ARTICLE

# *CM CALLOW V ZOLLINGER,* RECONCEPTUALIZED THROUGH THE TORT OF NEGLIGENT MISREPRESENTATION

**Vanessa Di Feo ***

**CITED:** (2022) 27 *Appeal* 103

## ABSTRACT

This article argues that *CM Callow Inc v Zollinger* was wrongly decided, and that the Supreme Court of Canada unnecessarily expanded the duty of honest contractual performance established in *Bhasin v Hrynew.* In this decision, the Supreme Court applied a contract law analysis to a fact scenario that did not entirely call for it. This is to say that the contract that Mr. Callow hoped to incentivize through freebie work never came into existence, so it should not have been assessed through the lens of the duty of honesty. This article argues that this approach was erroneous, given Canadian contract law's strong stance against imposing pre-contractual duties of good faith. While the article agrees that the duty of honesty was applicable to the *ongoing* contract between Mr. Callow and Baycrest, it submits that the tort of negligent misrepresentation should have addressed Baycrest's statements in relation to the potential future renewal. Such an analysis would have allowed for greater clarity in Canadian contract law, and it would have allowed for a more pronounced dividing line between contracting parties' disclosure obligations and the duty of honesty. As a result, this article predicts that the Supreme Court's decision will perpetuate confusion in the law pertaining to good faith and contracting parties' disclosure obligations. Further, this decision is likely to have a chilling effect on contracting parties' communications, given the justified fear of painting a misleading picture for the other side *vis-à-vis* potential future endeavours.

* Vanessa Di Feo completed her B.C.L. and J.D. degrees with a specialization in commercial negotiation and dispute resolution at McGill University. She completed her LL.M. with a concentration in business law at the University of Toronto. She is grateful for the supervision and guidance of Professor Catherine Valcke while writing this article, in addition to the advice and support of *Appeal's* editorial board. This article reflects Ms. Di Feo's views alone.

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## INTRODUCTION

*CM Callow v Zollinger* has pushed Canadian contract law in a new direction.[1] At the heart of *Callow* lies a key legal tension: to what extent can contracting parties withhold information without violating the duty of honesty? *Callow* not only tested the contents of this duty, but also its relationship with a potential duty to disclose. Given that *Callow* involved more than just contractual issues, it also cast doubt on contract law's adequacy to address rights and obligations pertaining to contracts that do not yet exist.

This article argues that the Supreme Court of Canada (the "SCC") came to the wrong result in *Callow*. Rather, the analysis should have distinguished two elements: (1) the ongoing winter agreement between the parties (the "Current Contract"), and (2) the agreement that Mr. Callow hoped to incentivize, but which never came into existence (the "Future Contract"). Given that there is no pre-contractual duty of good faith in Anglo-Canadian contract law,[2] the SCC should have resolved the issues surrounding the Future Contract using the tort of negligent misrepresentation. By imposing contractual rights and obligations in a context that should not have been entirely governed by contract law, the SCC has perpetuated confusion about the applicability and scope of the duty of good faith.

While it has garnered significant discussion,[3] the literature has not attempted to reconceptualize *Callow* using tort law. This article aims to fill this scholarly gap by proposing a clearer way to address comparable cases without further tangling Anglo-Canadian contract law. Fundamentally, it calls for caution, given the potential for "*ad hoc* judicial moralism or 'palm tree' justice."[4]

This article is divided into two parts. First, it delves into *Callow*'s role in advancing good faith in Anglo-Canadian contract law. Second, it argues for a two-part analysis that distinguishes between the Current and Future Contracts. Regardless of the legal avenue undertaken, Mr. Callow had a weak legal position. His success at trial was exactly the kind of judicial moralism that Justice Cromwell (as he then was) sought to avoid in *Bhasin.*[5]

## I. *CM CALLOW INC V ZOLLINGER:* PERPETUATING CONFUSION ABOUT GOOD FAITH

The decision of the SCC in *Callow* may have provided more questions than answers about good faith, the duty of honesty, and non-disclosure. Citing *Bhasin,* Justice Kasirer emphasized that the duty of honesty "does not impose a duty of loyalty or of disclosure or require a party

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1 2020 SCC 45, [2020] SCJ No 45 [*Callow*].

2 *Martel Building Ltd v Canada*, 2000 SCC 60 [*Martel*].

3 See, for example, Daniele Bertolini, "Toward a Framework to Define the Outer Boundaries of Good Faith Contractual Performance" (2021) 58:3 Alta L Rev 573; Stephen Waddams, "Good Faith in the Supreme Court of Canada" in Michael Furmston, ed, *The Future of the Law of Contract* (Milton: Taylor and Francis, 2020) 28 (discussing the appellate decision); Brandon Kain, "A Matter of Good Faith: The Treatment of *Bhasin v Hrynew* by Appellate Courts (Part I)" (2020) 51:1 Advocates' Q 1.

4 *Bhasin v Hrynew,* 2014 SCC 71, [2014] 3 SCR 494 at para 70 [*Bhasin*].

5 *Ibid.*

to forego advantages flowing from the contract."[6] Yet, it is difficult to square this statement—which aligns with *Bhasin* in theory—with the outcome in *Callow*. *Bhasin* concerned a case in which Can-Am outwardly lied to Bhasin.[7] In *Callow,* however, the SCC expanded *Bhasin's* message by punishing Baycrest for painting a misleading picture.[8] This shows the law's trajectory in a more interventionist direction that aligns with the civil law.[9] Good faith has evolved from precluding outright lies to knowingly misleading behaviour. The latter is difficult to define without imposing some level of disclosure. As such, it remains unclear to what extent (and how long) parties can choose to remain silent.

## A. Background

*Callow* concerned a long-term winter maintenance agreement between Mr. Callow, the owner of a snow removal and landscaping business, and Baycrest, a group of condominium corporations.[10] Pursuant to Clause 9 of the Current Contract, Baycrest was entitled to terminate that agreement upon providing 10 days' notice if Mr. Callow failed to give satisfactory services or for any other reason.[11] In March or April of 2013, Baycrest's Joint Use Committee ("JUC") voted to terminate the Current Contract.[12] Baycrest did not immediately inform Mr. Callow following this decision.[13] Instead, it waited until September 2013 to give Mr. Callow 10 days' notice.[14]

Meanwhile, Mr. Callow had come to believe that his contractual future with Baycrest was secure, that the contract would be renewed, and that Baycrest was satisfied with his services. [15] His belief was supported by several brief exchanges with two JUC members.[16] Further, Mr. Callow "performed work above and beyond [the] summer maintenance services contract, even doing freebie work,"[17] to incentivize a renewal.[18] As a result of the termination and his reliance on the JUC members' comments, Mr. Callow did not explore other opportunities and lost significant income following the termination.[19]

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6 *Bhasin, supra* note 4 at para 73.
7 *Ibid* at para 30.
8 *Callow, supra* note 1 at para 40.
9 See e.g. "The Common and Civil Law Traditions" online (pdf): *Berkeley Law* <https://www.law.berkeley.edu> [perma.cc/5548-7JXY].
10 *Callow, supra* note 1 at paras 6–7.
11 *Ibid* at para 8 (clause 9 is not publicly available, nor is the contract itself included in the parties' materials before the SCC).
12 *Ibid* at para 10.
13 *Ibid* at para 14.
14 *Ibid.*
15 *Ibid* at para 11.
16 It is worth noting also that both JUC members were aware of Mr. Callow's belief that the contract would be renewed: *ibid* at para 13.
17 *CM Callow Inc v Zollinger,* 2020 SCC 45 (Factum of the Appellant at para 42) [*Callow* FOA].
18 *Callow, supra* note 1 at para 12.
19 *Ibid* at para 15.

