsi de manière fautive son droit de résiliation. En dépit de cela, Baycrest plaide que la juge de première instance aurait commis une erreur en ne reconnaissant pas que sa conduite n'atteignait pas la norme « beaucoup plus rigoureuse » dont il est fait mention dans l'arrêt *Bhasin*. Je ne suis pas de cet avis. Aucune erreur de la sorte n'a été établie.

[93] Il est utile pour nos fins de rappeler qu'au vu des faits dans l'affaire *Bhasin*, une partie de la conduite malhonnête concernait le projet de Can-Am de réorganiser ses activités en Alberta. Dans le cadre de son projet, Can-Am envisageait d'invoquer son droit contractuel de non-renouvellement pour imposer une fusion entre M. Bhasin et son concurrent, M. Hrynew. De fait, cette réorganisation aurait donné

Can-Am, however, had said nothing of its plan to Mr. Bhasin. When Mr. Bhasin first heard of the merger plans he questioned an official of Can-Am about its intentions. "[T]he official 'equivocated'", Cromwell J. explained, "and did not tell him the truth that from Can-Am's perspective this was a 'done deal'" (para. 100). Cromwell J. later concluded that "Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal" (para. 108). Cromwell J. wrote: "The trial judge made a clear finding of fact that Can-Am 'acted dishonestly toward Bhasin in exercising the non-renewal clause'. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly" (para. 94 (references omitted)).

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

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

l'entreprise de M. Bhasin à M. Hrynew. Or, Can-Am n'avait rien dit de son projet à M. Bhasin. Lorsque ce dernier a entendu parler de la fusion pour la première fois, il a interrogé un représentant de Can-Am quant à ses intentions. « [L]e représentant [TRADUCTION] "a tergiversé" », d'expliquer le juge Cromwell, « et ne lui a pas dit la vérité, soit que, du point de vue de Can-Am, il s'agissait d'un "fait accompli" » (par. 100). Le juge Cromwell a conclu par la suite que « Can-Am avait rompu le contrat parce qu'elle n'a pas exécuté honnêtement le contrat conclu avec M. Bhasin, plus particulièrement en ce qui concerne ses intentions arrêtées quant au renouvellement » (par. 108). Le juge Cromwell a écrit : « La juge de première instance a tiré une conclusion de fait claire selon laquelle Can-Am [TRADUCTION] "a agi malhonnêtement envers M. Bhasin en recourant à la clause de non-renouvellement". Aucune raison ne permet de modifier cette conclusion en appel. Il s'ensuit que Can-Am a violé son obligation d'exécution honnête du contrat » (par. 94 (références omises)).

[94] Il est vrai que Baycrest est demeurée silencieuse quant à sa décision de résilier le contrat de Callow et que la clause 9, à première vue, ne lui imposait pas d'obligation de divulguer son intention, sous réserve de l'exigence du préavis de 10 jours. Cela dit, elle devait s'abstenir, comme l'a dit la juge de première instance, [TRADUCTION] « d'induire M. Callow en erreur » par une série de « communications actives » (par. 66). Lorsqu'elle a omis de s'abstenir de le faire en prévision de l'exercice de son droit de résiliation, elle a induit Callow en erreur, l'amenant à croire qu'elle laisserait intact le contrat d'entretien hivernal en vigueur.

[95] Selon ma compréhension des conclusions de fait de la juge de première instance, ces [TRADUCTION] « communications actives », ont pris deux formes. En premier lieu, M. Peixoto a fait des déclarations à M. Callow laissant entendre qu'un renouvellement du contrat d'entretien hivernal était probable. Comme l'a conclu la juge de première instance, [TRADUCTION] « [a]près ses discussions avec M. Peixoto et M. Campbell, M. Callow croyait qu'il allait probablement obtenir un renouvellement de deux ans de son contrat de services d'entretien

the documentary evidence, especially by the private e-mails between Mr. Peixoto and Mr. Campbell" (para. 41).

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

[97] The second form of "active communications" that deceived Callow was related to the "freebies" Callow had offered Baycrest in the summer of 2013. As the trial judge found, Callow performed this free work because Mr. Callow wanted to provide an incentive for Baycrest to renew the winter maintenance agreement. Baycrest, for its part, gladly accepted the services offered by Callow.

[98] Again, Baycrest attempts to recast the significance of these findings, arguing that "there is nothing inherently unlawful or unfair about accepting a contractor's incentives offered in the hopes of securing a new contract or the renewal of an existing contract" (R.F., at para. 112). Whether or not that is the case,

hivernal et que [Baycrest] étai[t] satisfait[e] de ses services rendus [en exécution du contrat en vigueur auquel il restait un hiver à courir]. Cette présomption est également étayée par la preuve documentaire, surtout par les courriels privés entre M. Peixoto et M. Campbell » (par. 41).

[96] Baycrest tente de dénaturer l'importance de cette conclusion, plaidant que M. Callow n'avait eu que des discussions informelles avec deux des membres du CUC — M. Peixoto et M. Campbell — sur la possibilité d'un renouvellement de contrat. De telles discussions informelles, dit-elle, ne sauraient être assimilées à un mensonge. Cette position fait abstraction de la conclusion clef de la juge de première instance selon laquelle c'est M. Peixoto — le membre du CUC qui avait négocié avec Callow les principales conditions relatives au prix contenues dans le contrat d'entretien hivernal — qui avait fait des déclarations à M. Callow laissant entendre qu'un renouvellement était probable (par. 23 et 40-43). Après avoir tiré des conclusions défavorables à la crédibilité de M. Peixoto, la juge de première instance a conclu qu'il avait [TRADUCTION] « amené M. Callow à croire que tout allait bien quant [au contrat] d'entretien hivernal » et que Baycrest était « intéress[ée] par une prorogation future des contrats de Callow » (par. 47). Cette malhonnêteté n'a pas eu lieu dans l'abstrait : la juge de première instance a conclu qu'elle avait trait au recours à la clause 9.

[97] La deuxième forme de « communications actives » qui a induit Callow en erreur avait trait aux travaux « en prime » que cette dernière a offerts à Baycrest durant l'été 2013. Comme l'a conclu la juge de première instance, Callow a effectué ces travaux gratuits parce que M. Callow voulait donner à Baycrest un incitatif à renouveler le contrat d'entretien hivernal. Baycrest, pour sa part, a accepté volontiers les services offerts par Callow.

[98] Encore une fois, Baycrest tente de dénaturer l'importance de ces conclusions, plaidant [TRADUCTION] « qu'il n'y a rien de foncièrement illicite ou injuste à accepter les incitatifs offerts par un entrepreneur dans l'espoir d'obtenir un nouveau contrat ou le renouvellement d'un contrat en vigueur » (m.i.,

I again stress that Mr. Peixoto "understood that the work performed by Callow was a 'freebie' to add an incentive for the boards to renew his winter maintenance services contract" and "advised Mr. Callow that he would tell the other board members about this work" (trial reasons, at para. 43). These active communications by Baycrest suggested, deceptively, that there was hope for renewal and, perforce, the current contract would not be terminated.

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

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

[101] The Court of Appeal did not interfere with these findings, nor has Baycrest argued that the trial judge made any palpable and overriding errors. Accordingly, in light of the trial judge's findings of fact, I agree that Baycrest intentionally withheld information in anticipation of exercising clause 9, knowing that such silence, when combined with

par. 112). Que ce soit le cas ou non, je souligne encore une fois que M. Peixoto [TRADUCTION] « comprenait que les travaux effectués par Callow étaient "en prime" pour donner un incitatif supplémentaire aux conseils pour qu'ils renouvellent son contrat de services d'entretien hivernal » et a « informé M. Callow qu'il ferait part de ces travaux aux autres membres du conseil » (motifs de première instance, par. 43). Ces communications actives par Baycrest laissaient entendre, de façon trompeuse, qu'il y avait bon espoir de renouvellement du contrat et que, forcément, celui en vigueur ne serait pas résilié.

[99] Considérant la conduite de Baycrest dans son ensemble au cours de ces quelques mois, il était certainement raisonnable que M. Callow, qui avait été amené à croire qu'un renouvellement était probable, en déduise que Baycrest n'avait pas décidé de résilier le contrat en vigueur. Qui plus est, Baycrest savait que M. Callow était sous cette fausse impression, comme le démontre le courriel envoyé par M. Peixoto le 17 juillet 2013, et elle a néanmoins continué à lui faire croire qu'un renouvellement était probable, même si la décision de résilier son contrat avait déjà été prise (voir les motifs de première instance, par. 48). Dès qu'elle s'est rendu compte que M. Callow était sous cette fausse impression, Baycrest aurait dû corriger la méprise; dans les faits, sa conduite a induit Callow en erreur.

[100] Avec égard, je ne puis souscrire à l'idée selon laquelle la méprise en l'espèce ne concernait que la résiliation pour services insatisfaisants, et ne portait pas sur la résiliation pour quelque autre raison que ce soit. La juge de première instance a conclu que la conduite malhonnête concernait des représentations selon lesquelles le contrat n'était pas du tout en péril tandis que Baycrest savait qu'il serait résilié (par. 65).

[101] La Cour d'appel n'a pas modifié ces conclusions et Baycrest n'a pas fait valoir que la juge de première instance avait commis des erreurs manifestes et déterminantes. Par conséquent, vu les conclusions de fait de la juge de première instance, je suis d'accord pour dire que Baycrest a intentionnellement retenu des renseignements en prévision de

its active communications, had deceived Callow. By failing to correct Mr. Callow's misapprehension thereafter, Baycrest breached its contractual duty of honest performance. This is in stark contrast to *United Roasters*, where the defendant merely withheld its decision to terminate the agreement. Unlike in this case, the defendant there did not engage in a series of acts that it knew would cause the plaintiff to draw an incorrect inference and then fail to correct the plaintiff's misapprehension.

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

son recours à la clause 9, sachant qu'un tel silence, conjugué à ses communications actives, avait induit Callow en erreur. En omettant de corriger la méprise de M. Callow par la suite, Baycrest a manqué à son obligation contractuelle d'exécution honnête. Ceci se distingue nettement de l'affaire *United Roasters*, où la défenderesse n'avait simplement pas révélé sa décision de résilier le contrat. Contrairement au présent cas, la défenderesse dans cette affaire ne s'était pas livrée à une série d'actes dont elle savait qu'ils amèneraient la demanderesse à tirer une déduction inexacte, pour ensuite omettre de corriger la méprise de cette dernière.

[102] En ce sens, la présente affaire est largement semblable à celle qui a fait l'objet du jugement *Dunning c. Royal Bank* (1996), 23 C.C.E.L. (2d) 71 (C.J. Ont. (div. gén.)), un des exemples de manquement à l'obligation de bonne foi dans la manière dont un congédiement est effectué fournis par le juge Iacobucci au soutien de ses conclusions dans l'arrêt *Wallace*. Bien qu'il fût rendu dans le cadre particulier de la bonne foi dans le contexte du droit de l'emploi, le jugement *Dunning* peut à bon droit servir d'analogie en l'espèce puisque, dans l'arrêt *Bhasin*, le juge Cromwell a expressément reconnu que « le devoir d'honnêteté constituait un élément clef des exigences de bonne foi qui ont été reconnues en lien avec la résiliation des contrats de travail » (*Bhasin*, par. 73, citant *Wallace*, par. 98; *Honda Canada Inc. c. Keays*, 2008 CSC 39, [2008] 2 R.C.S. 362, par. 58). Il me semble que si l'obligation d'exécution honnête était un élément clef des exigences de la bonne foi dont il était question dans les arrêts *Wallace* et *Keays*, un cadre d'analyse semblable s'applique, ces éléments étant de nouveau liés par le principe directeur. Comme l'a expliqué le juge Iacobucci, le poste de l'employé en cause dans l'affaire *Dunning* avait été éliminé, mais l'employeur lui avait dit qu'on lui trouverait probablement un autre poste et que la nouvelle affectation nécessiterait une mutation. Or, alors qu'on rassurait l'employé quant à son avenir, l'employeur envisageait de mettre fin à son emploi. En fin de compte, l'employeur a effectivement décidé de mettre fin à l'emploi de l'employé, mais ne lui a pas révélé ce renseignement pendant un certain

clearly violated the expected standard of good faith in the manner of dismissal.

[103] As *Dunning*, *Wallace* and *Keays* make plain, an employer has the right to terminate an employment contract without cause, subject to the duty to provide reasonable notice. However broad that right may be, however, an unhappy employee can allege a distinct contractual breach when the employer has mistreated them in the manner of dismissal. In the end, as Cromwell J. noted, "contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests" (*Bhasin*, at para. 86). When Baycrest deliberately remained silent, while knowing that Mr. Callow had drawn the mistaken inference the contract was in good standing because it was likely to be renewed, it breached the duty to act honestly. In my view, the trial judge did not create a new duty of disclosure in correcting that wrong but rather sought to denounce the Baycrest's conduct. Remedying that with an order for damages to repair Baycrest's failure to exercise clause 9 in accordance with the requirements of the duty of honest performance did not confer a benefit on Callow; it merely set matters right on the usual measure of corrective justice following this breach of contract. Respectfully stated, it is therefore my view that the Court of Appeal erred in concluding that Baycrest's conduct was dishonourable but not dishonest.

[104] I would note, however, that I do agree in part with the Court of Appeal's observation that the trial judge went too far in concluding that "[t]he minimum standard of honesty would have been to

temps, et ce même s'il savait que son employé était en train de vendre sa maison en prévision de sa mutation. L'employé n'a appris la nouvelle de la cessation de son emploi qu'après avoir vendu sa maison. Une telle conduite, a fait remarquer le juge Iacobucci, violait clairement la norme de bonne foi attendue dans la manière dont un congédiement doit être effectué.

[103] Comme l'illustrent clairement les arrêts *Dunning*, *Wallace* et *Keays*, l'employeur a le droit de résilier un contrat d'emploi sans motif, sous réserve de l'obligation de donner un préavis raisonnable. Toutefois, aussi large que puisse être ce droit, un employé mécontent peut alléguer une violation contractuelle distincte lorsque l'employeur l'a maltraité dans la manière dont il l'a congédié. En définitive, comme l'a souligné le juge Cromwell, « [l]es parties contractantes doivent [. . .] pouvoir s'attendre à ce que leur partenaire contractant respecte une norme minimale d'honnêteté en ce qui a trait à l'exécution du contrat, de sorte que s'il n'est pas donné suite au contrat, elles auront l'assurance d'une possibilité raisonnable de protéger leurs intérêts » (*Bhasin*, par. 86). Lorsque Baycrest est demeurée délibérément silencieuse, tout en sachant que M. Callow avait déduit erronément que le contrat n'était pas en péril parce qu'il allait probablement être renouvelé, elle a manqué à l'obligation d'agir honnêtement. À mon avis, la juge de première instance n'a pas créé de nouvelle obligation de divulgation en corrigeant ce tort, mais a plutôt voulu dénoncer la conduite de Baycrest. Le prononcé d'une ordonnance en dommages-intérêts pour réparer l'omission de Baycrest d'avoir eu recours à la clause 9 conformément aux exigences de l'obligation d'exécution honnête n'a pas conféré d'avantage à Callow. Cela a simplement rectifié la situation en appliquant comme d'habitude les règles de la justice corrective à la suite de cette violation de contrat. Soit dit respectueusement, je suis donc d'avis que la Cour d'appel a eu tort de conclure que la conduite de Baycrest avait été peu honorable, mais pas pour autant malhonnête.

[104] Je souligne cependant que je souscris en partie à l'observation de la Cour d'appel selon laquelle la juge de première instance est allée trop loin en concluant que [TRADUCTION] « [l]a norme

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

C. *Damages*

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

[106] On the first point, I note that the trial judge correctly proceeded on the premise that, "[d]ue to the breach of contract, [Callow] is entitled to be placed in the same position as if the breach had not occurred" (para. 79). Indeed, as Cromwell J. explained in *Bhasin*, breach of the duty of honest contractual performance supports a claim for damages according to the ordinary contractual measure (para. 88).

minimale d'honnêteté aurait été d'aborder les problèmes de rendement allégués, de donner un préavis dans les plus brefs délais ou de s'abstenir de faire des assertions en prévision de la période de préavis » (motifs de première instance, par. 67). Selon moi, imputer ces deux premières exigences équivaudrait à modifier le marché conclu entre les parties sur le plan substantiel, une conclusion que Callow ne sollicite pas devant notre Cour. Cela dit, je suis d'accord avec la juge de première instance pour dire que, à tout le moins, Baycrest devait s'abstenir de faire de fausses représentations en prévision de la période de préavis. Puisqu'elle a omis de corriger la méprise de M. Callow engendrée par ses fausses représentations, je suis moi aussi d'avis de reconnaître une violation du contrat de la part de Baycrest dans l'exercice du droit de résiliation que lui conférait la clause 9. La perte d'occasion qui en a résulté donne donc droit à des dommages-intérêts, ce sur quoi je vais maintenant me pencher.

C. *Dommages-intérêts*

[105] Baycrest prétend que Callow n'a pas droit à des dommages-intérêts au titre du manquement. Selon Baycrest, la juge de première instance a commis une erreur en fixant le montant des dommages-intérêts : d'abord, en octroyant à Callow les profits qu'elle prévoyait réaliser durant la période entière à courir sur le contrat, ensuite, en interprétant erronément la preuve relative aux dépenses de Callow et, enfin, en octroyant les dommages-intérêts à la fois au titre de la perte de profits et des dépenses engagées.

[106] Quant au premier point, je souligne que la juge de première instance est partie à bon droit du principe selon lequel [TRADUCTION] « [p]arce qu'il y a eu violation de contrat, [Callow] a le droit d'être placée dans la même situation que si la violation n'avait pas eu lieu » (par. 79). De fait, comme le juge Cromwell l'a expliqué dans l'arrêt *Bhasin*, un manquement à l'obligation d'honnêteté en matière d'exécution contractuelle justifie une réclamation en dommages-intérêts suivant ce qui est habituellement accordé en matière contractuelle (par. 88).

[107] The ordinary approach is to award contractual damages corresponding to the expectation interest (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 108). That is, damages should put Callow in the position that it would have been in had the duty been performed.

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

[109] I see no basis to hold that a breach of the duty of honest performance should in general be compensated by way of reliance damages. I recall that the duty of honest performance is a doctrine of contract law. Its breach is not a tort. Not only would basing damages in this case on the reliance interest set this contractual breach apart from the ordinary measure of contractual damages, but it would depart from the measure as it was applied in *Bhasin* (para. 108; see also MacDougall, at §1.130). In my respectful view, there is no basis to depart from *Bhasin* on this point which, in any event, was not argued by the parties. Further, I note that this view is shared by authors who have written that the duty of honest performance protects a party's expectation interest,

[107] D'ordinaire, on accorde en matière contractuelle des dommages-intérêts correspondant à la perte du profit escompté (*Société des loteries de l'Atlantique c. Babstock*, 2020 CSC 19, [2020] 2 R.C.S. 420, par. 108). Cela signifie que les dommages-intérêts doivent placer Callow dans la situation où elle se serait trouvée s'il avait été satisfait à l'obligation.

[108] Si on a observé à juste titre que les dommages-intérêts fondés sur la confiance et les dommages-intérêts fondés sur l'attente seront les mêmes dans plusieurs circonstances, voire toutes, ils sont néanmoins distincts sur le plan conceptuel. Comme l'a écrit le professeur Stephen Smith, [TRADUCTION] « [l]e tribunal ordonne aux défendeurs de faire ce qu'ils avaient promis de faire, non pas de faire tout ce qui est nécessaire pour garantir qu'il n'est pas porté préjudice au cocontractant du fait qu'il se fie à la promesse » (*Atiyah's Introduction to the Law of Contract* (6e éd. 2006), p. 405). Ce sont généralement des dommages-intérêts fondés sur la confiance qui sont octroyés en matière délictuelle (*PreMD Inc. c. Ogilvy Renault LLP*, 2013 ONCA 412, 309 O.A.C. 139, par. 65). Cela peut convenir lorsqu'il est difficile pour le demandeur de prouver la position dans laquelle il se serait trouvé si le contrat avait été exécuté. Octroyer de tels dommages-intérêts en matière contractuelle signifie que l'on replace la partie lésée dans la position où elle se serait trouvée si elle n'avait pas conclu le contrat (par. 66).

[109] Je ne vois aucune raison justifiant de conclure qu'un manquement à l'obligation d'exécution honnête devrait généralement être réparé au moyen de dommages-intérêts fondés sur la confiance. Je rappelle que cette obligation est une doctrine du droit des contrats. Le fait de ne pas s'en acquitter ne constitue pas un délit civil. Fonder les dommages-intérêts en l'espèce sur la confiance aurait non seulement pour effet de placer cette violation de contrat à part des dommages-intérêts habituellement accordés en matière contractuelle, mais divergerait également de l'approche adoptée dans l'arrêt *Bhasin* (par. 108; voir aussi MacDougall, §1.130). À mon avis, rien ne justifie de nous écarter de l'arrêt *Bhasin* sur ce point qui, quoi qu'il en soit, n'a pas été plaidé par

rather than reliance interest (see, e.g., McCamus (2015), at pp. 112-13). Finally, while reliance damages and expectation damages coincide on the facts here, there is good reason to retain, in my view, the ordinarily applicable measure of contractual damages that seeks to provide the plaintiff with what they had expected. Professor Waddams has written that this can have a positive deterrent effect: "One of the legitimate arguments in favour of the current rule and against a rule measuring damages only by the plaintiff's reliance is that a rule protecting only reliance would fail to deter breach in a large number of cases where the defendant calculated that the plaintiff's provable losses were less tha[n] the cost of performance" ("Breach of Contract and the Concept of Wrongdoing" (2000), 12 *S.C.L.R.* (2d) 1, at pp. 18-19).

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

[111] Moreover, Baycrest points to *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, for the proposition that damages are assessed by that mode of performance which is least burdensome to the defendant. Callow, it is said, is entitled to no more than the minimum that Baycrest was obligated to do pursuant to the contract. Since

les parties. En outre, je note que ce point de vue est partagé par des auteurs qui ont écrit que l'obligation d'exécution honnête protège l'intérêt d'une partie quant au profit escompté, plutôt que son intérêt au titre de la confiance qu'elle accorde à son cocontractant (voir, p. ex., McCamus (2015), p. 112-113). Enfin, même si les dommages-intérêts fondés sur la confiance et les dommages-intérêts fondés sur l'attente coïncident suivant les faits en l'espèce, j'estime qu'il y a une bonne raison de continuer à octroyer en matière contractuelle des dommages-intérêts ordinaires qui visent à procurer à la demanderesse ce à quoi elle s'attendait. Selon le professeur Waddams, ceci peut avoir un effet dissuasif positif : [TRADUCTION] « [u]n des arguments légitimes en faveur de la règle actuelle et contre une règle qui ne mesure les dommages-intérêts qu'en fonction de la confiance du demandeur est que la règle qui ne protègerait que la confiance ne dissuaderait pas la violation dans le grand nombre de cas où le défendeur calculerait que les pertes prouvables du demandeur seraient moindres que le coût de l'exécution » (« Breach of Contract and the Concept of Wrongdoing » (2000), 12 *S.C.L.R.* (2d) 1, p. 18-19).

[110] Baycrest plaide néanmoins que la juge de première instance ne s'est pas réellement demandé dans quelle position Callow se serait retrouvée si elle s'était acquittée de l'obligation, et a plutôt octroyé la valeur de ce qui restait à courir sur le contrat d'entretien hivernal. Baycrest fait valoir que, ce faisant, la juge a commis la même erreur que celle qu'avait commise la juge de première instance dans l'affaire *Bhasin*, qui s'était contentée d'octroyer des dommages-intérêts comme si le contrat avait été renouvelé. Baycrest soutient que notre Cour a condamné cette approche à juste titre puisque les parties n'avaient pas l'intention de conclure un contrat perpétuel ni ne l'avaient-elles présumé être tel.

[111] De plus, Baycrest s'appuie sur l'arrêt *Hamilton c. Open Window Bakery Ltd.*, 2004 CSC 9, [2004] 1 R.C.S 303, au soutien de la proposition selon laquelle les dommages-intérêts sont calculés en fonction du mode d'exécution le moins onéreux pour le défendeur. Callow, prétend-elle, n'a droit à rien de plus que le minimum de ce à quoi Baycrest

clause 9 allowed it to terminate the winter maintenance agreement at any point on 10 days' notice, no damages should flow.

[112] In my view, *Hamilton* is of no assistance to Baycrest in this case. While Cromwell J. referenced this principle in *Bhasin*, he did so in the context of whether the Court should recognize a broad, free-standing duty of good faith, for which the appellant there had argued. Briefly stated, the appellant's position was that the respondent, Can-Am, would have been in breach of such a duty since it had attempted to use the non-renewal clause to force Mr. Bhasin into a merger. Cromwell J. declined to recognize such a broad duty, reasoning that "Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract" (*Bhasin*, at para. 90; see also J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 23-25). Because no damages would have flowed from this breach, it was unnecessary for the Court to decide whether a broad, free-standing duty of good faith should be recognized.

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

était tenue en application du contrat. Puisque la clause 9 lui permettait de résilier le contrat d'entretien hivernal n'importe quand, moyennant un préavis de 10 jours, il n'y aurait pas lieu d'accorder des dommages-intérêts.

[112] À mon avis, l'arrêt *Hamilton* n'est d'aucun secours pour Baycrest en l'espèce. Bien que le juge Cromwell ait mentionné ce principe dans *Bhasin*, il l'a fait dans le contexte où se posait la question de savoir si la Cour devait reconnaître une obligation large et indépendante d'agir de bonne foi, ce que l'appelant en cette affaire avait plaidé. En un mot, l'appelant prétendait que l'intimée Can-Am avait manqué à cette obligation, puisqu'elle avait tenté de recourir à la clause de non-renouvellement pour imposer une fusion à M. Bhasin. Le juge Cromwell a refusé de reconnaître une obligation aussi large, raisonnant qu'« il faudrait encore mesurer la responsabilité contractuelle de Can-Am en fonction du mode d'exécution le moins contraignant, soit en l'espèce simplement un non-renouvellement du contrat » (*Bhasin*, par. 90; voir aussi J. D. McCamus, *The Law of Contracts* (3e éd. 2020), p. 23-25). Puisque cette violation n'aurait causé aucun dommage, il n'était pas nécessaire que la Cour décide s'il y avait lieu de reconnaître une obligation large et indépendante d'agir de bonne foi.

[113] Il convient de souligner que, malgré ses commentaires en rapport avec l'arrêt *Hamilton*, le juge Cromwell a accordé des dommages-intérêts à l'appelant découlant du manquement par les intimés à l'obligation d'exécuter le contrat honnêtement. Des dommages-intérêts ont été octroyés comme d'habitude au titre de la perte du profit escompté, soit de manière à placer M. Bhasin dans la situation où il se serait trouvé si Can-Am n'avait pas manqué à son obligation d'agir honnêtement dans son recours à la clause de non-renouvellement (*Bhasin*, par. 88 et 108). En conséquence, M. Bhasin a été indemnisé de la perte de la valeur de son entreprise (par. 108-110). Comme l'expliquent utilement les professeurs O'Byrne et Cohen, [TRADUCTION] « si Can-Am avait traité avec M. Bhasin honnêtement à tous les égards (sans être obligée pour autant de divulguer son intention de ne pas renouveler le contrat), M. Bhasin se serait rendu compte beaucoup plus tôt que sa

to protect his business, instead of seeing it 'in effect, expropriated and turned over to Mr. Hrynew'" ("The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015), 53 *Alta. L.R.* 1, at p. 8 (footnotes omitted)).

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

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

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

relation avec elle était grandement en péril et sur le point de se rompre. Il aurait pu prendre des mesures proactives pour protéger son entreprise, plutôt que de s'en voir "dans les faits dépossédé au profit de M. Hrynew" » (« The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew* » (2015), 53 *Alta. L.R.* 1, p. 8 (notes en bas de pages omises)).

[114] Comment se fait-il que des dommages-intérêts aient été accordés pour un manquement à l'obligation d'exécution honnête malgré le principe énoncé dans l'arrêt *Hamilton*? Bien que les dommages-intérêts doivent être calculés en fonction du mode d'exécution le moins onéreux pour le défendeur, ce mode en l'espèce aurait consisté à corriger la méprise dès que Baycrest a su que l'appelante avait tiré une déduction erronée. Si elle l'avait fait, Callow aurait eu l'occasion de conclure un autre contrat pour l'hiver qui s'en venait. Comme Callow l'a expliqué à l'audience, [TRADUCTION] « puisque cette malhonnêteté avait fait subir une perte à Callow en l'incitant à ne pas présenter de soumissions en vue d'obtenir d'autres contrats pendant l'été 2013 pour l'hiver 2013 à 2014, les condos lui doivent des dommages-intérêts » (transcription, p. 5), qui correspondent à l'occasion qu'elle a perdue en raison de leur recours abusif à la clause 9.

[115] Certes, la juge de première instance aurait pu expliquer plus clairement son raisonnement au soutien de l'octroi de dommages-intérêts. Cela dit, quand bien même elle aurait commis la même erreur que celle qu'avait commise la juge de première instance dans l'affaire *Bhasin*, ce qui l'a amenée à accorder des dommages-intérêts comme si le contrat était demeuré en vigueur, cette erreur n'a pas porté à conséquence.

[116] Comme l'a conclu la juge de première instance, Baycrest [TRADUCTION] « n'a pas donné [à Callow] une juste possibilité de protéger ses intérêts » (par. 67). Si Baycrest avait agi honnêtement dans l'exercice de son droit de résiliation et corrigé ainsi la fausse impression de M. Callow, Callow aurait pris des mesures proactives pour présenter des soumissions en vue d'obtenir d'autres contrats pour l'hiver qui s'en venait (m.a., par. 91-95). De fait, il y

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

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

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

[119] I see no issue of double recovery in this case. The trial judge awarded the $64,306.96 as lost profit, not lost revenue. This is appropriate because Callow was not actually hired for the other contract on which

avait amplement d'éléments de preuve devant la juge de première instance selon lesquels Callow avait eu des occasions de présenter des soumissions en vue d'obtenir d'autres contrats d'entretien hivernal durant l'été 2013, mais qu'elle avait choisi de renoncer à ces occasions en raison de la méprise de M. Callow quant à ce qu'il adviendrait de son contrat avec Baycrest. Quoi qu'il en soit, même si je concluais que la juge de première instance n'avait pas tiré de conclusion explicite sur la question de savoir si Callow avait perdu une occasion d'affaires, on peut présumer en droit que ce fut le cas, puisque c'est la malhonnêteté même de Baycrest qui empêche maintenant Callow de prouver de façon concluante ce qui se serait produit si Baycrest avait été honnête (voir *Lamb c. Kincaid* (1907), 38 R.C.S. 516, p. 539-540).

[117] Par conséquent, je ne constate aucune erreur manifeste et déterminante. Je suis convaincu que si la malhonnêteté de Baycrest n'avait pas privé Callow de l'occasion de présenter des soumissions en vue d'obtenir d'autres contrats, elle aurait réalisé un montant au moins égal au profit qu'elle a perdu au titre du contrat d'entretien hivernal. La juge de première instance a conclu que, déduction faite des dépenses, ce montant s'élève à 64 306,96 $. Je ne vois aucune raison de modifier sa conclusion de fait quant à l'estimation des dépenses. En conséquence, je ne vois aucun motif permettant d'infirmer cette portion de l'octroi de dommages-intérêts par la juge de première instance.

[118] La juge de première instance a en outre octroyé à Callow la somme de 14 835,14 $ représentant le coût de la location d'une pièce de machinerie pour un an. Monsieur Callow a affirmé dans son témoignage qu'il avait loué la machinerie spécialement pour le contrat d'entretien hivernal, mais qu'il ne l'aurait pas fait s'il avait su que le contrat allait être résilié (par. 81). Baycrest plaide que la juge de première instance s'est trompée en octroyant ces dépenses, puisque cela revient à un recouvrement en double.

[119] Je ne vois aucun problème de recouvrement en double en l'espèce. La juge de première instance a octroyé 64 306,96 $ pour la perte de profits, non pas pour la perte de revenus. Cette approche était

it did not bid and therefore did not necessarily have to undertake all the expenses that would have been required to fulfill that contract. However, as Callow had already committed to this expense, the lease of the machinery, it too should be compensated for along with the lost profit. The trial judge was entitled to decide this point as she did, having the advantage of measuring losses first hand. I see no reviewable error in the trial judge's approach on this issue.

V. Disposition

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

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

BROWN J. —

I. Introduction

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

appropriée puisque Callow n'a pas été embauchée pour l'autre contrat pour lequel elle n'a pas présenté de soumission de sorte qu'elle n'a pas nécessairement encouru toutes les dépenses qui auraient été nécessaires pour exécuter ce contrat. Toutefois, comme Callow avait déjà engagé la dépense liée à la location de la machinerie, cette dépense doit être indemnisée en plus de la perte de profits. La juge de première instance pouvait trancher cette question comme elle l'a fait, ayant eu l'avantage de mesurer directement les pertes. Je ne vois aucune erreur susceptible de révision dans la manière dont la juge de première instance a abordé cette question.

V. Dispositif

[120] Je suis d'avis d'accueillir l'appel, d'annuler l'ordonnance de la Cour d'appel et de rétablir le jugement de la juge de première instance, avec dépens devant toutes les cours.

Version française des motifs des juges Moldaver, Brown et Rowe rendus par

LE JUGE BROWN —

I. Introduction

[121] Le présent pourvoi nous invite à confirmer la portée et le fonctionnement de l'obligation d'exécution honnête, reconnue dans l'arrêt *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, en précisant la distinction qui existe entre une conduite activement trompeuse et une non-divulgation innocente. L'application de cette distinction aux faits de la présente affaire est chose simple. Comme la juge de première instance l'a conclu, les intimées (collectivement appelées ci-après « Baycrest ») ont déclaré à l'appelante C.M. Callow Inc. (ci-après « Callow ») que son contrat ne serait pas résilié (2017 ONSC 7095). Se fondant sur ces déclarations, Callow a perdu l'occasion d'obtenir d'autre travail pour la durée du contrat. La plainte de Callow ne porte donc pas sur le *silence* de Baycrest, mais plutôt sur ses déclarations, qui peuvent assurément servir de base à une demande fondée sur l'obligation d'exécution honnête.

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

[123] This is not to suggest that comparative legal analysis is not an important tool or that its use should somehow be unduly limited at this Court. As the majority's reasons amply document, the Court has a longstanding tradition of looking to Quebec's civil law in developing the common law — whether to answer a question that the common law does not answer (that is, to fill a "gap") or where it is necessary to modify or otherwise develop existing rules. In addition, where concerns are raised about the effects of moving the common law in one direction or another, this Court has considered the experience in Quebec and elsewhere, often for reassurance that the posited concerns are unfounded or overstated. What this Court has refrained from doing, however, is deploying comparative legal analysis that serves none of these purposes or, even worse, renders the law obscure to those who must know and apply it. But by invoking the civilian abuse of right framework to clarify when "[d]ishonesty is directly linked to the performance of a given contract" (para. 73) — a question requiring no "clarification" — the majority does exactly that.

[122] Puisque Baycrest n'a pas relevé d'erreur manifeste et déterminante dans les conclusions de la juge de première instance, je conviens avec les juges majoritaires que le pourvoi devrait être accueilli et que la décision de première instance devrait être rétablie. Malheureusement, toutefois, je me vois dans l'obligation d'exprimer respectueusement mon désaccord avec l'opinion des juges majoritaires voulant que la doctrine de l'abus de droit en droit civil du Québec soit « utile » pour comprendre l'application de l'arrêt *Bhasin* au présent pourvoi (par. 57). J'estime en effet, encore une fois respectueusement, que cette digression n'est pas « utile » et qu'elle n'« aide » pas les juges et les avocats qui doivent tenter de comprendre les principes de bonne foi en common law qui ont été élaborés dans ce jugement. De fait, elle ne fera qu'introduire de l'incertitude et de la confusion dans le droit.

[123] Je ne veux pas par là suggérer que l'analyse juridique comparative n'est pas un outil important ou qu'il faudrait en restreindre de quelque façon indûment l'usage par la Cour. Comme l'illustrent amplement les motifs des juges majoritaires, la Cour a une longue tradition de s'inspirer du droit civil québécois pour développer la common law — soit pour répondre à une question à laquelle cette dernière ne répond pas (c'est-à-dire pour combler une « lacune »), soit lorsque cela s'avère nécessaire pour modifier ou autrement préciser des règles existantes. En outre, lorsque la perspective de faire évoluer la common law dans une direction ou dans une autre suscite des inquiétudes, la Cour a examiné l'expérience vécue au Québec et ailleurs, souvent pour obtenir l'assurance que les préoccupations exprimées sont infondées ou exagérées. Toutefois, jusqu'à maintenant, la Cour s'est abstenue de faire appel à une analyse juridique comparative qui ne vise aucun de ces objectifs, ou pire, qui obscurcit le droit pour ceux qui doivent le connaître et l'appliquer. Or, en invoquant le cadre d'analyse de la notion civiliste d'abus de droit pour clarifier quand la « malhonnêteté est directement liée à l'exécution d'un contrat » (par. 73) — une question qui n'a nul besoin de « clarification » —, c'est précisément ce que font les juges majoritaires.

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

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

II. Background

[126] Baycrest comprises 10 condominium corporations with shared assets, for which decisions are made by a Joint Use Committee. In April 2012, Baycrest entered into two separate two-year agreements with Callow to provide summer landscaping and winter snow removal services. The terms of the

[124] Si mon objection vise donc fondamentalement la méthodologie adoptée par les juges majoritaires, elle porte également sur les conséquences substantielles qui en découlent. Comme l'admettent les juges majoritaires, le présent pourvoi porte sur l'obligation d'exécution honnête, pas sur l'obligation d'exercer un pouvoir discrétionnaire de bonne foi. Or, leur digression sur la notion d' « exercice fautif d'un droit » les amène essentiellement sur ce terrain même, puisqu'elle lie la *malhonnêteté* à *la manière dont est exercé le pouvoir discrétionnaire de nature contractuelle*. Donc, dans les faits, en s'appuyant sur une notion de droit civil, les juges majoritaires sont amenés à confondre des notions de common law distinctes l'une de l'autre, ou à tout le moins à masquer la distinction entre elles. Cela est tout aussi inutile qu'indésirable, puisque l'exercice du pouvoir discrétionnaire — outre le fait qu'il s'agit d'une question d'exécution qui peut faire l'objet de déclarations inexactes — n'a pas grand-chose à voir avec l'obligation d'exécution honnête. L'obligation d'exercer un pouvoir discrétionnaire de bonne foi — ou, pour l'exprimer avec la terminologie civiliste qu'ajoutent les juges majoritaires, d'une manière qui n'est pas « abusive » ou « fautive » — est plutôt un concept distinct qui ne s'applique pas dans le présent pourvoi.

