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Good Faith and Honest Performance and the Convergence between Common Law and Civil Law

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Case Commented On: *Ponce v Société d'investissements Rhéaume ltée*, 2023 SCC 25 (CanLII)

The topic of good faith in the realm of contracts once again made it to the Supreme Court of Canada in 2023, but this time, in a case dealing with good faith as it arises under the *Civil Code of Québec*, CQLR c CCQ-1991 (*Civil Code*).

The good faith duty under the *Civil Code* contains a duty of disclosure, which does not exist under the common law. This blog post will show, however, that it may be possible to deceive a counterparty at common law, as in, breach the duty of honest performance, by failing to disclose, depending on the circumstances of a case. In fact, it is arguable that if *Ponce v Société d'investissements Rhéaume ltée*, 2023 SCC 25 (CanLII) (*Ponce*) had arisen under the common law, the Court may have reached the same conclusion with regard to the duties of good faith and honest performance.

If these the two doctrines are more similar than different, or if the differences can be attributed to circumstance more than principle, then we have a combination of convergence and tension. The doctrines are not the same and they do not have the same origins. Yet they converge because they do many of the same things. And in that way, the cases dealing with the duty of good faith under civil law can inform how the duty can be interpreted under common law. When the Supreme Court articulates a duty, lower courts and academics spend years refining the duty and determining how far it extends, how to fill in gaps, how to define and interpret it, and how to apply it. Looking to the civil law for help in interpreting the good faith duty at common law simply provides more tools for interpretation.

Facts

In the case at bar, Antoine Ponce and Daniel Riopel were presidents of a group of three companies, Groupe Excellence (Presidents). The Presidents entered into an agreement (Agreement) with the majority shareholders of Groupe Excellence, which governed their relationship during the relevant period. The Agreement "formalized a business relationship between the parties that was based on their commitment to work toward the common goal of ensuring the success of Groupe Excellence" (*Ponce* at para 16) and provided different forms of incentive pay and benefits for the Presidents, including a right of first refusal should the shareholders decide to divest themselves of their interests in the group. The Agreement did not impose any express obligations on the Presidents.

In April 2005, the Presidents learned that a major company, Industrial Alliance Insurance and Financial Services Inc (IA), was interested in acquiring Groupe Excellence. The Presidents did not share this information with the shareholders. Rather, the Presidents entered into an "Undertaking of Confidentiality" with IA concerning any agreement IA and the Presidents might enter into. The Presidents then bought the companies themselves from the shareholders and then resold them to IA at a substantial profit. The respondent shareholders only learned of IA's acquisition of Groupe Excellence via a subsequently published press release.

The shareholders argued that the Presidents should have disclosed to them the interest expressed by IA in acquiring the companies.

Decision

In determining whether the Presidents had a duty to inform the shareholders of the interest expressed by IA in acquiring Groupe Excellence, the Court considered four types of obligations. This post will only address one of them: the duty of good faith. The Court found that the duty of good faith was satisfied, meaning the appellants had a duty to inform the shareholders of IA's interest (at para 85).

Commentary

This post will compare the Supreme Court's statements in *Ponce* to its statements in two cases which dealt with good faith and honest performance at common law, *Bhasin v Hrynew*, 2014 SCC 71 (CanLII) (*Bhasin*) and the subsequent case of *CM Callow Inc v Zollinger*, 2020 SCC 45 (CanLII) (*Callow*). It will also discuss *2505243 Ontario Limited v Princes Gates Hotel Limited Partnership*, 2022 ONCA 859 (CanLII) (*Princes Gate Hotel*), where the Ontario Court of Appeal dealt with good faith and honest performance.

For a refresher on the organizing principle of good faith and the duty of honest performance, as developed in *Bhasin* and the subsequent case of *Callow*, see my earlier post, There is No Presumption of Loss Flowing from a Breach of the Contractual Duty of Honest Performance.

a. Callow

It is helpful to review the facts of *Callow*, as there are several similarities between *Ponce* and *Callow*. The *Callow* summary is taken from my earlier blog post.

In *Callow*, the Supreme Court had to consider when non-disclosure qualifies as misleading conduct. The defendant, a group of condominium corporations (Baycrest), entered into two maintenance agreements with the plaintiff, Callow: a two-year winter contract and a separate one-year summer contract. Baycrest was allowed to terminate the winter contract upon 10 days' notice. Baycrest decided to terminate the winter agreement in the spring of 2013, but it did not inform Callow.

Throughout that spring and summer, Callow discussed renewing its winter agreement with Baycrest, and was left with the impression that Baycrest would renew its winter contract for

another two years. This belief had a two-fold effect on Callow: 1) Callow did extra work under its summer contract, providing various "freebie-work", which it hoped would be incentive for Baycrest to renew the winter maintenance agreement and 2) it did not pursue other opportunities for maintenance contracts.

Baycrest informed Callow that it would be terminating its winter contract in September 2013; it did so by providing 10 days notice, as required under the agreement. However, Callow usually obtained winter work over the summer months, meaning it was too late for it to find replacement work when the contract was terminated (*Callow* at para 149).