At first instance, Justice O'Bonsawin stated that "this is not a simple contract interpretation case."[20] Even though Baycrest abided by the unambiguous termination clause in the Current Contract, she held that it acted in bad faith for two key reasons. First, Baycrest withheld its decision to terminate the Current Contract to ensure that Mr. Callow would perform his services throughout the summer.[21] Second, Baycrest continuously represented that the contractual relationship was not in danger, and allowed Mr. Callow to complete extra tasks to bolster the chances of renewal.[22] The communications between the parties from March or April until mid-September 2013 were especially damaging to Baycrest's legal position.[23] Justice O'Bonsawin found that these conversations—coupled with Baycrest's delay in disclosing the termination—deceived Mr. Callow and deprived him of a fair opportunity to protect his business interests.[24]

The Court of Appeal for Ontario allowed Baycrest's appeal.[25] The court determined that Justice O'Bonsawin improperly expanded the duty of honesty, and that Baycrest owed Mr. Callow nothing beyond the 10-day notice period.[26] Protective of the central tenets of Anglo-Canadian contract law, the court maintained that "[the SCC] was at pains to emphasize that the concept of good faith was not to be applied so as to undermine longstanding contract law principles, thereby creating commercial certainty."[27] While Baycrest may have failed to act honourably, the court refused to find that its behaviour rose "to the high level required to establish a breach of the duty of honest performance."[28] The court emphasized that the duty of honesty pertains to matters *directly linked* to a contract's performance—not the parties' "freedom concerning future contracts not yet negotiated or entered into."[29] As such, the communications between the JUC members and Mr. Callow about the Future Contract did not preclude Baycrest from exercising its right to terminate the Current Contract.[30]

## B. The Decision at the SCC: A Divided Court

The SCC allowed Mr. Callow's appeal. Mr. Callow's legal victory is likely to perpetuate confusion about good faith and non-disclosure. Not only did the decision of the SCC comprise three sets of reasons, but the majority's comparative analysis failed to clarify the contracting parties' disclosure obligations in relation to the duty of honesty. The result is an expansionist approach that effectively applies contractual rights and obligations to *future* contracts. This section reviews each set of reasons for judgment.

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20 *CM Callow Inc v Tammy Zollinger,* 2017 ONSC 7095 at para 58 [*Callow* ONSC].
21 *Ibid* at para 65.
22 *Ibid.*
23 *Ibid.*
24 *Ibid* at para 67.
25 *CM Callow Inc v Zollinger,* 2018 ONCA 896 [*Callow* ONCA].
26 *Ibid* at para 8.
27 *Ibid* at para 11.
28 *Ibid* at para 16.
29 *Ibid* at para 18.
30 *Ibid.*

### i. The Majority Reasons for Judgment

Writing for the majority, Justice Kasirer found that the Court of Appeal should not have interfered with Justice O'Bonsawin's findings.[31] He wrote that Baycrest breached its duty to act honestly because it knowingly misled Mr. Callow into believing that the Current Contract would not be terminated.[32] Justice Kasirer's analysis focussed on the *manner* in which Baycrest exercised the termination, finding that 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."[33] He continued that "[n]o contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith."[34] To illustrate the link between the dishonest behaviour and Baycrest's exercise of Clause 9, Justice Kasirer relied upon Québec civil law's notion of abuse of contractual rights.[35] The appropriateness of this "comparative exercise" is a topic left for another article; however, the use of this civilian doctrine has attracted criticism.[36]

In terms of contracting parties' disclosure obligations, Justice Kasirer noted that the duty of honesty extends beyond precluding outright lies to include "half-truths, omissions, and even silence, depending on the circumstances."[37] According to Justice Kasirer, if a party is led to believe that their counterparty is satisfied with their work and that their ongoing contract is likely to be renewed, then it is reasonable for this party to infer that the contractual relationship is in good standing.[38] In the words of Justice Kasirer:

> 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]

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31 *Callow, supra* note 1 at para 5.

32 *Ibid* at para 40.

33 *Ibid* at para 5.

34 *Ibid* at para 48.

35 *Ibid* at paras 63ff.

36 *Ibid* at paras 121ff (Justice Brown's concurrence strongly criticizes Justice Kasirer's use of the doctrine). See generally Catherine Valcke, "Bhasin v Hrynew: Why a General Duty of Good Faith Would Be Out of Place in English Canadian Contract Law" (2019) 1:1 J Commonwealth L 65 (on the subject of civilian concepts being imported into Anglo-Canadian contract law); Rosalie Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019) 1:1 J Commonwealth L 1.

37 *Callow, supra* note 1 at para 91.

38 *Ibid* at para 37 (as will be discussed later in this article, this approach overlooks the text of the contract, which explicitly allowed for termination regardless of whether there was cause).

39 *Ibid* at para 38 [emphasis added].

Given the behaviour of Baycrest, Justice Kasirer imposed an obligation to correct Mr. Callow's mistaken impression because it knowingly painted a misleading picture.[40]

While this finding rewards the sympathetic plaintiff, it will negatively impact commercial contexts for three reasons. First, contracting parties will be more alive to the manner in which their counterparties will construe their actions and communications. One could counter that this is actually a positive outcome: contracting parties will likely be more precise and honest in their conversations, given the amplified potential for liability. The response is that a key value in Anglo-Canadian contract law is the freedom to pursue economic self-interest. In the business setting, this decision has the potential to chill communications between contracting parties.

Second, the majority's analysis delves into the parties' subjective intentions. Given Anglo-Canadian contract law's focus on the parties' objective intentions, this is problematic. The reasoning of the majority crosses the line into the civilian approach, which emphasizes the parties' subjective and objective intentions.[41] It also begs the question of who might impugn a corporation, what kind of behaviour might lead a party to come to a certain conclusion and to what extent such an inference might be reasonable. In *Callow*, Mr. Callow spoke with only 20 percent of Baycrest's JUC.[42] During those casual conversations, these individuals did not guarantee that Mr. Callow's contract would be renewed, nor did they officially speak on behalf of Baycrest.[43] These communications consisted of short emails and conversations "throughout the property."[44] Although there was objective email evidence to prove Baycrest's knowledge of Mr. Callow's mistaken impression about the agreement, this will only continue the slippery slope of subjective analysis that started with *Bhasin*.[45]

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40 *Ibid.*

41 See e.g., on Québec civil law: François Gendron, *L'interpretation des contrats,* 2nd ed (Montréal: Wilson & Lafleur, 2016), ch 5 at 76 [Gendron]: "Dans tout contrat, il y a donc un élément subjectif, qui tient à ce que les parties ont déclaré, et un élément objectif, qui vient le compléter à titre impératif, et qui tient à ce qui en découle, *ipso jure,* sans nécessiter le soutien de la volonté des parties, suivant les usages, l'équité ou la loi." See also *Jean Coutu Group (PJC) Inc v Canada (Attorney General)*, 2016 SCC 55.

42 *Callow, supra* note 1 at para 11.

43 *CM Callow Inc v Zollinger,* 2020 SCC 45 (Factum of the Respondent at para 42) [*Callow* FOR].

44 *Callow, supra* note 1 at paras 9, 13, 14.

45 Numerous scholars have commented on the disconnect between the objective and the subjective in *Bhasin*, see e.g. Stephen Waddams, "Good Faith in the Supreme Court of Canada" in Michael Furmston, ed, *The Future of the Law of Contract* (London: Informa Law from Routledge, 2020) 28 (Waddams notes that "it is a little surprising that the court should go to such lengths to establish a principle of good faith only to declare that the motives of the parties are irrelevant" at 41). Traditionally, the common law of contract has remained loyal to contractual interpretation based on the parties' objective intentions, see Lord Hoffman, "The Intolerable Wrestle with Words and Meanings" (1997) 114 S African LJ 656 (Lord Hoffman himself opined that "interpretation according to subjective intent is a logical contradiction" at 661). Anglo-Canadian contract law has illustrated its loyalty to its English roots in this sense, see *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129, 161 DLR (4th) 1 at para 54. The irony is that morally infused doctrines like good faith inherently imply a subjective element, see Gendron, *supra* note 90 at 76; Vincent Karim, *Les Obligations*, v1, 4th ed (Montréal: Wilson & Lafleur, 2015) at 76 at para 194 (Québec has recognized this tension and recognizes both a subjective and objective element of good faith).