[125] En tranchant le présent pourvoi, notre objectif devrait consister à élaborer le principe directeur de bonne foi en common law soigneusement, et de manière cohérente, et plus particulièrement de manière à fournir une orientation claire en prenant soin de distinguer les différentes doctrines recensées par notre Cour dans l'arrêt *Bhasin*. Soit dit en tout respect, je suis d'avis que ce n'est pas ce qu'ont fait les juges majoritaires ici.

II. Contexte

[126] Baycrest est composée de 10 associations condominiales ayant des actifs partagés et dont les décisions relatives à ces actifs sont prises par un comité d'utilisation conjointe. En avril 2012, Baycrest a conclu deux contrats distincts de deux ans avec Callow en vue de la fourniture de services

winter service agreement stipulated that Baycrest could terminate the agreement, without cause, upon giving 10 days' notice.

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

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

d'aménagement paysager en été et de services de déneigement en hiver. Selon les conditions du contrat de services d'entretien hivernal, Baycrest pouvait le résilier sans motif moyennant un préavis de 10 jours.

[127] En mars ou avril 2013, le comité d'utilisation conjointe a voté en faveur de la résiliation du contrat de services d'entretien hivernal avant son expiration prévue en avril 2014. Baycrest a toutefois choisi de ne pas faire part de sa décision au propriétaire de Callow, Christopher Callow, avant septembre 2013, afin de ne pas mettre en péril l'exécution des travaux visés par le contrat de services d'entretien estival. N'étant pas au courant de la décision de Baycrest, Callow a exécuté gratuitement des travaux pour celle-ci au printemps et à l'été 2013 dans l'espoir que cela inciterait Baycrest à renouveler les deux contrats. Monsieur Callow a également discuté de la possibilité de renouveler les contrats avec deux représentants de Baycrest, dont l'un avait participé à la négociation des contrats conclus en 2012. Ces discussions l'ont amené à croire que les contrats seraient probablement renouvelés en 2014 pour une période de deux ans et, par conséquent, que le contrat de services d'entretien hivernal n'était pas en péril. Sachant que Callow exécutait les travaux sur le fondement de cette méprise, Baycrest a néanmoins continué de garder pour elle sa décision de résilier le contrat.

[128] Le 12 septembre 2013, Baycrest a donné à Callow un préavis de son intention de résilier le contrat de services d'entretien hivernal. Callow a intenté une poursuite, alléguant que Baycrest n'avait pas exécuté le contrat de services d'entretien hivernal de bonne foi et qu'elle était donc responsable d'une violation de contrat. La juge de première instance a conclu que Baycrest avait manqué à son obligation d'exécution honnête. Selon elle, les déclarations et la conduite de Baycrest ont activement induit M. Callow en erreur et l'ont amené à croire que le contrat de services d'entretien hivernal ne serait pas résilié. En conséquence, la juge a accordé des dommages-intérêts afin de mettre Callow dans la situation où elle se serait trouvée si le contrat n'avait pas été résilié. La Cour d'appel de l'Ontario a infirmé la décision, déclarant que l'obligation d'exécution

only for 10 days' notice of termination and that was the extent of its entitlement.

honnête n'impose pas une obligation de divulgation (2018 ONCA 896, 429 D.L.R. (4th) 704). Selon elle, même si Baycrest a induit Callow en erreur, cette dernière n'avait négocié qu'un préavis de 10 jours en cas de résiliation et c'était tout ce à quoi elle avait droit.

III. Analysis

III. Analyse

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

A. *Le pourvoi peut être aisément tranché en appliquant le principe de bonne foi en common law*

[129] Disposing of this case is really a simple matter of applying this Court's decision in *Bhasin*. The first step in deciding a common law good faith claim is to consider whether any established good faith doctrines apply. Callow bases its claim on two established doctrines: the duty of honest performance and the duty to exercise discretionary powers in good faith. As I will explain, however, Callow's claim should be resolved by applying only the duty of honest performance.

[129] Pour disposer du présent pourvoi, il suffit d'appliquer l'arrêt *Bhasin* de notre Cour. La première étape à suivre pour trancher une demande fondée sur le principe de bonne foi en common law est de se demander si certaines doctrines de la bonne foi reconnues trouvent application. Callow fonde sa demande sur deux doctrines reconnues : l'obligation d'exécution honnête et l'obligation d'exercer un pouvoir discrétionnaire de bonne foi. Or, comme je l'expliquerai, sa demande devrait être résolue en appliquant uniquement l'obligation d'exécution honnête.

(1) The Duty of Honest Performance

(1) L'obligation d'exécution honnête

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

[130] Selon la norme minimale universelle applicable, tous les contrats doivent être exécutés de manière honnête. Les parties contractantes ne doivent donc pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat (*Bhasin*, par. 73-74). Si le demandeur subit une perte parce qu'il a fait confiance à la conduite trompeuse de l'autre partie, l'obligation d'exécution honnête sert à rétablir la situation du demandeur. Toutefois, cette obligation « n'impose pas un devoir de loyauté ou de divulgation ni n'exige d'une partie qu'elle renonce à des avantages découlant du contrat » (*Bhasin*, par. 73).

[131] The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure, is the central issue in this appeal. As that line has been clearly demarcated by cases addressing misrepresentation in other contexts, it is in my view worth

[131] La ligne de démarcation entre (1) une conduite activement trompeuse et (2) une non-divulgation permissible constitue la question centrale du présent pourvoi. Comme cette ligne a été clairement démarquée dans les cas portant sur des

affirming here that the same settled principles apply to the duty of honest performance. The duty of honest performance is, after all, broadly comparable to the doctrine of fraudulent misrepresentation, although it applies (unlike misrepresentation) to representations made *after* contract formation (B. MacDougall, *Misrepresentation* (2016), at pp. 63-64). It follows that those representations sufficient to ground a claim for misrepresentation are analogous to the representations that will support a claim based on the duty of honest performance.

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

déclarations inexactes dans d'autres contextes, j'estime qu'il vaut la peine de mentionner ici que, à mon avis, les mêmes principes établis s'appliquent à l'obligation d'exécution honnête. Après tout, cette obligation est largement comparable à la doctrine des déclarations inexactes frauduleuses, même si elle s'applique (contrairement à la doctrine des déclarations inexactes) aux déclarations faites *après* la conclusion du contrat (B. MacDougall, *Misrepresentation* (2016), p. 63-64). Il s'ensuit que ces déclarations qui permettent d'étayer une demande fondée sur des déclarations inexactes sont analogues à celles qui étayent une demande fondée sur l'obligation d'exécution honnête.

[132] La règle générale applicable aux contrats autres que ceux exigeant la bonne foi la plus absolue est que les parties contractantes ne sont pas tenues de divulguer des renseignements importants (*Bhasin*, par. 73 et 86). Un simple silence ne peut donc pas être considéré comme une conduite activement trompeuse (*Alevizos c. Nirula*, 2003 MBCA 148, 180 Man. R. (2d) 186, par. 19). Dans certains cas, cependant, le silence à l'égard d'un sujet particulier est trompeur compte tenu de ce qui *a* été dit (*Xerex Exploration Ltd. c. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6, par. 56, citant *Opron Construction Co. c. Alberta* (1994), 151 A.R. 241 (B.R.)). Encore une fois, il n'y a pas lieu de réinventer la roue en l'espèce. Il existe, dans le contexte des déclarations inexactes, [TRADUCTION] « une jurisprudence riche qui accepte que, parfois, le silence ou des demi-vérités constituent une déclaration » (MacDougall, p. 67; voir aussi A. Swan, « The Obligation to Perform in Good Faith : Comment on *Bhasin v. Hrynew* » (2015), 56 *Rev. can. dr. comm.* 395, p. 402). Une partie contractante ne peut donc pas dresser un portrait trompeur de l'exécution de ses obligations contractuelles en se fondant sur des demi-vérités ou sur une divulgation partielle (*Peek c. Gurney* (1873), L.R. 6 H.L. 377; *Alevizos*, par. 24-25; *Xerex*, par. 56-57). En outre, les parties contractantes sont tenues de corriger les déclarations qui se révèlent subséquemment fausses ou dont l'auteur se rend compte plus tard qu'elles étaient erronées (*Xerex*, par. 58; MacDougall, p. 118-119).

[133] Further, the representation need not take the form of an express statement. So long as it is clearly communicated, it may comprise other acts or conduct on the part of the defendant (MacDougall, at p. 87). The question is whether the defendant's active conduct contributed to a misapprehension that could be corrected only by disclosing additional information. If so, the defendant must make that disclosure. Conversely, a contracting party is not required to correct a misapprehension to which it has not contributed (T. Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v. Hrynew* and the Organizing Principle of Good Faith in Common Law Canada" (2016), 58 *Can. Bus. L.J.* 1, at p. 13). The entire context, which includes the nature of the parties' relationship, is to be considered in determining, objectively, whether the defendant made a misrepresentation to the plaintiff (MacDougall, at p. 102; see, e.g., *Outaouais Synergest Inc. v. Lang Michener LLP*, 2013 ONCA 526, 116 O.R. (3d) 742, at paras. 84-87; *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1981), 33 B.C.L.R. 291 (C.A.), at p. 296). It follows that the question of whether a misrepresentation has been made is a question of mixed fact and law, subject to appellate review only for palpable and overriding error.

[134] In light of these principles — which, again, are well established and require nothing more than a statement by this Court of their application to the duty of honest performance — I cannot accept Baycrest's argument that its conduct fell on the side of innocent non-disclosure. Indeed, the trial judge found that "active communications between the parties between March/April and September 12, 2013 . . . deceived Callow" (para. 66 (CanLII)). Based on Baycrest's conduct and express statements, the trial judge found that Baycrest had represented that the winter service agreement was not in danger of termination (paras. 65 and 76). Further, the trial judge found that Baycrest knew that its representations were misleading and nonetheless expressed its intention of keeping Callow in the dark (paras. 48 and 69). These findings are sufficient to support the conclusion that Baycrest breached the duty of honest

[133] Par ailleurs, il n'est pas nécessaire que la déclaration prenne la forme d'une déclaration expresse. Tant qu'elle est communiquée clairement, elle peut prendre la forme d'autres actes ou conduites de la part du défendeur (MacDougall, p. 87). La question est de savoir si la conduite active du défendeur a contribué à une méprise qui ne peut être corrigée que par la divulgation de renseignements supplémentaires. Le cas échéant, le défendeur doit faire cette divulgation. À l'inverse, une partie contractante n'est pas tenue de corriger une méprise à laquelle elle n'a pas contribué (T. Buckwold, « The Enforceability of Agreements to Negotiate in Good Faith : The Impact of *Bhasin v. Hrynew* and the Organizing Principle of Good Faith in Common Law Canada » (2016), 58 *Rev. can. dr. comm.* 1, p. 13). Le contexte dans son entièreté — ce qui inclut la nature de la relation entre les parties — doit être pris en considération pour déterminer objectivement si le défendeur a fait une déclaration inexacte au demandeur (MacDougall, p. 102; voir, p. ex., *Outaouais Synergest Inc. c. Lang Michener LLP*, 2013 ONCA 526, 116 O.R. (3d) 742, par. 84-87; *C.R.F. Holdings Ltd. c. Fundy Chemical International Ltd.* (1981), 33 B.C.L.R. 291 (C.A.), p. 296). Il s'ensuit que la question de savoir si une déclaration a été faite est une question mixte de fait et de droit susceptible de révision en appel seulement en cas d'erreur manifeste et déterminante.

[134] Compte tenu de ces principes — qui, je le répète, sont bien établis et exigent seulement que notre Cour confirme leur application à l'obligation d'exécution honnête —, je ne peux accepter l'argument de Baycrest selon lequel sa conduite relevait de la non-divulgation innocente. En effet, la juge de première instance a conclu que [TRADUCTION] « les communications actives entre les parties entre mars/avril et le 12 septembre 2013 [. . .] ont induit Callow en erreur » (par. 66 (CanLII)). Selon la juge de première instance, compte tenu de la conduite et des déclarations expresses de Baycrest, celle-ci avait déclaré que le contrat de services d'entretien hivernal ne risquait pas d'être résilié (par. 65 et 76). En outre, la juge a conclu que Baycrest savait que ses déclarations étaient trompeuses et a néanmoins exprimé son intention de laisser Callow dans l'ignorance (par. 48 et 69). Ces constatations suffisent à appuyer

performance. And Baycrest identifies no palpable and overriding error to justify overturning them.

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

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

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

la conclusion selon laquelle Baycrest a manqué à son obligation d'exécution honnête, et Baycrest ne relève aucune erreur manifeste et déterminante justifiant qu'elles soient infirmées.

[135] Je rejette également l'argument de Baycrest selon lequel ses déclarations ne visaient que la conclusion d'un nouveau contrat de services d'entretien hivernal et non la résiliation du contrat existant avec Callow. Comme je l'ai expliqué, la question de savoir si Baycrest a fait une déclaration donnant ouverture à un droit d'action à propos de l'exécution du contrat doit être tranchée en fonction du contexte, soit notamment de sa conduite telle que je l'ai décrite. En outre, il était loisible à la juge de première instance de conclure de cette conduite que Callow avait raisonnablement inféré que le contrat de services d'entretien hivernal ne serait pas résilié (voir, p. ex., *Queen c. Cognos Inc.*, [1993] 1 R.C.S. 87, p. 128-132). Là encore, je ne vois aucune raison de modifier la conclusion de la juge de première instance.

(2) L'obligation d'exercer un pouvoir discrétionnaire de bonne foi

[136] Callow soutient également que la décision de Baycrest de résilier le contrat de services d'entretien hivernal relevait d'un pouvoir discrétionnaire et devait être prise de bonne foi. Elle se fonde sur l'obligation de bonne foi qui prend naissance « lorsque le contrat confère un pouvoir discrétionnaire à l'une des parties » et qui a été confirmée par notre Cour dans l'arrêt *Bhasin* (par. 47). À titre préliminaire, je note que ce ne sont pas toutes les décisions qui supposent l'exercice d'un certain pouvoir discrétionnaire qui sont assujetties à cette obligation (*Bhasin*, par. 72; J. T. Robertson, « Good Faith as an Organizing Principle in Contract Law : *Bhasin v Hrynew* — Two Steps Forward and One Look Back » (2015), 93 *R. du B. can.* 809, p. 859). La mesure dans laquelle elle s'applique aux droits de résiliation absolus reste incertaine, et je ne prétends pas résoudre cette controverse ici (*Styles c. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, par. 41; *Mohamed c. Information Systems Architects Inc.*, 2018 ONCA 428, 423 D.L.R. (4th) 174, par. 19).

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

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

(3) Damages

[139] Having concluded that Baycrest breached the duty of honest performance, the remaining issue is

[137] Cette obligation limite l'exercice de certains pouvoirs contractuels pouvant sembler accorder un pouvoir discrétionnaire absolu à l'une des parties. Pour les fins du présent appel, il n'est pas nécessaire d'exprimer une opinion ferme quant à la norme applicable au manquement à cette obligation. Il suffit de noter que lorsqu'un demandeur se fonde sur cette obligation, sa plainte *ne* vise *pas* la malhonnêteté; il invoque plutôt que le défendeur n'avait pas le droit de prendre la décision qu'il a prise. Le comportement répréhensible est en fait l'exercice du pouvoir discrétionnaire lui-même, et le demandeur fonde donc sa demande sur l'*effet* de cette décision (voir, p. ex., *Greenberg c. Meffert* (1985), 50 O.R. (2d) 755 (C.A.); *Mesa Operating Ltd. Partnership c. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38 (C.A.)). Des dommages-intérêts sont accordés en fonction de la différence entre le résultat obtenu et le résultat qui aurait été obtenu si le défendeur avait exercé son pouvoir discrétionnaire de la manière la moins onéreuse possible, mais légalement acceptable.

[138] Or, Callow ne conteste pas que Baycrest avait le droit de résilier le contrat de services d'entretien hivernal comme elle l'a fait, sans motif et en ne remettant qu'un préavis de 10 jours. Elle conteste plutôt *la malhonnêteté* qui a *précédé* l'exercice par Baycrest de son pouvoir discrétionnaire. Callow demande donc des dommages-intérêts établis en fonction de ce qui serait arrivé si Baycrest avait pris la même décision, mais sans faire de déclarations inexactes quant à ses intentions. L'obligation applicable est donc celle d'exécution honnête. En somme, le pourvoi dont nous sommes saisis porte sur la malhonnêteté dans l'exécution d'un contrat, et sur rien d'autre. De fait, il présente *précisément* le type de situation envisagée par le juge Cromwell au nom de la Cour dans l'arrêt *Bhasin*, par. 73, où une partie « men[t] à l'autre partie [ou] la tromp[e] au sujet de l'exécution de ses obligations contractuelles ». À l'inverse, il *ne* s'agit *pas* d'une affaire portant sur l'exercice d'un pouvoir discrétionnaire.

(3) Dommages-intérêts

[139] Ayant conclu que Baycrest a manqué à son obligation d'exécution honnête, la question qu'il

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

[140] The majority relies on Cromwell J.'s statement in *Bhasin* that a breach of the duty of honest contractual performance "supports a claim for damages according to the contractual rather than the tortious measure" (para. 88). But when the purpose of the expectation measure of damages for breach of contract is examined and contrasted with the legal framework developed in *Bhasin*, the actual claim in *Bhasin* and the damages actually received, it becomes readily apparent that the reliance measure is precisely the measure that the *Bhasin* framework contemplates should be awarded. On this point, the majority's reasons represent *not* fidelity to *Bhasin*, but a regrettable departure that undermines the coherence between the interests sought to be protected in *Bhasin* and the remedy to be awarded.

[141] It has "long been settled and [is] indeed axiomatic" that the legal aim in remedying a breach of contract is to give the innocent party the full benefit of the bargain by placing it in the position it would have occupied had the contract been performed (P. Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at p. 5; see also *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 27). Awarding a reliance measure — that is, compensating for losses

reste à trancher est celle de savoir si le montant des dommages-intérêts octroyés par la juge de première instance est approprié. Bien que j'arrive au même résultat que les juges majoritaires, j'aborde cette question de façon quelque peu différente. Mes collègues majoritaires sont d'avis qu'un manquement à l'obligation d'exécution honnête devrait donner lieu à des dommages-intérêts fondés sur l'attente. Pour ma part, j'estime qu'il découle de la reconnaissance de la conduite trompeuse de Baycrest comme une faute indépendante de la clause de résiliation que les dommages-intérêts appropriés représentent la perte subie par Callow du fait de la confiance qu'elle a accordée aux déclarations trompeuses de Baycrest (qui, j'en conviens, coïncideront souvent avec les dommages-intérêts fondés sur l'attente).

[140] Les juges majoritaires se fondent sur l'affirmation du juge Cromwell dans l'arrêt *Bhasin* voulant que le manquement à l'obligation d'exécution honnête du contrat « justifie une réclamation en dommages-intérêts fondée sur la disposition contractuelle plutôt que sur l'acte délictuel » (par. 88). Or, lorsqu'on examine l'objet des dommages-intérêts fondés sur l'attente pour la violation de contrat et qu'on le met en opposition au cadre d'analyse juridique mis au point dans l'arrêt *Bhasin*, à la demande en tant que telle dans cet arrêt et à la réparation effectivement reçue, il devient évident que les dommages-intérêts fondés sur la confiance octroyés sont précisément ceux qui devaient être accordés selon le cadre d'analyse prévu dans l'arrêt *Bhasin*. Sur ce point, les motifs des juges majoritaires *ne* constituent *pas* une application fidèle à l'arrêt *Bhasin*; ils marquent plutôt une rupture regrettable par rapport à celui-ci, laquelle mine la cohérence entre les intérêts que cet arrêt visait à protéger et la réparation devant être accordée.

[141] Il est [TRADUCTION] « établi depuis longtemps et effectivement évident » que la réparation d'une violation de contrat a pour objectif en droit que la partie innocente puisse jouir de tous les avantages que lui confère le marché conclu, en la mettant dans la position où elle se serait trouvée si le contrat avait été exécuté (P. Benson, *Justice in Transactions : A Theory of Contract Law* (2019), p. 5; voir aussi *Fidler c. Sun Life du Canada, compagnie d'assurance-vie*, 2006 CSC 30, [2006] 2 R.C.S. 3, par. 27).

sustained by the innocent party in reliance on the contract — would ignore the innocent party's right to performance that flows from its having pledged consideration therefor, thereby potentially depriving it of the benefit of the contract. Indeed, confining recovery to losses sustained in reliance on the agreement would create an incentive to breach agreements where the cost of performance outweighs the reliance measure of damage (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at para. 704; see also L. L. Fuller and W. R. Perdue Jr., "The Reliance Interest in Contract Damages" (1936), 46 *Yale L.J.* 52, at pp. 57-66).

Le fait d'accorder des dommages-intérêts fondés sur la confiance — c'est-à-dire, le fait d'indemniser une partie innocente pour les pertes subies parce qu'elle s'est fondée sur le contrat — ne tiendrait pas compte du droit qu'a cette partie à l'exécution du contrat qui découle du fait qu'elle a promis une contrepartie pour celle-ci, ce qui pourrait la priver des avantages du contrat. De fait, limiter le recouvrement aux pertes subies par la partie parce qu'elle se fondait sur le contrat inciterait les parties à contrevenir à l'entente lorsque le coût de l'exécution dépasse le montant des dommages-intérêts fondés sur la confiance (S. M. Waddams, *The Law of Contracts* (7e éd. 2017), par. 704; voir aussi L. L. Fuller et W. R. Perdue Jr., « The Reliance Interest in Contract Damages » (1936), 46 *Yale L.J.* 52, p. 57-66).

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

[142] Cependant, la justification de l'attribution de dommages-intérêts fondés sur l'attente ne s'applique pas au manquement à l'obligation d'exécution honnête. Dans de tels cas, ce qui est en cause, ce *n'*est *pas* le fait que le défendeur a omis d'exécuter le contrat, frustrant ainsi les attentes du demandeur; c'est plutôt le fait que le défendeur *a* exécuté le contrat, mais a aussi causé la perte subie par le demandeur par ses déclarations extracontractuelles malhonnêtes et inexactes concernant cette exécution et *auxquelles s'est fié le demandeur*, à son détriment. En résumé, sa demande n'est pas fondée sur la perte de la valeur de l'exécution, mais plutôt sur la confiance préjudiciable qu'il a accordée aux déclarations inexactes et malhonnêtes. L'intérêt qui est protégé n'est pas un intérêt lié à l'attente, mais bien un intérêt lié à la confiance. De la même façon que ces intérêts ne sont pas liés, un montant de dommages-intérêts fondés sur l'attente n'est pas lié au manquement à l'obligation d'exécution honnête.

[143] The claim in *Bhasin* itself is illustrative. Bhasin contracted to sell financial products for Can-Am. The contract would renew automatically at the end of the initial term unless one of the parties gave six months' notice of non-renewal. Can-Am intended to force a takeover of Bhasin's business by his competitor, Hrynew, but misled him about its intention to do so. Can-Am also appointed Hrynew to audit Bhasin's business. When Bhasin protested this conflict of interest, Can-Am lied to him about

[143] La demande formulée dans l'affaire *Bhasin* illustre bien ce point. Monsieur Bhasin avait conclu un contrat de vente de produits financiers pour Can-Am. Le contrat devait être renouvelé automatiquement à la fin de la durée initiale, sauf si une des parties donnait à l'autre un préavis de non-renouvellement de six mois. Can-Am prévoyait imposer une prise de contrôle de l'entreprise de M. Bhasin par son compétiteur, M. Hrynew, mais l'a induit en erreur quant à son intention de le faire. Can-Am a aussi

the reason for Hrynew's appointment as auditor and the terms that would govern his access to Bhasin's confidential information. Ultimately, when Can-Am gave notice of non-renewal, Bhasin lost the value of his business. This Court found that, but for Can-Am's dishonesty in the period leading up to the non-renewal, he "would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew" (para. 109). It awarded damages to compensate for the lost value of the business.

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

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

nommé M. Hrynew pour qu'il effectue une vérification de l'entreprise de M. Bhasin. Lorsque ce dernier a protesté contre ce conflit d'intérêts, Can-Am lui a menti au sujet de la raison pour laquelle elle avait nommé M. Hrynew à titre de vérificateur et des modalités qui régiraient son accès aux renseignements confidentiels de M. Bhasin. En fin de compte, lorsque Can-Am a donné l'avis de non-renouvellement, M. Bhasin a perdu la valeur de son entreprise. La Cour a conclu que, n'eût été la malhonnêteté de Can-Am au cours de la période ayant mené au non-renouvellement, M. Bhasin « aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de M. Hrynew » (par. 109). Elle a accordé des dommages-intérêts pour compenser la perte de la valeur de l'entreprise.

[144] Ni la demande, dans cette affaire, ni l'octroi des dommages-intérêts ne se rapportaient au fait que Can-Am n'avait pas exécuté le contrat conclu avec M. Bhasin. La théorie du jugement était plutôt que M. Bhasin avait perdu la valeur de son entreprise en se fiant aux déclarations inexactes et malhonnêtes de Can-Am. La réparation accordée dans les faits a donc été évaluée en fonction de la différence entre la situation de M. Bhasin et celle où il se serait trouvé si Can-Am n'avait pas été malhonnête quant à son intention d'imposer une prise de contrôle en annulant son contrat. Si M. Bhasin ne s'était pas fié aux déclarations malhonnêtes de Can-Am, aucuns dommages-intérêts n'auraient pu être octroyés sur ce fondement, parce la malhonnêteté n'aurait pas changé sa situation.

[145] La réparation accordée dans l'arrêt *Bhasin* n'était donc manifestement pas fondée sur l'exécution attendue; il semble d'ailleurs plutôt qu'elle ne visait pas du tout à placer M. Bhasin dans la situation où il se serait trouvé si le contrat avait été exécuté (K. Maharaj, « An Action on the Equities : Re-Characterizing *Bhasin* as Equitable Estoppel » (2017), 55 *Alta. L. Rev.* 199, p. 215). Elle visait plutôt uniquement à réparer le préjudice découlant du fait que M. Bhasin ait fait confiance à une déclaration inexacte et malhonnête — une approche qualifiée par un professeur de [TRADUCTION] « très apparentée aux règles applicables en matière de délit civil » (MacDougall, p. 65). Par conséquent, à l'instar de la

p. 861; Maharaj, at pp. 215-18). A contracting party that breaches this duty will be liable to compensate its counterparty for any foreseeable losses suffered *in reliance* on the misleading representations.

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

[147] Baycrest advances three arguments for reducing the trial award. First, it says that the 10 day notice period defines its maximum exposure for damages because, irrespective of its dishonesty, its least onerous means of performance was to terminate the agreement. The trial judge therefore incorrectly awarded damages as if the winter contract had not been terminated.

[148] While Baycrest is correct to say that damages for breach of contract are measured against the defendant's least onerous means of performance (*Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 20), that principle does not assist Baycrest here. To perform the contract *honestly* (that is, without breaching the duty of honest performance), Baycrest was required *not to mislead* Callow about whether the contract would be terminated. It could have accomplished this by

préclusion et de la fraude civile, l'obligation d'exécution honnête protège l'intérêt du demandeur lié à la *confiance* qu'il a accordée à des déclarations trompeuses (Robertson, p. 861; Maharaj, p. 215-218). Une partie contractante qui manque à cette obligation doit indemniser son cocontractant des pertes prévisibles subies *du fait de la confiance que ce dernier a accordée* aux affirmations trompeuses.

[146] Cela ne veut pas dire que l'obligation d'exécution honnête est « subsumée » sous la préclusion et la fraude civile (motifs du juge Kasirer, par. 50). Cela revient simplement à observer que chacun de ces mécanismes juridiques protège le même intérêt. De fait, loin d'être « subsumée » sous la préclusion et la fraude civile, l'obligation d'exécution honnête protège l'intérêt lié à la confiance d'une manière distincte et plus large, puisque, comme notre Cour l'a souligné dans l'arrêt *Bhasin*, le défendeur peut être tenu responsable même lorsqu'il n'a pas l'*intention* que le demandeur s'appuie sur l'affirmation trompeuse (par. 88). Peu importe l'intention du défendeur, un demandeur n'a qu'à établir que, n'eût été la confiance qu'il a accordée à l'affirmation trompeuse, il n'aurait pas subi la perte.

[147] Baycrest demande une réduction du montant accordé en première instance en s'appuyant sur trois arguments. Premièrement, elle affirme que le délai de préavis de 10 jours définit son exposition maximale à des dommages-intérêts, car, peu importe sa malhonnêteté, la modalité d'exécution la moins onéreuse dont elle disposait était la résiliation du contrat. Selon elle, la juge de première instance a donc incorrectement accordé des dommages-intérêts comme si le contrat de services d'entretien hivernal n'avait pas été résilié.

[148] Bien que Baycrest ait raison de dire que les dommages-intérêts pour violation de contrat sont calculés en fonction de la modalité d'exécution la moins onéreuse pour le défendeur (*Hamilton c. Open Window Bakery Ltd.*, 2004 CSC 9, [2004] 1 R.C.S. 303, par. 20), ce principe ne lui est d'aucune assistance en l'espèce. Pour exécuter le contrat *honnêtement* (c'est-à-dire, sans manquer à l'obligation d'exécution honnête), Baycrest était tenue de *ne pas induire* M. Callow *en erreur* quant au sujet de savoir

keeping silent about termination or, having misled Callow as to the true state of affairs, by correcting Callow's misapprehension before he relied on the misleading conduct to his detriment. Had either of these possibilities occurred, Callow would have been able to seek other work for the 2013-14 winter season.

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

[150] Secondly, Baycrest says that the trial judge's award led to double recovery for Callow's expenses. But this is simply incorrect. The trial judge awarded Callow the *net* value of the winter service agreement ($64,306.96) — representing the gross contract value ($80,383.70) less Callow's expenses, which the trial judge approximated at 20 percent ($16,076.74). She then added back the cost of an equipment lease, which Callow had already entered into in reliance on Baycrest's misleading representations. Though

si le contrat allait être résilié. Elle aurait pu le faire en gardant le silence à ce propos ou, ayant induit M. Callow en erreur quant à l'état réel des choses, en corrigeant la méprise avant que celui-ci ne se fonde sur la conduite trompeuse à son détriment. Dans l'un ou l'autre de ces cas, Callow aurait pu chercher à obtenir d'autres contrats pour la saison hivernale 2013-2014.

[149] Bien entendu, nous ne pouvons pas affirmer avec certitude que Callow *aurait obtenu* d'autres contrats. Elle aurait tout aussi bien pu ne rien faire, tenant pour acquis que le contrat de services d'entretien hivernal avait de bonnes chances de ne pas être résilié. Par contre, cette difficulté sur le plan de la preuve est le produit de la malhonnêteté de Baycrest; cette dernière ne devrait donc pas être dégagée de sa responsabilité simplement parce que Callow ne peut pas prouver avec certitude ce qui serait arrivé si elle n'avait pas été trompée (*Wood c. Grand Valley Rway. Co.* (1915), 51 R.C.S. 283, p. 288-291; voir aussi *Lamb c. Kincaid* (1907), 38 R.C.S. 516, p. 539-540). Callow a déposé des éléments de preuve démontrant qu'elle présentait habituellement des soumissions durant les mois d'été pour obtenir des contrats d'entretien hivernal et qu'il était trop tard pour trouver d'autres contrats au moment où elle a reçu l'avis de résiliation. Je souscris à l'opinion des juges majoritaires selon laquelle le dossier permet de raisonnablement présumer que Callow aurait été en mesure de remplacer le contrat de services d'entretien hivernal par un contrat de valeur semblable. Bien que la juge de première instance ait commis une erreur en accordant des dommages-intérêts comme si le contrat de services d'entretien hivernal n'avait pas été résilié, j'accorderais, selon cette hypothèse, le même montant.

[150] Deuxièmement, Baycrest affirme que le montant des dommages-intérêts accordé par la juge de première instance a mené à un recouvrement en double des dépenses de Callow. C'est tout simplement faux. La juge de première instance a accordé à Callow la valeur *nette* du contrat de services d'entretien hivernal (64 306,96 $) — ce qui représente la valeur brute du contrat (80 383,70 $) moins les dépenses de Callow, que la juge a estimées à 20 pour 100 (16 076,74 $). Elle a ensuite ajouté le

the trial judge did not say so expressly, the record shows that Callow's approximated expenses included the cost of leasing equipment. If Callow is not reimbursed for the leasing expenses that he incurred in reliance on Baycrest's misleading representations, those expenses would therefore be counted against him twice. Absent Baycrest's breach of contract, Callow would have obtained a similarly valued contract and ended the 2013-14 winter season with $64,306.96 in profit. The trial judge's approach ensured that Callow was restored to this position, and, accordingly, I see no basis for overturning this aspect of her award.

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

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

[152] With the exception of my discussion regarding damages, most of the foregoing is consistent, or at least not inconsistent, with the majority's reasons, and is sufficient to dispose of this appeal. But while acknowledging this (at para. 44: " . . . the duty to act honestly about matters directly linked to the performance of the contract . . . is sufficient to dispose of

coût de la location d'équipement que Callow avait déjà déboursé du fait de la confiance qu'elle a accordée aux déclarations trompeuses de Baycrest. Bien que la juge de première instance ne l'ait pas mentionné expressément, le dossier démontre que les dépenses estimées de Callow incluaient le coût de la location d'équipement. Si Callow ne se fait pas rembourser les dépenses de location qu'elle a engagées du fait qu'elle a fait confiance aux déclarations trompeuses de Baycrest, ces dépenses lui seraient imputées deux fois. Et si Baycrest n'avait pas violé le contrat, Callow aurait obtenu un contrat de valeur semblable et aurait terminé la saison hivernale de 2013-2014 avec un profit de 64 306,96 $. L'approche de la juge de première instance a garanti que Callow soit remise dans cette situation; je ne vois donc aucune raison d'infirmer cet aspect de sa décision.

[151] Enfin, Baycrest soutient que la juge de première instance a mal interprété la preuve liée aux dépenses de Callow. Je ne suis toutefois pas convaincu que la juge ait fait autre chose qu'estimer les dépenses de Callow à 20 pour 100 de la valeur du contrat de services d'entretien hivernal, en se fondant sur les éléments de preuve fournis par Callow concernant ses dépenses des années précédentes. L'estimation des dépenses était une décision qui relevait de la compétence de la juge de première instance en tant qu'arbitre des faits et cette décision ne devrait pas être modifiée en appel. En effet, il est difficile d'imaginer ce que la juge de première instance aurait pu faire différemment, puisque le contrat de services d'entretien hivernal n'a jamais été exécuté et que, en conséquence, nous ne pouvons pas affirmer avec certitude qu'elles auraient été les dépenses de Callow.

B. *L'« abus de droit », l'« exercice fautif d'un droit » et l'analyse comparative de la bonne foi en droit des contrats*

[152] À l'exception de ce que je dis au sujet des dommages-intérêts, la plupart des propos qui précèdent sont compatibles, ou, du moins, ne sont pas incompatibles, avec les motifs des juges majoritaires et ils sont suffisants pour trancher le présent pourvoi. Toutefois, même s'ils le reconnaissent (au par. 44 : « . . . l'obligation d'agir honnêtement au sujet de

this appeal"; "[n]o expansion of the law set forth in *Bhasin* is necessary to find in favour of Callow"), the majority nonetheless proceeds to delve into matters beyond the duty to act honestly. And in so doing, it does indeed expand upon (and, I say, confuse) the law set forth in *Bhasin*.

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

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

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

[154] Both as a substantive and methodological matter, I cannot endorse this. First, in the

questions directement liées à l'exécution du contrat [. . .] suffit pour trancher le présent pourvoi »; « [i]l n'est pas nécessaire d'étendre la portée de la règle de droit énoncée dans l'arrêt *Bhasin* pour donner gain de cause à Callow »), les juges majoritaires entreprennent d'explorer des questions qui vont au-delà de l'obligation d'agir honnêtement. Or, ce faisant, ils étendent de fait la portée de la règle de droit énoncée dans l'arrêt *Bhasin* (et la rendent même confuse selon moi).

[153] Plus particulièrement, selon les juges majoritaires, le présent pourvoi nous donne l'occasion de répondre à deux questions : premièrement, « ce que constitue un manquement à l'obligation d'exécution honnête lorsqu'il se manifeste en lien avec une clause de résiliation accordant un droit unilatéral et apparemment absolu » (par. 30); et, deuxièmement, « les circonstances dans lesquelles la malhonnêteté est directement liée à l'exécution d'un contrat » (par. 64). Ces questions mènent les juges majoritaires à se concentrer sur la question de savoir si le recours à la clause de résiliation était *lui-même* malhonnête. Voici leur explication :

> L'obligation d'honnêteté, en tant que doctrine du droit des contrats, a plutôt une fonction restrictive sur l'exercice d'un droit par ailleurs complet et clair [. . .] Ceci veut simplement dire que plutôt que de restreindre la décision de résilier en soi, l'obligation d'exécution honnête donne lieu à des dommages-intérêts lorsque le droit a été exercé de manière malhonnête. [par. 53]

Les juges majoritaires s'appuient sur le droit civil québécois pour fonder cette approche. En particulier, ils soutiennent que « le lien direct exigé entre la malhonnêteté et l'exécution » est « mis en évidence » lorsqu'on considère « comment le cadre d'analyse de l'abus de droit au Québec lie la manière dont un droit contractuel est exercé aux exigences de la bonne foi » (par. 67). Ils soulignent que les art. 6, 7 et 1375 du *Code civil du Québec* « mettent ce lien en exergue en prévoyant qu'aucun droit contractuel ne peut être exercé de façon abusive sans violer les exigences de la bonne foi » (par. 67).

[154] Tant sur le fond que sur le plan de la méthodologie, je ne peux souscrire à ce point de vue.

circumstances of this particular appeal, the majority's resort to the civil law as a "source of inspiration" (para. 60) is inappropriate. As the majority acknowledges, the issues to which its analysis responds are fully addressed by *Bhasin* itself, and there is no indication that the principles outlined therein require further elaboration. Secondly, and relatedly, the majority's focus on the wrongful exercise of a right distorts the analysis mandated by *Bhasin* and undermines the independent character of the various common law good faith duties identified therein.

(1) Comparative Analysis

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

[156] In considering the utility of the comparative exercise that the majority proposes, it must be borne in mind that the common law principles applicable to this appeal are both determinative and settled. Drawing from civil law in these circumstances departs from this Court's accepted practice in respect of comparative legal analysis. Rather than permissibly drawing inspiration or comfort from the civil law in filling a gap in the common law or in modifying it, the majority's approach, I say respectfully, risks subsuming the common law's already-established and distinct conception of good faith into the civil law's conception. And to the extent it does so, it confuses matters significantly, the majority's assurances to the contrary notwithstanding.

[157] As Moldaver J. observed (in dissent, but not on this point) in *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 113 (emphasis added), "[t]he coexistence of

D'abord, dans les circonstances du présent pourvoi, le recours au droit civil par les juges majoritaires en tant que « source d'inspiration » (par. 60) est inapproprié. Comme ils le reconnaissent, les questions auxquelles répond leur analyse sont traitées de façon exhaustive dans l'arrêt *Bhasin* lui-même, et rien n'indique que les principes qui y sont énoncés aient besoin d'être précisés. Ensuite, et dans le même ordre d'idées, l'accent que mettent les juges majoritaires sur l'exercice fautif d'un droit fausse l'analyse qu'exige l'arrêt *Bhasin* et mine le caractère indépendant des diverses obligations de bonne foi établies en common law qui y sont cernées.