Callow sued Baycrest, claiming:

1. Baycrest had acted in bad faith "by accepting the free services while knowing Callow was offering them in order to maintain their future contractual relationship" (*Callow* at para 15); and
2. 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." (*Callow* at para 15)

A majority of the Supreme Court allowed the appeal on the basis of the duty of honest performance. It found that Baycrest had actively misled Callow to obtain free services, and that Baycrest had been required, under the duty of honest performance, to correct Callow's misapprehensions by disclosing its intentions. The Supreme Court found that Callow would have had the opportunity to obtain another contract for the coming winter if Baycrest had been forthcoming about its decision (*Callow* at para 115).

b. Similarities between Ponce, Callow, Bhasin

Under the *Civil Code*, the duty of good faith imposes a duty of disclosure, unlike the common law duty of good faith. In *Bhasin*, the Supreme Court said that the duty of honesty in contractual performance at common law "does not impose a duty of loyalty or of disclosure" (*Bhasin* at para 73) and following up in *Callow*, "*Bhasin* does not impose a duty to disclose…" (*Callow* at para 82), whereas in *Ponce*, it said, "[g]ood faith… imposes on each contracting party a duty to inform that 'encompass[es] their partner's legitimate expectations'" (*Ponce* at para 80).

Despite the absence of a duty of disclosure at common law, this post will show that it may be possible to deceive a counterparty by failing to disclose at common law, depending on the circumstances. In other words, it may be possible to breach the duties of good faith and honest performance by failing to disclose certain information even though there is no duty of disclosure.

Below is a comparison of the duties of good faith and honest performance under the common law and civil law, first of the principles articulated by the Supreme Court, and then of the analysis applied to the cases.

Under both common and civil law, the duty of honest performance is not a fiduciary duty, or a duty of "maximalist loyalty", as it is referred to under civil law (*Callow* at para 34; *Bhasin* at para 43; *Ponce* at para 72). There is also a minimum standard of honesty required from a contracting party (*Bhasin* at para 86; *Ponce* at para 72) under both systems of law, and each party must have appropriate regard for each other's interests (*Bhasin* at para 65; *Ponce* at para 72). And neither common nor civil law require parties to put each other's interests first (*Bhasin* at para 65; *Ponce* at para 72).

The difference between the two systems, as mentioned above, is that the civil law system imposes a duty of disclosure whereas the common law system does not. Despite this difference, however, the failure to speak out, which can include silence or omissions, can amount to a breach of the duty of honesty under the common law, depending on the circumstances. As the Court stated in *Callow*:

> [W]here 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… The concept of 'misleading' one's counterparty… 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… 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. (*Callow* at paras 81, 90-91)

In *Callow*, the Court went on to note that despite having no duty to disclose its intention to terminate the contract except for the 10-day notice period, that Baycrest nonetheless had to "refrain… from 'deceiv[ing] Callow' through a series of 'active communications'" which came in two forms: suggesting the renewal of the winter maintenance agreement was likely and accepting Callow's "freebies", which Baycrest understood to be incentives offered by Callow so Baycrest could renew the winter agreement (*Callow* at paras 94-98).

This strikes a similar note to what the Court said in *Ponce*, when it decided that regardless of whether the Presidents' answer was "a lie in the strict sense", their failure to convey the information about IA's interest in Groupe Excellence "amounted, at the very least, to dishonest concealment that was meant to mislead the shareholders" (*Ponce* at para 79).

In another recent case, the Ontario Court of Appeal similarly found a breach of the duty of good faith as a result of "misleading by inaction". In *Princes Gates Hotel*, the respondent tenant, 2505243 Ontario Limited (250) offered food services and operated two restaurants in the hotel owned by the appellant, a commercial landlord, Princes Gate GP Inc (PG), pursuant to a food and beverages agreement and two leases. While the agreement was ongoing, PG began discussions with a new food and beverage provider, Harlo, with a view to replacing 250.

The Ontario Court of Appeal relied on the trial judge's decision in finding that despite knowing that 250 intended to continue performing the agreement, PG entered into a secret process of

negotiation with Harlo while continuing "to communicate with 250… as if nothing had changed". This, it found, was a "breach of the duty of good faith in contract by way of misleading by inaction" (ONCA quoting with approval the trial judge at para 27).

c. Summary

There is no duty to disclose at common law, but there are requirements that come close to imposing a similar-sounding duty, depending on the circumstances. At common law, a party is required to do much more than simply refrain from lying. The decision to remain silent can sometimes breach the duty of honest performance, as can the decision to omit certain information or state some but not all of the truth.

In *Callow*, the Court found that one party accepting services performed by the other party while knowing it would not continue the contract amounted to a breach of the duty of honest performance. In *Princes Gate Hotel*, the Court found that entering into an agreement with another party while continuing to communicate with the tenant "as if nothing had changed" (at para 27) breached the duty of good faith. Could it be argued that these situations imposed a duty of disclosure? Or more broadly, could it be argued that the two duties, despite their different origins and systems of law, converge, and could therefore inform one another? It seems possible.

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