Third, the breach in *Callow* was not actually directly linked to the performance of the ongoing contract.[46] Rather, the communications between Mr. Callow and the JUC members pertained to the Future Contract.[47] Mr. Callow interpreted weak signals that he himself sought out. By finding that Baycrest breached the duty of honesty in relation to a non-existent contract, the SCC blurred the boundary between contractual and pre-contractual performance. The exchanges in *Callow* did not constitute formal negotiations. Rather, they were casual conversations that preceded the potential Future Contract. As such, the SCC's decision triggers questions about whether there might now be a duty to negotiate in good faith in Anglo-Canadian contract law, in addition to any corresponding disclosure requirements.[48]

### ii. The Concurring Reasons for Judgment

Justice Brown supported the outcome in *Callow.* He stated that, although contracting parties do not have a positive 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."[49] Even though Baycrest argued that its representations related only to the renewal of the Future Contract, Justice Brown deferred to the trial judge's conclusions.[50]

Nonetheless, Justice Brown opposed the use of "comparative exercise[s]" where domestic law is sufficient to resolve a dispute.[51] He argued that it was inappropriate to resort to the civilian doctrine of abuse of rights because the applicable common law principles were "determinative and settled."[52] *Callow* presented an opportunity to develop good faith and the duty of honesty (in addition to other potential legal avenues[53]) to resolve the issues at play.

Justice Brown also criticized the majority's decision as eliding the distinction between the duty to exercise a contractual discretion in good faith and the duty of honesty.[54] In his reasons, Justice Kasirer asserted that "the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by

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46 *Callow*, *supra* note 1 at para 215.

47 *Ibid* at para 214.

48 In *Martel*, *supra* note 2 at para 73, the SCC recognized that the duty to bargain in good faith has not been recognized in Canadian law to date: para 73. In *Bhasin, supra* note 4, the SCC formally established the organizing principle of good faith contractual performance. It appears that the principle is restricted to contractual performance as it stands now, and that there is no common law duty to negotiate a contract in good faith. There are exceptions where such a duty may arise, but this is broadly on the basis of certain special relationships like employment, insurance, and tendering contexts. See also Joshua Chalhoub & Aleksandar Tomasevic, "Good Faith Bargaining: The Law Governing Contract Negotiations" (Paper delivered at the 39th Annual Civil Litigation Conference, Mont Tremblant, Quebec, 15–16 November 2019).

49 *Callow, supra* note 1 at para 132 [emphasis added].

50 *Ibid* at para 135.

51 *Ibid* at paras 155ff.

52 *Ibid* at para 156.

53 Several scholars have observed that the common law can rely on other doctrines to achieve similar outcomes as the principle of good faith: Valcke, *supra* note 36; Krish Maharaj, "An Action on the Equities: Re-Characterizing *Bhasin* as Equitable Estoppel" (2017) 55:1 Alta L Rev 199.

54 *Callow, supra* note 1 at para 176.

fixing … on the wrongful exercise of a contractual prerogative."[55] Justice Brown disagreed with this proposition, arguing that these two duties should be kept analytically distinct:

> *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*... This is not simply a matter of *stare decisis* and incremental legal development… 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.[56]

Given the disagreement between the judges about how to conceptually distinguish both duties, there is a need for clarification in the law following *Callow*.

With regards to damages, Justice Brown found that the duty of honesty vindicates the plaintiff's reliance interest, rather than their expectation interest.[57] He reasoned that the breaching party should be liable to compensate the injured party "for any foreseeable losses suffered in reliance on the misleading representations."[58] The problem in this case was not a failure to perform the contract. Rather, Baycrest harmed Mr. Callow by making dishonest extra-contractual misrepresentations concerning that performance, upon which Mr. Callow detrimentally relied.[59] So, the issue did not pertain to the lost value of performance, but rather to Mr. Callow's detrimental reliance upon dishonest misrepresentations.[60] Overall, Justice Brown's concurring reasons for judgment emphasized that the majority's expansive approach—and its corresponding damages analysis—will obscure the scope and operation of the duty of honesty.

### iii. The Dissenting Reasons for Judgment

In her dissenting reasons, Justice Côté opined that the appeal should be dismissed:

> 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… Parties that prefer not to disclose certain info – *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.[61]

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55 *Ibid* at para 51.
56 *Ibid* at para 181 [emphasis added].
57 *Ibid* at para 145.
58 *Ibid.*
59 *Ibid* at para 142.
60 *Ibid.*
61 *Ibid* at paras 201 – 202 [emphasis added].

Justice Côté interpreted the facts as meaning that Baycrest did not knowingly mislead Mr. Callow. According to her, none of the conversations between Baycrest's representatives and Mr. Callow guaranteed that Mr. Callow's contract would be renewed.[62] In any case, she found that the misrepresentations did not relate directly to the performance of the Current Contract.[63] As such, Justice Côté argued that Baycrest should not be found liable.[64]

Justice Côté's dissent serves to warn lower courts dealing with the duty of honesty and its relationship with potential disclosure obligations. Her comments pertaining to the Current Contract are especially instructive. In particular, she emphasized that a contracting party is entitled to withhold its decision to terminate before the requisite notice period.[65] This remains loyal to the law as stated in *Bhasin,* where Cromwell J quoted *United Roasters, Inc v Colgate-Palm Olive Co*:

> … 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.*[66]

Justice Cromwell noted that "the situation is quite different" in cases where one of the parties has been actively misled or deceived.[67] However, this qualification is insufficient to justify the finding in *Callow.* Justice Côté's interpretation of the facts, in addition to the Court of Appeal's, would suggest that there was no actively misleading behaviour sufficient to rise to the level of dishonesty in this case. In accordance with *United Roasters*, Baycrest said nothing about the Current Contract (and gave the requisite 10-day notice). Accordingly, it should not have been punished because it had no contractual duties in relation to the Future Contract.

Ironically, when Justice Côté questioned Mr. Callow's counsel about this case, he conceded that it was acceptable for a party to withhold its decision to terminate as long as the party does not say anything at all.[68] According to Mr. Callow's counsel, Baycrest should be held liable because the JUC members told a half-truth and painted a misleading picture for Mr. Callow.[69] This position overlooked the fact that Baycrest's communications did not refer to

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62 *Ibid* at para 217.

63 *Ibid* at para 215.

64 *Ibid* at para 216.

65 *Ibid.*

66 *United Roasters Inc v Colgate-Palmolive Co*, 649 F (2d) 985 (4th Cir 1981) [*United Roasters*] cited in *Bhasin, supra* note 4 at para 87 [emphasis added].

67 *Ibid.*

68 "Supreme Court Hearings: Webcast of the Hearing on 2019-12-06" (6 December 2019) at 00h:24m:46s, online (video): *SCC* <www.scc-csc.ca/case-dossier/info/webcastview-webdiffusion-vue-eng.aspx?cas=38463&id=2019/2019-12-06--38463-38601&date=2019-12-06> [perma.cc/6WTT-64RC] [*Callow* SCC Hearing].

69 *Ibid.*

the Current Contract. Justice Côté's observations buttress this point:

> … *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* … 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*.[70]

Further, Justice Côté argued that extending the duty of honesty beyond a simple requirement not to lie would undermine commercial certainty.[71] Silence "cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak."[72]

## II. OVERVIEW OF THE LAW OF GOOD FAITH CONTRACTUAL PERFORMANCE

Before delving into this article's argument, it is important to provide an overview of the organizing principle of good faith in contractual performance, in addition to the corresponding duty of honest performance and the duty to disclose.