(1) Analyse comparative

[155] Les juges majoritaires s'inspirent de la notion civiliste d'abus de droit « comme cadre pour comprendre l'obligation d'exécution honnête de la common law » (par. 73). Plus spécifiquement, ils concluent que ce cadre d'analyse « aide à faire porter l'analyse de la question de savoir s'il y a eu manquement à l'obligation d'exécution honnête en common law sur ce que l'on pourrait appeler l'exercice fautif d'un droit contractuel » (par. 63).

[156] En examinant l'utilité de l'exercice comparatif que proposent les juges majoritaires, il faut garder à l'esprit que les principes de common law applicables au présent pourvoi sont à la fois déterminants et bien établis. En s'inspirant du droit civil dans de telles circonstances, on s'écarte de la pratique acceptée de notre Cour à l'égard de l'exercice de droit comparé. Plutôt que de s'inspirer à bon escient du droit civil ou de se rassurer grâce à lui afin de combler une lacune de la common law ou pour la modifier, l'approche des juges majoritaires, soit dit respectueusement, risque de subsumer la conception bien établie et distincte de la bonne foi qu'a la common law sous la conception qu'en a le droit civil. Dans la mesure où elle le fait, l'approche des juges majoritaires rend les choses très confuses, et ce, malgré leurs assurances du contraire.

[157] Comme l'a fait remarquer le juge Moldaver (dissident, mais non sur cette question) dans le *Renvoi relatif à la Loi sur la Cour suprême, art. 5 et 6*, 2014 CSC 21, [2014] 1 R.C.S 433, par. 113

two distinct legal systems in Canada — the civil law system in Quebec and the common law system elsewhere — is a unique and defining characteristic of our country." The distinct common law and civil law traditions represent an integral component of Canadian legal heritage and identity (Hon. M. Bastarache, "Bijuralism in Canada", in *Bijuralism and Harmonization: Genesis* (2001), at p. 26; see also M. Samson, "Le droit civil québécois: exemple d'un droit à porosité variable" (2018-19), 50 *Ottawa L. Rev.* 257, at p. 257).

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

[159] It also follows from the distinct nature of Canada's two legal traditions that drawing from one tradition to influence the other is simply an exercise in comparative legal analysis (*Caisse populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu*, [1990] 2 S.C.R. 995, at p. 1016). As I have already recounted, this is what the majority claims it is doing here. But while comparison is an important tool, its uses are not unlimited. In particular, comparative analysis, in the sense of using law from another legal system to elucidate or develop the domestic legal system, is generally appropriate only where domestic law does not provide an answer to the problem facing the court, or

(je souligne), « [l]a coexistence de deux systèmes juridiques distincts au Canada — le système de droit civil au Québec et le système de common law ailleurs — constitue une caractéristique unique et fondamentale de notre pays. » Les traditions distinctes en common law et en droit civil représentent un élément intégral du patrimoine et de l'identité juridiques canadiens (l'hon. juge M. Bastarache, « Le bijuridisme au Canada », dans *Bijuridisme et harmonisation : Genèse* (2001), p. 26; voir aussi M. Samson, « Le droit civil québécois : exemple d'un droit à porosité variable » (2018-2019), 50 *R.D. Ottawa* 257, p. 257).

[158] La préservation de cet aspect unique de l'identité du Canada exige que l'on maintienne les caractéristiques distinctes des traditions en common law et en droit civil. De fait, notre Cour est allée jusqu'à décrire sa propre composition comme ayant été conçue pour veiller à ce que « la common law et le droit civil évoluent côte à côte, tout en conservant leur caractère distinctif » (*Renvoi relatif à la Loi sur la Cour suprême*, par. 85 (je souligne)). Il s'ensuit — tout comme notre Cour a conclu dans *Renvoi relatif à la Loi sur la Cour suprême* que la présence d'au moins trois juges du Québec parmi ses membres « garanti[t] une expertise en droit civil et la représentation des traditions juridiques [. . .] du Québec » — que l'intégrité et le caractère distinct de la common law sont également garantis par la présence de juges des provinces ou territoires canadiens de common law.

[159] Il ressort également du caractère distinct des deux traditions juridiques du Canada que le fait de s'inspirer d'une tradition pour influencer l'autre n'est qu'un exercice de droit comparé (*Caisse populaire des Deux Rives c. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu*, [1990] 2 R.C.S. 995, p. 1016). Comme je l'ai déjà mentionné, c'est ce que les juges majoritaires prétendent faire en l'espèce. Toutefois, bien que la comparaison soit un outil important, son utilisation n'est pas illimitée. En particulier, l'analyse comparative, soit celle où l'on fait appel au droit d'un autre système juridique pour élucider ou préciser le système juridique interne, n'est généralement appropriée que si le droit

where it is necessary to otherwise develop that law. Using law from other systems in other circumstances would either be superfluous, or would (to the extent of its use) have the undesirable effect of displacing established domestic jurisprudence (J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975), 53 *Can. Bar Rev.* 715, at pp. 725-27; see also K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd rev. ed. 1998), at pp. 17-18; T. Lundmark, *Charting the Divide between Common and Civil Law* (2012), at pp. 8-10). As Justice Sharpe writes extra-judicially about the use of authority generally, which applies equally to comparative legal analysis, "[i]t is only where the case cannot readily be decided on the basis of binding authority that non-binding sources will have a material effect on the decision" (*Good Judgment: Making Judicial Decisions* (2018), at p. 171).

interne ne fournit pas de réponse à la question dont le tribunal est saisi, ou lorsqu'elle est nécessaire pour autrement préciser ce droit. Le recours au droit d'autres systèmes dans de telles circonstances serait superflu ou (dans la mesure où on y a recours) aurait l'effet indésirable d'écarter la jurisprudence interne établie (J.-L. Baudouin, « L'interprétation du Code civil québécois par la Cour suprême du Canada » (1975), 53 *R. du B. can.* 715, p. 725-727; voir aussi K. Zweigert et H. Kötz, *Introduction to Comparative Law* (3e éd. rév. 1998), p. 17-18; T. Lundmark, *Charting the Divide between Common and Civil Law* (2012), p. 8-10). Comme l'écrit le juge Sharpe à propos du recours aux précédents en général dans un ouvrage de doctrine, un commentaire qui s'applique également à l'analyse juridique comparative, [TRADUCTION] « [c]e n'est que dans les cas où l'affaire ne peut pas être aisément tranchée sur le fondement de précédents contraignants que des sources non contraignantes auront une incidence importante sur le jugement » (*Good Judgment : Making Judicial Decisions* (2018), p. 171).

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

[160] Ces sources ne témoignent pas d'un chauvinisme juridictionnel. Elles expriment plutôt une attitude de prudence et de retenue disciplinée dans le déploiement de l'analyse comparative dans les jugements, et ce, pour une bonne raison. S'inspirer de sources externes alors qu'il n'est pas nécessaire de le faire ne peut que conduire à compliquer une matière simple, introduisant ainsi de l'incertitude dans un domaine du droit bien établi jusque-là (*Gilles E. Néron Communication Marketing inc. c. Chambre des notaires du Québec*, 2004 CSC 53, [2004] 3 R.C.S. 95, par. 56, citant J.-L. Baudouin et P. Deslauriers, *La responsabilité civile* (6e éd. 2003), p. 193). Même une chose d'apparence aussi anodine qu'un changement de la terminologie utilisée pour décrire une notion — par exemple, le recours par les juges majoritaires au mécanisme civiliste de l'abus de droit et ses renvois à l'exercice fautif d'un droit — peut avoir des conséquences juridiques considérables, ayant une incidence sur la cohérence et la stabilité du système juridique ainsi modifié. La langue elle-même, après tout, joue « un rôle crucial dans l'évolution du droit » (Bastarache, p. 18; voir aussi Lundmark, p. 74-86).

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

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

[162] The result was, to put it mildly, destabilizing. And predictably so. While Western legal systems are called upon to address the same kinds of disputes, each has developed different ways over the centuries to resolve them. The result is like two massive jigsaw puzzles that cover the same amount of ground. From a distance, each looks much the same as the other, but up close, it becomes apparent that the pieces are cut differently so that pieces from one cannot fit (or at least fit easily) into the other. And so it was when "juristic reasons" began to be spoken of in the Canadian common law of unjust enrichment. Conflicting lines of authorities continued to apply the common law requirement of unjust factors, while in other decisions courts ascribed legal significance to the introduction of civilian language — that is, they "took the civilian language at face value and ordered restoration when defendants could not justify the retention of their enrichments" (McInnes, at p. 1056

[161] Ceci n'est pas pure spéculation. L'incorporation apparemment anodine de la terminologie du droit civil dans des jugements en common law a déjà produit précisément ce genre d'instabilité. Une confusion considérable dans la common law relative à l'enrichissement injustifié a pris naissance au Canada dans les années 1970, après l'introduction de la terminologie civiliste d'« absence de motif juridique à l'enrichissement », comme si cela était synonyme de l'exigence traditionnelle de l'élément « sans cause » qui avait été [TRADUCTION] « profondément enraciné » depuis l'arrêt du lord Mansfield dans *Moses c. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676 (M. McInnes, « The Reason to Reverse : Unjust Factors and Juristic Reasons » (2012), 92 *B.U.L. Rev.* 1049, p. 1052 et 1054). Comme l'explique le professeur McInnes :

> [TRADUCTION] . . . sans discussion ni explication, la Cour suprême du Canada s'est mise à employer la terminologie civiliste (c.-à-d. « l'absence de motif juridique à l'enrichissement ») tout en continuant à appliquer les éléments « sans cause » traditionnels. Comme on pouvait s'y attendre, le droit canadien de l'enrichissement injustifié est devenu encore plus confus alors que la cour disait une chose et en faisait une autre. [Notes en bas de bas omises; p. 1056.]

[162] Le résultat a été — et c'est là un euphémisme — déstabilisant, comme on pouvait s'y attendre. S'il est vrai que les systèmes juridiques occidentaux sont appelés à traiter des mêmes types de différends, ils ont chacun élaboré, au fil des siècles, différentes façons de les régler. Le résultat se compare à deux énormes casse-tête qui couvrent le même espace. De loin, ils ont sensiblement le même aspect, mais, de près, il devient évident que les pièces des casse-tête sont taillées différemment, de sorte que celles de l'un ne peuvent pas s'imbriquer (ou, du moins, s'imbriquer facilement) dans l'autre. Et il en fut ainsi lorsque l'on a commencé à parler de « motif juridique » en common law canadienne relative à l'enrichissement injustifié. Des courants jurisprudentiels divergents continuaient à appliquer la règle de common law qui exigeait l'élément « sans cause », tandis que dans d'autres jugements, les tribunaux ont attribué de l'importance, sur le

(footnote omitted)). In the end, this Court had to settle the question in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, which it did by clarifying that the civilian terminology of "juristic reasons" applies. But coming even several decades after the uncertainty arose, we must acknowledge that this confirmation of the civil law terminological shift *itself* also effected substantive instability in the administration of the common law:

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

[163] This is not to suggest that *Garland* is wrongly decided, or that its authority in the common law of unjust enrichment is somehow undermined by its civilian inclination. Rather, it is simply to point out that there can be a heavy price to pay — typically, by unijural lawyers and their clients — when external legal concepts are introduced via a judgment on a purely domestic legal issue. Hence the restraint which this Court has (until now) shown, by introducing external legal concepts to a judgment only where it is necessary to do so — that is, to fill a gap where domestic law *does not* provide an answer, or where it is necessary to modify or otherwise develop an existing legal rule. In such circumstances, other legal systems may well reveal potential solutions that would not have been apparent from a narrow domestic focus (Zweigert and Kötz, at pp. 17-20; see

plan juridique, à l'introduction de la terminologie civiliste — à savoir qu'ils [TRADUCTION] « ont pris la terminologie civiliste au pied de la lettre et ordonné la restitution lorsque les défendeurs ne pouvaient justifier la conservation de leurs enrichissements » (McInnes, p. 1056 (note en bas de page omise)). En définitive, il a fallu que notre Cour règle la question dans *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629, ce qu'elle a fait en précisant que le terme civiliste « motif juridique » s'appliquait. Toutefois, survenant même plusieurs décennies après qu'ait pris naissance l'incertitude, force est de reconnaître que cette confirmation du virage terminologique en question vers le droit civil a *elle-même* engendré une instabilité substantielle dans l'administration de la common law :

> D'un coup, il a fallu que les avocats et les juges modifient fondamentalement leur conception de l'injustice. La responsabilité se rattache maintenant à l'*absence* de tout motif justifiant la *conservation* par le défendeur, plutôt qu'à la *présence* de motif justifiant le *recouvrement* par le demandeur. La transition ne s'est pas faite sans heurt, et il faudra plusieurs années avant que la pratique retrouve le niveau d'uniformité et de certitude auquel les plaideurs sont en droit de s'attendre d'un système juridique mûr. [En italique dans l'original.]
>
> (McInnes, p. 1057)

[163] Cela ne veut pas dire que l'arrêt *Garland* est mal fondé, ou que sa tendance civiliste a pour effet en quelque sorte de miner sa valeur de précédent en common law relative à l'enrichissement injustifié. Je veux plutôt souligner qu'il peut y avoir un fort prix à payer — généralement par les avocats formés dans un seul des systèmes et par leurs clients — lorsque des notions juridiques externes sont introduites par la voie d'un jugement portant sur une question de droit purement interne. C'est ce qui explique la retenue dont la Cour a fait preuve (jusqu'à maintenant) en introduisant des notions juridiques externes dans un jugement seulement en cas de nécessité — c'est-à-dire pour combler une lacune lorsque le droit interne *ne* fournissait *pas* de réponse, ou lorsque cela était nécessaire pour modifier ou autrement préciser une règle de droit existante. Dans de telles circonstances,

also *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at pp. 1140-47 (per McLachlin J., as she then was)). This is what we mean when we say that Canada's two legal systems can serve as sources of "inspiration" (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 38).

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

[165] But that is not this case. Here, no gaps are to be filled, and no domestic common law requires development (or even "clarification"). Rather, in service of what the majority describes as a "dialogue" between the civil law and common law, it uses the civil law device of abuse of right to drive

il se peut fort bien que d'autres systèmes de droit révèlent d'éventuelles solutions que n'aurait pas dévoilées un examen par la lorgnette étroite du droit interne (Zweigert et Kötz, p. 17-20; voir aussi *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021, p. 1140-1147 (la juge McLachlin, plus tard juge en chef)). C'est ce que nous voulons dire lorsque nous affirmons que les deux systèmes juridiques du Canada peuvent servir de sources « d'inspiration » (*Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 CSC 9, [2011] 1 R.C.S. 214, par. 38).

[164] Nous pouvons également nous inspirer de l'expérience d'autres systèmes juridiques pour nous aider dans nos délibérations lorsqu'il s'agit de savoir si la solution éventuelle repérée à une question juridique entraînera des conséquences néfastes. De fait, tel a été le recours limité de la Cour au droit québécois (de même qu'au droit des É.-U.) dans *Bhasin*, par. 83-85, *Saadati c. Moorhead*, 2017 CSC 28, [2017] 1 R.C.S. 543, par. 34, et *Norsk*, p. 1174-1175 (le juge Stevenson, motifs concordants). De même, la Cour note parfois qu'un concept juridique élaboré dans un système, en utilisant des sources internes, est à l'image d'un concept reconnu par un autre système (*Deloitte & Touche c. Livent Inc. (Séquestre de)*, 2017 CSC 63, [2017] 2 R.C.S. 855, par. 138 (la juge en chef McLachlin, dissidente en partie); *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, par. 41; *Ciment du Saint-Laurent inc. c. Barrette*, 2008 CSC 64, [2008] 3 R.C.S. 392, par. 76-79; voir aussi *Sport Maska Inc. c. Zittrer*, [1988] 1 R.C.S. 564, p. 570 (le juge Beetz, motifs concordants)). Lorsqu'on y a recours de cette façon, les sources comparatives servent de fondement pour rassurer, du fait que d'autres systèmes juridiques en sont arrivés à des conclusions similaires.

[165] Or, tel n'est pas le cas en l'espèce. Il n'y a ici aucune lacune à combler et aucune règle de common law interne à préciser (ou même « à clarifier »). Aux fins de ce que les juges majoritaires décrivent comme un « dialogue » entre le droit civil et la common law, ils se servent plutôt de l'abus de droit, un mécanisme

an analysis which, I repeat, is neither necessary to decide this appeal, nor helpful in its obscuring of the law. Further, this case engages an issue — the place of good faith in contract law — on which the Canadian common law and civil law systems have adopted very different approaches — each autonomous, and neither inherently superior to the other (see, generally, R. Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019), 1 *Journal of Commonwealth Law* 83). As the Hon. Louis LeBel observed:

[TRANSLATION] The fact that the Court has maintained the specificity of the two legal traditions with respect to good faith shows the importance it attaches to respect for their conceptual autonomy. The dialogue between the two systems remains circumscribed by a judicial stance that, in general today, understands the importance and characteristics of the major legal traditions that make up Canadian bijuralism.

("Les cultures de la Cour suprême du Canada: vers l'émergence d'une culture dialogique?", in J.-F. Gaudreault-DesBiens et al., eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (2009), 1, at p. 15)

[166] Indeed, there are principled reasons for the distinct treatment of good faith as between the common law and civil law systems. As Professor Valcke observes, the common law also relies on other concepts, including the equitable doctrine of estoppel, to achieve similar outcomes as the doctrine of good faith ("*Bhasin v Hrynew*: Why a General Duty of Good Faith Would Be Out of Place in English Canadian Contract Law" (2019), 1 *Journal of Commonwealth Law* 65, at p. 77). At a more general level, the common law and civil law are premised on different understandings of legal rights (H. Dedek, "From Norms to Facts: The Realization of Rights in Common and Civil Private Law" (2010), 56 *McGill L.J.* 77, at pp. 79-81) and of the role of the state in mitigating the effects of harsh bargains (M. Pargendler, "The Role of the State in Contract Law:

de droit civil, pour réaliser une analyse qui, je le répète, n'est ni nécessaire pour trancher le pourvoi, ni utile puisqu'elle rend le droit confus. De plus, la présente affaire fait entrer en jeu une question — la place de la bonne foi en droit des contrats — à l'égard de laquelle les systèmes canadiens de common law et de droit civil ont adopté des approches très différentes — chacune étant autonome et ni l'une ni l'autre n'étant intrinsèquement supérieure à l'autre (voir, généralement, R. Jukier, « Good Faith in Contract : A Judicial Dialogue Between Common Law Canada and Québec » (2019), 1 *Journal of Commonwealth Law* 83). Comme l'a souligné l'hon. Louis LeBel :

Le maintien de la spécificité des deux traditions juridiques dans le domaine de la bonne foi témoigne de l'importance que la Cour attache au respect de leur autonomie conceptuelle. Le dialogue engagé entre les deux systèmes reste encadré par une attitude judiciaire qui, généralement aujourd'hui, entend l'importance et les qualités des grandes traditions juridiques qui forment le bijuridisme canadien.

(« Les cultures de la Cour suprême du Canada : vers l'émergence d'une culture dialogique? », dans J.-F. Gaudreault-DesBiens et autres, dir., *Convergence, concurrence et harmonisation des systèmes juridiques* (2009), 1, p. 15)

[166] De fait, le traitement distinct de la bonne foi dans les systèmes de common law et de droit civil respectivement s'explique logiquement. Comme le fait remarquer la professeure Valcke, la common law s'appuie également sur d'autres concepts, notamment sur la doctrine d'equity que constitue la préclusion, pour arriver à des résultats semblables à ceux de la doctrine de la bonne foi (« *Bhasin v Hrynew* : Why a General Duty of Good Faith Would Be Out of Place in English Canadian Contract Law » (2019), 1 *Journal of Commonwealth Law* 65, p. 77). À un niveau plus général, la common law et le droit civil s'appuient sur des conceptions distinctes de ce que sont les droits (*legal rights*) (H. Dedek, « From Norms to Facts : The Realization of Rights in Common and Civil Private Law » (2010), 56 *R.D. McGill.* 77, p. 79-81) et du rôle de l'État dans l'atténuation des

The Common-Civil Law Divide" (2018), 43 *Yale J. Intl L.* 143, at p. 179).

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

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

effets de marchés draconiens (M. Pargendler, « The Role of the State in Contract Law : The Common-Civil Law Divide » (2018), 43 *Yale J. Intl. L.* 143, p. 179).

[167] Je reconnais que les juges majoritaires parlent des « raisons particulières de faire preuve de prudence en entreprenant l'exercice comparatif que Callow nous invite à mener en l'occurrence » (par. 70). Cependant — et encore une fois, je le souligne, dans un domaine de la common law qui ne comporte aucune lacune à combler, ou qui n'a nul besoin d'être précisé —, en appliquant comme ils le font la doctrine civiliste de l'« abus de droit », ils font fi de toute prudence, ils portent atteinte au caractère indépendant de la doctrine existante de bonne foi — que l'arrêt *Bhasin* a soigneusement conservé — et ils adoptent, du moins implicitement, la règle généralement applicable que notre Cour a rejetée dans cet arrêt.

[168] En termes clairs, la méthodologie comparative qu'adoptent les juges majoritaires n'est pas superfétatoire. En effet, l'appliquer est en soi leur unique objectif. Les juges majoritaires appliquent la doctrine de l'abus de droit pour « faire porter l'analyse de la question de savoir s'il a eu manquement à l'obligation d'exécution honnête en common law sur ce que l'on pourrait appeler l'exercice fautif d'un droit contractuel » (par. 63). Ils citent le droit civil québécois au soutien de la proposition voulant « qu'aucun droit contractuel ne [puisse] être exercé de façon abusive » (par. 67). Ceci nous amène à une autre raison pour laquelle il n'est pas souhaitable d'appliquer une méthodologie comparative en l'espèce, ce qui m'oblige à m'exprimer sans détour. Les passages des motifs des juges majoritaires que je viens de citer, voire la notion même d'« abus de droit », ne diront rien à la vaste majorité des avocats et des juges de common law et seront pour eux dénués de sens, voire incompréhensibles. Pourtant, la plupart d'entre eux présumeront raisonnablement — comme plusieurs l'ont fait lorsque le terme « motif juridique » est entré dans le lexique de la common law en matière d'enrichissement injustifié — qu'une raison d'ordre juridique justifie de recourir ici à ces notions, et qu'ils doivent donc se familiariser avec elles ou obtenir de l'aide d'une ressource qualifiée

does, to the *Civil Code of Québec*. How they would acquire the necessary familiarity, and the extent to which they must acquire it, is left unexplained.

dans les deux systèmes juridiques afin de représenter leurs clients ou de rendre jugement de façon compétente. À tout le moins, les avocats de common law qui appliquent les notions de common law en cause ici devront sans doute avoir le *Code civil du Québec* en tête, à l'instar des juges majoritaires. La manière dont ces avocats et juges acquerront les connaissances nécessaires et la mesure dans laquelle ils devront le faire demeurent inexpliquées.

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

[169] Il ne s'agit pas de préoccupations futiles et, sur ce point, il y a une certaine réalité que nous devons garder à l'esprit. Dans la plupart des provinces, peu d'avocats et de juges de common law ont une connaissance suffisante du français pour lire les sources de droit civil portant sur l'abus de droit. En outre, parmi ceux et celles qui ont cette connaissance, un plus petit nombre encore ont une formation en droit civil lui permettant d'en comprendre la substance.

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

[170] J'admets que je ne suis pas en mesure d'exprimer un point de vue sur le bien-fondé de la déclaration des juges majoritaires selon laquelle ceux-ci, ou la Cour, engagent un « dialogue » entre les systèmes juridiques de droit civil et de common law. De fait, la signification d'un tel « dialogue » ne m'apparait pas évidente dans le contexte de l'exécution de nos fonctions judiciaires. En acceptant cependant que mes collègues se considèrent eux-mêmes comme prenant part à un tel dialogue, je suggère avec le plus grand respect qu'ils ne le fassent pas aux dépens de ceux qui doivent connaître, comprendre et appliquer un aspect d'un de ces systèmes juridiques que les juges majoritaires rendent maintenant opaques. En somme, leur digression inutile sur des concepts juridiques externes créera des difficultés pratiques sur le terrain en rendant la common law qui régit les relations contractuelles moins compréhensible, et donc moins accessible à ceux qui doivent la connaître, accroissant ainsi les coûts pour tous les intéressés. À une époque où plusieurs cherchent à éliminer de vieux obstacles qui nuisent à l'accès à la justice, je n'en érigerais pas de nouveaux sous la forme d'un langage juridique qui ressemble peu — voire pas du tout — à celui qui correspond à la formation et à l'expérience acquises par ceux et celles qui aident les citoyens à s'y retrouver dans le système judiciaire.

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

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

[172] The direction that civil law developments must be consistent with the overall civil law of Quebec applies with equal force when considering potential modifications to the common law. Maintaining the distinct character of each of Canada's legal traditions requires administering each system according to its own scheme of rules, and by reference to its own authorities (*Colonial Real Estate Co. v. La Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 S.C.R. 585, at p. 603; see also J. Dainow, "The Civil Law and the Common Law: Some Points of Comparison" (1967), 15 *Am. J. Comp. L.* 419, at pp. 434-35). It follows that any enrichment from another legal system must be incorporated only insofar as it conforms to the internal structure and organizing principles of the adopting legal system (F. Allard, *The Supreme Court of Canada and its Impact on the Expression of Bijuralism* (2001), at p. 9). Ultimately, the golden rule in using concepts from one of Canada's legal

[171] Même dans les situations où une analyse comparative *est* appropriée, il faut garder à l'esprit l'analogie du casse-tête. Il n'est tout simplement pas vrai que « la common law et le droit civil représentent [. . .] des manières distinctes de connaître le droit » (motifs du juge Kasirer, par. 71 (je souligne)). Il ne s'agit pas de différentes *théories* du droit, mais bien de *systèmes* de droit différents. Et puisque les règles de droit doivent provenir du système dans lequel elles s'appliqueront, l'analyse comparative doit être entreprise avec soin et circonspection. La déclaration de notre Cour dans *Caisse populaire des Deux Rives*, p. 1004, est à propos :

> . . . [la] similarité apparente des règles fondamentales ne doit cependant pas nous faire oublier que les tribunaux se doivent d'assurer au droit des assurances un développement qui reste compatible avec l'ensemble du droit civil québécois, dans lequel il s'insère. Ainsi, si les arrêts de juridictions étrangères, nommément l'Angleterre, les États-Unis et la France, peuvent avoir un certain intérêt lorsque le droit y est fondé sur des principes similaires, il n'en reste pas moins que le droit civil québécois a ses racines dans des préceptes qui lui sont propres et, s'il peut être nécessaire de recourir au droit étranger dans certains cas, on ne saurait y puiser que ce qui s'harmonise avec son économie générale. [Je souligne.]

[172] La directive voulant que l'élaboration du droit civil doive être compatible avec le droit civil québécois dans son ensemble s'applique avec autant de force lorsqu'il s'agit d'examiner d'éventuelles modifications de la common law. Pour maintenir le caractère distinct de chacun des systèmes juridiques du Canada, il faut les administrer chacun suivant son propre ensemble de règles et en renvoyant à ses propres précédents (*Colonial Real Estate Co. c. La Communauté des Sœurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 R.C.S. 585, p. 603; voir aussi J. Dainow, « The Civil Law and the Common Law : Some Points of Comparison » (1967), 15 *Am. J. Comp. L.* 419, p. 434-435). Il s'ensuit que tout apport d'un autre système juridique ne doit être incorporé que dans la mesure où il respecte la structure interne et les principes directeurs du système juridique qui l'adopte (F. Allard, *La Cour suprême du Canada et son impact sur l'articulation du bijuridisme* (2001), p. 9). En fin de compte,

systems to modify the other is that the proposed solution must be able to completely and coherently integrate into the adopting system's structure (J.-L. Baudouin, "Mixed Jurisdictions: A Model for the XXIst Century?" (2003), 63 *La. L. Rev.* 983, at pp. 990-91).

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

[TRANSLATION] Up until now, the courts have sometimes sanctioned abuse of right in cases of malice. However, they have also sanctioned unilateral resiliation by a distributor for reasons found not to be within the spirit of the discretionary resiliation clause, or where the resiliation was improper, that is, without any valid reason, or without prior notice or without any sign of what was to come. These cases clearly illustrate the "moralization" of contractual relations by the doctrine of abuse of right: for it is not enough to resiliate a contract in a strictly lawful manner (in accordance with the language of a resiliation clause), it is also necessary to do so in a legitimate way. [Emphasis added.]

(*Birdair inc. v. Danny's Construction Co.*, 2013 QCCA 580, at para. 131 (CanLII), citing J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin with the collaboration of N. Vézina, at para. 125.)

[174] Even if we were to imagine that it *was* the exercise of the termination clause that led in this case to the breach of duty of honest contractual performance — which, as I shall explain below, it was not — *Bhasin* stipulates clearly that there is no duty to disclose information or intentions relevant to termination that flows from the common law duty of

lorsqu'on a recours aux préceptes d'un des systèmes juridiques du Canada pour modifier l'autre, la règle d'or consiste en ce que la solution proposée doit être capable de s'intégrer complètement et de façon cohérente dans la structure du système qui les adopte (J.-L. Baudouin, « Systèmes de Droit Mixte : un Modèle Pour le 21e Siècle ? » (2003), 63 *La. L. Rev.* 993, p. 1000).

[173] Cet élément revêt un intérêt pratique en l'espèce. Incorporer de force sur le plan analytique à la common law le concept civiliste d'abus de droit relativement à la résiliation d'un contrat n'est pas la mince affaire que semblent supposer les juges majoritaires. Il en est ainsi parce que l'obligation de bonne foi en droit civil impose des obligations plus contraignantes à la partie qui résilie le contrat qu'elle ne le fait en common law. La Cour d'appel du Québec a expliqué le concept d'abus de droit dans le contexte de la résiliation d'un contrat de la façon suivante :

Jusqu'à présent, les tribunaux ont parfois sanctionné l'abus de droit en cas de malice. Cependant, ils ont aussi sanctionné la résiliation unilatérale par le distributeur pour des motifs jugés étrangers à l'esprit de la clause de résiliation discrétionnaire, ou encore lorsque la résiliation avait été intempestive, c'est-à-dire sans aucun motif valable, ou sans préavis ou en l'absence d'indice annonciateur. Cette jurisprudence illustre bien la « moralisation » des rapports contractuels par la doctrine de l'abus de droit : car il ne suffit pas de résilier un contrat dans la stricte légalité (selon le texte d'une clause de résiliation), encore faut-il le faire de façon légitime. [Je souligne.]

(*Birdair inc. c. Danny's Construction Co.*, 2013 QCCA 580, par. 131 (CanLII), citant J.-L. Baudouin et P.-G. Jobin, *Les obligations* (6e éd. 2005), par P.-G. Jobin avec la collaboration de N. Vézina, par. 125.)

[174] Même si nous devions nous imaginer que c'est *en fait* le recours à la clause de résiliation qui a mené en l'espèce au manquement à l'obligation d'exécution honnête du contrat — ce qui n'est pas le cas, comme je l'expliquerai plus loin —, l'arrêt *Bhasin* énonce clairement qu'il n'y a pas d'obligation de divulgation de renseignements ou d'intentions en

good faith. But under the civilian doctrine invoked by the majority, terminating a contract without disclosing intentions can constitute an abuse of right. While the majority acknowledges that it "do[es] not rely on the civil law here for the specific rules that would govern a similar claim in Quebec" (para. 73), this tends to affirm how inappropriate its comparative analysis is here. The majority either relies on a truncated and therefore distorted version of the civilian framework of abuse of right, or else opens the door to future "clarifications" (which would further undermine the integrity of the common law duty of honest performance as stated in *Bhasin*). Even on its own terms, then, the majority's invocation of abuse of right raises more questions than it claims to answer.

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

(2) The Wrongful Exercise of a Right

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

[177] The gravamen of a claim in honest performance is that a party made dishonest representations concerning contractual performance that caused its counterparty to suffer loss. It is *not* that a right was exercised in a way that was wrongful, abusive, or

lien avec la résolution d'un contrat découlant de l'obligation en common law d'agir de bonne foi. Cependant, suivant le principe de droit civil invoqué par les juges majoritaires, résilier un contrat sans divulguer l'intention de le faire peut constituer un abus de droit. Bien que les juges majoritaires reconnaissent qu'ils « ne [s]e fonde[nt] pas sur le droit civil en l'espèce pour les règles spécifiques qui régiraient une demande similaire au Québec » (par. 73), cela tend à confirmer à quel point leur analyse comparative est inappropriée en l'espèce. Soit ils se fondent sur une version tronquée et donc déformée du cadre d'analyse de l'abus de droit de droit civil, soit ils ouvrent la porte à des « clarifications » futures (ce qui minerait encore plus l'intégrité de l'obligation d'exécution honnête en common law telle qu'elle est énoncée dans l'arrêt *Bhasin*). Par conséquent, le renvoi par les juges majoritaires au concept d'abus de droit soulève en soi plus de questions qu'il ne prétend en régler.

[175] Pour tous ces motifs, je suis d'avis qu'il n'est pas approprié de renvoyer à la doctrine de l'abus de droit ni de s'appuyer sur elle en l'espèce. Le présent pourvoi invite notre Cour à simplement appliquer l'obligation d'exécution honnête, sans plus. Transplanter la doctrine de l'abus de droit dans le contexte de la common law est non seulement inutile en l'espèce, mais le faire sans renvoyer au contexte plus large dans lequel la bonne foi s'applique en common law causera beaucoup d'incertitude.

(2) L'exercice fautif d'un droit

[176] Le fait que les juges majoritaires se fondent sur la notion d'abus de droit en droit civil me mène à une critique finale sur le fond : en mettant l'accent sur l'exercice fautif d'un droit, ils faussent l'analyse décrite dans l'arrêt *Bhasin* et gomment la distinction entre l'exécution honnête et la bonne foi dans l'exercice d'un pouvoir discrétionnaire contractuel.

[177] L'élément essentiel d'une demande fondée sur l'exécution honnête est qu'une partie a fait des déclarations malhonnêtes concernant l'exécution du contrat qui sont à l'origine d'une perte pour l'autre partie. Ce *n'*est *pas* qu'un droit a été exercé

even dishonest. Here, for example, the complaint hinges on Baycrest's deceptive conduct *preceding* the exercise of the termination clause. By relying on Baycrest's misleading representations, Callow missed the opportunity to bid on other contracts. The exercise of the termination clause is relevant only in the sense that it was the subject of the misrepresentation.

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

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

de manière fautive, abusive ou même malhonnête. En l'espèce, par exemple, la plainte repose sur la conduite trompeuse de Baycrest qui a *précédé* le recours à la clause de résiliation. En se fiant aux déclarations trompeuses de Baycrest, Callow a raté l'occasion de présenter des soumissions en vue d'obtenir d'autres contrats. Ce recours à la clause de résiliation n'est donc pertinent que dans la mesure où il a fait l'objet de la déclaration inexacte.

[178] Certes, dans l'arrêt *Bhasin*, le juge Cromwell a affirmé que le défendeur avait manqué à l'obligation d'exécution honnête lorsqu'il « n'a pas agi honnêtement envers [le demandeur] en recourant à la clause de non-renouvellement » (par. 103). Toutefois, cette formulation reflète la conclusion de la juge de première instance portant que le défendeur [TRADUCTION] « a agi malhonnêtement envers M. Bhasin en recourant à la clause de non-renouvellement » (*Bhasin c. Hrynew*, 2011 ABQB 637, 526 A.R. 1, par. 261, cité dans *Bhasin*, par. 94). Ailleurs, le juge Cromwell a exprimé clairement que le manquement reposait sur le fait que « [la défenderesse] n'a pas exécuté honnêtement le contrat conclu avec [le demandeur], plus particulièrement en ce qui concerne ses intentions arrêtées quant au renouvellement » (par. 108). Cela reflète le cadre d'analyse général qu'il décrit, c.-à-d. que l'obligation d'exécution honnête est « une simple exigence faite à une partie de ne pas mentir à l'autre partie ni de la tromper au sujet de l'exécution de ses obligations contractuelles » (par. 73).

[179] Il importe d'assurer la précision analytique concernant la source du manquement — la malhonnêteté qui a précédé la résiliation, et non la résiliation en tant que telle — pour deux raisons. Premièrement, une violation de l'obligation d'exécution honnête peut découler de nombreux aspects de l'exécution. La règle générale énoncée dans l'arrêt *Bhasin* fournit une norme claire qui peut être appliquée dans différents contextes, notamment aux faits du présent pourvoi. Il n'y a aucun avantage à élaborer une analyse distincte qui répond de façon étroite à la malhonnêteté à l'égard de l'exercice d'un droit contractuel. Cela ne ferait que rendre le droit plus confus et difficile à appliquer.

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

[180] Deuxièmement, la source du manquement établit une distinction entre l'obligation d'exécution honnête et l'obligation d'exercer un pouvoir discrétionnaire contractuel de bonne foi. Comme je l'ai mentionné précédemment, en présence d'une allégation de manquement à la seconde de ces obligations, l'analyse se concentre sur la question de savoir si le défendeur avait le droit d'exercer son pouvoir discrétionnaire comme il l'a fait. En concentrant plutôt l'analyse de l'exécution honnête sur la manière dont un droit a été exercé, les juges majoritaires brouillent les frontières entre ces deux obligations distinctes. De fait, ils affirment que « l'obligation d'exécution honnête partage une méthodologie avec l'obligation d'exercer les pouvoirs discrétionnaires de nature contractuelle de bonne foi en se concentrant, du moins dans les circonstances comme celles dont nous sommes saisies, sur l'exercice fautif d'une prérogative contractuelle » (par. 51).

[181] We are bound by *Bhasin* to treat the duty of honest performance as conceptually distinct from the duty to exercise discretionary powers in good faith (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 65). This is not simply a matter of *stare decisis* and incremental legal development (although it is at least those things); there is also the practical concern that blurred and ambiguous treatment of these two duties has a meaningful impact on the outcome for contracting parties. Contrary to the majority's suggestion, the wrong at issue in each category of cases is distinct, and the damages available differ accordingly. The award for a breach of the duty of honest performance addresses the effect of the *dishonesty*. In contrast, the award for a breach of the duty to exercise discretion in good faith addresses the effect of the *exercise of discretion itself*. Placing both duties under the umbrella of the "wrongful exercise of a contractual right" obscures these distinctions and thus represents an unfortunate departure from *Bhasin*.