### A. The Organizing Principle of Good Faith

Prior to *Bhasin,* the law pertaining to good faith developed in a "piecemeal"[73] manner. Anglo-Canadian contract law resisted acknowledging such a generalized doctrine.[74] Specifically, the courts recognized the need for good faith where the parties' contractual relationship was "subject to a carefully circumscribed requirement of good faith performance."[75] Thus, good faith generally applied in three scenarios: (a) contracts imposing a duty to cooperate; (b) contracts limiting the exercise of discretionary powers in the contract; and (c) contracts precluding parties from acting to evade contractual duties.[76] Essentially, the courts justified the use of good faith by addressing a heightened need for fairness in certain relationships.

To clarify the confused legal landscape and bring Anglo-Canadian contract law in line with its key trading partners, the SCC recognized an organizing principle of good faith as an incremental step in the law.[77] According to Justice Cromwell, "[t]hat organizing principle is simply that parties must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily."[78] Yet, this principle has not been so simple to apply in practice,

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70 *Callow, supra* note 1 at para 205 [emphasis added].

71 *Ibid* at para 195.

72 *Ibid* at para 200.

73 Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney General, 1987) at 169.

74 See generally *Transamerica Life Canada Inc v ING Canada Inc*, 2003 CanLII 9923 (ONCA), 68 OR (3d) 457; *Mesa Operating Limited Partnership v Amoco Canada Resources Ltd,* 1994 ABCA 94, 46 ACWS (3d) 644.

75 Joseph 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 811.

76 John McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2012) at 839.

77 *Bhasin, supra* note 4 at para 33.

78 *Ibid* at para 63.

and it has attracted mixed criticism in the legal world. In one camp, *Bhasin* has been considered "a huge and welcome step in that it rationalizes a heretofore hopelessly confused area of law."[79] In the other, it has been perceived as potentially generating "an unforeseen host of discrete obligations, and … seems inescapably to pose a significant threat to freedom of contract."[80]

In response to *Bhasin,* many Canadian common law courts have struggled to come to terms with an organizing principle that challenges key tenets of Anglo-Canadian contract law, such as freedom and sanctity of contract. For example, in *Addison Chevrolet Buick GMC Limited et al v General Motors of Canada Limited et al,* the Ontario Superior Court of Justice refused to allow a "radical extension" of the law of contractual interpretation:

> The duty of good faith performance of contractual obligations recently affirmed by the Supreme Court of Canada in *Bhasin* ... [is] not a licence... to invent obligations out of whole cloth divorced from the actual terms of the contract between the parties ...[81]

The court's statements illustrate a widespread concern about protecting the written terms of the contract. For example, in *Styles v Alberta Investment Management Corporation*, the Alberta Court of Appeal stated that "*Bhasin* is not to be used as a tool to rewrite contracts and award damages to contracting parties that the court regards as being 'fair', even though they are clearly unearned under the contract."[82] This demonstrates the judicial fear of using good faith to rewrite contractual terms with the benefit of hindsight.

## B. The Duty of Honesty and the Duty to Disclose

In *Bhasin,* the SCC also established the duty of honesty.[83] Justice Cromwell defined this duty as meaning "simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."[84] With regard to the dividing line between honest performance and a potential duty to disclose, Justice Cromwell clarified that there is no positive duty to disclose in Anglo-Canadian contract law:

> 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

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79 Geoff R Hall, "*Bhasin v Hrynew*: Towards an Organizing Principle of Good Faith in Contract Law" (2015) 30 BFLR 335 at 336. See also Neil Finkelstein et al, "Honour among Businesspeople: The Duty of Good Faith and Contracts in the Energy Sector" (2015) 53:2 Alta L Rev 349; Tamara 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 LJ 1.

80 Chris DL Hunt, "Good Faith Performance in Canadian Contract Law" (2015) 74:1 CLJ 4 at 7. See also Lisa A Peters, "Tell Me No Lies: The New Duty of Honesty in Contractual Performance" (2014), online: *Lawson Lundell LLP* <www.lawsonlundell.com> [perma.cc/6WB5-BECF]; Daniele Bertolini, "Decomposing *Bhasin v Hrynew*: Towards an Institutional Understanding of the General Organizing Principle of Good Faith in Contractual Performance" (2017) 67:3 UTLJ 348; Valcke, *supra* note 36.

81 2015 ONSC 3404 at para 119, rev'd in part 2016 ONCA 324.

82 2017 ABCA 1 at para 54.

83 *Bhasin, supra* note 4 at para 73.

84 *Ibid* at para 73.

> interests… *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.*[85]

Considering that this "clear distinction" divided the SCC in *Callow* seven years later, it is useful to provide a brief survey of cases involving non-disclosure.

In *Moulton v British Columbia,* a subcontractor alleged that British Columbia violated the principle of good faith because it failed to inform him that a local Indigenous group had threatened to interfere with their construction contract.[86] The British Columbia Court of Appeal found that British Columbia did not owe Moulton a duty to disclose, that there were no issues going to honest performance in that case, and that Moulton's arguments interpreted *Bhasin* too broadly:

> *Bhasin* provides a new approach to the role of good faith in contract interpretation in Canadian law, but Moulton reads it too broadly in application to this case. There is no basis to say that the Province acted dishonestly, unreasonably, capriciously or arbitrarily in failing to disclose to Moulton that Mr. Behn had threatened to disrupt the logging when the threats were made. *The question in this case is whether it had any obligation to disclose that information within the relationship* created by Moulton entering into the TSLs, given their terms, and, if the Province was so obliged, whether it is liable for failing to do so. *No issues of honest contractual performance, as discussed in* Bhasin*, arise in this appeal.*[87]

The facts in this case are comparable to those in *Callow*, given that a subcontractor was deprived of material information by their counterparty. Yet, while both cases state that there is no duty to disclose, the outcomes demonstrate a progression in the law. In *Moulton,* British Columbia's non-disclosure was legally acceptable.[88] In *Callow*, however, Baycrest's failure to disclose Mr. Callow's termination rendered it liable.[89] While the difference can be explained by the fact that *Callow* involved a half-truth,[90] it demonstrates that the law since *Bhasin* has evolved from precluding outright lies to knowingly misleading conduct that effectively bars non-disclosure.

In *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, British Columbia initiated a tender process for the construction of a highway.[91] British Columbia changed the terms of eligibility to improve one bidder's competitive advantage and accepted that ineligible bidder's bid.[92] It then hid its knowledge of this fact and actively took steps to ensure that this information was not disclosed to the bidders who remained.[93] In this case, British Columbia

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85 *Ibid* at para 86 [emphasis added] .
86 2015 BCCA 89 at paras 8ff, 381 DLR (4th) 263 [*Moulton*].
87 *Ibid* at para 76 [emphasis added].
88 *Ibid* at para 93.
89 *Callow, supra* note 1 at para 5.
90 *Ibid.*
91 2010 SCC 4, [2010] 1 SCR 69 at paras 9ff [*Tercon*].
92 *Ibid* at para 6.
93 *Ibid.*

was found both to have breached its "implied obligation of good faith in the contract and… [to have] breached this obligation by failing to treat all bidders equally."[94] While the breach took place in the bidding context, *Tercon* illustrates the judicial distaste for parties that cover up[95] their actions to reap financial and competitive benefits.