[181] Nous sommes liés par l'arrêt *Bhasin* et devons traiter l'obligation d'exécution honnête comme étant conceptuellement distincte de l'obligation d'exercer les pouvoirs discrétionnaires de bonne foi (*Société des loteries de l'Atlantique c. Babstock*, 2020 CSC 19, [2020] 2 R.C.S. 420, par. 65). Il ne s'agit pas simplement d'une question de *stare decisis* et d'évolution progressive du droit (bien qu'il s'agisse à tout le moins de ces deux choses); il existe également une crainte d'ordre pratique que le traitement flou et ambigu de ces deux obligations ait une incidence considérable sur ce qu'il advient pour les parties contractantes. Contrairement à ce que laissent entendre les juges majoritaires, la faute en cause dans chaque catégorie de cas est distincte, et les dommages-intérêts pouvant être accordés diffèrent en conséquence. La réparation accordée pour une violation de l'obligation d'exécution honnête se rapporte à l'effet de la *malhonnêteté*. En revanche, celle accordée pour un manquement à l'obligation d'exercer un pouvoir discrétionnaire de bonne foi se rapporte à l'effet de *l'exercice du pouvoir discrétionnaire comme tel*. Considérer ces deux obligations comme relevant de « l'exercice fautif d'un droit contractuel » obscurcit ces distinctions et représente donc un écart malencontreux par rapport à l'arrêt *Bhasin*.

IV. Conclusion

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

The following are the reasons delivered by

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

[184] In this case, the respondents ("Baycrest") bargained for a right to terminate *at any time* and *for any other reason than unsatisfactory services* upon giving 10 days' notice. Baycrest made the decision to terminate, but it chose to wait before sending the notice, as it did not want to jeopardize the performance of other work that was being done by the appellant ("Callow", referring interchangeably to C.M. Callow Inc. and to its principal, Mr. Christopher Callow). In the meantime, Baycrest became aware that its counterparty was entertaining hopes of a renewal, although it did not say or do anything that materially contributed to those hopes. Baycrest did nothing to discourage them; such conduct may not be laudable, but it does not fall within the category of "active dishonesty" prohibited by the contractual duty of honest performance.

I. Issue on Appeal

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

IV. Conclusion

[182] Je suis d'avis d'accueillir l'appel, d'annuler la décision de la Cour d'appel et de rétablir le jugement de la juge de première instance, avec dépens devant notre Cour et devant les juridictions inférieures.

Version française des motifs rendus par

[183] LA JUGE CÔTÉ (dissidente) — Que signifie tromper activement son cocontractant dans le contexte d'un droit contractuel de résilier un contrat sans motif? Où tracer la ligne entre conduite malhonnête et non-divulgation légitime de l'intention de mettre fin à un contrat? Une partie à un contrat doit-elle dissuader l'autre de nourrir des espoirs quant à la poursuite de leur relation d'affaires? Telles sont les questions soulevées par le pourvoi.

[184] En l'espèce, les intimées (« Baycrest ») ont négocié un droit de résilier leur contrat *à tout moment* et *pour toute raison autre qu'une insatisfaction liée aux services rendus* moyennant un préavis de 10 jours. Baycrest a pris la décision de résilier, mais elle a choisi d'attendre avant d'envoyer le préavis, car elle ne voulait pas compromettre l'exécution des autres travaux effectués par l'appelante (« Callow », référant de manière interchangeable soit à l'entreprise C.M. Callow Inc., soit à son dirigeant, M. Christopher Callow). Entre-temps, Baycrest a appris que son cocontractant entretenait des espoirs de renouvellement, bien qu'aucune de ses paroles ou actions n'ait pu y contribuer de façon significative. Baycrest n'a rien fait pour dissiper ces espoirs; une telle conduite n'est peut-être pas louable, mais elle ne tombe pas dans la catégorie de la « conduite malhonnête » prohibée par l'obligation contractuelle d'exécution honnête.

I. Question en litige

[185] Mes deux collègues semblent s'entendre sur les propositions suivantes.

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

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

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

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

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

[191] Before turning to my analysis, I wish to express my substantial agreement with Justice Brown's observations insofar as they pertain to the role of external legal concepts. Justice Kasirer states at para. 44 of his reasons that "[n]o expansion of the law set forth in *Bhasin* is necessary" to dispose of this appeal. However, he then embarks on, and I say this respectfully, an unnecessary comparative exercise between the civil law and the common law under the pretext of "dialogue". I am perplexed by the virtues of "dialogue" in a case like this one where

[186] En premier lieu, la présente affaire ne porte que sur l'obligation d'exécution honnête et non sur l'obligation d'exercer des pouvoirs discrétionnaires de bonne foi (ces deux obligations ont été distinguées dans l'arrêt *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, par. 47, 50 et 72-73).

[187] En deuxième lieu, l'obligation d'exécution honnête « signifie simplement que les parties ne doivent pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat » (*Bhasin*, par. 73).

[188] En troisième lieu, les parties n'ont pas d'obligation de divulguer des renseignements ni leur intention quant à la résiliation du contrat (*Bhasin*, par. 73 et 87).

[189] En quatrième lieu, il n'est pas nécessaire d'élargir la common law en reconnaissant une nouvelle obligation de bonne foi destinée à encadrer la « non-divulgation intentionnelle ».

[190] Je comprends que nous nous entendons tous sur ces prémisses. Dûment formulée, la question en litige porte donc sur la distinction évoquée dans l'arrêt *Bhasin* (par. 73 et 86-87) entre la tromperie active et la non-divulgation légitime. Dans le contexte de la présente affaire, il s'agit de savoir si Baycrest a menti à Callow ou l'a intentionnellement induit à croire à tort qu'elle ne risquait pas d'exercer son droit à la résiliation du contrat hivernal pour toute raison autre qu'une insatisfaction liée aux services rendus. La réponse est non.

[191] Avant d'entreprendre mon analyse, je tiens à mentionner que je souscris à l'essentiel des observations du juge Brown dans la mesure où elles se rapportent au rôle des notions juridiques externes. Le juge Kasirer affirme au par. 44 de ses motifs qu'« [i] l n'est pas nécessaire d'étendre la portée de la règle de droit énoncée dans l'arrêt *Bhasin* » pour trancher la présente affaire. Toutefois, il se lance ensuite, et je le dis avec égards, dans une comparaison inutile entre le droit civil et la common law sous un prétexte de « dialogue ». Je suis perplexe quant aux avantages

no gaps in the common law need to be filled and no rules need to be modified. I do not see why we should adopt such an approach, one that provides no palpable benefits and that is also arbitrary and unpredictable.

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

II. Ambit of the Duty of Honest Performance

A. *Context in Which the Duty Was Created*

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

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

> The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest . . . . The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good

d'un tel « dialogue » dans un cas comme celui-ci où il n'y a pas lieu de combler une lacune dans la common law ni de modifier l'une ou l'autre de ses règles. Je ne vois pas pourquoi nous devrions adopter cette approche arbitraire, imprévisible et dont les bénéfices sont loin de sauter aux yeux.

[192] Cela dit, je crois que l'état actuel de la common law ne permet pas d'arriver au résultat auquel parviennent mes collègues. Je crains que l'inutile débat sur les exercices de droit comparé n'ait détourné l'attention des faits de cette affaire tels qu'ils sont.

II. La portée de l'obligation d'exécution honnête

A. *Le contexte dans lequel l'obligation a été créée*

[193] Dans l'arrêt *Bhasin*, la Cour a accepté à l'unanimité de créer une obligation contractuelle d'exécution honnête, une « nouvelle obligation en common law au sein du vaste principe directeur de l'exécution de bonne foi des contrats » (par. 72). Le juge Cromwell a souligné qu'il ne s'agissait que d'une « étape modeste élaborée de façon progressive » (par. 73; voir aussi par. 82 et 89), l'obligation d'exécution honnête étant une « norme minimale » (par. 74).

[194] De l'avis du juge Cromwell, la nouvelle obligation ne « porte[rait] [que] très peu atteinte à la liberté contractuelle » (par. 76), si peu qu'il estimait que la possibilité d'une telle atteinte était « plus théorique que concrète » (par. 81). Au sujet du principe directeur de bonne foi dont l'obligation est issue, le juge Cromwell a affirmé ce qui suit :

> Il convient d'appliquer le principe de la bonne foi d'une manière conforme aux engagements fondamentaux du droit des contrats en common law, lequel accorde généralement beaucoup de poids à la liberté des parties contractantes dans la poursuite de leur intérêt personnel. En matière commerciale, une partie peut parfois causer une perte à une autre partie — même de façon intentionnelle — dans la poursuite légitime d'intérêts économiques personnels [. . .] L'évolution du principe de la bonne foi doit éviter clairement de se transformer en une forme de

faith should not be used as a pretext for scrutinizing the motives of contracting parties. [para. 70]

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

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

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

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

moralisme judiciaire ponctuel ou en une justice au cas par cas. Plus particulièrement, le principe directeur de bonne foi ne devrait pas servir de prétexte à un examen approfondi des intentions des parties contractantes. [par. 70]

[195] Le juge Cromwell a également exprimé certaines préoccupations relatives à la clarté des exigences imposées par la nouvelle obligation, à son effet sur la stabilité des contrats et aux conséquences pratiques de celle-ci (par. 59, 66, 70-71, 73, 79-80 et 86-87). Il s'est efforcé d'expliquer ce que la nouvelle obligation *n'était pas* :

> L'obligation d'exécution honnête que je propose ne devrait pas être confondue avec l'obligation de divulgation ni avec celle de loyauté qui incombe au fiduciaire. Une partie contractante n'est pas généralement tenue de subordonner ses intérêts à ceux de l'autre partie. [Je souligne; par. 86.]

[196] Passant à une description positive, il a souligné que l'obligation d'exécution honnête *était* « une simple exigence » de ne pas se mentir ni de s'induire intentionnellement en erreur sur des questions directement liées à l'exécution du contrat (par. 73).

[197] L'obligation faite aux parties de ne pas se mentir ne nécessite aucun commentaire. Reste à savoir quel type de conduite relève de l'obligation de ne pas s'induire intentionnellement en erreur. Étant donné l'absence d'une obligation de divulguer des renseignements, il est difficile de déterminer à partir de quand le silence d'une partie induira intentionnellement l'autre partie en erreur. Devons-nous faire des distinctions subtiles entre un « simple silence » et d'autres types de silence, comme le propose le juge Brown? Si tel est le cas, je me demande comment les parties contractantes — à qui, je le répète, le droit n'impose *pas* de « devoir de loyauté ou de divulgation » ni d'obligation de « renonce[r] à des avantages découlant du contrat » (*Bhasin*, par. 73) — comment les parties contractantes, donc, sont censées savoir à quel moment un silence acceptable se transforme en un silence inacceptable susceptible de constituer une violation de contrat. En toute déférence, je ne crois pas que ce genre de casuistique soit compatible avec la « simple exigence » qu'entendait énoncer le juge Cromwell dans l'arrêt *Bhasin*.

[198] As Cromwell J. put it, "a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty" (para. 86 (emphasis added)). He added that "*United Roasters* makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87 (emphasis added)). These words should be taken at face value. The duty of honest performance should remain "clear and easy to apply" (para. 80).

B. *Permissible Non-disclosure*

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

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

[201] Absent a duty of disclosure, that is, absent any kind of free-standing positive obligation flowing from the duty of honest performance, a party to a contract has no obligation to correct his counterparty's mistaken belief unless the party's active conduct has *materially* contributed to it (see, in a different context, T. Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v. Hrynew* and the Organizing Principle

[198] Selon le juge Cromwell, « il est possible d'établir une nette distinction entre l'omission de déclarer un fait important, même s'il s'agit de la ferme intention de mettre fin à un contrat, et la conduite malhonnête » (par. 86 (je souligne)). Plus loin, il ajoute : « L'arrêt *United Roasters* indique clairement qu'il n'existe pas d'obligation unilatérale de divulgation de renseignements lorsqu'il s'agit de mettre fin au contrat. Or, la situation est assez différente, à mon avis, lorsqu'il s'agit d'induire en erreur ou de tromper activement l'autre partie contractante au sujet de l'exécution du contrat » (par. 87 (je souligne)). Il y a lieu de prendre ces propos au pied de la lettre, car l'obligation d'exécution honnête doit demeurer « claire et d'application simple » (par. 80).

B. *La non-divulgation légitime*

[199] Il faut garder à l'esprit que toutes les obligations découlant de l'exécution honnête sont « négatives » (P. Daly, « La bonne foi et la common law : l'arrêt *Bhasin c. Hrynew* », dans J. Torres-Ceyte, G.-A. Berthold et C.-A. M. Péladeau, dir., *Le dialogue en droit civil* (2018), 89, p. 101-102; voir également les motifs du juge Kasirer, par. 86). Étendre davantage la portée de l'obligation d'exécution honnête « écartera[it] la stabilité des opérations commerciales » (*Bhasin*, par. 80).

[200] Par conséquent, le silence ne saurait être considéré comme malhonnête au sens de l'arrêt *Bhasin*, à moins qu'il n'y ait une obligation positive de parler. Or, une telle obligation ne naît pas du seul fait qu'une partie au contrat s'aperçoit que son cocontractant agit sur le fondement d'une croyance erronée.

[201] En l'absence d'une obligation de divulgation, c'est-à-dire en l'absence d'une obligation positive et indépendante découlant de l'exécution honnête, une partie à un contrat ne saurait être tenue de corriger la croyance erronée de son cocontractant à moins d'y avoir contribué *de façon significative* par sa conduite (voir, dans un contexte différent, T. Buckwold, « The Enforceability of Agreements to Negotiate in Good Faith : The Impact of *Bhasin v.*

of Good Faith in Common Law Canada" (2016), 58 *Can. Bus. L.J.* 1, at pp. 12-13).

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

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

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

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

Hrynew and the Organizing Principle of Good Faith in Common Law Canada » (2016), 58 *Rev. can. dr. comm.* 1, p. 12-13).

[202] Pour déterminer si une contribution est significative, il faudra bien entendu examiner le contexte, y compris la nature de la relation entre les parties (voir les motifs du juge Brown, par. 133), de même que les dispositions contractuelles pertinentes. Mais la raison sous-jacente à cette exigence est d'ordre pratique et tient compte de l'importance que l'arrêt *Bhasin* accorde aux attentes commerciales (par. 1, 34, 41, 60 et 62) : les parties qui préfèrent ne pas divulguer certains renseignements — comme cela leur est permis — ne sont pas tenues d'adopter une nouvelle ligne de conduite dans leur relation contractuelle simplement parce que le silence leur a paru préférable à la parole.

[203] La common law ne saurait d'une part, permettre aux parties contractantes de ne pas divulguer des renseignements, mais anéantir cette possibilité, d'autre part, en imposant à ces parties une norme de conduite irréconciliable avec les attitudes spontanées — évasives et équivoques — prises quand, au détour d'une conversation, elles se trouvent confrontées à cela même qu'elles souhaitent s'abstenir de divulguer.

[204] Certes, les parties qui font un tel choix doivent être circonspectes dans leurs paroles comme dans leurs actions, surtout si elles apprennent que leur cocontractant agit sur le fondement d'une croyance erronée; mais elles ne devraient pas pour autant être tenues de se comporter comme si chacun de leurs gestes était scruté à la loupe à titre de cause possible de cette croyance erronée. Une telle exigence serait inacceptable.

[205] Dans le contexte d'un droit contractuel de résilier un contrat sans motif, cela signifie qu'une partie désireuse de mettre fin à une entente n'a pas besoin de transmettre de signaux d'alerte pour amener son cocontractant à comprendre que leur relation d'affaires est en danger. S'il n'y a pas d'obligation de divulgation, c'est qu'il n'y en a pas, un point c'est tout.

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

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

III. Analysis

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

9. If the Contractor [i.e. Callow] fails to give satisfactory service to the Corporation [i.e. Baycrest] in accordance with the terms of this Agreement and the specifications and general conditions attached hereto or if for any other reason the Contractor's services are no longer required for the whole or part of the property covered by this Agreement, then the Corporation may terminate this contract upon giving ten (10) days' notice in writing to the Contractor, and

[206] Ainsi, le fait qu'une partie soit consciente de la croyance erronée de son cocontractant ne suffira pas à donner naissance à une obligation de divulgation, à moins que cette partie n'ait posé un acte concret qui a contribué à cette croyance de façon significative. Cet acte concret et cette croyance erronée doivent tous les deux se rapporter à l'exécution contractuelle; autrement, il serait difficile de prétendre qu'une partie a « indui[t] intentionnellement [l'autre] en erreur au sujet de questions directement liées à l'exécution du contrat » (*Bhasin*, par. 73).

[207] En somme, la « norme minimale » d'honnêteté qu'impose l'obligation d'exécution honnête doit cadrer avec les autres principes énoncés dans l'arrêt *Bhasin*. Elle doit aussi être réaliste et non exagérément formaliste. En l'absence d'une obligation de divulgation, une partie ne saurait être tenue d'empêcher son cocontractant de persister dans une croyance erronée. Cela ne veut pas dire qu'elle peut susciter ou renforcer une telle croyance par des déclarations ou des actes concrets d'une importance non négligeable. Une partie a l'obligation de corriger la croyance erronée de son cocontractant si elle y a contribué de *façon significative* par sa propre conduite.

III. Analyse

[208] Callow et Baycrest ont conclu deux contrats de deux ans : un contrat hivernal visant principalement des services de déneigement pour la période allant du 1er novembre 2012 au 30 avril 2014, et un contrat de services d'entretien estival pour la période allant du 1er mai 2012 au 31 octobre 2013. Le contrat hivernal, qui fait l'objet du présent litige, contenait la disposition suivante :

[TRADUCTION]

9. Si l'Entrepreneur [c.-à-d. Callow] ne rend pas des services satisfaisants à la Société [c.-à-d. Baycrest] conformément aux dispositions du présent Contrat et aux devis et conditions générales qui y sont joints, ou si, pour toute raison autre, les services de l'Entrepreneur ne sont plus requis pour les immeubles visés par le Contrat ou pour toute partie de ces immeubles, la Société peut résilier le présent contrat en donnant à l'Entrepreneur un préavis

upon such termination, all obligations of the Contractor shall cease and the Corporation shall pay to the Contractor any monies due to it up to the date of such terminations. [Emphasis added.]

(A.R., vol. III, at p. 10)

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

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

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

écrit de dix (10) jours, et dès la résiliation, toutes les obligations de l'Entrepreneur prendront fin et la Société paiera à l'Entrepreneur les sommes qui lui sont dues jusqu'à la date de résiliation. [Je souligne.]

(d.a., vol. III, p. 10)

[209] En mars ou avril 2013, Baycrest a décidé de résilier le contrat hivernal. Le 12 septembre 2013, elle a donné à Callow un préavis de résiliation de 10 jours. Entre-temps, Baycrest a appris que Callow exécutait gratuitement certains travaux d'aménagement paysager, étant sous l'impression que le contrat hivernal ne serait pas résilié (motifs de première instance, 2017 ONSC 7095, par. 48 (CanLII)).

[210] Étant donné ces circonstances, on comprend sans peine que Callow ait été [TRADUCTION] « stupéfait » par la résiliation. Selon ce que croyait Callow, [TRADUCTION] « s'il y avait un problème, il se serait attendu à ce que [Baycrest] le porte à son attention, comme [elle] l'avait fait par le passé » (motifs de première instance, par. 49). Certes, le comportement de Baycrest manquait de courtoisie et de considération. Toutefois, telle n'est pas la question en l'espèce. Il s'agit plutôt de savoir si Baycrest a contribué de façon significative à la croyance erronée de Callow que le contrat ne serait pas résilié. Dans l'affirmative, Baycrest avait l'obligation de corriger cette croyance erronée conformément à son obligation d'exécution honnête. Autrement, elle n'était pas tenue de divulguer quoi que ce soit.

[211] Devant notre Cour, Callow a reconnu qu'en concluant le contrat hivernal, il avait accepté le risque que Baycrest [TRADUCTION] « puisse résilier [le contrat] et divulguer sa décision à cet effet en ne donnant qu'un préavis écrit de 10 jours » (transcription, p. 11; voir également les motifs de la C.A., 2018 ONCA 896, 429 D.L.R. (4th) 704, par. 14). À mon avis, les dispositions du contrat hivernal étaient telles que Callow aurait pu se retrouver exactement dans la situation où il se trouve à présent, et ce quelle que fût la conduite de Baycrest au cours du printemps et de l'été 2013. Une telle possibilité découlait nécessairement du contrat qu'il avait négocié.

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

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

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

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

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

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

[213] In my view, the appeal should be dismissed.

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

[215] Furthermore, although the trial judge seems to have been aware that there was no duty of disclosure (para. 60), she nonetheless found that Baycrest had acted in bad faith by "withholding the information to ensure Callow performed the summer maintenance services contract" (para. 65; see also para. 76). She never asked herself whether Baycrest

[212] Pour l'essentiel, Callow prétend que la conduite de Baycrest l'a amené à croire que le contrat hivernal ne risquait plus d'être résilié, malgré le libellé clair de la clause de résiliation. Il insiste sur les éléments suivants :

(1) Baycrest a délibérément tenu sa décision secrète, parce qu'elle ne voulait pas compromettre l'exécution du contrat estival;

(2) Baycrest s'est montrée satisfaite de ses services;

(3) Il a eu des discussions avec M. Peixoto et M. Campbell relativement au renouvellement du contrat hivernal;

(4) Baycrest a accepté ses travaux « bénévoles »;

(5) Baycrest était au courant de sa croyance erronée.

[213] À mon avis, le pourvoi devrait être rejeté.

[214] L'analyse de la « tromperie active » par la juge de première instance relève d'une compréhension erronée du droit. Aucune considération n'a été accordée au fait que, pour constituer un manquement à l'obligation d'exécution honnête, la tromperie active doit être « directement li[ée] à l'exécution du contrat » (*Bhasin*, par. 73). Lors de son examen de la conduite de Baycrest, la juge de première instance n'a pas cherché à savoir si Baycrest avait [TRADUCTION] « ment[i] [à Callow] ou [l'avait] autrement [induit] intentionnellement en erreur » au sujet de l'exercice de son droit à la résiliation du contrat hivernal *pour toute raison autre* qu'une insatisfaction liée aux services rendus. C'est pourquoi, par exemple, elle a insisté à tort sur la nécessité pour Baycrest [TRADUCTION] « d'aborder les problèmes de rendement allégués » (par. 67) malgré le fait que le contrat hivernal pouvait être résilié même si les services rendus par Callow étaient satisfaisants.

[215] De plus, bien que la juge de première instance semble s'être souvenue de l'inexistence d'une obligation de divulgation (par. 60), elle a néanmoins conclu que Baycrest avait fait preuve de mauvaise foi en [TRADUCTION] « retenant l'information pour s'assurer de la bonne exécution du contrat de services d'entretien estival par Callow » (par. 65; voir aussi

had explicitly or implicitly said or done anything that could have misled Callow into thinking that the contract was at no risk of being terminated for any other reason than unsatisfactory services. It is clear from reading the trial judge's reasons as a whole that the "representations" she found had been made by Baycrest (at paras. 65, 67 and 76) were not directly linked to the performance of the winter agreement. In sum, the trial judge's misunderstanding of the applicable legal principles vitiated the fact-finding process.

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

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

par. 76). Elle ne s'est jamais demandé si Baycrest avait, explicitement ou implicitement, dit ou fait quoi que ce soit qui aurait pu induire Callow à croire erronément que le contrat était à l'abri d'un risque de résiliation pour toute raison autre qu'une insatisfaction liée aux services rendus. À la lecture de l'ensemble des motifs de la juge de première instance, il est clair que les « déclarations » faites par Baycrest (par. 65, 67 et 76) n'étaient pas directement liées à l'exécution du contrat hivernal. En somme, la compréhension erronée par la juge de première instance des principes juridiques applicables a vicié le processus d'appréciation des faits.

[216] Baycrest avait négocié un droit de résilier son contrat hivernal *pour toute raison* et *à tout moment*, moyennant un préavis de 10 jours. Son obligation d'exécution honnête ne la contraignait pas à « renoncer » à cet indéniable « avantag[e] découlant du contrat » (*Bhasin*, par. 73). Elle n'avait aucune obligation d'informer Callow de sa décision de procéder à la résiliation jusqu'au moment de transmettre le préavis de 10 jours stipulé dans le contrat hivernal. Même après qu'elle eut pris connaissance de la croyance erronée de Callow, Baycrest n'avait pas l'obligation de refuser les travaux que celui-ci a exécutés « bénévolement » de sa propre initiative, ni de corriger la croyance erronée qui l'animait. Une telle obligation n'aurait pris naissance que si Baycrest avait contribué de façon significative à cette croyance erronée en la suscitant ou en la renforçant. Considérant la preuve et les conclusions de la juge de première instance, je ne suis pas convaincue que Baycrest a agi ainsi.

[217] Je ne partage pas la lecture que fait mon collègue, le juge Kasirer, de certaines conclusions de fait tirées par la juge de première instance (par. 100). Ces conclusions, formulées de manière très générale, ne devraient pas être isolées du contexte global des motifs et de la preuve qui a été faite. Par exemple, mon collègue écrit que « M. Peixoto a fait des déclarations à M. Callow laissant entendre qu'un renouvellement du contrat d'entretien hivernal était probable » (par. 95) et il qualifie cela de « conclusion clef » (par. 96). Toutefois, la conclusion tirée par la juge de première instance se rapportait à *ce que*

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

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

A. *Discussions About Renewal*

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

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

Callow pensait plutôt qu'à *ce que Baycrest avait dit* (motifs de première instance, par. 41), ce qui est très différent. De fait, comme je l'explique ci-dessous, la preuve à l'appui de cette « conclusion clef » démontre que les idées de Callow au sujet du renouvellement du contrat hivernal n'avaient rien à voir avec ce que lui avait dit Baycrest.

[218] J'en viens maintenant à l'application aux faits de l'espèce des principes juridiques exposés ci-avant.

A. *Les discussions sur le renouvellement*

[219] Callow soutient que Baycrest a contribué de façon significative à sa croyance erronée en discutant d'un possible renouvellement. Cette question est au cœur du présent pourvoi. Il n'est pas contesté que le contrat hivernal, à la différence du contrat en cause dans l'arrêt *Bhasin*, ne prévoyait pas de renouvellement automatique; il ne prévoyait qu'un droit de résiliation. Comme il ne fait l'objet d'aucune stipulation du contrat hivernal, le renouvellement ne saurait se rapporter à « l'exécution [de ce] contrat » au sens de l'arrêt *Bhasin*. Pour que sa réclamation soit accueillie, Callow doit donc établir que le manquement à l'obligation d'exécution honnête concerne la résiliation du contrat.

[220] Mes deux collègues acceptent l'argument de Callow selon lequel on peut inférer, des discussions sur le renouvellement, qu'aucune menace de résiliation ne pesait sur le contrat hivernal. Je serais d'accord avec une telle proposition dans la situation suivante : si une partie amène l'autre à croire que leur contrat sera renouvelé, il s'ensuit que cette dernière peut raisonnablement s'attendre à ce que la relation d'affaires soit prolongée plutôt que résiliée. Toutefois, une inférence en ce sens ne peut être tirée dans l'abstrait. Pour conclure qu'une partie, par des discussions sur un renouvellement, a amené l'autre partie à penser qu'aucun risque de résiliation ne menaçait le contrat en vigueur, le processus inférentiel doit évidemment tenir compte de la nature du risque en jeu et de ce qui a été communiqué pendant ces discussions. Autrement, l'inférence donnerait lieu à une erreur manifeste et dominante

review (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 22-23).

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

> During the spring and summer of 2013, Callow performed regular weekly grass cutting, garbage pick-up and was in discussions with the condominium corporations' board members to renew the contract for the following summer and also the winter maintenance services contract for a further two years. At this time, Callow had only completed year one of a two-year contract. The contract was supposed to remain in place for the winter of 2013-2014.
>
> After his discussions with Mr. Peixoto and Mr. Campbell, Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and they were satisfied with his services. [Emphasis added; paras. 40-41.]

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

> **Q.** Now is probably a good time to — well tell me about these discussions. Let's hear what discussions were you having.
>
> **A.** Mostly with Joe [Peixoto], we discussed it, and he said "yeah, it looks good, I'm sure they'll be up for it, let me talk to them".
>
> **Q.** Up for what?
>
> **A.** A two-year renewal.

qui serait susceptible de contrôle en appel (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 22-23).

[221] En l'espèce, l'art. 9 du contrat hivernal permettait la résiliation (1) si les services n'étaient pas satisfaisants, ou (2) pour toute raison autre que l'insatisfaction liée aux services rendus. Il s'agit de savoir si, en discutant du renouvellement, Baycrest a communiqué quoi que ce soit qui aurait pu amener Callow à croire que le contrat hivernal n'était menacé d'aucun risque de résiliation pour *toute raison autre* que l'insatisfaction liée aux services rendus. Dans ses motifs, la juge de première instance a décrit les discussions entre les parties de la façon suivante :

> [TRADUCTION] Au cours du printemps et de l'été 2013, Callow exécutait des services hebdomadaires réguliers de tonte de pelouse et de cueillette des ordures et avait des discussions avec les membres des conseils des sociétés condominiales en vue de renouveler le contrat pour l'été suivant, et aussi le contrat de services d'entretien hivernal pour deux autres années. À cette époque, un an seulement s'était écoulé sur un contrat de deux ans. Le contrat devait demeurer en vigueur pour l'hiver 2013-2014.
>
> Après ses discussions avec M. Peixoto et M. Campbell, M. Callow croyait qu'il allait probablement obtenir un renouvellement de deux ans de son contrat de services d'entretien hivernal et qu'ils étaient satisfaits de ses services. [Je souligne; par. 40-41.]

[222] La juge de première instance, qui a jugé Callow crédible, s'est appuyée sur la partie suivante de son témoignage :

> [TRADUCTION]
>
> **Q.** Ce serait probablement un bon moment pour — eh bien parlez-moi de ces discussions. Racontez-nous quelles discussions vous aviez.
>
> **R.** Surtout avec Joe [Peixoto], nous en avons discuté, et il a dit « ouais, ça se présente bien, je suis sûr qu'ils seront preneurs, laisse-moi leur parler ».
>
> **Q.** Preneurs pour quoi?
>
> **R.** Un renouvellement de deux ans.

Q. All right. Anyone else?

A. Kyle Campbell I ran into once or twice on site and we had discussions as well too.

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

A. That I was likely going to be getting a two-year renewal, there was no reason not to, they were satisfied with the service, they were happy with it. [Emphasis added.]

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

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

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

Q. D'accord. Quelqu'un d'autre?

R. J'ai croisé Kyle Campbell une ou deux fois sur place et nous avons aussi eu des discussions.

Q. D'accord, et quelle a été votre impression de — de — en fait, je suppose que vous avez déjà répondu. . .

R. Que j'allais vraisemblablement obtenir un renouvellement de deux ans, il n'y avait aucune raison de ne pas l'obtenir, ils étaient satisfaits du service, ils en étaient ravis. [Je souligne.]

(d.a., vol. II, p. 67-68)

[223] Apparemment, on n'a pas accordé beaucoup d'importance à la question du renouvellement en première instance. La déclaration modifiée n'en faisait aucune mention; elle se focalisait plutôt sur ce que Baycrest savait, sur le « bénévolat » de Callow et sur la prestation de services satisfaisants. Même si la juge de première instance a abordé la question du renouvellement, je souligne que ses conclusions à cet égard portent sur la *croyance erronée* de Callow que le contrat hivernal serait sans doute renouvelé (par. 41); elles ne portent *pas* sur ce que Baycrest a fait ou dit qui aurait pu amener Callow à croire erronément cela.

[224] Ce que pensait Callow est une chose; ce qu'a dit ou fait Baycrest en est une autre. Selon Callow lui-même, M. Peixoto n'a rien proposé au nom de Baycrest. Il est clair que l'affirmation de M. Peixoto — [TRADUCTION] « je suis sûr qu'ils seront preneurs, laisse-moi leur parler » (d.a., vol. II, p. 67) — signifiait que malgré son opinion favorable, ce n'était pas lui qui prenait la décision et que Baycrest n'avait même pas envisagé la possibilité d'un renouvellement à ce moment. On ne pouvait certainement pas inférer de cette affirmation la probabilité d'un renouvellement. Le témoignage de Callow ne laisse pas entendre qu'on l'a faussement amené à croire que Baycrest envisageait bel et bien un renouvellement — la réponse de M. Peixoto présuppose plutôt le contraire —; il ne laisse pas non plus entendre que Baycrest a dit ou fait quoi que ce soit pour éliminer le risque pris par Callow de voir son contrat résilié pour toute raison autre

not to, they were satisfied with the service, they were happy with it" (A.R., vol. II, at p. 68).

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

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

[227] At most, it can be said that Mr. Peixoto and Mr. Campbell did not dissuade Callow from entertaining hopes when they had a chance to do so. But, and most importantly, they did not suggest that

qu'une insatisfaction liée aux services rendus. De fait, Callow a affirmé croire en la probabilité d'un renouvellement, car [TRADUCTION] « il n'y avait aucune raison de ne pas l'obtenir, ils étaient satisfaits du service, ils en étaient ravis » (d.a., vol. II, p. 68).

[225] Au cours de son interrogatoire préalable, Callow a justifié de la même façon sa croyance que le contrat hivernal serait renouvelé : parce [TRADUCTION] « [qu']il n'avait aucune raison de ne pas l'être » (d.a., vol. II, p. 49). Il n'a *pas* fait allusion à ses discussions avec M. Peixoto ou M. Campbell. Lorsqu'on lui a demandé si quelqu'un lui avait dit que son contrat serait renouvelé, il a affirmé ne pas se souvenir. La preuve n'établit *pas* que M. Peixoto ou M. Campbell avaient amorcé les discussions sur le renouvellement. Au contraire, elle tend à indiquer que Callow en est à l'origine. Contre-interrogé au sujet de ses travaux « bénévoles », Callow a admis que derrière sa croyance erronée en un renouvellement probable de son contrat, il n'y avait rien de plus qu'un [TRADUCTION] « *bon espoir* ». Rien dans son témoignage ne laisse entendre qu'on lui a communiqué *quoi que ce soit* qui aurait pu l'induire à croire à tort que Baycrest envisageait sérieusement non pas la résiliation, mais un renouvellement de deux ans du contrat hivernal.

[226] Dans ses motifs, la juge de première instance renvoie aux [TRADUCTION] « communications actives [. . .] entre mars/avril et le 12 septembre 2013, qui ont trompé Callow » (par. 66), et aux « déclarations précédant la période de préavis » (par. 67; voir également par. 65 et 76). Toutefois, ces renvois doivent être considérés à la lumière de la preuve et de l'ensemble des motifs. Même si la juge de première instance a tiré des conclusions défavorables quant à la crédibilité de M. Peixoto et de M. Campbell, ainsi que des conclusions favorables quant à la crédibilité de Callow, la preuve ayant trait au renouvellement n'autorise qu'un nombre très limité d'inférences concernant la résiliation.

[227] Tout au plus peut-on dire que M. Peixoto et M. Campbell n'ont pas mis fin aux espoirs de Callow lorsqu'ils ont eu l'occasion de le faire. Cependant, et cela s'avère déterminant, ils n'ont pas laissé entendre

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

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

[228] The trial judge placed great importance on the fact that Callow's services had been satisfactory and that Baycrest's conduct had given him no reason to think otherwise (paras. 22, 27, 29-30, 34-36, 39, 41, 46-47 and 55). I note there is no finding that Baycrest communicated any particular sign of satisfaction pertaining *to the performance of the winter agreement* past March 19, 2013. That being said, there is nothing dishonest about Baycrest terminating the winter agreement after showing its satisfaction with the quality of Callow's work.

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

que Baycrest envisageait réellement la poursuite de leur relation d'affaires. Si tel avait été le cas, je reconnais qu'il aurait pu être justifié d'inférer que Callow avait été amené à croire qu'aucun risque de résiliation ne pouvait précipiter la fin du contrat en vigueur avant l'échéance. Mais ce n'est tout simplement pas ce qui s'est produit en l'espèce. À mon avis, la juge de première instance n'a pas inféré des discussions sur le renouvellement que Baycrest avait, par ses paroles ou ses actions, éliminé le risque que le contrat hivernal soit résilié pour toute raison autre qu'une insatisfaction liée aux services rendus. L'eût-elle fait, son inférence serait susceptible de contrôle en appel, car elle ne se fonderait pas sur la preuve. Considérant le contexte décrit ci-dessus, les déclarations vagues et évasives de M. Peixoto et de M. Campbell n'ont pas contribué de façon significative à la croyance erronée de Callow; partant, Baycrest n'était pas tenue de divulguer des renseignements supplémentaires.

B. *La satisfaction de Baycrest à l'égard des services rendus par Callow*

[228] La juge de première instance a accordé beaucoup d'importance au caractère satisfaisant des services rendus par Callow et à la conduite de Baycrest qui ne lui avait donné aucune raison de penser le contraire (par. 22, 27, 29-30, 34-36, 39, 41, 46-47 et 55). Je constate d'après ses conclusions que Baycrest n'a jamais, après la date du 19 mars 2013, communiqué quelque signe précis de satisfaction que ce soit à l'égard de *l'exécution du contrat hivernal*. Cela dit, il n'y a rien de malhonnête à ce que Baycrest résilie le contrat hivernal après s'être montrée satisfaite de la qualité des travaux exécutés par Callow.

[229] De plus, les parties avaient expressément prévu que Baycrest pouvait résilier le contrat hivernal malgré sa satisfaction à l'égard des prestations de Callow, car le contrat stipulait que Baycrest pouvait exercer son droit de résiliation pour toute raison autre qu'une insatisfaction liée aux services rendus. Par conséquent, des rétroactions positives concernant les services fournis ne sauraient justifier la croyance erronée de Callow selon laquelle le contrat ne serait pas résilié.

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

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

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

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

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

C. *La croyance erronée de Callow que le contrat hivernal demeurerait en vigueur*

[230] La juge de première instance a conclu que Baycrest avait [TRADUCTION] « continu[é] d'affirmer que le contrat n'était pas en danger » (par. 65 et 76; voir également par. 13). Cette conclusion était essentiellement fondée sur les signes généraux de satisfaction communiqués par Baycrest, sur son acceptation des travaux « bénévoles » de Callow et sur la croyance erronée qu'avait celui-ci à la suite des discussions sur le renouvellement. Comme je l'ai déjà expliqué, rien de tout cela n'obligeait Baycrest à divulguer son intention de résilier le contrat hivernal.

[231] Les conclusions que la juge de première instance *n'a pas tirées* sont tout aussi pertinentes. Elle n'a *pas* conclu que Baycrest avait décidé de renoncer à son droit de résilier le contrat hivernal. Elle n'a *pas* conclu que Baycrest avait menti à Callow. Elle n'a *pas* conclu que Baycrest avait éliminé le risque pris par Callow de voir son contrat résilié pour toute raison autre qu'une insatisfaction liée aux services rendus. Enfin, elle n'a pas indiqué pourquoi Callow croyait si fermement [TRADUCTION] « que son contrat de services d'entretien hivernal demeurerait en vigueur l'hiver suivant » (par. 13).