In *Lavrijsen Campgrounds Ltd v Eileen Reville, Steven Reville and Douglas Reville,* the vendor of a campground warranted that it would provide the purchasers with information about prepaid camper deposits and rentals.[96] The agreement of purchase and sale was silent with respect to prepaid rentals, but the purchasers requested this information.[97] In response, the vendor provided them with inadequate information.[98] By providing partial disclosure and withholding material information about the prepaid rentals, the vendor pocketed nearly $75,000.[99] According to the court, the vendor breached the duty of honesty when it "selectively disclosed partial information and actively withheld important information concerning prepaid rentals,"[100] since "active non-disclosure constitutes intentional misrepresentation"[101] under *Bhasin*. This case can be distinguished from *Callow* because the vendor intentionally breached a warranty following the purchasers' request for specific information in the formal setting of a property sale.[102]

In *Baier v Kitchener-Waterloo Skating Club,* a skating club did not tell an instructor that it had decided not to renew her contract (as a dependent contractor).[103] In the meantime, the club allowed Baier to register skaters while aware that they would not permit her to coach them.[104] Additionally, in conversations with the parents of the skaters, the club insinuated that the instructor was "worse than she was."[105] The court found that the club breached its duty of honesty because it knowingly misled Baier about her future with the club by accepting her skater registrations and schedules.[106] By failing to disclose their decision (with the intention of reaping financial benefits), the club "crossed the line 'between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.'"[107]

There are parallels between *Baier* and *Callow*, given the defendants' concealment of their decision not to renew a future agreement. While Baycrest's vague comments contributed to Mr. Callow's positive "impression" about the renewal,[108] the club devised a scheme to remove

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94 *Ibid* at para 58.
95 *Ibid.*
96 2015 ONSC 103 at paras 6ff [*Lavrijsen*].
97 *Ibid* at para 4.
98 *Ibid* at para 13.
99 *Ibid* at para 17.
100 *Ibid* at para 13.
101 *Ibid* at para 15.
102 *Ibid*.
103 2019 CanLII 31632 (ONSCSM), [2019] OJ No 1930 at paras 50ff [*Baier*].
104 *Ibid* at para 151.
105 *Ibid* at para 154.
106 *Ibid* at para 151.
107 *Bhasin, supra* note 4 at para 86, as cited in *Baier, supra* note 103 at para 151.
108 *Callow, supra* note 1 at para 13.

Baier while retaining as many of her students as possible so that they could profit financially.[109] They manipulated the situation such that Baier's students would have paid their fees before discovering that their instructor would not be teaching them.[110] The club's behaviour rose to a higher level of dishonesty than Baycrest's, given its active concealment of the termination, in addition to its attempts to tarnish the reputation of the instructor.[111]

In *Mohamed v Information Systems Architects Inc,* a company terminated a consulting contract on the basis that the contractor, Mohamed, had a criminal record.[112] Mohamed disclosed his record to the defendant and complied with a security check before entering into the contract to consult on a project between the defendant and Canadian Tire.[113] The contract allowed the defendant to terminate the agreement if it was in its "best interest to replace the consultant for any reason."[114] The contract also provided that the defendant would not assign a consultant to the contract if they had a criminal record without the consent of Canadian Tire.[115] After Mohamed started working with Canadian Tire, the company discovered his record and asked the defendant to remove Mohamed from the project.[116] The Court of Appeal for Ontario found that the defendant violated the principle of good faith when it invoked the termination clause.[117] Even though the defendant possessed "a facially unfettered right to terminate the contract, it had an obligation to perform the contract in good faith and therefore to exercise its right to terminate the contract only in good faith."[118] Given that Mohamed disclosed his criminal record before signing the contract and commencing his work with Canadian Tire, the defendant's reliance on the criminal record to terminate him constituted a breach of good faith.[119] The same court found that *Callow* was "very different"[120] from *Mohamed* because Mohamed's contract was terminated *because* of his criminal record, which he had disclosed, and because the defendant made no attempt to resolve the issue.[121]

While there is no positive duty to disclose in Anglo-Canadian contract law, the failure to disclose material facts can breach the duty of honesty where the behaviour of the party is deceptive and they derive a benefit from their dishonesty. Still, the dividing line between the duty of honesty and a potential duty to disclose remains nebulous following *Callow*.

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109 *Baier, supra* note 103 at para 77.
110 *Ibid.*
111 *Ibid*.
112 2018 ONCA 428 at para 2 [*Mohamed*].
113 *Ibid*.
114 *Ibid.*
115 *Ibid* at para 1.
116 *Ibid* at para 2.
117 *Ibid* at para 19.
118 *Ibid* at para 18.
119 *Ibid.*
120 *Callow* ONCA, *supra* note 25 at para 20.
121 *Ibid* at para 19.

## III. RECONCEPTUALIZING *CALLOW* THROUGH THE LENS OF THE TORT OF NEGLIGENT MISREPRESENTATION

I argue in this article that the Future Contract in *Callow* should have been resolved by resorting to tort law principles. As such, the analysis should have been divided between the Current Contract and the Future Contract. I now examine *Callow*'s facts using a two-part approach, first assessing the Current Contract through the lens of the duty of honesty, and then applying the test for negligent misrepresentation to the facts surrounding the Future Contract.

### A. The Current Contract: The Duty of Honest Performance Applies but Was Not Breached

With regard to the Current Contract, this article agrees with Justice Côté's stance that Baycrest did not knowingly mislead Mr. Callow.[122] Accordingly, Baycrest did not have a duty to correct Mr. Callow's misapprehension or to inform him of its decision to terminate the Current Contract.[123] Beyond that, Baycrest should not have been held liable for contractual obligations *vis-à-vis* the Future Contract.

This article also agrees with Justice Côté that Mr. Callow misinterpreted vague signals that he himself sought out. As mentioned above, Mr. Callow only approached two members of Baycrest's JUC, who did not speak officially on behalf of Baycrest.[124] Further, the two JUC members did not assure Mr. Callow that the Current Contract was secure.[125] These exchanges actually pertained to the Future Contract.[126] While they might have given Mr. Callow hope, the judges deciding the case disputed whether this was enough to knowingly mislead him and justify Baycrest's liability.[127] Given the nature of these conversations, which vaguely alluded to the Future Contract, and the fact that Baycrest gave Mr. Callow 10 days' notice in compliance with Clause 9, why should Baycrest have been punished for its decision to adhere to the agreement? This is exactly the question that lower courts will have to grapple with following *Callow*, and it leaves room for greater judicial interventionism.

Even though *Bhasin* established a less onerous standard for grounding contractual liability where equivocation could be considered actionable dishonesty,[128] it is difficult to square the

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122 *Callow, supra* at note 1 at para 214.

123 *Ibid.*

124 *Ibid* at para 221.

125 The JUC members thanked him for the work he was doing around the property, told him that they would tell the JUC members about the freebie work, and told him that the work was looking good: *Callow* FOR, *supra* note 43 at paras 110ff. Further, at his cross-examination, Mr. Callow specifically stated that he never received assurances and the belief that he had about the Future Contract was his own "impression": *Callow* FOR, *supra* note 43 at para 115.

126 As accepted by the Court of Appeal in *Callow* ONCA, *supra* note 25 at para 18 and Justice Côté's dissent in *Callow*, *supra* note 1 at para 215. For example, Mr. Callow stated at trial that Mr. Peixoto said at trial that "yeah, it looks good, I'm sure they'll be up for it, let me talk to them." When questioned what "they" would be "up for," Mr. Callow responded, "A two-year renewal": *Callow* FOR, *supra* note 43 at para 107.

127 *Callow, supra* note 1 at para 19.

128 *Bhasin, supra* note 4 at para 100.

finding in *Callow* with the lesson from *Bhasin*. In *Bhasin*, Can-Am continuously lied to Bhasin about the nature of the organizational changes at play and was dishonest about its intention to force him out of the company.[129] In *Callow,* however, Baycrest's behaviour did not rise to this level. As interpreted by Justice Côté, Baycrest was silent about the Current Contract that it had already decided to terminate. This was legally acceptable.[130]

One could infer from the result in *Callow* a responsibility for contracting parties to be vigilant about whether their communications will create a misleading impression. In *Callow*, the trial judge and the SCC majority relied on email evidence to objectively establish that Baycrest knew that it was misleading Mr. Callow.[131] But what about cases in which there is no such evidence? While there will always be a burden of proof to discharge, it is worth noting that the SCC in *Callow* has not provided adequate guidance to lower courts with regard to this question. *Callow* highlights unresolved tensions in the law pertaining to good faith: to what extent does one have to look out for the interests of their counterparty, and to what extent must they ensure that their counterparty does not come to erroneous conclusions about the contract?

## B. The Future Contract: Using Tort Law to Reconceptualize *Callow*

Given that good faith applies to contractual *performance* and not formation,[132] there is an area of permissibility in the SCC's analysis in *Callow.* The result in *Callow* is out of place in Anglo-Canadian contract law because it has effectively imposed a contractual duty in relation to a contract that never existed. Regardless of the avenue of redress, Anglo-Canadian contract law cannot comfortably accommodate cases like Mr. Callow's. At its core, the majority decision contradicts common law values like *caveat emptor* and moves the law in an expansionist direction.[133] This could have been avoided by addressing the Future Contract through tort law principles.

Given that tort law governs relationships in which there is a common law duty of care—rather than one that the parties have chosen to enter into[134]—I am of the view that the SCC should have addressed Baycrest's behaviour regarding the Future Contract. As Justice Brown

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129 *Ibid* at para 30.

130 In so finding, Côté J wrote in *Callow, supra* note 1 at para 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'— 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*.

131 *Callow* ONSC, *supra* note 20 at para 48.

132 *Martel, supra* note 2.

133 This moves the common law into the interventionist direction that is seen in civil law jurisdictions, where judges tend to take a more active role to intervene and protect parties in unfair situations. See e.g. Geoffrey Hazard & Angelo Dondi, "Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits" (2006) 39 Cornell Int'l LJ 59.

134 *Donoghue v Stevenson,* [1932] UKHL 100, [1932] AC 562.

stated in his concurring reasons for judgment, "there is, in the context of misrepresentation, a rich law accepting that sometimes silence or half-truths amount to a statement."[135] It is this rich law that I explore here to demonstrate that negligent misrepresentation would have been more appropriate to address the Future Contract than the duty of honesty.

## C. The Tort of Negligent Misrepresentation

The elements of the tort of negligent misrepresentation were first developed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[136] The SCC adopted these principles in *Kamloops v Nielson,*[137] refining them in *Hercules Managements Ltd v Ernst & Young,*[138] *Queen v Cognos Inc*,[139] and *Deloitte & Touche v Livent Inc (Receiver of)*.[140] The five elements of the tort of negligent misrepresentation are as follows: (i) the duty of care must be based on a special relationship; (ii) the representation must be untrue, inaccurate, or misleading; (iii) the representor must have acted negligently in making the representation; (iv) the representee must have reasonably relied on the negligent misrepresentation; and (v) this reliance must be detrimental.[141] Below, the article applies each element to the facts in *Callow.*

### i. The Duty of Care Based on a Special Relationship

Mr. Callow and Baycrest did not have a special relationship to ground a duty of care. Given that this is the first step in the negligent misrepresentation analysis, such a finding would render the other elements toothless: "to state that the facts of a case are governed by a common law duty of care is merely to open the door to the resolution of the dispute before the court."[142] Professor Lewis Klar describes the duty of care in the following terms:

> The concept envisages a relationship of proximity which is more restricted than the relationship of proximity based on foreseeability of harm defined by *Donoghue v Stevenson,* but wider than a relationship of proximity which exists between the parties to a contract or parties in a fiduciary relationship. It seems to occupy some middle ground between the two.[143]

In the specific context of negligent misrepresentation, Justice La Forest in *Hercules* located the special relationship test within the two-stage *Anns Test* to "avoid creating a 'pocket' of negligent misrepresentation cases that determined the issue of duty differently from other negligence

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135 Bruce MacDougall, *Misrepresentation* (Toronto: LexisNexis, 2016) at 67, as cited in *Callow, supra* note 1 at para 132.

136 [1963] UKHL 4, [1964] AC 465 [*Hedley Byrne*].

137 [1984] 2 SCR 2, 10 DLR (4th) 641.

138 [1997] 2 SCR 165, 146 DLR (4th) 577 [*Hercules*].

139 [1993] 1 SCR 87, 99 DLR (4th) 626 [*Cognos*].

140 2017 SCC 63 [*Deloitte*].

141 *Cognos, supra* note 139 at para 33.

142 Lewis Klar, Tort Law, 5th ed (Toronto: Thomson Reuters, 2015), ch 9 at 339.

143 Klar, *supra* note 142, ch 7 at 239.

cases."[144] The first stage determines whether there is a *prima facie* duty of care based on the parties' proximity and reasonable foreseeability of injury. The second stage assesses whether there are policy concerns sufficient to negate the *prima facie* duty of care.[145]

a. Stage One of the Anns Test: Prima Facie Duty of Care

It is unlikely that a court would find that Baycrest owed Mr. Callow a *prima facie* duty of care. While they had a proximate relationship in which Mr. Callow's reliance was foreseeable, it was not reasonable for Mr. Callow to rely on the vague and unofficial comments of the JUC members.

*Proximity*. According to the SCC, proximity is the "controlling concept,"[146] rather than the category of the alleged wrong, the type of loss claimed or foreseeability. Professor Klar has written that "the issue of proximity asks whether it would be just and fair to impose a duty of care on the defendant for the plaintiff's protection."[147] Although the facts in Callow did not fit into the recognized categories of the duty of care, the tort of negligent misrepresentation has arisen in various subcontractor relationships and contexts.[148] Regardless, the courts allow for a duty of care to be imposed in new kinds of relationships by conducting the full proximity analysis.[149] This requires an assessment of the nature of the relationship, the parties' respective expectations, the defendant's undertaking, the plaintiff's reliance on the representation and the parties' respective rights and obligations flowing from their relationship.[150]

In *Martel,* a subcontractor sued the Canadian Government for negligent misrepresentation.[151] Martel had leased a building to the Government under a 10-year lease that had an option for renewal.[152] Before the lease expired, Martel's President and CEO met with the Government Department's Chief of Leasing to express a desire to negotiate a renewal.[153] After multiple unsuccessful attempts to negotiate, the Government moved on to the tendering process and awarded the tender to one of Martel's competitors.[154] When Martel sued the Government, this case raised the difficult question of whether the relationship was sufficient to ground a duty of care in the context of commercial negotiations.[155] The SCC found that there was

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144 *Hercules, supra* note 138 at para 142. The *Anns Test* was developed in *Anns et al v London Borough of Merton*, [1978] AC 728, [1977] 2 All ER 492, and imported into Canadian law in *Cooper v Hobart*, 2001 SCC 79 [*Cooper*]. While the name for this test has varied (including, the *Anns/Cooper* Framework), this article uses the title of the "*Anns Test*."

145 *Deloitte, supra* note 140 at paras 19–20.

146 *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para 21 [*Maple Leaf Foods*].

147 Klar, *supra* note 142, ch 5 at 185

148 *Moulton, supra* note 86 (the negligent misrepresentation claim was secondary to that of breach of contract); *Martel, supra* note 2 (a subcontractor sued the Government of Canada for negligent misrepresentation for its conduct during commercial negotiations).

149 Klar, *supra* note 142, ch 3 at 147.

150 *Ibid*; *Maple Leaf Foods, supra* note 146 at para 66; *Cooper, supra* note 144 at para 29.

151 *Martel, supra* note 2 at para 52.