[232] La croyance de Callow que son contrat était à l'abri d'un risque de résiliation de la part de Baycrest reposait sur deux choses. D'abord, sur la rétroaction positive qu'il avait reçue concernant ses services. Comme il le dit, Baycrest [TRADUCTION] « en étai[t] ravi[e] ». Toutefois, cela n'est pas très pertinent dans un contexte où Baycrest pouvait résilier le contrat hivernal pour toute raison autre qu'une insatisfaction liée aux services rendus. Ensuite, ce qui est le plus important, la croyance erronée de Callow s'appuyait sur une interprétation fautive du contrat hivernal.

[233] Lors de son témoignage au procès, Callow a affirmé avoir eu connaissance de la clause de résiliation, mais avoir cru que la durée de deux ans du contrat rendait cette clause inexécutoire :

Q. . . . So, in that letter, there is a — a statement that the termination was in breach of the agreement. So, my question for you is, at that point in time what was your understanding, why was the termination in breach of the agreement?

A. Because they asked me, and we entered into a two year agreement, to provide services both summer and winter; and I did so at a reduced rate. I upheld my end of the bargain which was to perform that work at that reduced rate. They — and which I might add, I was not paid for, the landscaping and the final aspect of it, they were supposed to pay me. They didn't do it. And I continued to fulfill my contractual obligations. I expected nothing less than the same from them.

Q. So — so, when you — because you talk — but you knew that in the winter contract, there was that termination clause.

A. They had a clause written in there. I didn't believe it be enforceable because we had a two year contract. That's the whole idea to a two year contract. You have contract for two years. I provide services for two years and they pay me for those services. [Emphasis added.]

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

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

IV. Conclusion

[235] The trial judge erred in concluding that Baycrest had to address performance issues or

[TRADUCTION]

Q. . . . Donc, dans cette lettre, il y a une — une déclaration que la résiliation constituait une violation du contrat. Donc, la question que je vous pose est, à ce moment-là, que compreniez-vous, pourquoi la résiliation constituait-elle une violation du contrat?

R. Parce qu'ils m'ont demandé, et nous avons conclu un contrat de deux ans, de fournir des services l'été et l'hiver; et je l'ai fait à un tarif réduit. J'ai respecté ma part du marché, qui était de faire les travaux à ce tarif réduit. Ils — et ce pour lesquels, j'ajouterais, je n'ai pas été payé, l'aménagement paysager et l'aspect final de ces travaux, ils devaient me payer. Ils ne l'ont pas fait. Et j'ai continué à remplir mes obligations contractuelles. Je ne m'attendais à rien de moins qu'ils en fassent autant.

Q. Donc — donc, lorsque vous — parce que vous parlez — mais vous saviez que dans le contrat hivernal, il y avait cette clause de résiliation.

R. Ils avaient une clause écrite là-dedans. Je ne croyais pas qu'elle était exécutoire parce que nous avions un contrat de deux ans. C'est ça l'idée d'un contrat de deux ans. Vous avez un contrat pendant deux ans. Je fournis des services pendant deux ans et ils me paient pour ces services. [Je souligne.]

(d.a., vol. II, p. 120; voir également p. 106-107.)

[234] Même si Callow n'a pas soutenu cette prétention devant notre Cour, son interprétation fautive de la clause de résiliation jette un éclairage important sur la raison pour laquelle il croyait le contrat hivernal à l'abri d'un risque de résiliation pour toute raison autre qu'une insatisfaction liée aux services rendus. La preuve ne suggère pas que Baycrest a dit ou fait quoi que ce soit qui eût pu éliminer ce risque, ni qu'elle a eu quoi que ce soit à voir avec l'interprétation fautive que Callow s'est faite de la clause de résiliation. Par conséquent, je suis d'avis que Baycrest n'était pas tenue de corriger la croyance erronée de Callow en divulguant des renseignements qu'elle avait décidé de taire.

IV. Conclusion

[235] La juge de première instance a eu tort de conclure que Baycrest devait aborder les problèmes

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

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

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

[238] I would therefore dismiss the appeal.

Appeal allowed with costs throughout, CÔTÉ J. *dissenting.*

de rendement ou fournir plus tôt le préavis de résiliation (par. 67). Elle ne s'est pas demandé si, par ses déclarations, Baycrest avait induit Callow à croire erronément qu'elle ne mettrait pas fin au contrat hivernal pour toute raison autre qu'une insatisfaction liée aux services rendus. À mon avis, la juge de première instance a élargi la portée de l'obligation d'exécution honnête d'une façon qui n'était pas compatible avec les autres principes énoncés dans l'arrêt *Bhasin*.

[236] En somme, le point en litige dans le présent pourvoi consiste à savoir si Baycrest a menti à Callow ou l'a intentionnellement induit à croire qu'elle ne risquait pas d'exercer son droit à la résiliation du contrat hivernal pour toute raison autre qu'une insatisfaction liée aux services rendus. Il n'y a eu aucun mensonge éhonté. Baycrest savait que Callow croyait à tort qu'on aurait recours à ses services une fois l'hiver venu. Cependant, Baycrest n'a jamais renoncé à l'avantage contractuel qu'elle avait de pouvoir résilier le contrat hivernal à tout moment, moyennant un préavis de 10 jours. Baycrest n'a pas non plus dit ou fait quoi que ce soit qui a contribué de façon significative à la croyance erronée de Callow selon laquelle le contrat hivernal était à l'abri d'un risque de résiliation pour toute raison autre qu'une insatisfaction liée aux services rendus. Aussi discutable qu'ait été sa conduite, Baycrest n'était pas tenue de corriger cette croyance erronée.

[237] Je précise que le résultat auquel j'arrive ne devrait pas être interprété comme voulant dire que le comportement de Baycrest était approprié ou que Callow n'a aucun recours. Il signifie que le recours de Callow ne saurait être fondé sur un manquement à l'obligation d'exécution honnête. En fait, la juge de première instance a conclu que Baycrest s'était injustement enrichie grâce aux travaux « bénévoles » de Callow (par. 77), mais elle a affirmé que celui-ci n'a fourni aucune preuve des dépenses encourues lors de ses travaux. Cette question, toutefois, nous entraîne hors du cadre du présent pourvoi.

[238] Je suis donc d'avis de rejeter le pourvoi.

Pourvoi accueilli avec dépens devant toutes les cours, la juge CÔTÉ *est dissidente.*

Solicitors for the appellant: McCarthy Tétrault, Toronto; KMH Lawyers, Ottawa.

Solicitors for the respondents: Gowling WLG (Canada), Ottawa.

Solicitors for the intervener the Canadian Federation of Independent Business: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the Canadian Chamber of Commerce: Torys, Toronto.

Procureurs de l'appelante : McCarthy Tétrault, Toronto; KMH Lawyers, Ottawa.

Procureurs des intimées : Gowling WLG (Canada), Ottawa.

Procureurs de l'intervenante la Fédération canadienne de l'entreprise indépendante : Blake, Cassels & Graydon, Toronto.

Procureurs de l'intervenante la Chambre de commerce du Canada : Torys, Toronto.

TAB 9

Alberta Court of Queen's Bench
Clark & Associates Real Estate Ltd. v. Winroc Corp.
Date: 1990-09-21

S.M. Tarrabain, for plaintiffs.

D. Jack, for defendants.

(Calgary No. 8701-14551)

September 21, 1990.

[1] MCCBAIN J.:– This suit is brought by the plaintiffs, claiming for the payment of a commission of $180,000 on the sale of 51 per cent of the voting shares of the Winroc Corporation ("Winroc") and Allroc Building Products Limited ("Allroc") to the Aristos Corporation for $1.6 million. It has been discontinued as against the defendants Main Plumbing & Heating Limited, Murray McCann and Gary Jewell.

[2] Early in 1985, John Clark, (to be distinguished from Douglas Clark the principal of the plaintiff Clark & Associates Real Estate Limited) a real estate salesman, approached Wayne Jack, president of the Winroc Corporation and vice president of Allroc Building Products Ltd., wishing to see if he could offer the company for sale. Wayne Jack agreed that he could attempt to sell it. John Clark, at the time, was associated with Dixon Realty, and he put together some information that might be of interest to a purchaser (Ex. 27). That showed a cash investment of $5,500,000 and real estate holdings of $6,200,000 with financing thereon in the amount of $4,000,000. After he left Dixon Real Estate John Clark prepared a brochure "For Sale Business Opportunity Calgary Alberta." John Clark had a prospect, but nothing came of this. He had known another realtor, Douglas Clark, for some years, and he approached Douglas Clark on the basis that "Somebody might have a prospect." Douglas Clark had in mind a person who might be interested in such an acquisition – "Cochrane Dunlop." He received from John Clark the documents I have mentioned.

[3] Douglas Clark wished to pursue this opportunity, and a meeting was arranged and occurred on 22nd March 1985; in attendance were Wayne Jack, President of Winroc Corporation, Douglas Clark and John Clark. The purpose of it was to introduce Mr. Jack and Douglas Clark.

[4] Respecting that meeting, Mr. John Clark testified, "We discussed parameters," and he remembered that Douglas Clark outlined the information that he would need. He recalled a discussion about the real estate and the company, or just the company, or a

combination of both, to be sold. He said there was no discussion about the financial state of Winroc, but there was a general discussion on commission and "We indicated a norm of 3% on asset value," "Let's see what will evolve and then we will see what the fee will be." He said there was no agreement reached on a fee at that time.

[5] John Clark continued: "Yes, Jack agreed to pay a commission a fee if the company was sold." "Jack discussed selling all of the company and part of the company." He testified Mr. Jack did not say he would pay the fee on 6.2 million. "It was suggested by me a 3% fee we could look for but based on negotiations, and what the offer was composed of." "Yes, I believe he knew he would have to pay a commission if somebody sold his company." "We said 3% would be a fair fee but we'd negotiate a fee?"

[6] John Clark is to receive a "finder's fee" if commission is collected as a result of this action.

[7] Mr. Jack testified: He recalled being approached by John Clark in 1985. "He approached me to see if I would sell the company." Mr. Jack said they would entertain selling but would want to know who the potential purchaser would be.

[8] Respecting the meeting of 22nd March, Jack recalled that Douglas Clark "Wanted to impress us that he could sell the company – we wanted to impress him that it was a good company." He said it was a broad discussion and that the brochure "FOR SALE BUSINESS OPPORTUNITY" was walked through to bring Doug Clark up to speed. He did not recall much discussion of the financial side, and he said there was no discussion about any need to sell the company. He recalled a discussion about commission. "It was identified that the commission would be 3% if you sold that much real estate." "We didn't know that would be sold. It was a cursory look – it would have to be valued."

[9] Jack recalled that Douglas Clark identified a potential buyer "Cochrane and Dunlop." Mr. Jack was aware of who they were. Mr. Jack recalled a necessity to wait for an audited statement "before we proceeded further."

[10] Douglas Clark recalled the meeting being set up by John Clark and that John Clark "knew the Winroc company could be sold" and that "Dixon Realty had tried to sell the company, but they could not conclude a sale."

[11] In recalling the meeting Douglas Clark said that Wayne Jack confirmed the company was for sale and "His first option was to preserve his ownership in the company and get a financial partner," and also that he (Mr. Jack) might purchase other companies

that had gone bankrupt, but that to do so Winroc did not have the finances. The time apparently for such purchases was opportune. "But if he couldn't get a partner, then a sale of the company."

[12] Douglas Clark testified there was a "general discussion on remuneration for Clark and Associates." "The company debt was high so we couldn't do it [the sale] on the shares so we discussed asset value."

[13] On discovery asked "If the deal went together you would sit down and negotiate some type of commission?" – he replied, "Oh, absolutely because you see what typically happens is that typical principals squeeze the broker out at the last minute."

[14] He recollected Mr. Jack coming up with the asset value of 6 to 6.2 million. "We had a ball park figure for commission of $ 180,000.00." He said, "Commission was discussed on the assets of the company." "The rate was 3% on the asset value in the company." "He [Jack] did not object to that number." On discovery of Douglas Clark:

> Q. And the understanding basically was that, was it not, that if you brought in a deal, that a commission would then be determined at that time? That really is how it went over the time, isn't it? A. Yeah, you don't finalize absolutely and even if you do finalize, in most deals of this size, you don't end up right on at the end of the day with your 3 percent. In a decent percentage of the deals, there is some giving and taking and some negotiating on the fees by the end of the day.
>
> Q. I suppose to a large extent it would depend too on what the deal ultimately turned out to be, wouldn't it. A. Right.

[15] The only information we had was Ex. 26 – "For Sale Business Opportunity" and Ex. 27 "The Company and Background." Subsequently, according to Douglas Clark, he identified his potential purchaser as Cochrane Dunlop of Toronto, and he forwarded information to them with Mr. Jack's concurrence. This came to nought, as Mr. Frederick, the major shareholder of Cochrane Dunlop, determined "that building products was not a mix for the hardware business." After that, according to Douglas Clark, for a time no one was interested.

[16] There was no formal agreement on commission according to Douglas Clark, but "at our meeting in March we received a consensus."

[17] Subsequently, Douglas Clark said that in several "pro formas we put 180 to 200 thousand as the expense of the deal" – "We assumed the original consensus would stand up."

[18] As to the lack of a written agreement or commission, Douglas Clark said it was usual to have a written agreement; however, many times he had proceeded on a deal without one.

[19] On cross-examination Mr. Clark said the industry norm was 3 per cent or asset value on a real estate deal. "I could see it would be difficult to value shares so I used real estate for the bench mark." He confirmed that "we discussed a commission of 3% based on the real estate value of the company. We wanted to establish a basis for a fee on the sale of 100% of Winroc. 100% sale of Winroc would give us 3% of the six million real estate assets" (as their fee).

[20] I am satisfied that Mr. Jack at that meeting knew that both of the Clarks were realtors who wished to pursue the sale of his company to earn a commission. Mr. Jack knew that, and admitted a fee would be payable "If they did what I expected them to do?"

[21] In August 1986 at the request of Douglas Clark, John Clark wrote the following letter, respecting commission:

> Janmar Developments Ltd.
> 211 Lake Placid Green SE
> Calgary, AB T2J 5G6
> Ph: (403) 263-1970 278-0793
>
> 1986 02 28
>
> Mr. Doug Clark
> Clark & Associates
>
> Dear Doug
>
> WINROC SALE
>
> Further to our recent telephone conversation regarding the sale of Winroc, I would like to make the following comments regarding the discussions I had with Mr. Wayne Jack of Winroc in reference to the commissions.
>
> Following the first few meetings that you and I had with Mr. Wayne Jack, Mr. Jack asked what our fee would be if a transaction was completed. I indicated to him at that time the fee would be 3 per cent of the gross sale price. Depending on how the "offer" was structured, we would be willing to negotiate a fair fee as to amount and pay-out.
>
> Sometime in November you indicated that an offer was forthcoming. I informed Mr. Jack regarding the pending offer. He raised the issue of commission again which we both agreed would be agreed upon once the offer was reviewed and structure of the terms were known.

> Shortly after this, I sensed the "offer" had died. At no time did Mr. Jack ever communicate to me if the offer was still alive, or was it dead, even though in the early meetings everything seemed important to him that I was his contact and information should go through me.
>
> Trusting the above outlines what happened re the Winroc sale.
>
> Yours truly,
>
> "John A.K. Clark"

I am satisfied, on the evidence pertaining to this meeting, that an agreement was reached that Clark & Associates would be retained to attempt to sell the Winroc Corporation, and associated companies, and that a commission would be payable if Clark & Associates brought about a sale. While a commission of 3 per cent was discussed, based on the real estate value, it is clear and I find that no agreement was reached as to the amount of commission that may be payable. The parties were content to defer that and see what form a sale may take. The payment of commission was to be dependent upon a sale taking place. The parties understood that when and if a sale occurred, the commission would then be negotiated when sale price and the form of the sale was known. There was no agreement that the plaintiffs would be paid anything for any other service rendered in attempting to sell the companies. The only remuneration contemplated depended on a sale.

[22] In the period 22nd March 1985 to November 1985 various events occurred, and services were rendered by Douglas Clark and his associate in Clark & Associates Real Estate Ltd., Wayne Goebel.

[23] In early July and into July Douglas Clark pursued the prospect Dunlop Cochrane. In this regard a meeting was held on 4th July with Gary Houssin, John Clark, Douglas Clark and Wayne Jack, respecting Cochrane Dunlop. Nothing came of this prospect.

[24] Wayne Goebel joined Clark & Associates in 1980. He is a chartered accountant, and a licensed realtor under that company. He is also a certified management accountant. In "May June" of 1985 he learned from Douglas Clark that "Winroc was for Sale," and told him that one Murray McCann was a potential purchaser. When he learned that the Cochrane Dunlop prospect had failed, he met with Murray McCann to see if he was interested in the company. He says he met with him a number of times. He obtained Clark's approval "for McCann to look at it," and he got McCann to approve the use of his

name and obtained bank references, and he gave information on McCann to Douglas Clark.

[25] On 4th July Jack met with John Clark and Douglas Clark. In July Mr. McCann introduced Goebel to Craig Jewell, the comptroller of Main Plumbing and Heating Ltd., and Mr. McCann informed Goebel that Jewell would be looking after the details, and, according to Mr. McCann, Jewell was to do the "due diligence" and "to confirm the financial information to see if the price was fair."

[26] On 23rd July Douglas Clark had a discussion with Gary Houssin, vice president of finance at Winroc and Allroc, who had been instructed by Mr. Jack to take care of the financial details and information required in pursuing a sale. On 25th July Mr. Jack forwarded to Douglas Clark a summary of management personnel and a summary of ownership, and financial statements and information. Wayne Goebel sent a letter to McCann and Jewell on 29th July 1985, "We believe this company is a prime candidate [for acquisition]," and thereafter outlined information with respect to "The Proposed Sale of the Winroc Companies."

[27] In July or early August Wayne Goebel prepared a "Calculation of Value" (Ex. 29) showing a value of $3,890,000 for 100 per cent. He submitted this to the "McCann Group." Mr. Goebel also prepared the first two pages of Ex. 29 with reference to ownership profits, management, etc., and turned it over at a meeting. (McCann testified that he could have received this material with the letter of 29th July.)

[28] As a result of preliminary information, McCann was interested. He testified that Goebel had indicated a price of $2,200,000 for 100 per cent of the company "That piqued our interest." A meeting was arranged for 13th August, to introduce Mr. Jack and Mr. McCann, and that meeting took place in the afternoon at the Winroc premises. In attendance were Mr. Jack, Mr. McCann, Mr. Goebel, Douglas Clark, Gary Houssin and Mr. Jewell. A tour of the premises was made. Goebel testified that the Armstrong line of products was discussed. Mr. McCann looked on this meeting as more of a social occasion. It was on the 13th that Mr. Jack met Mr. Goebel for the first time.

[29] Wayne Goebel testified that he also met with Mr. Jack and Mr. Houssin on the morning of 13th August at the Winroc offices, as Mr. Jack wished to receive, prior to the planned afternoon meeting, background information on Murray McCann. At that meeting, according to Goebel, a price of $3 million was discussed, and he said a commission of 200,000 was discussed and legal fees in the amount of $50,000. Wayne Jack recalled

Douglas Clark coming to his office to "prep him for the meeting." He testified that commission was not discussed. I accept that testimony. I am of the view that Mr. Goebel is in error. I do not believe and find that commission was not discussed by Mr. Goebel with Mr. Jack on 13th August.

[30] On 14th August Houssin couriered "A second set of our latest audited financial statements with operating analysis …"

[31] John Clark informed Wayne Jack that Mr. McCann was a potential purchaser, and that he should proceed with Douglas Clark, and that he, John Clark, would no longer be involved. Thereafter he was not.

[32] A meeting had been set up for 28th August, and at that meeting Houssin, Jewell, Goebel, and Heather McCann, were in attendance. Goebel says the discussion was about pricing, accounting, financial statements. Houssin testified, "We talked of administration."

[33] In the period from the end of August to 15th September Goebel testified that he talked to Jewell, who wanted more information and that he would contact Douglas Clark to obtain it from Winroc.

[34] Goebel testified that Clark met with Houssin on 16th September. Generally I note it was Mr. Goebel who acted as the conduit for requests for Jewell, and, generally, Douglas Clark would contact Houssin in order to satisfy requests and inquiries for financial information on the Winroc companies.

[35] Exhibits 13 and 14 are "Summary of Purchase and Sale Concepts – September 26, 1985." Exhibit 14 shows four pages in the handwriting of Gary Houssin with additional writing by the plaintiffs. Exhibit 15 is similar with a page added "Pre-Tax Income." Exhibit 19 was prepared by Houssin. He said it was an "overview of the value of the company," and it was "to give to Goebel and Clark." He believed this was in October. It is a detailed exposition of the components of a transaction, having a total share transaction price of $5,159,000, with the components:

Net Equity Value	$3,336,000
Goodwill	$1,798,000

[36] On or about 22nd October there was a meeting, and Goebel, Jewell, Douglas Clark and Houssin were in attendance. Houssin testified that Ex. 19 could have been given at this meeting. Goebel remembered that Ex. 19 had been received, and he testified that

Jewell was upset that the price had changed (his diary shows "Went to Winroc price change to $5,159,000. Jewell not happy"), and Jewell was going to tell Mr. McCann that there would be no further offer. "Jewell said it was a nice meeting and he left." Mr. McCann testified that "October/November" Jewell told him that there had been a change of prices. Also respecting this meeting Goebel says that Jewell came in with an offer but he did not see it. Mr. McCann testified that "no offer was made in 1985, and it was not Jewell's role to do an offer." Goebel said, "On October 22nd the deal collapsed" – but – "I didn't take 'No'. McCann would make a lot of money."

[37] McCann testified that he was not interested at a price of $5,159,000 and was not interested at a price of $3,250,000. "We didn't have 3.25 million to put into it."

[38] On the evening of the 22nd Goebel testified that he was certain that he had phoned Mr. McCann at his residence and "He was mad. The price went from $3,200,000.00 to $5,000,000.00 plus."

[39] Goebel testified he set up a meeting for 31st October. Mr. McCann on the stand stated that he was in San Diego on the date of call alleged by Goebel and that he did not receive a telephone call from Goebel. Goebel testified to meeting with Mr. McCann on 31st October and explained to him that it was still a good acquisition. On that day Mr. McCann was in Los Angeles. He testified that such a meeting did not take place. I am satisfied that neither this telephone call nor the alleged meeting took place on the dates testified to by Goebel. Goebel did say, "If he was out of town I may be wrong – I did meet with him I got the deal back on track."

[40] After 31st October Goebel said he received further information on Winroc. Mr. McCann testified that after the end of October "If I spoke to Goebel part of the conversation would have been Winroc," and he says that on 7th November he may have spoken to Goebel.

[41] Goebel testified that on 13th November he told Jewell further statements were coming.

[42] In mid-November Wayne Jack testified that he had a meeting with Douglas Clark. He characterized it as a "Wind-Down Meeting." "They had not been able to do a deal," and "We had co-operated – we parted as friends." Jack said, "There was no discussion about dealing with McCann in the future and there was no discussion about commission." "No he didn't say if a deal was done there'd be a commission." After this

meeting Mr. Jack said he next heard from Douglas Clark when he received a letter dated 31st July 1986 offering to settle the commission for a $50,000 payment. Mr. Jack recorded many meetings in his diary. This one is not recorded; however, he did explain, "Many meetings are not recorded there."

[43] Counsel for the Winroc, in her written submission, submits that in November 1985 the relationship came to an end. She argues:

> They had tried and been unsuccessful in bringing in an offer. They could not sell the company and they will do no further work for the Defendant. – He did not address the issue of his compensation – in the event that a deal with McCann should be struck at some later date.

[44] In this time context it is interesting to note Ex. 20, a letter dated 12th November 1985 on the letterhead of the Winroc Corporation, to Douglas Clark of Clark & Associates enclosing copies of financial statements as at 30th September 1985. That letter ends with "Please call us with your question and let us know if you require anything further."

[45] On 13th November 1985 Clark forwarded the statements to Jewell. His letter ends, "I am hopeful we can now proceed." Mr. McCann testified that in the period July 1985 to 30th November 1985 Jewell was receiving information and talking to him from time to time. On 19th August 1986 when Mr. Jack rejected the claim of Clark & Associates to a commission of $50,000, he makes no mention of any meeting with Clark bringing the relationship to an end.

[46] I am satisfied that as of mid-November, Winroc was still pursuing a sale through the agency of Clark & Associates.

[47] I am unable on the testimony of Mr. Jack to conclude that what transpired at this meeting amounted to a termination of the agency and agreement. Even on the testimony of Mr. Jack, that agreement was not abandoned or terminated. The initial agreement remained that a commission would be payable on a completed sale.

[48] Jack testified to meeting with Mr. McCann on 19th December 1985. He said that Mr. McCann was sorry there was no deal, and "Could we put it back on the track," and he believed that he met with him also in late January 1986. Mr. McCann's recollection was meeting with Mr. Jack at least once in the period 19th December to 6th February.

[49] According to Mr. Jack the conversation in January was about the possibility of a deal. "We arrived at a basis to talk. The basis we achieved was we could do a 50/50 deal." That, according to Mr. Jack, got the parties to "the piece of paper in February."

[50] Exhibit 39 reads:

PRESIDENT

MAIN PLUMBING & HEATING SUPPLIES WESTERN LTD.

February 6, 1986

Mr. Wayne Jack
President
The Winroc Corporation
5018 - 80 Avenue S.E.
Calgary, Alberta
T2C 2X3

Dear Wayne:

This will confirm our conversation of today wherein indicated an interest in purchasing and you of selling 50% of Winroc and its associated Companies. It is my understanding that we agreed fair value for the companies to be shareholder's equity at April 30, 1986 plus 50% of excess of fixed asset value over book value. To this is added 100% of after tax earnings for the year ended April 30, 1987 after allowing us a return of 15% on our investment.

It was hoped that closing would be May 1, 1986.

If this is substantially as you understood our agreement to be, please sign a copy of this letter.

Yours very truly,

"Murray"

J. Murray McCann

Agreed this day of February 1986 in the City of Calgary in the Province of Alberta.

_____
Wayne Jack, President
The Winroc Corporation

JMM/oe

1415 - 28th Street N.E., Calgary, Alberta T2A 2P6
Telephone (403) 273-2200

Mr. Jack replied:

The Winroc Corporation
5018 - 80th Avenue S.E.
Calgary, Alberta T2C 2X3

Phone: (403) 236-5383

February 18, 1986

Mr. J. Murray McCann

President

Main Plumbing & Heating Supplies (Western) Ltd.

1415-28th Street N.E.

Calgary, Alberta

T2A 2P6

Dear Murray:

I basically agree with your letter of February 6, 1986. However, in light of its briefness, and in order to provide a little more clarity at this time, I am responding with this letter.

Firstly, I and my major partner are in agreement regarding your acquisition of 50% of Winroc and its affiliated companies. These companies are The Winroc Corporation, Allroc Building Products Limited and Winroc Holdings Ltd. With respect to the latter company, its undeveloped land holding and its research and development activities will both be removed prior to our closing date with you.

There are a variety of ways for you to acquire a 50% share position in the companies. It is not the intent of this letter to provide any absolute position on any particular way. We would, however, like to state a preference to a position, whereby you would acquire 25% of the shares presently outstanding, and then purchase the balance of the shares from treasury.

With respect to the fair value of the companies, it is our position that such value is equal to the Shareholders' Equity as at April 30, 1986, adjusted to reflect a reasonable value for the assets. Your letter referred only to an adjustment for fixed assets. As you will recall, some of our prior discussions referred to adjustments for other times. I am confident that our respective accountants can agree on what is fair in this regard.

The pre-tax earnings of the first year will be distributed in the following manner: firstly, you will receive an amount equivalent to a 15% rate of interest on your investment; the balance of the pre-tax earnings will be paid out to the other shareholders. The pay-outs will occur upon the Directors' approval of the audited financial statements for that year.

It is agreed that the effective date of your purchase would be May 1, 1986.

I hope that the above points are in substantial accord with your thoughts. If so, please sign a copy of this letter to indicate that we have an agreement in principle.

Yours very truly,

The Winroc Corporation

"W.A. Jack"

President

WAJ/cm

Agreed this 17 day of February, 1986 in the City of Calgary, in the Province of Alberta.

"J. Murray McCann"

J. Murray McCann, President

Main Plumbing & Heating Supplies (Western) Ltd.

[51] January and February 1986 Goebel said he was in contact with Jewell who told him things were progressing.

[52] A further letter dated 24th February 1986 prepared by a lawyer was directed to Murray McCann, this time in the form of an offer; it was signed by Mr. Jack as president of the Winroc Corporation, and was agreed to and accepted by Mr. McCann as president of Main Plumbing & Heating Supplies (Western) Ltd. on the same date. By a formal agreement made as of 16th January 1986 between one Polet and Neptune Management Ltd., of the first part, and Wayne Jack and WA-Jack Management Ltd. of the second part, and the Aristos Corporation of the third part, and Allroc Building Products Ltd. of the fourth part, the transaction was set out. There was a "closing" 8th August 1986.

[53] The nature of the transaction was that of a share purchase with all of the shares being issued from treasury. The Aristos Corporation was the nominee of Murray McCann and the price was $1,600,000.

[54] After the mid-November meeting that Jack had with Douglas Clark, Mr. Jack testified that he heard nothing from him until he received a letter dated 31st July 1986. That letter reads:

Clark & Associates
Real Estate Ltd.
501,315 - 10th Avenue S.E.
Calgary, Alberta
T2G OW2
Telephone: (403) 266-4784 or 949-3516

July 31, 1986

The Winroc Corporation
5018-80 Avenue S.E.
CALGARY, Alberta T2C 2X3

ATTENTION: W.A. (Wayne) Jack

RE: Commission agreement for the sale of fifty percent of the outstanding common and preferred shares of Winroc Group of Companies to Main Plumbing & Heating Ltd. and or companies controlled by Mr. Murray McCann.

Dear Sir:

Regarding the conversation with Mr. Murray McCann and Wayne Goebel on July 30, 1986, we stated that our reduced fee for bringing the two parties together for sales summary analysis; reviewing and critic [sic] of alternatives, and arranging many meetings in Calgary between the principals and seperately [sic] between Mr. Craig Jewell and Gary Houssin over many months is $50,000.00 payable upon the transfer of shares.

Referring to our conversations of July 31, 1986 we believe our reduced fee of $50,000.00 for obtaining a qualified financial partner for your companies is more than justified. We feel strongly that our involvement was substantially more than a simple introduction.

We are prepared to settle for $50,000.00 in liew [sic] of the verbal agreement made between Mr. Wayne Jack, Mr. John Clark and the writer on or about January 30, 1985.

We look forward to your early response.

Regards,

"W.J.D. Clark"

cc: Mr. Murray McCann

[55] Mr. Jack testified he thought the letter was a joke, and he responded:

The WINROC Corporation
5018 - 80th Avenue S.E.
Calgary, Alberta T2C 2X3
Phone: (403) 236-5383

August 19, 1986

Clark & Associates

Real Estate Ltd. WITHOUT PREJUDICE
#501 - 315 - 10th Avenue S.E.
Calgary, Alberta
T2G OW2

Attention: Mr. W.J.D. Clark

Dear Mr. Clark:

I am in receipt of your letter dated July 31, 1986 and wish to advise you that I have discussed the relevant matter with the appropriate associates concerned.

A unanimous decision was reached, that your request for a $50,000.00 payment of settlement was completely unfounded, furthermore, we request the return of all of our documents in your possession immediately, and we will disregard the implications of your Edmonton based "partner's" lack of confidentiality exhibited in this matter.

Yours truly,

THE WINROC CORPORATION

"W.A. Jack"
President

[56] Mid-November 1985 to August 1986 Mr. Jack said he had no discussions with Goebel.

[57] Having regard to what transpired, are the agents in this case entitled to a commission?

[58] Decided cases indicate that an agent will be entitled to a commission if he is the effective cause of the ultimate sale: *Nicholson v. De Buse,* 23 Alta. L.R. 158, [1927] 3 W.W.R. 799, [1928] 1 D.L.R. 324 (C.A.), at pp. 799, 800 and 805, respectively:

> Of the great number of cases on real estate agency to be found in the digests, e.g., *C.E.D.,* tit. "Agency," and in the text books, e.g., *Ogden (Canadian)* and *Walker (American)* I think it should be said very little *law* is to be found in any of them …
>
> Whether in any particular case the agent found the person to whom the owner eventually sold is a pure question of fact depending on the particular facts and circumstances of each case, and therefore decisions in other cases on other facts and circumstances are of little or no value. The use of such words as *"causa causans," "efficient cause,"* "effective cause," etc., do not in my opinion help to a solution but rather the contrary …
>
> The question in this case is not whether or not the plaintiff performed some service whether of value or not in endeavouring to effect a sale but whether he was, as some cases put it, "the *causa causans"* and others "the efficient cause" or "an efficient cause."

[59] The case of *Campbell & Haliburton Ltd. v. Turley* (1951), 2 W.W.R. (N.S.) 257 (Alta. T.D.). At p. 266, the court cites with approval from *Wycott v. Campbell* (1871), 31 U.C.Q.B. 584:

> "The general rule is that a person should be paid for his work. It is also as plain a rule that a person must perform his contract to enable him to get his payment."

At p. 267, the court goes on to state:

> … however complicated may be the facts involved, whatever preliminary problems must first be disposed of, the right of the agent to recover his commission must in the end depend upon whether he has *in fact* performed the services for which he was employed, or whether he has *in fact* failed to perform them.

[60] An agent, like anyone else, must do his job before he is entitled to be paid. The question, then, is what is the agent's job? Reference is made in *Campbell & Haliburton,* at p. 266, to *Locators v. Clough* (1908), 17 Man. R. 659, 8 W.L.R. 590 (C.A.):

> "An agent suing for his commission, in order to succeed, must show that he has fulfilled the contract on which his claim is based."

[61] The Court of Queen's Bench of this province considered the circumstances under which a real estate agent commission would be earned in the case of *Doherty Bros. Realty Ltd. v. Ruffo* (1980), 24 A.R. 326. Kerans J. says at p. 333:

> It was argued for the defendant that, because of the second agent obtained the binding offer where the first did not, the first is not the effective cause of the sale and is not entitled to a fee. In my respectful view, if the introducing agent arouses the interest of the purchaser he has earned a fee.

[62] It is further submitted that where a vendor and a purchaser are introduced by the agent, even if the fact that the sale is effected by the parties themselves after arranging the necessary financing, the agent is entitled to a commission: *Harvest Hldg. Ltd. v. Bohun* (1984), 34 Sask. R. 127 (Q.B.).

[63] Further, in the *United Real Estate Inc. v. Headrick* (1988), 69 Sask. R. 310 (C.A.), where an agent was making an offer on behalf of an undisclosed principal and subsequently the undisclosed principal made direct contact with the vendor to purchase the property, it was held that the agent was entitled to the commission since he was the effective cause of the sale.

[64] In the case of *Fenske v. Ginter Estate* (1987), 79 A.R. 351 (Q.B.), the agent in that case introduced the purchaser to the vendor, the conditional purchaser's agreement expired and three days later the property was bought by a friend of the original purchaser. Prior to the friend's purchase, the original purchaser obtained an option to buy shares in the friend's business and it was held that the agent was entitled to a commission.

[65] It is submitted that an agent is entitled to a commission when it is shown that that agent is the effective cause of sale. To bring a purchaser, or to produce or introduce or find a purchaser, has no real difference in meaning insofar as the liability of the seller to pay commission is concerned; if the agent actually brings the buyer and seller together he is the effective cause of the sale: see *Circle Realty Ltd. v. Long* (1960), 25 D.L.R. (2d) 184 (B.C.S.C).

[66] Mr. McCann and Mr. Jack were unknown personally to each other prior to their introduction arranged by the plaintiffs. Prior to that meeting the plaintiffs had made Mr. McCann aware of the possibility of a purchase and Mr. Jack aware of the possibility of a sale to Mr. McCann. McCann testified that he was "introduced to the company by Goebel" and that Goebel "aroused my interest."

[67] The plaintiffs facilitated the exchange of information between the parties. Goebel did some analyses. The agreement reached on 22nd March was that a commission would be payable if a sale was brought about by Clark & Associates, whatever the form of the sale.

[68] In bringing the parties together, and facilitating the early stages of negotiations, I am satisfied that the plaintiffs were the effective cause of the sale that occurred, notwithstanding that such sale took place after a lapse of time, and when the agents were not active, and in a form and at a price not anticipated at the outset.

[69] The statement of defence was amended at trial to add:

> Further or in the alternative if the Plaintiff did provide services to the Defendants as alleged, which is not admitted but is expressly denied then the Plaintiffs owed the Defendants a fiduciary duty and failed to provide services with such due diligence and to the standard of care required of an agent in dealing with his principal.

And further:

> The parties appear to have proceeded at cross purposes based on misinformation being amassed by Clark and Goebel. Mr. McCann was considering
>
> …

[70] Were the plaintiffs inept or negligent in the services performed by them? Did they fail in any duty owed?

[71] It is important to note at the outset that the negotiations were complicated, involving the analyses of financial statements of several companies. It is of equal importance to note that the principal negotiators were able and experienced. Mr. Jack is an experienced and successful businessman. He was assisted by Mr. Houssin, a chartered accountant. Mr. McCann is an experienced and successful businessman, and he was assisted by Mr. Jewell, also a chartered accountant.

[72] Prior to meeting Mr. Jack for the first time Mr. McCann testified that Goebel had told him that the Winroc Corporation was available for sale, and that he had given him some financial information and a summary. As a result he said that he was interested, and so a meeting was arranged for him to meet Jack (the meeting or "tour" on 13th August).

[73] On 29th July 1985 Goebel provided to Mr. McCann and Jewell a letter on "The Proposed Sale of the Winroc Group of Companies." It states no price, it does give, inter alia, "a record of profitability."

[74] In July or early August Goebel prepared Ex. 23, "Calculation of Value," showing a value or price of $3,890,000, based on average after tax earnings. That calculation was included in Ex. 29, as well as the first two pages also prepared by Mr. Goebel, respecting ownership receipt of profits, etc. The remainder of the exhibit is financial information and information on shareholding which was sent to Clark & Associates on 25th July by Wayne Jack of Winroc.

[75] Mr. Goebel also prepared Ex. 24, "5 year Actual Average and 1986 Budget," which produced prices of $3,220,000 and $3,485,000. He said he would not have shown that to Houssin.

[76] This information of price in Ex. 29 was in the hands of McCann or Jewell before the meeting of 13th August.

[77] Mr. McCann testified that "Goebel represented that 100% of Winroc and Allroc could be obtained for something in the order of 2.2 million."

[78] I am not sure where or when such a representation was made. It does not appear in writing. In any event McCann was aware of the calculation of value of Goebel, of $3,890,000, before the meeting with Jack. He still wished to meet Jack, he still went on the plant tour on 13th August. He did not lose interest.

[79] I do note, of course, that this price is for 100 per cent acquisition and that price bears no reasonable proportionality to the price at which the sale for half of the shares was concluded.

[80] The breakdown in negotiations came at the meeting of 22nd October and as a result of the price of $5,159,000 as a total share transaction price.

[81] McCann testified that he was not interested at a price of $5,159,000 and he was not interested at a price of $3,250,000. He gave a cogent reason: "We did not have 3.25 million to put in." These prices were the work of Houssin of Winroc, and not the work of Goebel.

[82] There are other areas to be considered with respect to the standard of the work done by the plaintiffs.

[83] Mr. Douglas Clark's appreciation and analyses of the real estate component of value could have been more thorough. However, McCann was not interested in acquiring the real estate. Mr. Goebel's evidence respecting cheques issued in excess of deposits did

not stand up when compared to the evidence of Mr. Houssin pertaining to the cheques and that the entries do not show a deficit position.

[84] I am not satisfied on the evidence that there was any significant failure by the plaintiffs to provide competent or reasonable services to the defendants, so as to disentitle them to a commission, or so as to justify a reduction in the amount of commission otherwise earned.

[85] The plaintiffs seek judgment on a "quantum meruit" basis. In my view that equitable doctrine is applicable.

[86] Bowstead on Agency, 14th ed. (1976), p. 183 sets out the principle:

> A claim for a contractual *quantum meruit* must be based on an implied term that a reasonable sum is payable in the circumstances. Where the contract expressly provides for remuneration on the happening of an event, any such implication would be contrary to this express term and so could not be made.

[87] The doctrine of quantum meruit is explained by Fridman and McLeod in their textbook Restitution (1982), at pp. 416 and 417 as follows:

> It is clear that reference is made to the doctrine of *quantum meruit* in two distinct settings. In a contractual setting, remuneration is said to be paid on a *quantum meruit* basis when, although a valid contract is found to exist in fact and law, there is no clause spelling out in express terms the consideration for the contract. In such circumstances, the courts award reasonable remuneration to the person who has rendered the services. In a quasi contractual setting, an action for quantum meruit is based, in general, upon the rendering of services by one person to another who has requested such services be rendered or freely accepted them with the knowledge that they are not rendered gratuitously. The person who renders services to another who has neither requested them nor freely accepted them in circumstances where he knew or ought to have known that they were not to be rendered gratuitously has in general no right to recover remuneration for the work done or recompense for benefits conferred. Whereas the payment of money invariably confers a benefit on another, the rendering of services may not confer any necessary benefit on an individual. A person should only be called upon to pay for benefits, in general, where he has requested or freely accepted such services with the opportunity to reject. It is not sufficient that the plaintiffs have rendered the services under a mistake. He must go further and show that the services were requested or freely accepted by the defendant.
>
> … in the absence of an express request, a defendant will be held liable if he freely accepted the plaintiff's services, in the sense that he accepted them or retained them after having had a reasonable opportunity to reject them and with the actual or presumed knowledge that they were meant to be paid for and not rendered gratuitously. A case which involves either a request or free acceptance today may be taken to represent a traditional restitutionary *quantum meruit* situation.

I must therefore determine what is reasonable compensation payable to the plaintiffs for the services rendered. To do so I must examine evidence which may assist me in arriving at the amount of such remuneration.

[88] At the meeting of 22nd March 1985 there was a discussion about a commission of 3 per cent. Indeed, that seems to be the only specific fee ever mentioned during the course of that meeting. That commission rate surfaced on the basis of the value of the real estate component of Winroc; however, it was also indicated that may be applicable to a share transaction.

[89] Douglas Clark testified, "We had a ball park figure for commission of $180,000.00." Mr. Clark testified that Mr. Jack did not object to that number, and that it was Mr. Jack who came up with the figures 6 million to 6.2 million. Douglas Clark further testified that on several pro-formas "we put 180 thousand to 200 thousand," and he said that he used real estate as a bench mark because "I could see it would be difficult to value shares." John Clark testified that at this meeting "We indicated a norm of 3% on asset value – Let's see what evolved and then see what the fee would be." I review such evidence mindful that I have found there was no agreement on the amount of commission payable. I do so only because here experienced agents are speaking of a possible commission rate, albeit subject to a negotiation of the rate when a sale is concluded.

[90] On 31st July 1986, by his letter already copied herein, Douglas Clark asked for $50,000 from the Winroc Corporation and was prepared to settle in that amount. When questioned on his letter and the "reduced fee of $50,000.00," Douglas Clark explained that 1986 "was a tough year," and that "the cash flow was tight." He added "that there were bills to be paid."

[91] Mr. Goebel's example of a commission earned on the real estate deal, Centre Development Ltd., is not of course of assistance in considering commission payable on this share transaction. He also gave an example of the sale of Cross Roads Industries Ltd. at $1,750,000 cash where the commission was 3 per cent on that amount and 3 per cent in excess profits (payable over five years).

[92] George Dawson qualified as an expert. His experience was mostly related to real estate transactions. Dawson testified that it was generally 3 per cent commission, but on smaller "deals" it was 6 per cent on the first $100,000 and 3 per cent "on the balance." He also gave evidence respecting a referral fee which I take to refer to a situation where one realtor has a potential purchaser and refers that person to another realtor who

proceeds to a sale with that client. When a "deal" is consummated by the second realtor, the referring realtor is entitled to 10 per cent to 20 per cent of the gross commission earned. Dawson called it an introduction fee. His evidence on an introduction fee is of no assistance to me. The transaction that took place was the sale of shares. The circumstances do not bring into play any consideration of a referral or introduction fee as the plaintiffs, not another agent, located the prospect with whom a sale was concluded. Mr. Dawson also testified that frequently an agent does not write up the offer.

[93] Timothy Whyte was qualified as an expert in business sales. He is a financial analyst. Whyte explained the difference between a real estate broker and a business broker – a business broker and financial analyst provides advice on the sale of the business, and he explained that a financial analyst is involved in the larger transactions involving the sale of a business "usually one half million or more." He considered that there was a higher duty in such transactions.

[94] He referred to various steps in the divestiture process that he would follow when retained to sell a business:

> DIIVESTITURE PROCESS
> – PREPARING COMPANY FOR SALE
> – PRICING ADVICE
> – PREPARE 'TEASER' DOCUMENT AND CORPORATE PROFILE
> – IDENTIFY POSSIBLE BUYERS
> – COMPETITORS
> – VERTICAL INTEGRATION
> – INDUSTRY PARTICIPANTS
> – DEVELOP MARKETING STRATEGY
> – IDENTIFY AND PREQUALIFY BUYERS
> – DISTRIBUTE 'TEASER' DOCUMENT
> – OBTAIN CONFIDENTIALITY AGREEMENT
> – DISTRIBUTE 'CORPORATE PROFILE'
> – DEVELOP NEGOTIATING STRATEGY
> – AUCTION
> – CONTROLLED AUCTIONS
> – DISCREET NEGOTIATIONS
> – ASSIST IN NEGOTIATIONS
> – ASSIST IN CLOSING OF TRANSACTIONS

[95] Also received in evidence was his expert statement:

EXPERT STATEMENT OF TIMOTHY G. WHYTE

I, TIMOTHY G. WHYTE, of the City of Calgary, in the Province of Alberta, am a Director of the Corporate Finance/Valuations practice area of Peat Marwick Thorne, Chartered Accountants.

It is my understanding that I will be called as a witness at the trial of the above-noted action for the purpose of providing my opinion as an expert in the practice of business valuations, financial analysis, financial market research, purchaser research arising on the sale of business interests and the related fees and/or commissions earned in relation to providing such advice.

In this regard I comment:

– that few professionals would proceed in an engagement without a clear written engagement letter being agreed upon and signed by a client before undertaking such an engagement.

– that a full comprehensive service on a divestiture or sale of a business provided by a reasonable, prudent and professional advisor should include an in-depth financial and operational analysis of the subject company and the industry it operates within, and that the client should be provided with a comprehensive purchaser research and all copies of material to be supplied to prospective purchasers including a suitable confidentiality agreement, investment overview or term sheet and a comprehensive corporate profile; that the fee structure for an assignment involving the sale or divestiture of a business varies. Some advisors are prepared to accept a fee that is wholly contingent on the sale of the business being completed. Other advisors set fees based on not only the successful completion of the sale but also the amount of sale proceeds. The 'Lehman' formula, or a variation thereof, is sometimes quoted as benchmark for fee calculations of this nature. This formula determines fees on a successful transaction based on the final sale price as follows:

Portion of Sale Price	Fees as a Percentage of the Portion of Sale Price
To $1 million	5%
$1-2 million	4%
$2-3 million	3%
$3-4 million	2%
$4 million and up	1%

For example in a sale transaction of $1.6 million, fees as calculated under the 'Lehman' formula would be $74,000.

An alternative method of determining fees on a sale or divestiture transaction relates to hours incurred at agreed upon professional rates. The amount of fee in this case varies with the extent of time expended in order to render the professional services and the level or quality of the professional services provided.

– that I have reviewed the files and working papers provided to me by the Defendants. Based on my review of the evidence of work performed by the Plaintiffs in terms of quality and quantity, the nature of the services provided by the Plaintiffs was principally that of referring to the Defendants the name of and introduction to a potential purchaser who ultimately completed the transaction. In sale transactions in which I have been involved, a fee for the referral of a qualified purchaser is limited to 10% of the final or normal fee, as calculated on a contingent basis, or on a commission paid for the ultimate sale of that vendor. For example, in the fee example

> illustrated above of $74,000, a referral fee of $7,400 would be appropriate if agreed to in advance …

[96] Whyte further testified that "due diligence is verification of the information of the Purchaser's business."

[97] In his opinion the financial analyst was responsible to the vendor for thorough work, and an analyst is paid a fixed fee, or a success fee, if the transaction is completed. He added that in his experience there was rarely a fee for partial success. "If the fee is a percentage it is a percentage of the assets sold or the price paid per share."

[98] He said that the "Lehman Formula" was often used as a guide, and that to earn a full commission under this formula, it was necessary to take all of the steps set out in the divestiture process.

[99] In his opinion, if an agent introduced a purchaser, qualified that purchaser, passed on financial and other information to the purchaser and provided a cursory analysis of the vendor's business, attended meetings, made telephone calls, and did nothing else, the agent will only be entitled the equivalent of a referral fee. That fee, in his opinion, will be 10 per cent of the gross fee on the commission earned.

[100] Given the same hypothetical [situation] with the addition of an incorrect analysis, in his opinion the agent risked the opportunity of earning any fee.

[101] I feel I must at this juncture comment on this witness' response to the first hypothetical [situation]. It appears to me that the broker in this scenario has gone well beyond a simple referral, and would on the basis of work done have earned more than a bare referral fee.

[102] The witness did not give an example of any actual transactions paralleling the hypothetical situation posed to him where such a referral fee was paid.

[103] He felt "A professional in divestiture should have an engagement letter. Sometimes it doesn't." Often Mr. Whyte was retained on the basis of an hourly fee and a fee for success on the concluded transaction. While it was rare for Mr. Whyte to be engaged on a pure commission basis, he had so acted. He gave rates of 10 per cent on the first 100,000 and 6 per cent on the second 100,000.

[104] On consideration of all this evidence, and on consideration of the fact that the plaintiff Douglas Clark & Associates qualified the purchaser, engaged in meetings, did analyses of the financial information, acted as a conduit for the flow of information back

and forth and encouraged Mr. McCann to pursue the acquisition of the business, and giving predominant weight to the fact that the vendor eventually completed the sale transaction with the purchaser introduced to the vendor by the plaintiff, and having regard to the scale of Lehman Formula 5 per cent of the first million and 4 per cent for the excess up to 2 million (1.6 million thus giving a fee of $74,000) and considering that the agents, did not do all of that which might be reasonably expected of a business broker I find a commission in the rate of 3 per cent results in reasonable compensation that is to say a commission of $48,000 is reasonable compensation for the services performed.

[105] Section 2(3)(*a*) of the Judgment Interest Act, S.A. 1984, c.J-0.5, provides that the court may:

> (3) If it considers it just to do so having regard to … the circumstances of the case or the conduct of the action …
>
> (*a*) refuse to award interest under this Part.

[106] Counsel for the defendants submits that:

> In the event that it is found that the Plaintiffs are entitled to a commission, it is respectfully submitted that this Honourable Court ought to exercise its discretion to preclude any claim for interest which might otherwise lie under *The Judgment Interest Act,* S.A. 1984, c. J-0.5, as amended. Reference is made to section (3)(a) of the *Judgment Interest Act.* The conduct of the Plaintiffs in this litigation is such that they ought to be precluded from receiving interest.
>
> Firstly, Doug Clark, the officer and director of the corporate Plaintiff, would appear to have omitted to bring key documents (Exhibits 50 and 51) to the attention of the Defendants, despite the service of a Notice to Produce upon the Plaintiff's counsel. He failed to provide the full explanation of the circumstances surrounding the composition of Exhibit 52. It is difficult to believe, given the inter-relationship between these three documents that Mr. Clark forgot about the first two letters. When he produced and explained the third. [sic] Even if he had lost these documents the form of the Affidavit on Production and the Rules of Court, Rule 188, still provide for disclosure of same. Had the Defendants and their counsel not spoken to John Clark shortly before trial, these documents might never have surfaced. Secondly, certain evidence of Wayne Goebel would appear to be without substantiation and of questionable authorship and purpose. But for the evidence of Mr. McCann and Exhibit 61, Mr. Goebel was able to maintain a course of evidence from Examinations for Discovery to trial which was at best misleading, and it is respectfully submitted, untrue and self serving. This was evidence on key points, and further evidence which portrayed Mr. Goebel as a clear, concise, knowledgeable and well organized professional, and left the misperception that Mr. Goebel had involvement in key discussions with both Vendor and Purchaser which kept this transaction on track. In fact, they did not occur at all. Mr. Goebel's evidence prolonged and confused the issues between the parties and the Plaintiffs ought not be able to claim interest.

[107] Exhibit 50 reads:

> Janmar Developments Ltd.

211 Lake Placid Green SE

Calgary, AB T2J 5G6 Ph. (403) 278-0793

1986 08 28

Mr. Doug Clark

Clark & Associates

Dear Doug:

WINROC SALE

Further to our recent telephone conversation regarding the sale of Winroc, I would like to make the following comments regarding the discussions I had with Mr. Wayne Jack of Winroc in reference to the commissions.

Following the first few meetings that you and I had with Mr. Wayne Jack, Mr. Jack asked what our fee would be if a transaction was completed. I indicated to him at that time the fee would be 3 per cent of the gross sale price. Depending on how the "offer" was structured, we would be willing to negotiate a fair fee as to amount and pay-out.

Sometime in November you indicated that an offer was forthcoming. I informed Mr. Jack regarding the pending offer. He raised the issue of commission again which we both agreed would be agreed upon once the offer was reviewed and structure of the terms were known.

Shortly after this, I sensed the "offer" had died. At no time did Mr. Jack ever communicate to me if the offer was still alive, or was it dead, even though in the early meetings everything seemed important to him that I was his contact and information should go through me.

Trusting the above outlines what happened re the Winroc sale.

Yours truly,

'J.A.K. Clark'

John A.K. Clark

[108] Douglas Clark at the trial testified, "I only saw it yesterday, you showed me a photocopy."

[109] Douglas Clark testified he received Ex. 51 from John Clark:

Janmar Developments Ltd.

211 Lake Placid Green SE

Calgary, AB T2J 5G6 Ph. (403) 278-0793

1986 09 02

Mr. Doug Clark

Clark & Associates

Dear Doug

WINROC SALE

Further to our telephone conversation regarding the sale of Winroc, I would like to make the following comments regarding discussions I had with Mr. Wayne Jack of Winroc in reference to the commissions.

It was a consensus that our fee would be three (3) per cent and deemed earned and payable on closing of the transaction. The three per cent fee was to be based upon an asset value of six million dollars, or an equivalent value if the transaction involved the sale of the company shares.

Yours truly,

'J.A.K. Clark'

John A.K. Clark

Exhibit 52 reads:

Janmar Developments Ltd.,

211 Lake Placid Green SE

Calgary, AB T2J 5G6 Ph. (403) 278-0793

1986 09 02

CLARK & ASSOCIATES REAL ESTATE LTD.

#1160, 255 - 5 Avenue S.W.

Calgary, Alberta

T2P 3G6

Attention: Mr. W.J. Douglas Clark

Re: Sale of Winroc Group of Companies to
Main Plumbing & Heating Ltd.

Dear Doug,

Further to our telephone conversation regarding the sale of Winroc, I would like to make the following comments regarding discussions we had with Mr. Wayne Jack of Winroc in reference to the commissions.

During meetings held in Mr. Jack's Winroc office in Calgary, approximately March 19th, 1985, it was agreed that our fee would be three (3) percent and deemed earned and payable on closing of the transaction. The three percent fee was to be based upon an asset value of six million dollars, or an equivalent value if the transaction involved the sale of the company shares.

Yours truly,

'John A.K. Clark'

John A.K. Clark

[110] Exhibit 52 was produced and marked as an exhibit on the discovery of Douglas Clark.

[111] At trial Douglas Clark explained:

> When it appeared we had difficulty with Jack on our fees earned, I requested John Clark to write me regarding discussion on fees so he produced this letter.
>
> "I asked him to redraft it" – John agreed to change the wording". He asked me to redraft it. We wanted to spell out that the fee was on the asset value because if we did it on shares it would be a zero amount.

[112] Exhibit 51, he said, was the original. On examination on discovery, although not specifically asked if he had done more than receive the letter, he does not volunteer that he redrafted the original letter from John Clark for Clark's signature.

[113] There is no doubt that the letters were relevant to the lawsuit and should have been disclosed.

[114] Secondly, Mr. Goebel I have found was in error when he testified to speaking to Mr. McCann following the meeting of 22nd October, the meeting when Jewell took umbrage at the price of over $5 million, and I have found that he erred when he said that he met with McCann on 31st October 1985. In this regard Goebel testified: "If he was out of town I may be wrong – I did meet with him. I got the deal back on track."

[115] The section of the Judgment Interest Act gives the court a discretion to refuse to award interest "If it considers it just to do so having regard to … the circumstances of the case or the conduct of the action …"

[116] What I have to consider is whether the non-disclosure of the circumstances surrounding the preparation of Ex. 52, the failure to reveal the existence of the prior letter, and Mr. Goebel's testimony with respect to a meeting with Mr. McCann, and a telephone call should prompt me to deny interest.

[117] There is a paucity of cases in this area. I have been referred to but two, neither of which are of assistance to me:

[118] *Jedlicka v. Reid* (1987), 76 A.R. 228 (Q.B.);

[119] *Jackson v. Calgary Exhibition & Stampede Ltd*. (1985), 57 A.R. 125 (Q.B.).

[120] I do not believe that the circumstances of this case or the conduct of the action by the plaintiffs here justifies the denial of interest pursuant to the Act, and I so find.

[121] The plaintiffs' action against Main Plumbing & Heating and Craig Jewell and Murray McCann has been discontinued. Wayne Goebel was at all times acting as an associate of the plaintiff Clark & Associates real Estate Ltd. He is not entitled to judgment.

[122] The plaintiff Clark & Associates Ltd. shall have judgment in the amount of $48,000 against the Winroc Corporation and Allroc Building Products Ltd., with interest pursuant to the Judgment Interest Act.

[123] Counsel for the defendants has requested leave to speak to costs, and that leave is granted. Counsel should contact me to arrange for a date on which submissions on costs will be heard.

Judgment for corporate plaintiff.

TAB 10

CITATION: Laurentian University of Sudbury, 2021 ONSC 3272
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-05-07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell, Andrew Hanrahan and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor Ernst & Young Inc

Vern W. DaRe, for the Firm Capital Corporation, the DIP Lender

Susan Philpott, Charles Sinclair and David Sworn, Insolvency Counsel for Laurentian University Faculty Association (LUFA)

Tracey Henry and Danielle Stampley, for Laurentian University Staff Union (LUSU)

Aryo Shalviri and Pamela Huff, for the Royal Bank of Canada

Andrew Hatnay, Demetrios Yiokaris and Sydney Edmonds and Eugene Meehan, Q.C., for Thorneloe University

Dylan Chochla and Stuart Brotman, for the Toronto Dominion Bank

André Claude, for the University of Sudbury

Donia Hashem, for the Canada Foundation for Innovation

Virginie Gauthier, for Lakehead University

George Benchetrit, for the Bank of Montreal

Joseph Bellissimo and Natalie Levine, for Huntington University

Gale Rubenstein and Bradley Wiffen, for the Financial Services Regulatory Authority

Sarah Godwin, for the Canadian Association of University Teachers

David Salter and Peter J. Osborne, for the Board of Governors

Rachel Moses, for Royal Trust

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association

Michelle Pottruff, for the Ministry of Colleges and Universities

Charlotte Servant-L'Heureux, for the Assemblée de la francophonie de l'Ontario

Linda Chen, for the Information and Privacy Commissioner of Ontario

HEARD: April 29, 2021

DECISION RELEASED: May 2, 2021

REASONS: May 7, 2021

ENDORSEMENT

[1] On Sunday, May 2, 2021, the following endorsement was released:

> [1] Thorneloe University ("Thorneloe") brings this motion under section 32(2) of the *Companies' Creditors Arrangement Act* ("CCAA") for an order that the following two agreements in the Notice of Disclaimer of Laurentian University of Sudbury ("Laurentian") dated April 1, 2021 are not to be disclaimed or resiliated:
>
> > (a) the Federation Agreement between Laurentian and Thorneloe, dated 1962 (the "Federation Agreement"); and,
> >
> > (b) the Financial Distribution Notice between Laurentian and Thorneloe dated May 1, 2019, amending the Proposed Grant Distribution and Services agreement between Laurentian, the University of Sudbury, Thorneloe University, and Huntington University dated November 10, 1993 (the "Financial Distribution Notice") (collectively, the "Agreements");
>
> and, for an order amending the Loan Amendment Agreement dated April 20, 2021 (the "DIP Amendment Agreement"), to delete the following condition:
>
> > 4. The Disclaimers of the Borrower's Federation Agreements and Financial Distribution Notices with each of Huntington

> University, Thorneloe University and the University of Sudbury (collectively, the "Federated Universities") issued on April 1, 2021 shall become effective, binding and final on May 1, 2021 (the "New Disclaimer Term").

[2] This motion was heard via Zoom on April 29, 2021.

[3] The University of Sudbury also brought a motion pursuant to section 32(2) of the CCAA with respect to a Federation Agreement between Laurentian and the University of Sudbury. This motion was heard via Zoom on April 30, 2021 by Gilmore J.

[4] This endorsement is being released concurrently with the endorsement of Gilmore J.

[5] For reasons to follow, Thorneloe's motion is dismissed.

[2] These are my reasons.

BACKGROUND

[3] In 1960, Thorneloe, Huntington University ("Huntington"), and the University of Sudbury ("U Sudbury") (collectively, the "Federated Universities"), were established by the Anglican, United and Roman Catholic churches, respectively. As religiously affiliated institutions, they were not eligible for government funding. The Province of Ontario passed an *Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151, and Laurentian was established. On September 10, 1960, U Sudbury and Huntington entered into Federation Agreements with Laurentian and in 1962, Thorneloe entered into a Federation Agreement with Laurentian (collectively, the "Federation Agreements").

[4] The Federated Universities agreed to suspend degree-granting authority (other than Theology, in the case of Thorneloe and Huntington) and effectively operate as a single university. The Federated Universities would teach courses to students for credit at Laurentian. Funding from the provincial government was provided to the Federated Universities, through Laurentian.

[5] The arrangement among the Federated Universities to distribute government grants is set out in the Proposed Grant Distribution and Services Fees Agreement dated November 10, 1993.

[6] The funding arrangement was changed commencing in the 2019 – 2020 academic year, per the Financial Distribution Notice.

[7] Laurentian wants to disclaim the Federation Agreements and the Financial Distribution Notice with respect to Thorneloe and U Sudbury.

[8] As referenced in the Third Report of the Monitor, the Federated Universities do not admit or register their own students, nor do they grant their own degrees (with the exception of Theology

at Huntington and Thorneloe). All Federated University programs and courses are offered through Laurentian, and all students apply for admission to Laurentian. Students who enroll in a program at Laurentian may take elective courses at any or all of the Federated Universities as well as Laurentian. Students enrolled in programs, courses, majors and minors that are administered by the Federated Universities are students of Laurentian, and these courses are credited towards a degree from Laurentian. Laurentian provides certain services to the Federated Universities, however, each of the Federated Universities is separately governed and manages its finances separately from Laurentian and each other.

[9] The Monitor also reported that as all students are students of Laurentian regardless of whether they are enrolled in programs or take courses at one of the Federated Universities, the Federated Universities do not directly bill or collect tuition. Laurentian manages admission. Students are billed tuition by Laurentian. Students then choose courses from a Laurentian course catalogue which includes courses offered through the Federated Universities.

[10] While Laurentian does not receive grant revenue or tuition revenue that is directly intended for the benefit of the Federated Universities, Laurentian and the Federated Universities have certain financial agreements in place pursuant to which Laurentian receives, allocates and distributes a portion of Laurentian's revenue to the Federated Universities in accordance with the funding formula (the "Federated Funding Formula"). Through this Federated Funding Formula, Laurentian compensates the Federated Universities for delivering programs and services to Laurentian students. The key terms of the Federated Funding Formula include the following:

(a) A portion of provincial grants received by Laurentian are distributed to the Federated Universities based on the proportion of students enrolled in the Federated Universities' programs;

(b) A portion of tuition fees received by Laurentian are distributed to the Federated Universities based upon student enrolment and courses offered through the Federated Universities; and

(c) An offsetting charge for service fees charged by Laurentian to the Federated Universities in exchange for Laurentian providing certain support services to the Federated Universities (calculated as 15% of grant and tuition revenues distributed to the Federated Universities).

[11] As of the fall 2020 academic term, there were 417 students enrolled in full-time and part-time programs through the three Federated Universities (271 full-time equivalents). This includes 91 full-time and part-time students of Thorneloe (62.8 full-time equivalents), 108 full-time and part-time students at U Sudbury (69.6 full-time equivalents), and 163 full-time and part-time students at Huntington (103.2 full-time equivalents). The remaining students are enrolled in programs jointly offered by the Federated Universities.

[12] Students who enrolled at Laurentian have had the ability to take elective courses at any or all of the Federated Universities, as well as at Laurentian. The main activity of both U Sudbury

and Thorneloe is to offer elective courses through the Faculty of Arts for students enrolled in the Applicant's programs.

[13] Each of the Federation Agreements contains an aspirational statement which addresses the Federated relationship:

> [B]oth Laurentian University and [the Federated University] declare and express the firm hope and conviction that the relationship between the Universities established by this agreement will be a permanent one… [a]nd to build a great institution of learning which shall forever be bilingual and nondenominational in its character.

[14] Laurentian has Indenture Agreements with each of the Federated Universities, pursuant to which the Federated Universities lease land owned by Laurentian and on which they have constructed their own buildings. Each indenture provides for lease terms of 99 years, with the possibility of further renewal.

[15] The indentures contain termination provisions which allow for the termination of the indenture if the relevant Federated University withdraws from the Federation with the Applicant. No notice of disclaimer was issued by Laurentian in respect of any of the indentures and the indentures are not the subject matter of this motion.

[16] Laurentian takes the position that the main activity of the Federated Universities is offering elective courses that are administered for Laurentian's students. Each time a Laurentian student takes an elective course through the Federated Universities, rather than an elective through Laurentian, that represents lost tuition revenue to Laurentian.

[17] Laurentian takes the position that in fiscal year 2020, as a result of Laurentian students' enrolment in programs and courses through the Federated Universities, Laurentian transferred to the Federated Universities approximately $3.5 million in total grants, $5.3 million in net tuition and $0.3 million in material fees, for a total of $9.1 million. That amount was offset by the administrative services fee of approximately $1.4 million, for a net transfer from Laurentian to the Federated Universities of approximately $7.7 million in fiscal year 2020.

[18] Laurentian has approximately 9,300 undergraduate and graduate students. Laurentian asserts that its Faculty of Arts has the ability and capacity to offer a range of alternative electives to its students, such that there is no need for Laurentian to lose revenue because its students take elective courses offered through the Federated Universities. Since students enrolled in programming offered by the Federated Universities can otherwise be accommodated and enrolled in programs offered by Laurentian, Laurentian asserts that a substantial portion of the grant revenue represents lost revenue for Laurentian. Laurentian and the Monitor concede that Laurentian will not be able to accommodate 100% of the displaced students but anticipate that it will be able to accommodate most of them.

[19] Laurentian also asserts that approximately 70% of its revenues in 2019-2020 is comprised of tuition and grant funding, and, due to the freeze of tuition fees, Laurentian cannot increase

revenue through tuition fees. Thus, the only opportunity for Laurentian to fully utilize the revenue it receives in respect of its students is for them to be enrolled in programs and courses at Laurentian.

[20] Thorneloe presents the facts from its viewpoint. It considers that the funds flow through Laurentian to Thorneloe pursuant to the Financial Distribution Notice. The funds do not belong to Laurentian and the funds do not represent a subsidy. As set out in the Financial Distribution Notice, Laurentian charges Thorneloe an additional 15% of Thorneloe's earned government grants and tuitions.

[21] Thorneloe also points out that it is a small component of the Laurentian Federation, employing a total workforce of 28, including seven full-time faculty members, 12 sessional faculty members, six staff and three casual staff.

[22] Notwithstanding its small size, Thorneloe contends that it has a big impact. In 2019-2020, Thorneloe taught 2861 Laurentian students, representing 297 full-time equivalents ("FTEs"). In 2020-2021, Thorneloe taught slightly fewer (2477) Laurentian students, after it made the decision to close underperforming programs.

[23] Thorneloe also contends that the financial problems of Laurentian are not attributable to Thorneloe or the Federation model.

CCAA PROCEEDINGS

[24] Laurentian obtained an initial stay of proceedings under the CCAA on February 1, 2021. The objective of the CCAA filing was the subject of comment in the affidavit of Dr. Robert Haché, sworn January 30, 2021, filed in support of the initial application. Section VIII covers the "Proposed Restructuring of Laurentian", the "Evaluation of the Federated Universities Model" and the "Restructuring of Program Offerings".

[25] Paragraph 295 of the affidavit reads as follows:

> The Laurentian 2.0 framework seeks to accomplish the foregoing through:
>
> (a) **Restructuring the Academic Model** by streamlining academic programming and delivery through the reduction of number of programs, restructuring academic supports and terminating the agreements and relationship with the Federated Universities; and
>
> (b) **Restructuring the Business Model** by updating business operations, restructuring existing obligations through a compromise in the CCAA and ultimately balancing the budget.

[26] Paragraph 298 reads, in part, as follows:

> [298] More particularly, during this CCAA proceeding, LU ("Laurentian") intends to:
>
> …
>
> (b) re-evaluate the Federated Universities model in such a way that the historic significance of the Federated Universities can be preserved while ensuring that the relationships reflect the current realities of each organization;

[27] Paragraphs 299 – 301 read as follows:

> [299] In 2019, LU provided notice of a change in the funding agreement between LU and each of the Federated Universities. While this amendment was necessary to make the funding arrangements consistent with metrics in respect of tuition and grants from the Province, further work is required. LU estimates that the Federated Universities model costs LU approximately $5 million each year.
>
> [300] Currently, the Federated Universities have duplicate organizational infrastructure, functions and services. Although LU respects the autonomy of the Federated Universities, the Federated Universities also have financial challenges. One successful outcome of this CCAA proceeding may be the remolding of the Federated Universities model in such a way that creates economies of efficiency for LU and the Federated Universities while maintaining the historical significance and identities of the Federated Universities.
>
> [301] This Court-supervised proceeding will assist LU in focusing its discussions and negotiations with leadership of the Federated Universities to arrive at a compromise and solution that is acceptable and, more importantly, ensures the long-term sustainability of LU. If necessary, LU may utilize the proposed mediation to address and resolve the Federated Universities model.

[28] The Honourable Justice Sean Dunphy conducted a judicial mediation to address a number of issues facing Laurentian. Although the contents of any discussions have not been made public, it is apparent that the issues as between Laurentian and the Federated Universities were discussed but were not resolved.

[29] On April 1, 2021, Laurentian gave Notice to Disclaim or Resiliate an Agreement with Thorneloe and with U Sudbury. The notice covered both the Federation Agreements and the Financial Distribution Notice.

[30] The Monitor approved the Notices of Disclaimer.

[31] On April 15, 2021, Thorneloe delivered a Motion Record opposing the Notice of Disclaimer issued to Thorneloe.

[32] U Sudbury also delivered a Motion Record opposing the Notice of Disclaimer. The motion was the subject of a bilingual hearing before Gilmore J.

ISSUE

[33] Thorneloe submits there is one issue to be determined on this motion: should the court prohibit the disclaimer?

ANALYSIS

[34] Section 32 of the CCAA addresses the disclaimer or resiliation of agreements.

[35] The debtor company may, on notice to the other parties to an agreement and the monitor, disclaim or resiliate an agreement to which the company is a party at the commencement of the CCAA proceedings: s. 32(1). The monitor must approve the proposed disclaimer or resiliation. Otherwise, the debtor is required to make an application to the court for an order that the agreement be disclaimed or resiliated: ss. 32(1) and (3). The counterparty has 15 days to make an application to the court opposing the disclaimer or resiliation: s. 32(2). In deciding whether to make the order, the court is to consider, among other things, the factors set out in s. 32(4), which read as follows:

> **Factors to be considered**
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[36] Thorneloe makes the following arguments in opposition to the disclaimer:

(a) Thorneloe did not cause Laurentian's financial problem;

(b) The disclaimer will result in significant financial hardship for Thorneloe and result in Thorneloe having to make an insolvency filing pursuant to the CCAA or the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3;

(c) Thorneloe is immaterial to Laurentian's financial situation and therefore, the disclaimer would not result in a material improvement to Laurentian's restructuring;

(d) The relationship between Laurentian and Thorneloe is not a commercial relationship to which the disclaimer provisions of the CCAA were intended to apply; and

(e) Laurentian is acting in bad faith contrary to s. 18.6 of the CCAA.

[37] The Monitor approved the disclaimer for reasons set out in the Third Report as follows:

> 169. … [I]t is the Monitor's view that the Notices of Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of the Applicant. In fact, it is the Monitor's view that without the Notices of Disclaimer, the Applicant is unlikely to be able to complete a viable plan of compromise or arrangement.
>
> …
>
> 172. While the net estimated savings achieved to date is significant and addresses the Applicant's operational deficit, it is unlikely to be sufficient to cover among other items: (a) the repayment of the DIP Facility (even if refinanced over time) and (b) payment of distributions to creditors pursuant to a plan of compromise or arrangement in connection with the compromise of their claims.
>
> 173. As a not-for-profit, LU is unable to issue equity to creditors. It has no or limited ability to service additional debt beyond the refinancing of the DIP. As set out above, LU has limited opportunity to drive increased revenue. Therefore, LU must, through its restructuring, generate sufficient savings to provide for the ability to make payments over time to its creditors in partial satisfaction of their claims. The savings generated to date through the LUFA Term Sheet, LUSU Term Sheet and non-union employee savings represent a significant component of the required savings, but not the entirety.
>
> 174. The Federated Universities model represents a significant cost to LU. In Fiscal 2020, LU transferred approximately $7.7 million to the Federated Universities as a result of LU students taking programs and courses offered through the Federated Universities. This included the transfer of approximately $3.5 million of grants received by LU, $5.3 million in net tuition collected from LU students and $0.3 million in material fees in respect of Federated Universities courses all offset by a 15% service fee of approximately $1.4 million. …
>
> 175. The Monitor understands that the majority of the funds transferred to the Federated Universities relates to the delivery by the Federated Universities of

> elective courses taken by students enrolled in LU programs as opposed to students enrolled in programs offered through the Federated Universities.
>
> 176. In conducting its review of its academic offerings and operational restructuring model, LU determined that it has the ability and capacity to offer a comprehensive list of programs and courses to LU students from the suite of programs and courses delivered by LU faculty in the absence of continuing the Federated Universities relationship. As a result, LU determined that it could retain the vast majority of the funds transferred to the Federated Universities and continue to support students without incurring those incremental costs.
>
> 177. As a result, LU is of the view that savings estimated in the range of $7.1 to $7.3 million annually can be generated through the disclaimer of the Federated Universities as part of this restructuring.
>
> 178. The Monitor recognizes the potential financial hardship that the Notices of Disclaimer may have for the Federated Universities. However, given the additional savings required for LU to have a reasonable opportunity to put forward a viable plan of compromise or arrangement and effect a successful restructuring, the Monitor is of the view that the disclaimer of the Federated Universities agreements is necessary.

[38] To counter the submissions of Laurentian and the views and recommendations expressed by the Monitor, Thorneloe filed a Report on Financial Impact of Termination of Federated Agreement and Financial Distribution Agreement on Thorneloe University. The Report was prepared by Mr. Allan Nackan, a partner with A. Farber & Partners Inc. Mr. Nackan has been identified as an expert for the purposes of providing his opinion. I am satisfied that Mr. Nackan is an expert in the area of insolvency and restructuring. However, Mr. Nackan acknowledged in cross-examination that he is not an expert in terms of government funding of universities and that he has no prior experience in determining university funding. His lack of industry-specific experience has to be taken into account when considering his report and conclusions.

[39] It is also necessary to acknowledge the expertise of Ernst & Young Inc., the court-appointed Monitor. The Monitor is an officer of the court, with a duty to be neutral and objective: *Bell Canada International Inc. (Re)*, [2003] CarswellOnt No. 4537 (S.C.). The principals of Ernst & Young Inc., including Sharon Hamilton, who signed the Monitor's Third Report, are widely acknowledged as being experts in the field of insolvency and restructuring. Moreover, the Monitor has been involved since the proceedings began and has extensive knowledge of the Applicant's operations and restructuring efforts.

[40] Farber was retained to provide an opinion on whether the termination of the Federated Agreement and the Financial Distribution Notice would result in significant financial hardships to Thorneloe, and whether or not the termination would enhance Laurentian's prospects of a viable compromise or arrangement.

[41] Farber concludes the termination of the Federated Agreement will cause serious financial hardship to Thorneloe as a consequence of which Thorneloe will have to resort to a formal insolvency process.

[42] Farber also concludes that the termination of the Federated Agreement will have an immaterial impact on overall costs reduction in Laurentian's restructuring process and is unlikely to enhance prospects of Laurentian making a viable plan.

[43] In a supplementary report, Farber concludes that:

- Laurentian is not facing an immediate liquidity crisis on May 1, 2021;
- there is no compelling reason that would necessitate termination of the federated arrangement with Thorneloe on May 1, 2021;
- from a financial perspective, Laurentian and the DIP Lender have not provided information to support the need for a Disclaimer Deadline of May 1, 2021.

[44] A consideration of the s. 32(4) factors requires a balancing of interests. The subsection is silent with respect to the relative importance of any one of the factors to be considered and is not restricted to the listed factors. The test does, however, require the court to balance the benefit of the proposed disclaimer for Laurentian against the detrimental impact on Thorneloe. The disclaimer of a contract must be fair, appropriate and reasonable in all the circumstances. Ultimately, it is a discretionary decision to determine whether the disclaimer should be upheld. This discretion is exercised by weighing the competing interests and prejudice to the parties and assessing whether the disclaimer or resiliation is fair and reasonable.