152 *Ibid* at para 2.

153 *Martel, supra* note 2 at paras 6ff.

154 *Ibid* at paras 17–20.

155 *Ibid* at para 31.

a proximate relationship sufficient to ground a *prima facie* duty of care.[156] In particular, the parties' previous lease indicated a close and direct relationship:

> Both the pre-existing lease arrangement and the communications between the appellant and respondent here are indicators of proximity. *That does not mean that any exchange loosely viewed as a negotiation will necessarily give rise to a proximate relationship. The expression of interest does not automatically create proximity absent some evidence of genuine and mutual contracting intent …* The communications between the appellant and Martel disclose a readiness to arrive at an agreement despite the fact one was never reached.[157]

Similar to *Martel,* the parties in *Callow* had a pre-existing arrangement, given that they had embarked upon a long-term contractual relationship in 2010.[158] Additionally, the parties had a long history of communication. For example, Mr. Callow kept the JUC members up to date on his work,[159] and one of the JUC members negotiated the original contract and often went to Mr. Callow if something was wrong.[160] This would likely be sufficient to find a proximate relationship; however, other factors weaken the likelihood that a court would find that Baycrest owed Mr. Callow a *prima facie* duty of care.

*Foreseeability*. The relationship between Mr. Callow and Baycrest is also sufficient to establish foreseeability. According to Professor Klar, "Canadian courts have applied the Hedley Byrne principle to other relationships (aside from the established categories) where it was foreseeable that one party would reasonably rely on the information."[161] Rather than asking whether the harm to the plaintiff was foreseeable based on the facts of the case, the assessment should focus on whether the type of relationship at play gave rise to a foreseeable risk of injury[162] It was foreseeable that Mr. Callow would rely on Baycrest's representations: the JUC members, given their positions and access to JUC meetings, knew that Mr. Callow generally relied on their signals.[163] Given their contractual relationship, past dealings, and the potential for a Future Contract, it was foreseeable that Mr. Callow would rely on the representations they made. As such, Baycrest had an obligation to be truthful and honest in its representations.[164]

*Reasonable Reliance to Establish a Duty of Care*. Despite the presence of the other elements necessary to determine a prima facie duty of care, Mr. Callow's reliance on Baycrest's statements was not reasonable. Although this article fleshes out the element of reasonableness below,

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156 *Ibid* at para 53.

157 *Ibid* at para 52 [emphasis added].

158 *Callow, supra* note 1 at para 6.

159 *Callow* ONSC *supra* note 20 at para 66 (the trial judge referred to the "active communications" between the parties); *Callow, supra* note 1 at para 222 (disclosure during Mr. Callow's testimony that he had discussions with one of the JUC members).

160 *Callow, supra* note 1 at para 96.

161 *Fletcher v Manitoba Public Insurance Co,* [1990] 3 SCR 191, 74 DLR (4th) 636 at 209, cited in Klar, *supra* note 142, ch 5 at 179.

162 Klar, *supra* note 142, ch 5 at 180–81.

163 *Callow* ONSC, supra note 20 at para 15.

164 *Cognos, supra* note 139 at 141.

this is also key to the analysis to find a prima facie duty of care.[165] With regard to reasonable reliance in this context, Justice Brown's comments in Maple Leaf Foods are instructive:

> This Court… has tied that requirement in cases of negligent misrepresentation… to the *defendant's undertaking of responsibility and its inducement of reasonable and detrimental reliance in the plaintiff*… When a defendant undertakes to represent a state of affairs or to otherwise do something, it assumes the task of doing so reasonably, thereby manifesting an intention to induce the plaintiff's reliance upon the defendant's exercise of reasonable care in carrying out the task. And where the inducement has that intended effect of that is, *where the plaintiff reasonably relies, it alters its position, possibly foregoing alternative and more beneficial courses of action that were available at the time of the inducement.*[166]

Mr. Callow altered his position based on Baycrest's representations: he rented equipment that he did not ultimately need[167] and decided against exploring other opportunities.[168] Still, the key question is whether Baycrest induced Mr. Callow's *reasonable* (rather than actual) reliance.[169] While Baycrest could have been more forthcoming, its comments were insufficient to induce reliance.[170]

Mr. Callow's reliance was unreasonable because of the context of the conversations. According to Professor Klar, the "seriousness of the occasion is an important factor in determining the special relationship at issue. Advice given during an informal social or non-business occasion will likely not give rise to a duty on the part of the advisor."[171] In *Martel,* for example, the subcontractor and Government spoke during formal negotiations, in which Martel's CEO expressed a desire to negotiate.[172] In *Callow,* however, the communications that grounded Mr. Callow's detrimental reliance are comparable to the "exchange[s]" that the SCC alluded to in *Martel*.[173] Mr. Callow approached members of Baycrest's JUC outside of their residences and had informal conversations with them throughout the property.[174] Further, during email exchanges, the JUC members merely thanked Mr. Callow for his "freebie" work and agreed to tell the other members about his efforts.[175] The situation in *Martel* indicated a much more serious nature of the conversations, so it was reasonable and foreseeable for Martel to rely on the Government's statements.[176] Mr. Callow's reliance was weaker than Martel's because

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165 Klar, *supra* note 142, ch 5 at 181 (given the necessity of reasonable reliance to both elements of the negligent misrepresentation analysis, there is some overlap between this section and section iv below).

166 *Maple Leaf Foods, supra* note 146 at para 33 [emphasis added].

167 *Callow* ONSC, *supra* note 20 at para 81.

168 *Ibid.*

169 Klar, *supra* note 142, ch 5 at 186.

170 *Callow* ONSC, *supra* note 20 at para 47.

171 Klar, *supra* note 142, ch 7 at 247.

172 *Martel, supra* note 2 at para 6.

173 *Ibid* at para 52.

174 *Callow* FOR, *supra* note 43 at paras 107ff (Mr. Callow's cross-examination at first instance).

175 *Callow* FOR, *supra* note 43 at paras 110ff (email evidence from 12–13 June 2013).

176 *Martel, supra* note 2 at para 51. Though, it is noteworthy that even in *Martel*, the *prima facie* duty of care was negated by policy concerns: *ibid* at para 114.

Baycrest was responding vaguely to his comments about his work around the property outside of official channels.[177] As such, I am of the view that Baycrest did not owe Mr. Callow a *prima facie* duty of care.

b. Stage Two of the Anns Test: Policy Concerns

Even if a *prima facie* duty of care existed in *Callow,* it would likely be negated by policy concerns. In *Martel*, the SCC emphasized crucial policy considerations to limit the *prima facie* duty of care in the context of pre-contractual negotiations.[178] These policy concerns included the objectives of negotiations, marketplace considerations, and the traditional concern of indeterminate liability—specifically, that imposing a duty of care could turn tort law into an "after-the-fact insurance."[179] The same policy concerns apply to *Callow*. If courts were to impose a pre-contractual duty of care to casual exchanges prior to contract formation, this would unduly strain contracting parties' communications about potential future endeavours and impose a positive duty to disclose, though one could argue that this is *Callow*'s effect in the realm of contract law.