[45] In my view, the considerations in the Third Report of the Monitor reflect a proper balancing of the competing interests of Laurentian and all stakeholders, including Thorneloe. The Third Report discusses the financial challenges facing Laurentian and proposes solutions that could enhance the prospects of a viable plan of compromise or arrangement, while acknowledging the potential financial hardship on the Federated Universities. The Farber Report and the Supplementary Farber Report focuses of the impact of the disclaimer on Thorneloe and the short term DIP Financing requirements. In narrowing its focus, the Farber Report does not take into account that in order to enhance the prospects of a viable plan of compromise or arrangement, it is often necessary to take into account the potential compromises that will have to be made by all stakeholder groups. For this reason, I have concluded that the Third Report of the Monitor has to be given greater weight than the Farber Report and the Supplementary Farber Report.

[46] Laurentian submits that the Courts have identified guiding principles for the analysis:

(a) the recommendation of the Monitor is afforded significant weight in CCAA proceedings (see *Nortel Network Corp. Re*, 2018 ONSC 6257 at para. 27; *Aralez*

Pharmaceuticals Inc., Re, 2018 ONSC 6980 at para. 36; and *Aveos Fleet Performance Inc.*, 2012 QCCS 4074 at para. 50(f);

(b) the disclaimer does not need to be essential to the restructuring, it only need be advantageous and beneficial (see *Timminco Ltd., Re*, 2012 ONSC 4471 at para. 54 ("*Timminco*"); see also *Homberg Invest Inc.*, 2011 QCCS 6376 at para. 103);

(c) the threshold to establish "significant financial hardship" in opposing a disclaimer is high. There must be specific evidence of financial hardship. Mere loss or damage is not sufficient, and it must be likely that the hardship is caused by the disclaimer (see *Target Canada Co. Re*, 2015 ONSC 1028 at para. 26);

(d) the test to establish "significant financial hardship" is subjective and depends on an examination of the individual characteristics and circumstances of the counterparty (see *Timminco* at para. 60); and

(e) the Court should take into consideration the effect that the disclaimer will have on the outcome for all other unsecured creditors and be an equitable result that is dictated by the guiding principles of the CCAA (see *Timminco* at para. 62).

[47] There is no doubt that Laurentian has significant financial challenges. There is also no doubt that, if a successful restructuring is to be achieved, it must be done on an expedited basis. If Laurentian is to successfully restructure its affairs, it is essential that it maintain continuity of operations. The spring term commences May 3, 2021 and extends until the latter part of July 2021. The fall term commences at the beginning of September 2021. If the restructuring is to succeed, Laurentian must be in a position to provide assurances to both its students and faculty that it has a viable plan that will ensure continued operations for both the spring term, the fall term and beyond.

[48] Laurentian, with the assistance of the Monitor, identified a number of areas in which a financial restructuring was required. These include a downsizing of the number of programs being offered by Laurentian and also the necessity to arrive at new, sustainable collective agreements with LUFA and LUSU. These requirements and accommodations are set out in the motion to extend the stay of proceedings.

[49] Laurentian also identified, at the outset of the CCAA proceedings, that it would be necessary to have a fundamental readjustment or realignment with the Federated Universities.

[50] Although Thorneloe is of the view that its relationship with Laurentian has only a minor impact on the financial position of Laurentian, it seems to me that this view is far too narrow in scope. Laurentian has identified that if the disclaimers involving Thorneloe and U Sudbury are upheld, together with the revised agreement with Huntington, this will result in $7.7 million of additional funds remaining with Laurentian on an annual basis. This calculation has been identified by the Monitor and, in my view, represents a real source of annual financial relief for Laurentian.

[51] Thorneloe counters by indicating that it is only one of three Federated Universities; the $7.7 million figure cannot be attributed, in total, to Thorneloe. At first glance, this is an attractive

and persuasive argument. It does not, however, take into account that Huntington, in negotiating its settlement with Laurentian, has included what is known colloquially as a "most favoured nation" clause. Quite simply, if Thorneloe is able to negotiate a better alternative than the agreement negotiated by Huntington, Huntington is in a position to reopen negotiations with Laurentian to obtain similar treatment. Therefore, it seems to me that although there are three Federated Universities involved, their positions are interlinked and interrelated to such a degree that the $7.7 million calculation is relevant to take into account on this motion.

[52] The Notices of Disclaimer are, in my view, central to the Applicant's restructuring. The Disclaimer will result in millions of dollars of additional tuition and grant revenue remaining within Laurentian. As noted in both the affidavit of Dr. Haché and the Monitor's Report, each time a Laurentian student takes an elective course offered through Thorneloe, revenue associated with that course is transferred from Laurentian to Thorneloe. Because the Applicant has the capacity to independently offer students the vast majority of all necessary programs and electives within its existing cost structure, each course taken by a Laurentian student through Thorneloe represents lost revenue for Laurentian.

[53] The Applicant contends that it simply cannot afford to continue its relationship with the Federated Universities. In order to right-size the University, Laurentian cannot continue paying for programs and courses supplied by the Federated Universities that it does not require and are revenue negative for Laurentian.

[54] The Applicant submits that it cannot simply "balance its budget" in order to achieve financial sustainability. It submits that it must generate positive cash flow from operations on an annual basis, prior to the funding of expenses, to achieve financial sustainability. In my view, this submission is consistent with the objective and necessity of achieving long-term sustainability.

[55] Laurentian has also submitted that the savings to be realized from the disclaimer are necessary for the purposes of submitting a viable plan. The Monitor is in agreement with this submission.

[56] Although the savings realized from the disclaimer do not, in isolation, represent a significant amount, in my view, that is not the end of the inquiry. In order to enhance the prospects of a viable plan of reorganization being put forward, it is necessary to assess the totality of what Laurentian is attempting to achieve in this restructuring.

[57] Laurentian suggests that savings have to be realized from a number of sources, including the Federated Universities. Without the total amount of savings being realized, Laurentian submits that it will been unable to put forward the basis of a plan that will be acceptable to its various constituents.

[58] It is necessary to take into account another factor, namely that there is evidence that Laurentian has achieved other milestones in its attempt to put forward a viable plan of reorganization. These include the revised relationships with LUFA and LUSU, the reduction in the number of courses, and the reduction in the number of staff. None of these milestones were realized without significant compromise and hardship being experienced by faculty, students and

the greater Sudbury community. Without such compromises, Laurentian will not be able to survive.

[59] It is also necessary to take into account the position of the DIP Lender. The DIP Lender has put forth a condition for its continued support and for increased financing. That condition is that the Disclaimer with respect to Thorneloe and U Sudbury had to be finalized by May 1, 2021, subject to any reserved decision of the court.

[60] Thorneloe challenges the position of the DIP Lender for two reasons. First, the condition relating to the Disclaimer was not a condition of the original DIP and was inserted only after the Notice of Disclaimer was issued. Second, the analysis performed by Farber indicates that the increased DIP Loan is not required until the latter part of June at the earliest.

[61] There is, in my view, no basis to question the legitimacy of the DIP Lender nor question the conditions that the DIP Lender has put forth with respect to any request to extend the DIP Loan and to increase the amount of the DIP Financing. The DIP Lender is entitled to take into account commercial reality in assessing its options.

[62] The DIP Lender is not a pre-existing lender to Laurentian, nor is there any evidence that the DIP Lender is engaged in a "loan to own strategy". These facts distinguish this DIP Lender from a number of DIP lenders that have been involved in the cases referenced by counsel to Thorneloe, as referenced in Rostom and Fell, "Recent Trends in DIP Financing" (2016) 5-4 IIC Journal; *Essar Steel Algoma (Re)*, Endorsement of Newbould J. dated November 16, 2015; and *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459.

[63] It is also relevant to remember that this is not a situation where the Court is being asked to approve DIP financing with this DIP Lender. These approvals were granted in February 2021 with no party objecting and with no appeals being filed. It was a competitive process and the DIP Lender was one of eight potential DIP lenders identified at the outset of the proceedings.

[64] Thorneloe also takes issue with respect to the reluctance of a representative of the DIP Lender to be cross-examined or to answer any questions with respect to the DIP Financing.

[65] In response, Laurentian takes the position that the terms for the continued DIP were negotiated as part of a process of achieving a viable long-term plan. Second, although the increased DIP may not be necessary until mid-June, it is a requirement for any extension of the stay to provide a cash flow statement that takes into account the entirety of the Stay Period, and it is necessary to provide the necessary assurances to faculty and students that Laurentian will be able to operate for the next academic term, which commences May 3, 2021 and extends towards the middle to the latter part of July 2021. It is simply not feasible, from its standpoint, to operate without the continued DIP Facility and the certainty that the DIP Facility will be available throughout the entirety of the academic term and the Stay Period.

[66] With respect to the cross-examination of the DIP Lender, I note that no affidavit has been filed in these proceedings by a representative of the DIP Lender. In addition, the DIP Lender is not a pre-existing lender. The DIP Lender is not involved in any of the pre-CCAA DIP contractual

relationships. It is up to the debtor, with the assistance of the Monitor, to negotiate the terms of the DIP Financing. There is no evidence that the DIP Lender has any ulterior motive in negotiating the condition to extend additional financing and to extend the term.

[67] Thorneloe also raises the concern that the Disclaimer will result in significant financial hardship for Thorneloe and result in Thorneloe having to make insolvency filings pursuant to the CCAA or the *Bankruptcy and Insolvency Act*.

[68] There is no doubt that this is a legitimate point being raised by Thorneloe. The impact of the disclaimer on Thorneloe is significant. The consequence of the disclaimer is such that Thorneloe will be unable to operate in its current form. However, Thorneloe was offered alternatives. The form of the Huntington Transition Agreement was offered to Thorneloe but was not accepted. More importantly, it is also necessary to take into account that if Laurentian's restructuring does not succeed and it ceases operations, Thorneloe, as conceded by its counsel, will also be unable to continue operations.

[69] Thorneloe also contests the disclaimers on the basis that the relationship between Laurentian and Thorneloe is not a commercial relationship to which the disclaimer provisions of the CCAA were intended to apply. In my view there is no merit to this submission. The CCAA proceedings were commenced on February 1, 2021. The Initial Order declares that Laurentian is insolvent and is a company to which the CCAA applies. The disclaimer provisions in s. 32 are available to a debtor company. The exceptions set out in s. 32(9) have no application in the circumstances. Laurentian is entitled to utilize the disclaimer provisions in accordance with s. 32.

[70] Thorneloe also takes the position that Laurentian is acting in bad faith contrary to s. 18.6 of the CCAA which provides:

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

[71] In support of this argument, Thorneloe points to Laurentian's attempt to terminate its relationship with Thorneloe, knowing that the disclaimer will result in Thorneloe's insolvency, and to Laurentian's persistence in the face of evidence that termination will not materially assist its restructuring. Thorneloe also submits that Laurentian has consistently and continually wanted to terminate its relationship with Thorneloe and thereby failed to engage in good faith negotiations.

[72] I do not accept that Laurentian has acted in bad faith. Restructurings are not easy and often result in treatment that a party can consider to be extremely harsh. However, that does not

necessarily mean that the other party has not been acting in good faith. In its Third Report, the Monitor makes specific reference to the bad faith argument being raised by Thorneloe. It is significant that the Monitor makes no statement that would suggest in any way that Laurentian has been acting in bad faith. The Monitor ultimately recommends at paragraph 206 of its Third Report that the court grant the relief sought by the Applicant, which includes the disclaimer and also an extension of the stay of proceedings.

[73] Section 11.02(3) of the CCAA addresses the burden of proof on an application for an extension of the stay of proceedings other than the initial application. This includes a requirement that the applicant satisfy the court that it has acted, and is acting, in good faith and with due diligence. By supporting the application for the extension and upholding the disclaimer, it can be inferred that the Monitor does not support the argument of Thorneloe to the effect that Laurentian has been acting in bad faith.

[74] My summary of the factors set out in s. 32(4) of the CCAA is as follows:

(a) the Monitor approved the proposed disclaimer;

(b) the Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Laurentian;

(c) the Notice of Disclaimer will have financial consequences to Thorneloe, but this is not a sufficient reason to disallow the Notice of Disclaimer. Thorneloe was offered an alternative, similar to Huntington, which was not accepted.

[75] In addition, it seems to me that, in the circumstances of this case, it is necessary to consider the broader implication of disallowing the Notice of Disclaimer – namely the potential demise of Laurentian.

[76] The dilemma facing the court is clear. If Thorneloe's motion succeeds, with the result that the Disclaimer is not effective, it could lead to an unraveling of Laurentian's restructuring plan and the collapse of Laurentian. This in turn would have significant impact on all faculty, students and the greater Sudbury community. It would also result in the financial collapse of Thorneloe. Obviously, this is not a desirable outcome.

[77] If the Notices of Disclaimer are upheld, I acknowledge that this could lead to the cessation of operations of Thorneloe. I do not lightly discount the impact on faculty, employees and students at Thorneloe, but the impact is significantly less than if Laurentian and Thorneloe are both forced to suspend or cease operations.

[78] Given these two undesirable options, the better choice or to put it another way, the least undesirable choice, is to uphold the Notices of Disclaimer.

DISPOSITION

[79] In the result, the motion brought by Thorneloe to invalidate the Notice of Disclaimer is dismissed.

Chief Justice G.B. Morawetz

Date: May 7, 2021

TAB 11

1927

December 9

[APPELLATE DIVISION]

NICHOLSON (Plaintiff) *Respondent*

v. DEBUSE (Defendant) *Appellant*

Agency—Real Estate—Commission—When Earned.

Where an owner of land has employed an agent to find a purchaser it is not necessary in order to entitle the agent to his commission that he should have been the sole cause of the sale, it is sufficient if his acts during the period of the listing materially contributed to the sale (per Beck and Hyndman, JJ.A. and *semble* Mitchell, J.A.; Clarke, J.A. *contra*).

The use of such words "*causa causans*," "efficient cause," "effective cause," do not help to a solution of such cases but rather the contrary (per Beck, J.A.).

Appeal from a judgment by His Honour J. D. R. Stewart, Judge of the District Court for the Judicial District of Hanna, in favour of the plaintiff in an action for an agent's commission on a sale of lands. Appeal dismissed with costs. Beck and Hyndman, JJ.A. for dismissal; Clarke, J.A. for allowing the appeal with respect to both pieces of land in question; Mitchell, J.A. for allowing it with respect to one of the pieces.

The appeal was heard by BECK, HYNDMAN, CLARKE and MITCHELL, JJ.A.

F. C. Moyer, for defendant, appellant: The onus was on the plaintiff to show that he was the *causa causans* of the sale. The question put to the purchaser as to whether the plaintiff's efforts influenced him was improperly excluded: *Wright's Principal and Agent,* pp. 255-6; *Mansell v. Clements,* L.R. 9 C.P. 139. Cases particularly applicable to this case are *St. Germain v. L'Oiseau,* 5 Alta. L.R. 420, 2 W.W.R. 1007; *Neve v. Leeson* [1920] 3 W.W.R. 815; affirmed [1921] 1 W.W.R. 904, 61 D.L.R. 216; *Dicker v. Willoughby Sumner Co.,* 4 Sask. L.R. 251, 19 W.L.R. 142; *Munroe v. Beischel,* 1 Sask. L.R. 238, 8 W.L.R. 846.

A. A. McGillivray, K.C., for plaintiff, respondent: The finding that there was a listing of the lands in question should not be disturbed: *Young v. Degon* [1923] 2 W.W.R. 982.

Since a transfer of both properties was in fact made the fact that the listing was an oral one is immaterial: *The Real Estate Commission Act,* R.S.A., 1922, ch. 139.

The variations between the listings, the Lambert offer and the sale are of no importance. In any event the employment was a general one: *Toulmin v. Millar,* 12 App. Cas. 746, 57 L.J.Q.B. 301; *Burchell v. Gowrie and Blockhouse Collieries Ltd.,* [1910] A.C. 614, 80 L.J.P.C. 41, at 47; *Howard v. George,* 49 S.C.R. 75, 5 W.W.R. 1152; *King v. Schon,* 14 Alta. L.R. 79, [1918] 3 W.W.R. 892. The appellant is not relieved from liability by the fact that the purchaser was not introduced by the respondent; 1 *Halsbury,* p. 195, *Neve v. Leeson,* [1921] 1 W.W.R. 904, 61 D.L.R. 216; or because the secret sale by the appellant prevented the respondent from completing the deal: *Green v. Bartlett,* 14 C.B. (N.S.) 681, 32 L.J.C.P. 261, approved in *Burchell v. Gowrie and Blockhouse Collieries Ltd., supra.* The sole test is whether the relation of buyer and seller was brought about by the agent; *Griffith v. Anderson,* 35 Man. R. 480, [1926] 1 W.W.R. 956; *Stratton v. Vachon,* 44 S.C.R. 395, at 407.

Cur. adv. vult.

December 9, 1927.

BECK, J.A.—I have read the judgments of my brothers Hyndman and Clarke and having studied the appeal book I

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agree in the result with my brother Hyndman though with some hesitation as to the Rambo quarter.

Of the great number of cases on real estate agency to be found in the digests, e.g., *C.E.D.*, tit. "Agency," and in the text books, e.g., *Ogden* (*Canadian*) and *Walker* (*American*) I think it should be said very little *law* is to be found in any of them. The common case of listing land for sale with a real estate agent in this country, as has often been pointed out, means only that the agent is employed to find a purchaser. He has no authority to make a sale. If he finds a purchaser with whom the owner negotiates, though on different terms from those given to the agent, the agent is entitled to his commission. That is the character of the employment in this case.

Whether in any particular case the agent found the person to whom the owner eventually sold is a pure question of fact depending on the particular facts and circumstances of each case, and therefore decisions in other cases on other facts and circumstances are of little or no value. The use of such words as *"causa causans,"* "efficient cause," "effective cause," etc., do not in my opinion help to a solution but rather the contrary.* On the evidence as I have intimated I find as a fact that the plaintiff found the purchaser for both the Gore parcel and the Rambo parcel. The plaintiff had been—the trial Judge so finds—employed by the defendant to find a purchaser for both parcels. He had interviews on a number of occasions with Lambert, the purchaser from the defendant, which I find—as did the trial Judge—were instrumental in bringing about the sale to Lambert. Perhaps it is a question of law whether in order to be entitled to his commission the agent must be the *sole* instrumentality in effecting the sale—the sole *causa causans,* efficient cause, effective cause, etc. Whether it is a question of law or a question of mixed fact and law, or a question of fact, I am of opinion that it cannot be so held. *Griffith v. Anderson* [1926] 1 W.W.R. 956, 35 Man. R. 480, is an enlightening case. In that case reference is made to *Walker, Fraser & Steele v. Fraser's Trustees* [1910] S.C. 222

*[Note by Beck, J.A.: *Cf. Montreal Agencies Ltd. v. Kimpton* [1927] S.C.R. 598.]

(Ct. of Sess.) where Lord Dundas, delivering the judgment of the Court is quoted as saying:

"Shortly put, I think the test is whether or not the ultimate sale was brought about or materially contributed to, by actings of the pursuers, as authorized agents of the defendants."

With this I agree.

HYNDMAN, J.A.—This is an appeal from the judgment of Stewart, D.C.J.

The plaintiff is a real estate agent at Munson, Alberta, and the defendant is a farmer of the same locality.

The plaintiff alleges that in the early part of 1926 the defendant verbally agreed to pay him a commission of $1 per acre if the plaintiff would find a purchaser for defendant's farm lands or any portion thereof; that the plaintiff entered into negotiations with one Lambert for the purchase of the south-west quarter of sec. 3, tp. 30, rge. 20, west of the fourth meridian, and the north-west quarter of sec. 28, tp. 29, rge. 20, west of the fourth meridian, in this province, and that as a result of these negotiations Lambert purchased said lands and that the plaintiff's efforts were the effective cause of such sale. He, therefore, claims $320 being at the rate of $1 per acre. In the alternative the plaintiff claims $320 on a *quantum meruit* for his services rendered in connection with said sale.

The defendant denied that he entered into any agreement with plaintiff or that the plaintiff brought about the relationship of vendor and purchaser between defendant and Lambert or was the effective cause of such sale. Also in the alternative he denied that the south-west quarter of sec. 3 aforesaid was involved in any listing of property given plaintiff or that the plaintiff did in any manner bring about the relationship of vendor and purchaser or effect a sale of the property. Also that the sale of the north-west quarter of sec. 28 was not the result of services rendered by the plaintiff; nor was he the effective cause of the sale. He also pleads *The Real Estate Commissions Act,* R.S.A., 1922, ch. 139.

The south-west quarter of sec. 3, tp. 30, rge. 20, west of the fourth meridian, is known as the Gore quarter and the

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north-west of 28 as the Rambo quarter. The defendant was the registered owner of both parcels.

The case is largely a question of fact which depends on an examination and balancing of, and the credibility which should be attached to, the evidence adduced on both sides.

The learned Judge, having heard the evidence adduced by both parties, gave judgment for the plaintiff for the amount claimed—from which judgment the defendant appeals.

The plaintiff's testimony is substantially as follows: That in the spring of 1926 the defendant, being the owner of six quarter sections in the Munson district and a parcel at Carstairs or Compeer and being anxious to dispose of all his property, at the plaintiff's office in Munson orally listed with him all his lands, and agreed that if he would find a purchaser for these lands or any part thereof would pay him a commission of $1 per acre.

The price of the Gore quarter was to be $45 per acre, and the Rambo quarter $40 per acre. If summer-fallowed, the price of the Gore quarter was to be $50 per acre. The price of the Rambo quarter was to include the crop. He says that he made every effort to sell both these quarters and interviewed different parties, including Lambert, who subsequently did purchase both quarter sections as a result of which this action was brought; he first approached and interested Lambert in the purchase of these lands in the late spring. The price given Lambert was, as to the Gore quarter $45 and the Rambo quarter $40; Lambert was at first interested but would do nothing definite, and so plaintiff continued to see him from time to time; at the various interviews the questions of price and terms including interest were mentioned; eventually Lambert decided to buy the Gore quarter at $50 per acre on terms, one-third cash and the balance in three equal payments, interest at seven per cent per annum. On the following Sunday plaintiff went to the defendant's place and told him he had sold the Gore quarter to Lambert. Defendant replied that he himself had sold this land several years before to Lambert, at which plaintiff expressed surprise. At this same meeting being asked by plaintiff if the crop still went with the

Rambo quarter he said "No," but the price remained the same. Plaintiff then called upon Lambert who said that he, Lambert, had told defendant the previous Saturday night in Drumheller that he had bought the land and defendant asked him "Why he hadn't bought it from him and saved his commission." If this latter evidence is true it seems to me conclusive as regards the plaintiff's right to commission so far as the Gore quarter is concerned.

The evidence of the defendant is substantially that he never listed either of these parcels of land with plaintiff and, in any event, it was not the result of plaintiff's efforts, but due entirely to his own negotiations with Lambert, that a sale was made.

As to the first matter the learned trial Judge frankly said at the close of the trial he did not believe the defendant. His words were:

"I am not only perfectly certain there was a listing but I am satisfied that the defendant knew it and also that he was deceiving the Court when he said he had not listed the property."

In my opinion these observations were fully justified as the evidence of Lambert, who was a defence witness, and clearly favourable to that side, admitted several times that defendant told him plaintiff had a listing although not an exclusive one.

I think the testimony of Lambert, taken as a whole, generally corroborates the material testimony of the plaintiff, first, in that there was a listing, and, secondly, that whilst he might not have been the whole cause, his efforts were certainly a contributing factor to the sale.

Defendant strongly contended that he had arranged to sell this land himself long prior to the time plaintiff negotiated with the purchaser. That this was not the case must be evident from the fact that after the alleged arrangement with Lambert he listed the land with the plaintiff. A person who has sold, or who is under agreement to sell, his property, does not place it in the hands of an agent or otherwise offer it for sale. That is only common sense. Granting, therefore, a listing, I think it more or less absurd for him to contend that

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he sold it himself previously. It may have been, and probably was, the fact that he did discuss a sale with Lambert, but nothing came of it and a sale was not effected.

The question, I think, arising on the facts here resolves itself pretty much into this; granted a listing with plaintiff at a time when no real agreement existed between the owner and the prospective purchaser, if such agent had used his efforts to induce such purchaser to agree to buy, and afterwards the purchaser and owner meet and discuss the same matter, and a sale is eventually made, does the intervention of the owner, or the fact that on a previous occasion he himself tried to sell him the land, deprive the agent of his right to commission or compensation, although both may have been more or less instrumental in bringing about the sale? In other words, must the agent be the sole cause of the bargain in order to succeed in an action for commission?

The learned trial Judge found not only that the land was listed, but further that the plaintiff was the efficient cause of the sale, a question of fact. (*Green v. Bartlett,* 14 C.B. (N.S.) 681, 32 L.J.C.P. 261, 143 E. R. 613, 10 Jur. N.S. 78.)

I think there was ample evidence for the first finding and doubt can arise only with respect to the second. If there was any reasonable evidence in behalf of the latter, clearly, we should not reverse the judgment, even though we might ourselves think otherwise. A very good test might be to put the question, whether the sale would likely have gone through had plaintiff not had anything to do with it? Personally I am of opinion that the various interviews between the agent and purchaser, especially during the absence of defendant in the summer, must have contributed to it in a large degree, and cannot reasonably be ignored and considered of no value.

The employment was, of course, not to sell the land, but merely one of brokerage, to find a purchaser. The price and terms are not necessarily material or vital so long as the vendor concludes a sale as a result of the broker's agency. (*Aikins v. Allan* [1904] 14 Man. R. 549, at p. 553.)

In *Stratton v. Vachon* (1911) 44 S.C.R. 395, Duff, J., at p. 406, said:

"The legal rule governing this case is thus stated by Lord Atkinson delivering the judgment of the Privy Council in *Burchell v. Gowrie and Blockhouse Collieries* [1910] A.C. 614, at page 624, 80 L.J.P.C. 41, 103 L.T. 325:

" 'There is no dispute about the law applicable to the first question. It was admitted that, in the words of Erle, C.J., in *Green v. Bartlett* (1863) 14 C.B. (N.S.) 681, 32 L.J.C.P. 261, 143 E.R. 613, "if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him." Or in the words of the late authorities, the plaintiff must show that some act of his was the *causa causans* of the sale (*Tribe v. Taylor* [1876] 1 C.P.D. 505, at p. 510), or was an efficient cause of the sale (*Millar v. Radford* [1903] 19 T.L.R. 575).' "

It will be noted that Lord Atkinson used the words "an efficient cause." It would seem to me then, that so long as the plaintiff can show that he, during the period of his listing, actually contributed in some way towards inducing the contract, that should be sufficient to earn his commission. With respect to the Gore quarter I have no difficulty in arriving at the conclusion that he did so contribute.

As to the Rambo land I am bound to say that the case is not so satisfactory, but is it proper to say that the trial Judge's finding was "clearly untenable," for that must be the situation? (See *Wolf v. Tait* [1887] 4 Man. R. 59, at pp. 68 and 69.)

Plaintiff's evidence was clear that he did suggest purchase of this land to Lambert from time to time; that no sale took place until the sale of the Gore quarter was almost completed, and that Lambert finally decided to buy on the trip to Calgary, and on that occasion indicated such decision to the defendant in the absence of the plaintiff. Now can this Court say that the previous work of the plaintiff, remembering that the listing had not yet been withdrawn, was not a *causa causans* of the sale? It would seem to me a very strong argument in

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favour of the conclusion that it was in that the purchaser himself broached the subject to the defendant on the trip to Calgary, and not the defendant to Lambert. I am not by any means clear that the trial Judge was wrong in this regard and his decision with respect to the Rambo quarter should therefore also stand.

The *Real Estate Commission Act*, R.S.A., 1922, ch. 139, clearly does not apply, a sale having been consummated, and it is therefore unnecessary to deal with that defence.

With regard to the question put to Lambert as to what was the inducement which caused him to purchase the land, and which was ruled out by the trial Judge, I am of opinion that in the light of the subsequent testimony its importance is eliminated. Lambert in effect stated all he possibly could say on that point and no substantial injustice was done. There is nothing, therefore, in this ground of appeal.

For these reasons I would dismiss the appeal with costs.

CLARKE, J.A.—The finding of the trial Judge is that the land in question was listed with the plaintiff for sale but that the listing was not exclusive.

In *Brinson v. Davies* (1911) 105 L.T. 134, 27 T.L.R. 442, 55 S.J. 501, it was decided that in a contract of agency of this kind there is an implied term that the owner shall be at liberty to sell—himself, and if his doing so prevents the agent from finding a purchaser, the agent is not entitled to a commission because the owner has only done that which he was entitled to do.

The question in this case is not whether or not the plaintiff performed some service whether of value or not in endeavouring to effect a sale but whether he was, as some cases put it, "the *causa causans*" and others "the efficient cause" or "an efficient cause."

I think the simple rule for guidance is that stated by Erle, C.J., in the oft-quoted case of *Green v. Bartlett* (1863) 14 C.B. (N.S.) 681, 32 L.J.C.P. 261, 143 E.R. 613, viz., that if the relation of buyer and seller is really brought about by the

act of the agent, he is entitled to commission although the actual sale has not been effected by him.

From a perusal of the evidence prior to the argument I was not satisfied that it warranted a finding that the sale or the relation of buyer and seller was brought about by the plaintiff, the argument did not change my opinion, but finding that there was opinion to the contrary in the Court I again made a careful study of the evidence with the result that I am now more strongly convinced of the correctness of my former view. The two quarter sections in question lie adjacent to lands owned by the father of the purchaser, Lambert, the purchase by him of the properties which were well known to him had been discussed at different times during the two years prior to the listing and early in May, 1926, probably before the listing, or at all events before the plaintiff mentioned it to Lambert there was a fairly definite understanding between the defendant and Lambert, but in no sense binding, that Lambert would buy the Gore quarter in the fall in case his crops would turn out well enough to enable him to finance it. The plaintiff was aware of these negotiations in June, 1926, when he was submitting to Lambert a list of properties he had for sale including this one. Nothing of consequence took place in connection with the sale of this quarter until Lambert's crop was assured and was being harvested when the plaintiff went to see him, which appears to be the only serious effort he made to sell him this quarter. This was only a few days before Lambert agreed with the defendant to purchase. As to the Rambo quarter section, Lambert had not previously shown any inclination to purchase though it had been proposed to him by the defendant. On the occasion referred to when the plaintiff was endeavouring to sell the Gore quarter it was Lambert himself who brought up the question of its purchase and asked the plaintiff to see if it could be got for $30 an acre but as relations between plaintiff and defendant became estranged immediately afterwards upon the latter learning of the plaintiff's endeavour to claim a commission by making a sale of these properties no further negotiations took place about this quarter until the defendant and Lambert went to Calgary to close the sale of the Gore quarter. On the way Lambert ap-

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Clarke, J.A.

proached defendant about the Rambo quarter on account of his father having advised him to purchase it and offered to take it off his hands if he desired to get rid of it. Terms were agreed upon and in Calgary the sale of both quarters was completed. If I were to enquire into the efficient cause of the Rambo quarter I would attribute it to the convenient location of the land, Lambert's desire to get the land for himself, and the advice of his father, and this in part applies to the Gore quarter. I doubt if it can be said that either plaintiff or defendant was the *causa causans* of the sale of that quarter. The best evidence of what induced the sale seems to be embodied in the statement of Lambert in answer to the question: "You were in the market to purchase land?" Answer: "Well, I never thought that seriously. When I got ready I bought, that was all there was to it, I can't say I was or I wasn't." I do not think the plaintiff strengthened his claim by getting the written offer signed by Lambert to purchase the Gore quarter dated September 6, 1926. That was after the plaintiff knew his agency was repudiated. The reference in it to a deposit of $50 was a myth and it appears to me the whole object was to bolster up a claim for commission. The case is in principle much like *Barager v. Wallace*, 12 Sask. L.R. 301, [1919] 2 W.W.R. 858, 47 D.L.R. 158, where the Court of Appeal of Saskatchewan disallowed a claim for commission.

I would allow the appeal with costs, set aside the judgment below and dismiss the action with costs.

MITCHELL, J.A.—My view of the evidence is that the trial Judge was correct in his finding that there was a listing with the plaintiff of both of the quarter sections involved.

Upon a perusal of the judgment written by my brother Hyndman, together with the opinion I have formed as to the effort put forth by the plaintiff looking to a sale of both quarter sections, I have no hesitation in agreeing with his conclusions upon the facts, and with his application of the authorities, which he quotes therein, so far as the Gore lands only are concerned.

With regard, however, to the part played by the plaintiff in connection with his claim for commission on the Rambo

lands, I am rather inclined to the general view of the evidence taken by my brother Clarke.

I cannot find throughout the evidence specific instances wherein the plaintiff had put forth such degree of effort as would entitle him to say that he was a contributing factor in connection with any of the discussions or negotiations that led up to the sale of these latter lands. Much less can it be said that he was "the effective cause" or even "an effective cause," "the *causa causans*," which the authorities cited by my brother Hyndman indicate should be present, in order to constitute such relationship between principal and agent, entitling the plaintiff to succeed.

In my judgment, the sale of the Rambo lands resulted entirely from the circumstance that Lambert and the defendant accompanied one another by train to Calgary for the purpose, among other things, no doubt, of formally completing the purchase and effecting the transfer of the Gore lands, the same having been just previously sold to Lambert.

But for that favourable opportunity afforded for discussion of the subject and the fact that Lambert was then committed to the purchase of the Gore quarter, I see nothing in the evidence to indicate that Lambert would otherwise have bought or was considering the purchase of the Rambo lands and there is certainly nothing to indicate such definite effort on the part of the plaintiff as might have resulted in Lambert becoming in any way interested in this land; excepting possible references to these latter lands by the plaintiff to Lambert, while he was urging upon him the purchase of the Gore lands, but which apparently had made no impression upon the latter. The evidence clearly indicates that up to the time the journey to Calgary, above referred to, was undertaken there was no indication of an impending deal between the defendant and Lambert, as to the Rambo lands, but on the contrary the subsequent purchase of the same by Lambert was a development of the train journey to Calgary. Had there been any such intention created in the mind of Lambert previously, it seems to me unlikely that the negotiations for the Gore quarter would have been consummated without reference to the Rambo quarter.

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Mitchell, J.A.

I would make no allowance to the plaintiff with respect to the Rambo lands and would give the plaintiff the commission on the Gore lands, at the rate agreed upon, the appeal to be allowed.

Appeal dismissed with costs.

MacIntyre & Sandercock, solicitors for plaintiff, respondent.

F. C. Moyer, solicitor for defendant, appellant.

TAB 12

Court of King's Bench of Alberta

Citation: Razor Energy Corp., v Companies' Creditors Arrangement Act, 2024 ABKB 534

Date:20240906
Docket: 2401 02680
Registry: Calgary

In the Matter of the Companies Creditors Arrangement Act, RSC 1985, c C-36

Between:

Razor Energy Corp., Razor Holdings Gp Corp, Blade Energy Services Corp.

Applicants

- and -

Companies' Creditors Arrangement Act

Respondents

Corrected judgment: A corrigendum was issued on September 12, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on September 9, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of
Honourable Justice M.E. Burns

---

[1] Razor is in the business of the development and production of oil and gas.

[2] Alberta (the "Crown") owns and holds legal title to most mines and minerals and natural resources in the province and enters into agreements under the *Mines and Minerals Act,* RSA c

M-17 (the "*Act*") that grants rights in respect of minerals, which includes petroleum and oils as provided in Section 1(1)(p)(i) and section 16 of the *Act*.

[3] The *Act* provides that a royalty determined under the *Act* is reserved to the Crown on a mineral recovered pursuant to an agreement. The royalty is prescribed from time to time by the Lieutenant Governor in Council (section 34).

[4] The Alberta Petroleum Marketing Commission ("APMC") was created and appointed to act as the Crown's agent to receive and market crude oil royalty volumes and includes tasks related to crude oil royalty forecasting, deliveries, and settlement of Crown oil royalties under the *Petroleum Marketing Act* and its' regulations.

[5] Razor has entered into approximately 321 "Petroleum and Natural Gas Leases" with the Crown. Each of the agreements are substantially identical other than the location and "leased substance." As a result, Razor is obligated to deliver to the Crown a royalty share of the leased substance produced by delivering such share to APMC.

[6] The royalty owing to the Crown in respect of the leased substance produced by Razor in January 2024 was not delivered to the APMC by Razor.

[7] On January 30, 2024, Razor commenced insolvency proceedings by filing notices of intention to make proposals to their creditors pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), consequently there was a stay of proceedings respecting Razor and its property.

[8] On February 28, 2024, Razor converted its proposal proceedings to proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"), with an ("initial order") being granted the same day. Amongst other things, a Monitor was appointed and the stay of proceedings under the proposal continued with respect to preventing parties from commencing or continuing proceedings or exercising any rights or remedies against Razor.

[9] On February 28th, APMC notified the Monitor and Razor Energy of the Crown's ownership and title to royalty oil, including the January royalty deficiency volumes (estimated to be 934.8 m^3 of crude oil). AMPC advised Razor Energy it was in a bailment and trust relationship with respect to the Crown's royalty share of crude oil production, and there was no right to seize and convert the Crown's property for the use of Razor Energy and its creditors and the royalty oil could not form part of the property of Razor Energy.

[10] On March 1, 2024, the APMC directed Razor Energy ("the Direction"), pursuant to section 12(1) of the *Petroleum Marketing Regulation*, to deliver, in kind, to APMC, as part of the February 2024 royalty deliveries, crude oil of an equal quantity and like quality to the January 2024 royalty deficiency volumes that were not delivered.

[11] The Monitor's position, as stated in its First Report, was that as the Direction from APMC was directly related to the January royalty amounts, it appeared to the Monitor that the Direction was in breach of the prohibition on the exercise of rights and remedies contained in paragraph 15 of the Initial Order.

[12] APMC, on behalf of the Crown, argues that it has a proprietary right in the oil that it reserves as royalties. This right applies to the monthly oil royalty and the oil it directs to be paid under section 12(1) of the *Act*. APMC argues that the Crown does not become a creditor when a royalty is not paid – it has a proprietary right that it may seek over subsequent oil production.

AMPC is not seeking the enforcement of a payment, it is seeking to have the Crown's royalty share delivered to it.

[13] Razor, and its primary creditor, Arena Investors LP, argue that while the Crown may have a proprietary right to the oil in the month the royalties are due, if the oil is not provided, the Crown becomes a creditor with respect to the outstanding royalty deficiency volumes and the usual priorities will apply to the Crown in the context of the bankruptcy. The fact that APMC is directing Razor's pre-filing obligations be paid in kind rather than cash is still enforcing a missed payment – an outstanding liability to a creditor.

What is the scope of the stay?

[14] The Initial Order, as amended and extended, contains provisions mandating a stay. It provides, in part, that:

> **NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**
>
> 14. Until and including March 8, 2024, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.
>
> **NO EXERCISE OF RIGHTS OR REMEDIES**
>
> 15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court […]

[15] Razor asserts that all financial and payment obligations relating to the pre-filing period are stayed under the *CCAA* and failure to pay a pre-filing royalty deficiency volume does not give rise to an enforceable remedy during the applicable stay period. The *CCAA* is clear that it is binding upon the Crown. It is also clear that the *CCAA* applies with respect to the debtor's assets and does not permit a debtor to take and use that which they do not own.

Is this a deemed trust?

[16] Razor argues that while the *Mines and Minerals Act* uses language of "ownership," APMC's claim is akin to or in fact a statutory deemed trust. Section 37(1) of the *CCAA* provides:

> 37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[17] Razor argues that the Crown's royalty share of the mineral produced in a given month is commingled with all the produced minerals which are property of Razor Energy. Razor asserts that section 3(b) of the *Marketing Regulation* implicitly recognizes this and states that "when crude oil recovered pursuant to an agreement is delivered to a field delivery point during a delivery month, the Crown's royalty share of that crude oil is deemed to be delivered first". Presumably, Razor's position is that the Crown's oil, deemed to be delivered first, would then engage the protection of s 37(1) of the *CCAA*.

[18] The Crown's position is that this is different because here there is no question that the Crown holds the propriety interest in all of the crude subject to Razor's interest. Razor's interest is governed by a contract and the provisions of the *Act*. Section 37 applies to "property of a debtor company" being held in trust for Her Majesty. The Crown's royalty share is not and never was the "property of the debtor" which was deemed by statute to be held for the Crown. It was always the property of the Crown. At most, Razor is "a trustee or agent" in respect of the Crown royalty share. This is not a deemed trust created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share.

[19] The Alberta Court of Appeal considered the *Act* and the Crown's interest in the mineral production in the decision of ***Excel Energy Inc v Alberta***, 1997 ABCA 24 at paragraphs 6 and 7, where the court noted:

> ... under Alberta law, the Crown royalty is an *in rem* right. To establish the required statutory obligation, Excel relied upon provisions in the *Mines and Minerals Act*, RSA 1980, c M-15, s 34 provides that "A royalty … is reserved to the Crown in right of Alberta on any mineral recovered pursuant to an agreement." S. 35(3) provided that the royalty interest was deliverable in kind. S. 36 provides that title remains in Alberta even though the royalty is commingled during the extraction and refining process, and indeed remains until the Alberta interest is "disposed of by or on behalf of the Crown". If then, the producer ever sells the royalty it can only do so as agent for Alberta.
>
> It first must be said that this attempt by Canada to treat an obligation as income is, of course, the creation of a fiction. Nobody but Alberta ever in fact had that royalty or received a penny by way of proceeds from it. Alberta held an *in rem* interest in the hydrocarbons as they came out of the ground, and, when they were sold, the proceeds, under the scheme of the Alberta *Act*, went straight to Alberta. The producer could never be anything more than a trustee or agent.

[20] Consequently, this is not a case such as ***British Columbia v. Henfrey Samson Belair Ltd.,*** [1989] 2 S.C.R. 24, where a person collects a tax (cash or similar), and the legislation deems a trust over the tax collector's property for the amount of the tax collected.

[21] Further, in ***Canada v. Canada North Group Inc***., 2021 SCC 30, the question was whether a deemed trust created by statute had a priority over priming (administrative) charges in the context of the *CCAA*. The SCC found that the deemed trust did not create a beneficial interest that could be considered a proprietary interest and did not give the Crown a property interest as a common law trust would, reasoning that the trust lacked the quality that allowed a court to refer to a beneficiary as a beneficial owner.

[22] Here, the Court of Appeal recognized the *in rem* ownership interest in the hydrocarbons. Razor's relationship to the Crown's royalty share as a trustee or agent is not a deemed trust

created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share. No deemed trust is necessary or has been created. There is already a proprietary interest. Razor does not hold the oil in a "trust" as one would find in a deemed trust. Razor is holding onto the Crown's oil. The Initial Order applies to creditors and to Razor's property, not the Crown's property.

But does the Crown become a creditor when a royalty is not delivered?

[23] Given the decision in *Excel*, it is clear that the Crown's rights to the royalty share are *in rem*. Razor never owned and was never entitled to own the Crown's royalty share of production. Neither the *BIA* nor the *CCAA* give Razor any ownership interest in the Crown's royalty share.

[24] The Crown argues that Alberta is not acting as a creditor, but the steward of natural resources owned by and for the benefit of all Albertans, which it develops in the public interest, but in the context of oil that was not provided when required, is the Crown then a creditor with respect to the non-delivered amount? And if so, is it the type of "claim" covered by the Initial Order or the statutes?

[25] Arena argues that APMC is fundamentally seeking relief in relation to a pre-filing claim which has been stayed by virtue of the Initial Order. The APMC is utilizing the enforcement mechanisms available to it under provincial legislation to seek recovery of the January 2024 royalty shares.

[26] The reality is that the royalty is a tangible, physical quantity of oil but Razor no longer possesses the January 2024 royalty shares volume because it was likely transferred to third party oil marketers back in the beginning of the year (albeit in violation of section 11 of the *Act*) and the tangible assets are unrecoverable. As a result, the APMC cannot enforce its *in rem* rights with respect to that particular oil.

Can AMPC demand the royalty under s 12?

[27] Section 12(1) of the Petroleum Marketing Regulation provides:

> 12(1) If there is an underdelivery balance at a battery for a delivery month, the Commission, by a notice given to the operator of the battery for that delivery month, may direct that the default under the agreement or agreements resulting from the deficient delivery be remedied by the delivery in kind to the Commission of crude oil in equal quantity and of like quality to the underdelivery balance
>
> (a) in the month in which the direction is given,
> (b) in a particular subsequent month, or
> (c) in instalments in 2 or more particular subsequent months,
>
> whichever is specified in the direction (emphasis added).

[28] Section 12 is a statutory enforcement clause/remedy. Section 15 of the Initial Order is specific in providing that all rights and remedies of a government body, whether judicial or extra-judicial, statutory, or non-statutory, against or in respect of the Razor Entities, or affecting the Business or Property, are stayed.

[29] Whether APMC could exercise its rights under section 13 (seeking a monetary amount) is irrelevant to this determination.

[30] Further, there is no paramountcy issue here. There is no conflict between the Act and *Petroleum Marketing Regulation* and the *CCAA* or *BIA*. The Initial Order was made within the power, authority, and jurisdiction of the Court. The Crown is bound by it.

[31] At its crux, even though the oil was wrongfully taken in January, and the Crown has title to any and all subsequent oil, subject to the terms of the leases, and even though the oil was held in a true trust, not a deemed trust, the act allows, and the Initial Order provides, that all attempts at remedying the taken oil were stayed. Using the power in Section 12 is a remedial step that is stayed.

[32] APMC's application is dismissed.

Heard on the 10 day of April, 2024.
Dated at the City of Calgary, Alberta this 6th day of September, 2024.

M.E. Burns
J.C.K.B.A.

Appearances:

William Shores,
Shores Jardine LLP
for the Applicant

Pantellis Kyriakakis,
McCarthy Tetrault LLP,
for the Respondent Razor Energy Razor Holdings GP Corp.,
and Blade Energy Services Corp.

Jessica Cameron,
Fasken Martineau DuMoulin LLP
for the Respondent Arena Investors LP

Kelly Bourassa,
Blake, Cassels & Graydon LLP
counsel to the court-appointed Monitor,
for FTI Consulting Canada Inc.

Mick Wall,
Attorney General of Alberta
for the Respondents

Corrigendum of the Reasons for Decision
of
The Honourable Justice M.E. Burns Honourable Justice M.E. Burns

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A corrigendum was issued to correct Honourable Justice M.E. Burns title on the cover page.

Corrigendum of the Reasons for Decision
of
M.E. Burns M.E. Burns, Registrar in Bankruptcy

A Corrigendum was issued to correct one counsel's law firm.

TAB 13

FASKEN

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November 15, 2024
File No.: 314144.00005/23362

VIA EMAIL (scollins@mccarthy.ca)

Razor Energy Corp., Razor Holdings GP Corp., Blade Energy Services Corp.
c/o McCarthy Tetrault LLP
4000, 421 - 7 Avenue SW
Calgary, AB T2P 4K9

Attn: Sean Collins

Dear Mr. Collins:

Re: In the matter of the Plan of Compromise or Arrangement of Razor Energy Corp., Razor Holdings GP Corp., Blade Energy Services Corp. (collectively the "Razor Entities")
Court of King's Bench of Alberta Action No. 2401-02680 (the "CCAA Proceeding")
Notice of Claim against Directors and Officers of Razor

We write to you with respect to the above noted matter.

Be advised that Arena Investors LP ("**Arena**") has suffered and will continue to suffer damages as a result of multiple gross errors, misstatements, misleading statements, omissions, and other material misrepresentations made by the Razor Entities' directors and officers ("**D&O**") to Arena during the course of the CCAA Proceedings (the "Misrepresentations"). Arena demands that the Razor Entities and their D&O provide compensation to Arena for these damages and take all necessary actions to prevent further damages.

Throughout the CCAA Proceedings, the Razor Entities' D&O, specifically Mr. Doug Bailey, repeatedly advised Arena's representatives that any corporate transaction for the acquisition of the Razor Entities' business through a share subscription, would assume the indebtedness owed by Razor Royalties LP to Arena (the "**Arena Indebtedness**"), and would honour Arena's interest in the gross overriding royalties ("**GORR**") that had been assigned to Arena as security for repayment of that indebtedness. As a result of these Misrepresentations, Arena was induced to support the Razor Entities throughout the CCAA Proceedings to its own detriment.

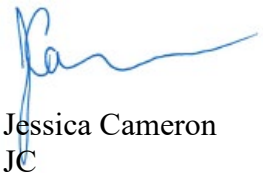
Contrary to all prior representations, Arena discovered on October 22, 2024, for the first time, that the corporate transaction with Texcal Energy Canada Inc. (the "**Texcal Transaction**"), contemplates vesting out both the indebtedness owing to Arena and Arena's interest in the GORRs for no or nominal consideration. It is apparent that Mr. Bailey was aware since at least September 16, 2024, and perhaps even earlier, that the Texcal Transaction would extinguish Arena's indebtedness and interest in the GORRs but failed to inform Arena of this critical information.

Mr. Bailey's conduct in this regard was oppressive, unfairly prejudicial to Arena, and unfairly disregards Arena's interests as the senior secured creditor of the Razor Entities (excepting Blade). Arena continues to investigate the Misrepresentations and will take further action as necessary to protect its rights. Arena demands that the Razor Entities and its D&O take all necessary steps to: (1) fairly compensate Arena for the full amount of the Arena Indebtedness; (2) preserve Arena's interest in the GORRs; and (3) prevent further damage to Arena or its rights.

We understand from the Razor Entities' materials filed in the CCAA Proceeding that they are seeking channeling relief to allow any person who has a claim against the Razor Entities' D&O to have the benefit of any existing insurance policies. Accordingly, Arena hereby provides notice to each of the Razor Entities, and their respective D&O, that Arena demands the above compensation and non-monetary relief from the Razor Entities' D&O in respect of the conduct described herein, and demands that Razor and the Razor Entity D&O notify all of their insurers of same, provide a copy of this letter to its insurers, take all necessary steps to comply with the duties imposed by any insurance policies, and provide copies of all communications with their insurers to Arena promptly.

We trust the foregoing to be in order.

Yours truly,



Jessica Cameron
JC

TAB 14

McCarthy Tétrault LLP
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November 22, 2024

Via Email (jharrison@irsnavacord.com)

Iridium
Suite 1100, 255 Fifth Avenue SW
Calgary, AB T2P 3G6

Attention: Joel Harrison

Dear Sir:

Re: Notice of Claims and Possible Claims

Policyholder: Razor Energy Corp.
Insureds: Past and Present Directors and Officers of the Policyholder
Beazley Syndicates 2623/623 at Lloyd's: Directors and Officers Liability Insurance Policy
UMR: B1262FI2147123
Policy Period Extension: October 11, 2024 – December 11, 2024

Company: Razor Energy Corp.
Insureds: Past and Present Directors and Officers of the Policyholder
Lloyd's Syndicate AEB 2623: Excess Directors and Officers Liability Insurance
UMR: B1262FI2147223
Policy Period Extension: October 11, 2024 – December 11, 2024

Company: Razor Energy Corp.
Insureds: Past and Present Directors and Officers of the Policyholder
Lloyd's Syndicate AWH 2232: Side A Difference in Conditions Directors and Officers Liability Insurance
UMR: B1262F12147323
Policy Period Extension: October 11, 2024 – December 11, 2024

We are counsel to Razor Energy Corp. ("**Razor Energy**"), Razor Holdings GP Corp. ("**Razor Holdings**"), and Blade Energy Services Corp. ("**Blade**", Blade, Razor Holdings, and Razor Energy are collectively referred to as, the "**Razor Entities**").

The Razor Entities sought and obtained protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**") on February 28, 2024. Under a process authorized by the Court in the CCAA proceedings, Razor Energy has entered into a subscription agreement with Texcal Energy Canada Inc. Court approval of the transactions is scheduled to be heard on November 27, 2024.

Attached is a letter from counsel to Arena Investors LP ("**Arena**"), dated November 15, 2024 (the "**Claim**"). The Claim is a Claim against the "**insureds**" and one or more "**insured person**" under each of the above-captioned policies. Further to our telephone conversation of even date, we confirm Iridium's advice that it will provide immediate notification of the Claim to each of the underwriters in accordance with the terms the respective policies.

At your earliest convenience, please advise the writer of any further information you may require as well as the underwriters' respective coverage positions.

Thank you for your assistance.

Yours truly,

McCarthy Tétrault LLP

Sean Collins, KC

SC/kh
Enclosure

cc: Razor Energy Corp.
Doug Bailey, Chief Executive Officer and Director of Razor Energy Corp.
Kevin Braun, Chief Financial Officer
Shahin Mottahed, Former Director
Frank Muller, Former Director
Sean Phelan, Former Director

Iridium
Attention: Danielle Gorst
Via Email: dgorst@irsnavacord.com

TAB 15

COURT FILE NUMBER	
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	ARENA LIMITED SPV, LLC and 405 DOLOMITE LLC
DEFENDANTS	DOUG BAILEY, KEVIN BRAUN, SONNY MOTTAHED, SEAN PHELAN, FRANK MULLER, MICHAEL BLAIR, and DARREN JACKSON
DOCUMENT	**STATEMENT OF CLAIM**
PARTY FILING THIS DOCUMENT	**ARENA LIMITED SPV, LLC and 405 DOLOMITE LLC**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers & Solicitors 3400 First Canadian Centre 350 – 7th Avenue S.W. Calgary, AB T2P 3N9 **ATTN: Alex Kotkas** Tel: (403) 261-5358 File No.: 314144.00005

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED DIGITALLY
2401 16672
Nov 22, 2024
1:48 PM
CLERK OF THE COURT

NOTICE TO DEFENDANT(S)

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Statement of Facts Relied On:

The Parties

1. The Plaintiffs are limited liability corporations incorporated pursuant to the laws of the State of Delaware, United States of America. The Plaintiffs are the lenders under a loan agreement dated February 16, 2021, as amended and restated on several occasions (collectively the "**Loan Agreement**"), between Arena Limited, SPV LLC ("**Arena SPV**") and 405 Dolomite LLC ("**405 Dolomite**" and together with Arena SPV the "**Arena Lenders**") and Razor Royalties Limited Partnership ("**Razor Royalties LP**") by its general partner, Razor Holdings GP Corp. ("**Razor Holdings**"), as borrower, and as guaranteed by Razor Energy Corp. ("**Razor Energy**").

2. The Plaintiff is a complainant within the meaning of Section 239 of the Alberta *Business Corporations Act*, RSA 2000, c B-9 (the "***ABCA***").

3. The Defendant, Doug Bailey, is an individual residing in the City of Calgary, Province of Alberta. At all material times, Mr. Bailey was a director of Razor Energy and Razor Holdings, who in turn is the general partner of Razor Royalties LP. Further, at all material times Mr. Bailey was also the President and Chief Executive Officer of Razor Energy.

4. The Defendant, Kevin Braun, is an individual residing in the City of Calgary, Province of Alberta. At all material times, Mr. Braun was a director of Razor Energy and Razor Holdings. Further, at all material times Mr. Braun was also the Chief Financial Officer of Razor Energy.

5. The Defendant, Sonny Mottahed, is an individual residing in the City of Calgary, Province of Alberta. At all material times, Mr. Mottahed was a director of Razor Energy.

6. The Defendant, Sean Phelan, is an individual residing in the City of Calgary, Province of Alberta. At all material times, Mr. Phelan was a director of Razor Energy.

7. The Defendant, Frank Muller, is an individual residing in the Town of Okotoks, Province of Alberta. At all material times, Mr. Muller was a director of Razor Energy.

8. The Defendant, Michael Blair, is an individual residing in the City of Calgary, Province of Alberta. At all material times, Mr. Blair was the Chief Operating Officer of Razor Energy.

9. The Defendant, Darren Jackson, is an individual residing in the City of Calgary, Province of Alberta. At all material times, Mr. Jackson was the Vice President, Production and Operations of Razor Energy.

10. The Defendants are collectively referred to herein as the "**Directors & Officers**".

The Loan & Security

11. Pursuant to the Loan Agreement, the Arena Lenders made available to Razor Royalties LP three senior secured term loan facilities in the initial maximum principal amounts of USD$11,042,617, USD$8,833,922, and USD$11,042,403 (collectively the "**Loan**"). As at November 4, 2024, the Arena Lenders are owed USD$5,460,028.72 pursuant to the Loan Agreement, plus all accrued professional fees on a solicitor-and-his-own-client basis, with interest and fees continuing to accrue thereon (collectively the "**Arena Indebtedness**").

12. As part of the Loan Agreement between the parties, the Razor Borrower's obligations owing to the Arena Lenders under the Loan Agreement were guaranteed by Razor Energy pursuant to a continuing agreement of guarantee and suretyship dated February 16, 2021 (the "**Guarantee**").

13. As part and parcel of the Arena Lender's overall agreement to enter into the Loan Agreement, the parties agreed to grant the Arena Lender's certain gross overriding royalties ("**GORRs**") in respect of Razor Energy's oil and gas production from certain oil and gas mineral leases in Alberta.

14. Through a series of transactions, Razor Energy sold GORR interests to Razor Royalties LP, which interests were purchased by Razor Royalties LP using the proceeds from the Loan. Razor Royalties then assigned its interests in the GORRs to the Arena Lenders, as continuing and collateral security for its obligations owing under the Loan Agreement.

15. Additionally, as further security for Razor Royalties LP's obligations owing to the Arena Lenders under the Loan Agreement, the following security was granted:

(a) A securities pledge agreement made by Razor Energy in favour of the Agent with respect to all of its limited partnership interests in Razor Royalties LP (the "**Borrower Pledge**");

(b) A securities pledge agreement made by Razor Energy in favour of the Agent with respect to all of its equity interests in Razor Holdings (the "**GP Pledge**") and together with the Borrower Pledge the "**Pledge Agreements**");

(c) A $50,000,000 secured debenture granted by Razor Energy and Razor Royalties LP, with respect to all of its petroleum and natural gas interests; and

(d) Debenture pledge agreements, granted by Razor Energy and Razor Royalties LP, with respect to such debentures,

(all of the foregoing collectively referred to herein as the "**Arena Security**").

16. The Arena Security was duly registered against Razor Energy, Razor Holdings, and Razor Royalties LP at the Alberta Personal Property Registry on or about February 16, 2021.

17. The Arena Security was duly registered against Razor Energy's mineral interests with the Alberta Department of Energy on February 5, 2024.

Razor Energy's Financial Difficulties & Commencement of CCAA Proceedings

18. Commencing in early 2023, Razor Energy encountered financial difficulties, and the parties committed various defaults under the terms of the Loan Agreement and Arena Security as a result. As a result of these defaults, on or about March 2, 2023, the Arena Lenders issued a Notice of Default and Reservation of Rights letter to Razor Royalties LP (the "**First Default Notice**").

19. Notwithstanding the existence of the defaults, the Arena Lenders did not enforce upon the Arena Security, and instead elected to provide the Razor entities with breathing room to resolve their financial difficulties.

20. The Arena Lenders worked constructively with Razor Energy and provided numerous accommodations, including waiving covenants and amending covenants, as well as giving Razor Energy time to explore strategic alternatives, such as corporate mergers/amalgamations, private placements, stock sales and other restructuring transactions.

21. By the end of the summer of 2023, the Razor entities were once again in default pursuant to the Loan Agreement. As a result, on or about August 31, 2023, the Arena Lenders issued a further Notice of Default and Reservation of Rights to Razor Royalties LP.

22. Despite the Second Default Notice, the Arena Lenders continued to give Razor Energy time to attempt to effect restructuring transactions. This additional time was provided in part, as Arena was advised by Razor Energy that it was recovering from having its production volumes shut-in due to wildfires during the summer of 2023. Following this temporary shut-in, Razor Energy's daily production volumes were increasing leading to improved financial and operating results.

23. Despite the Arena Lenders' cooperation and accommodations, further defaults occurred in late 2023 under the terms of the Loan Agreement, and a further Notice of Default and Reservation of Rights letter was issued to Razor Royalties LP and Razor Energy, as guarantor, on or about October 16, 2023.

24. Notwithstanding the continuing defaults, the Arena Lenders again did not enforce upon the Arena Security, and instead continued to work with the Razor entities to assist them in the resolution of their financial difficulties.

25. Ultimately, neither Razor Energy nor Razor Royalties LP were able to sufficiently improve their financial situation. On January 30, 2024, Razor Energy and Razor Holdings, along with their affiliate Blade Energy Service Corp. (collectively, the "**Debtors**") filed a notice of intention to file a proposal under Part III of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 (the "**NOI Proceedings**").

26. Further, on February 28, 2024, the Debtors obtained an Initial Order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("**CCAA**"), which converted

the NOI Proceedings into proceedings under the CCAA (the "**CCAA Proceedings**"). Razor Royalties LP is not a debtor in those CCAA Proceedings; however, the stay of proceedings granted therein has been extended to Razor Royalties LP.

Representations made to Arena throughout the CCAA Proceedings

27. From the outset of the CCAA Proceedings, the Debtors advised the Arena Lenders that they would seek to restructure their affairs through a sale of their assets or business. Additionally, from about April 2024, to October 22, 2024, the Directors & Officers, represented to the Arena Lenders that the Arena Indebtedness and Security would be assumed as part of a proposed corporate transaction to be concluded in the Debtors' CCAA Proceedings, as more particularly detailed below.

28. Beginning on February 6, 2024 (while the Debtors' restructuring was still taking place under the NOI Proceedings), the Debtors commenced a sale and investment solicitation process (the "**SISP**"), using Peters & Co. Limited as the sales agent (the "**Sales Agent**") for the marketing and ultimate sale of the Debtors' assets and/or business.

29. Since the inception of the CCAA Proceedings, the Debtors have been pursuing a share transaction with Solidarity Holdings Inc. ("**Solidarity**"), to be effected by way of a reverse vesting order (the "**Corporate Transaction**"). On or about March 28, 2024, Solidarity submitted a non-binding letter of intent (the "**First LOI**") to purchase all of the issued and outstanding shares of Razor Energy for a purchase price of $13,350,000.

30. The First LOI was superseded by an amended non-binding letter of intent submitted by Solidarity to Razor Energy on or about April 22, 2024 (the "**Finalized LOI**"). Pursuant to the Finalized LOI, the total combined purchase price had been reduced to $11,500,000, but included the "assumption of the secured obligations owing by Razor Royalties LP and guaranteed by Razor [Energy], to Arena Investors LP, in the approximate amount of CDN$6.5 million".

31. On or about May 1, 2024, the Agent began engaging in discussions directly with Solidarity with respect to the assumption of the Arena Indebtedness and Arena Security, which

included providing Solidarity with all credit and security documentation pertaining to the Loan Agreement and Arena Security.

32. On or about May 22, 2024, the Debtors convened a virtual stakeholder meeting (the "**Stakeholder Meeting**") to discuss the structure of the Corporate Transaction and potential distribution of funds therefrom. At that meeting, the Debtors advised parties, including the Arena Lenders, that part of the purchase price payable under the Corporate Transaction included the assumption of the Arena Indebtedness.

33. As a result of this representation, the Arena Lenders did not oppose the Debtors' application on or about July 17, 2024, before the Alberta Court of King's Bench (the "**Court**"), whereby the Debtors obtained Court approval to conclude two separate asset transactions for portions of the Debtors' assets (the "**July Asset Transactions**"). The proceeds of these transactions, totaling approximately $1,115,000, were utilized to fund the Debtors' CCAA Proceedings and in furtherance of advancing the Corporate Transaction.

34. The Arena Lenders did not receive any distributions from these asset sales, nor did they seek such distribution. Rather, they supported the approval of each of these transactions on the basis that the continuation of the CCAA Proceedings was necessary to effect the proposed Corporate Transaction, pursuant to which the Arena Indebtedness and Security was to be assumed.

35. Unbeknownst to the Arena Lenders at the time, the structure of the Corporate Transaction was changing over the course of July and August 2024, jeopardizing the assumption of the Arena Indebtedness and Security; however, the Directors & Officers failed to advise the Arena Lenders of these developments at this time.

36. Rather, throughout the summer of 2024, certain of the Directors & Officers, during various conversations with the Arena Lenders, continued to represent that the Corporate Transaction being pursued included the assumption by Solidarity of the Arena Indebtedness.

37. The Arena Lenders relied on these representations in making strategic decisions affecting their interests in the CCAA Proceedings, including, but not limited to:

(a) Not opposing the July Asset Transactions, as discussed above;

(b) Supporting the Debtors in a contested application in April 2024 against the Alberta Petroleum Marketing Commission ("**APMC**");

(c) Supporting the Debtors in a contested application in September 2024 against Conifer Energy Inc. ("**Conifer**");

(d) Requesting to be added as a Respondent to appeal proceedings commenced by the APMC in further support of the Debtors; and

(e) Supporting the Debtors at each of their applications to extend the stay of proceedings in the CCAA Proceedings, all in order to pursue the Corporate Transaction.

38. In early September 2024, Mr. Bailey met with representatives of the Arena Lenders to provide an update on the status of the Corporate Transaction. While Mr. Bailey raised concerns regarding the Corporate Transaction with the Arena Lenders' representative, he did not definitively advise them that the transaction structure had changed, such that there would be no debt assumption or assumption of the Arena Security, including the GORR.

39. It was not until October 22, 2024, that Razor Energy advised that, contrary to all prior representations made to the Arena Lenders, the Corporate Transaction with Solidarity would not include an assumption of the Arena Indebtedness or the Arena Security.

40. The Arena Lenders were not consulted about this dramatic change to the structure of the Corporate Transaction. In fact, it was quite the contrary. From April 2024 until October 22, 2024, the Arena Lenders had been led by the Debtors and Solidarity to believe that the Corporate Transaction between the parties would include a full assumption of the Arena Indebtedness and Arena Security.

41. If approved, the Corporate Transaction will result in millions of dollars in preferential payments being made to unsecured creditors ahead of the Arena Lenders, with the Arena Lenders receiving nothing.

42. Had the Arena Lenders known that the Debtors and Solidarity would seek to vest out all liabilities owing under the Loan Agreement, as well as their interests in the Arena Security, including the GORRs, the Arena Lenders would never have supported the Debtors throughout the CCAA Proceedings, spending significant legal fees in the amount of approximately USD$175,000 to do so.

43. Further, the Arena Lenders reliance upon the representations made to them materially impacted their strategy in relation to the CCAA Proceedings. Had they been aware from the outset that the Corporate Transaction would not include an assumption of the Arena Indebtedness or Arena Security, they would have, at a minimum opposed the distribution of the July Asset Transactions to the Debtors.

44. Further, the Arena Lenders reliance upon the representations made to them prevented them from advancing interim financing to the Debtors in order to finance a secondary robust sale and investment solicitation process, a process which was reasonably foreseeable to generate additional asset transactions sufficient to repay the Arena Lenders in full.

Misrepresentations

45. As a result of the foregoing, the Defendant Directors & Officers have negligently misrepresented the true nature of the Corporate Transaction in their dealings with the Arena Lenders.

46. At all material times, the Defendant Directors & Officers owed the Arena Lenders a duty of care, a duty of honesty and a duty of good faith due to the nature of their debtor/creditor relationship. They breached those duties by failing to act honestly, candidly, transparently, and reasonably in their dealings with the Arena Lenders.

47. The Defendant Directors & Officers failed to negotiate the terms of the Corporate Transaction with the Arena Lenders, in good faith.

48. Furthermore, they represented to the Arena Lenders that the Corporate Transaction would include the full assumption of the Arena Indebtedness and Arena Security, at a time when those representations were untrue.

49. Such statements were made by the Defendant Directors & Officers negligently, without exercising reasonable care or competence in confirming their accuracy, or alternatively, with a wanton disregard as to their accuracy.

50. In the alternative, the Defendant Directors & Officers had no reasonable grounds to believe that such statements were true at the time they were made, when they were in fact false.

51. The Arena Lenders relied upon the defendants false statements throughout the CCAA Proceedings, to the Arena Lenders detriment.

52. As a result of this reliance, the Arena Lenders have suffered damages in that: i) the Full Amount of the Arena Indebtedness is not being assumed as part of the Corporate Transaction; ii) the Arena Security is being vested off, including the GORR, as part of the Corporate Transaction; and iii) significant professional fees in the approximate amount of USD$175,000 have been in support of the Debtors through the CCAA Proceedings.

Oppression

53. The Defendant Directors & Officers have acted and continue to act in a manner which is oppressive of, unfairly prejudicial to, or unfairly disregards the interests of the Plaintiffs as senior secured creditors of Razor Energy and Razor Royalties LP.

54. The named Directors & Officers have renegotiated the terms of the Corporate Transaction to the prejudice of the Arena Lenders for their own personal benefit. The Corporate Transaction is being effected in order for the Directors & Officers to avoid personal liability for Razor Energy's abandonment and reclamation obligations estimated at between $115 to $123 million.

55. Furthermore, as senior secured creditors of Razor Energy and Razor Royalties LP, the Plaintiffs had reasonable expectations as to how Razor Energy and Razor Royalties LP and their respective Directors & Officers would conduct themselves with respect to the

management of the corporation and limited partnership. Those reasonable expectations include, but are not limited to:

(a) that Razor Energy and Razor Royalties LP will be managed in accordance with generally accepted corporate governance practices;

(b) that Razor Energy will be managed in accordance with the Defendants' statutory obligations under the *ABCA,* and that the Directors and Officers would act honestly, in good faith, and in keeping with the duties owed to the Arena Lenders;

(c) that the proceeds of sale of the assets or business of Razor Energy and Razor Royalties LP would be utilized to satisfy creditor claims in order of priority;

(d) that the Directors & Officers of Razor Energy would not use their control over the corporation to their own personal benefit, to the prejudice of their senior secured creditors; and

(e) that the Directors & Officers of Razor Energy and Razor Royalties LP, respectively, would not use their control over the corporation to unlawfully prevent distribution of proceeds to the Arena Lenders.

56. Contrary to the reasonable expectations of the Plaintiff as senior secured creditors of Razor Energy and Razor Royalties LP, the Defendant Directors & Officers have:

(a) Pursued approval from the Court of the Corporate Transaction, which will result in preferential payments being made to unsecured creditors ahead of the Arena Lenders;

(b) failed to act honestly, transparently and in good faith with the Arena Lenders regarding the true structure of the Corporate Transaction;

(c) abused their position of power with Razor Energy to pursue a Corporate Transaction to avoid their own personal exposure for Razor Energy's abandonment and reclamation obligations, solely for their own personal benefit;

(d) acted in such a further oppressive manner as shall be proven at the trial of this matter.

57. As a result of these oppressive acts and statutory breaches, the Defendant Directors & Officers have caused serious harm and prejudice to the rights and interest of the Plaintiffs as the senior secured creditors of Razor Energy and Razor Royalties LP.

58. The Plaintiffs are entitled to immediate relief from the Defendant Directors & Officers under the *ABCA* in order to remedy and redress their ongoing oppression.

Remedy Sought:

59. The Plaintiffs claim against the Defendant Directors & Officers, jointly and severally:

(a) Damages in the amount of the Arena Indebtedness, or an amount to be proven at Trial, arising from the misrepresentations committed by them against the Arena Lenders and as a result of the oppressive conducted perpetrated by the Directors & Officers;

(b) Damages in the amount of USD$175,000 as a result of the professional fees incurred by the Arena Lenders, which costs would not have been incurred by them, but for the misrepresentations committed by the Defendant Directors & Officers;

(c) An order declaring that as a result of the Directors & Officers' exercise of their powers and their intervention in the affairs of the corporation, the business and affairs of Razor Energy and Razor Royalties LP have been and are being conducted in a manner that is oppressive, unfairly prejudicial to, and that unfairly disregards the interests of the corporation and limited partnership's senior secured creditor, contrary to Section 242 of the *ABCA*;

(d) Such further remedies for oppression and misrepresentation as this Honourable Court may award;

(e) prejudgment interest pursuant to the terms of the Loan Agreement;

(f) post-judgment interest pursuant to the Loan Agreement, on such terms as this Honourable Court deems just, or pursuant to the *Judgment Interest Act*, RSA 2000, c. J-1, as amended;

(g) costs of these proceedings on a solicitor and own client basis or on such other basis as may be directed by this Honourable Court; and

(h) such further and other relief as this Honourable Court deems just.

NOTICE TO THE DEFENDANTS BY COUNTERCLAIM

You only have a short time to do something to respond to this counterclaim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice to counterclaim in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice to counterclaim on the plaintiff(s) by counterclaim's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice to counterclaim within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) by counterclaim against you after notice of the application has been served on you.

TAB 16

McCarthy Tétrault LLP
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Canada
Tel: 403-260-3500
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Direct Line: (403) 260-3698
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Email: ssmyth@mccarthy.ca

mccarthy tétrault

November 25, 2024

Via Email: uk.specialty.claims.professionalrisks@ajg.com
ARTHUR J. GALLAGHER (UK) LIMITED
The Walbrook Building
25 Wallbrook
London, England, EC4N 8AW

Via Email: flclaims@beazley.com
BEAZLEY SYNDICATES AFB
2023 LLOYD'S UNDERWRITER SYNDICATE NO. AFB 2623
2023 LLOYD'S UNDERWRITER SYNDICATE NO. AFB 623
c/o Financial Lines Claims
Beazley Plc
London, England, EC2N 4BQ

Via Email: uk.specialty.claims.professionalrisks@ajg.com
HDI GLOBAL SPECIALTY SE
UK BRANCH
c/o Gallagher Claims Division
Arthur J. Gallagher (UK) Limited
67 Lombard Street
London, England, EC3V 9LJ

Via Email: uk.specialty.claims.professionalrisks@ajg.com
ALLIED WORLD GLOBAL MARKETS
LLOYD'S UNDERWRITER SYNDICATE NO. 2232 AWH
c/o Gallagher Claims Division
Arthur J. Gallagher (UK) Limited
67 Lombard Street
London, England, EC3V 9LJ

Via Email: jharrison@irsnavacord.com
IRIDIUM
Suite 1100, 255 Fifth Avenue SW
Calgary, AB T2P 3G6

Attention: Joel Harrison

Re: NOTICE OF CLAIM AND POSSIBLE CLAIMS – DIRECTORS AND OFFICERS OF RAZOR ENERGY CORP. (the "Policyholder") AND ITS SUBSIDIARIES including without limitation Razor Royalties Limited Partnership, Razor Holdings GP Corp., and Blade Energy Services Corp. (the "Subsidiaries"); Claim - Arena Limited SPV et al v. Doug Bailey et al., Court of King's Bench of Alberta, Judicial Centre Calgary, Court File No. 2401-16672

We understand that you are, respectively, the former broker, underwriters and current broker of the following policies of insurance:

1. UMR: B1262FI2147123
    a. Type: Directors and Officers Liability Insurance
    b. Policyholder: Razor Energy Corp.
    c. Underwriters: BEAZLEY SYNDICATES AFB
    2023 LLOYD'S UNDERWRITER SYNDICATE NO. AFB 2623
    2023 LLOYD'S UNDERWRITER SYNDICATE NO. AFB 623
    d. Policy Period: October 11, 2023 to October 11, 2024
    e. Extension: October 11, 2024 to December 11, 2024
    f. Limit: CAD 5,000,000

2. UMR: B1262FI2147223
    a. Type: Excess Directors and Officers Liability Insurance
    b. Policyholder: Razor Energy Corp.
    c. Underwriters: HDI GLOBAL SPECIALTY SE
    d. Policy Period: October 11, 2023 to October 11, 2024
    e. Extension: October 11, 2024 to December 11, 2024
    f. Limit: CAD 5,000,000 in excess of CAD 5,000,000

3. UMR: B1262FI2147323
    a. Type: Side A Difference in Conditions
    b. Policyholder: Razor Energy Corp.
    c. Underwriters: ALLIED WORLD GLOBAL MARKETS
    LLOYD'S UNDERWRITER SYNDICATE NO. 2232 AWH
    d. Policy Period: October 11, 2023 to October 11, 2024
    e. Extension: October 11, 2024 to December 11, 2024
    f. Limit: CAD 5,000,000

On behalf of the Policyholder and Subsidiaries, and for the benefit of each of their respective directors and officers, we write to give notice of a Claim.

Out of an abundance of caution, we are providing notice of the Claim directly to each of the insurers, although it is our view that notice to Iridium is sufficient.

Counsel to Arena has provided our office with a courtesy copy of the attached Statement of Claim (the "**Claim**") that has been issued in the Court of King's Bench of Alberta, Judicial Centre Calgary, Court File No. 2401-16672 against directors, former directors, and officers of the Policyholder and its Subsidiaries.

The Claim is a Claim against the "**insureds**" and one or more "i**nsured person**" under each of the above-captioned policies.

This letter is copied to the directors, former directors, and officers of the Policyholder and its Subsidiaries that are named as defendants in the attached Statement of Claim.

We have not accepted service of the attached Statement of Claim on behalf of any party. We are not aware of whether the Statement of Claim has been served by the plaintiffs on any of the defendants named in the Statement of Claim.

At your earliest convenience, please advise the writer of any further information you may require as well as the underwriters' respective coverage positions.

Yours very truly,

McCarthy Tétrault LLP

Sean S. Smyth, KC

Attachments:

Letter from S.S. Smyth, KC, February 15, 2024
Letter from S.F. Collins, KC, November 22, 2024
With attached Letter from Faskens to McCarthy Tétrault, November 15, 2024
Statement of Claim, Court of King's Bench of Alberta, Judicial Centre Calgary, Court File No. 2401-16672

c. Doug Bailey - dbailey@razor-energy.com
Kevin Braun - kbraun@razor-energy.com
Shahin (Sonny) Mottahed - sonny.mottahed@gmail.com
Sean Phelan - sean.phelan@shaw.ca
Frank Muller - fmuller5151@gmail.com
Michael Blair - michael7blair@gmail.com
Darren Jackson - Darjack45@gmail.com

Sean F. Collins, KC - scollins@mccarthy.ca

Iridium, Attention: Danielle Gorst - dgorst@irsnavacord.com