### ii. Untrue, Inaccurate, or Misleading Representations

The next step would be to assess the truthfulness of the representations.[180] This is a question of fact that must be assessed at the time the representation was made.[181] Even though the JUC knew of the decision to terminate the Current Contract and of Mr. Callow's hope for the Future Contract, they repeatedly thanked him for his great work.[182] Although one of the JUC members did assure Mr. Callow that "it looks good, I'm sure they'll be up for it, let me talk to them,"[183] this was a vote of confidence from one (out of 10) JUC members and not a certain representation that the Future Contract would take place.[184] As interpreted by Justice Côté, "it certainly could not be inferred from this statement that a renewal was likely."[185] Aside from this comment, most of the parties' conversations were brief and vague.[186]

Although the JUC members' comments did not establish that the Future Contract would be formed, there was controversy between the judges deciding the case (at all levels of court) about whether the evidence supported the conclusion that Baycrest misled Mr. Callow. These communications, coupled with Baycrest's knowledge of Mr. Callow's desire to form the Future Contract,[187] led the trial judge to find that Mr. Callow was deceived.[188] In her reasons, Justice O'Bonsawin emphasized that:

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177 *Callow* FOR, *supra* note 43 at paras 110ff (email evidence from 12–13 June 2013).
178 *Martel, supra* note 2 at paras 66ff.
179 *Ibid* at para 68.
180 Klar, *supra* note 142, ch 7 at 252.
181 *Ibid,* ch 7 at 253.
182 Email evidence of 12 June 2013, as reproduced in *Callow* FOR, *supra* note 43 at paras 110ff.
183 *Ibid.*
184 This was Côté J's interpretation of the facts: *Callow, supra* note 1 at para 223.
185 *Callow, supra* note 1 at para 224.
186 *Callow* FOR, *supra* note 43 at paras 110ff.
187 *Callow* ONSC, *supra* note 20 at paras 65–66.
188 *Ibid*.

> They were both aware that this was "freebie" work performed by Callow and "no corporation is paying for this." Mr. Campbell emailed Mr. Peixoto … regarding the "freebie" work: "Yeah, I was talking to him about it last week and he was mentioning he was going to do that. He's basically doing this to try and make sure we keep him for summer grounds, which is fine by me." Mr. Peixoto then responds: "I figured as much. 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 and he is under the impression we're keeping him for winter again. I didn't say a word cuz I don't wanna get involved but I did tell Tammy…[189]

As acknowledged by the Court of Appeal, this is insufficient to rise to the level of dishonesty.[190] The JUC members' internal comments show that Baycrest speculated about Mr. Callow's *desire* to form the Future Contract; however, speculating about a counterparty's beliefs (based on casual conversations) does not mean that a party has made negligent misrepresentations or breached their duty of honesty.[191] In any case, if the comments painted such a clear picture in Mr. Callow's mind, why did he feel the need to seek out reassurances?

Although Baycrest's comments were not fully transparent, it flies in the face of Anglo-Canadian contract law to require parties to disclose their bottom line.[192] Further, extending tort law to the "minutiae of pre-contractual conduct"[193] would place undue scrutiny upon commercial parties and lead courts to act as regulators. In the context of negligent misrepresentation, the scope of misleading communication is broader than in the duty of honesty, which must pertain directly to the performance of the contract.[194] Yet, even in tort law, holding Baycrest liable would overlook the content of its communications and diminish the abilities of the parties to fully participate in negotiations.

### iii. The Representor Must Have Acted Negligently in Making the Representation

It is arguable whether Baycrest acted negligently when one considers the nature of the occasion, the purpose for which the statements were made, the foreseeable use of the statements, and the probable damage resulting from the statements.[195] While there is no need for a guarantee to ground negligent misrepresentation, the standard in such cases is higher than one of honesty.[196] The applicable standard of care is the objective standard of the reasonable person.[197] In *Arland and Arland v Taylor,* Justice Laidlaw defined the reasonable person as follows:

> He is a mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time… He is a person of normal

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189 *Ibid* at paras 12, 48.
190 *Callow* ONCA, *supra* note 25 at para 16.
191 *Ibid.*
192 Buckwold, *supra* note 79.
193 *Martel, supra* note 2 at para 70.
194 *Bhasin, supra* note 4 at para 73.
195 Klar, *supra* note 142, ch 7 at 254.
196 *Cognos, supra* note 139 at 140.
197 *Ibid.*

> intelligence who makes prudence a guide to his conduct… His conduct is the standard 'adopted in the community' by persons of ordinary intelligence and prudence.[198]

It is unlikely that a court would find that Baycrest violated the standard of care in tort law. The JUC members did not reveal the potential for the Future Contract (aside from one favourable, unofficial opinion, as discussed above).[199] Instead, they thanked Mr. Callow for his work when he emailed them to "let him know" what they thought,[200] and they agreed to notify the JUC that Mr. Callow was doing "freebie" work.[201] This did not constitute a misleading statement that could reasonably lead Mr. Callow to form his incorrect impression. Thus, it is unlikely that a court would find that Baycrest violated the standard of care. Mr. Callow himself admitted that the JUC members never talked to him about the Current Contract. In particular, at the hearing at first instance, Mr. Callow explicitly said that the JUC members led him to believe that everything was "fine," and that they were "absolutely interested in extending the contract for a future couple of years." He explicitly noted that they "weren't even talking about the current one."[202]

Further, the JUC members never communicated that the Future Contract would take place. Mr. Callow conceded that he took it upon himself to do the additional work throughout the property. Also at the hearing at first instance, Mr. Callow expressly stated that he was "under the impression that [his] contracts were going to be renewed for another couple of years and [he] was doing this additional work as a show of good faith to try and improve the appearance of the property as well as an incentive to gain a future renewal."[203] Specifically, Mr. Callow explained that he "was under the impression it was likely to be renewed" and "hopeful" that it would be. Yet, when asked if he told anyone at Baycrest that he was doing the freebie work because he understood his contracts would be renewed, he replied that he "did not use those specific words."[204]

Not only do these statements buttress this article's thesis that the analysis should have been divided between the Current and Future Contracts, but they also show that the JUC members never told Mr. Callow that he would receive the Future Contract. His perception was based on his hope and efforts to incentivize the Future Contract, but this would be insufficient to ground liability in tort.

### iv. Reasonable Reliance

As discussed above, it is also unlikely that a Court would find Mr. Callow's reliance to be reasonable. The judges deciding *Callow* made it clear that Mr. Callow relied on the JUC members' comments, given the "real and substantial effect" that they had on his decision not

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198 *Arland and Arland v Taylor,* 1955 CanLII 145 (ONCA) at para 27, [1955] 3 DLR 358.
199 *Callow* FOR, *supra* note 43 at paras 110ff.
200 *Ibid.*
201 *Ibid.*
202 *Ibid.*
203 *Ibid.*
204 *Ibid.*

to seek other opportunities and to lease equipment.[205] Beyond *actual* reliance and its financial ramifications, the negligent misrepresentation analysis also requires *reasonable* reliance.[206] In *Hercules,* Justice La Forest stipulated the five indicia of reasonable reliance.[207] These indicia, rather than forming a strict, cumulative test, serve as factors to assess the reasonableness of the plaintiff's reliance.[208] The indicia are as follows: the defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made; the defendant was a professional or possessed special skills, judgment, or knowledge; the information was provided in the course of the defendant's business; the information was deliberately given, and not on a social occasion; and the information was given in response to a specific enquiry.[209] The relevant indicia in *Callow* were Baycrest's financial interest in the transaction, whether the information was deliberately given, and whether the representation was made on a social occasion.

a. Baycrest's Financial Interest in the Transaction.

In *Callow,* the trial judge explicitly noted that Baycrest had a financial interest in the subject of the alleged misrepresentations (the Future Contract).[210] Given the parties' long-term contractual endeavour, the future of this relationship would impact Baycrest's finances. It was in Baycrest's financial interest to ensure that Mr. Callow continued to work as their subcontractor throughout the summer. This would allow Baycrest to reap the value of the Current Contract.[211] As Justice Moldaver observed at the SCC hearing, Mr. Callow would be enthusiastic about his work over the summer, as opposed to bitter (and, therefore, less motivated to work effectively).[212] As a result, Baycrest was able to get its value for money over the summer months, especially as Mr. Callow did "freebie" work.[213]

b. The Information was Given Deliberately and Not on a Social Occasion

As discussed above, the JUC members' conversations with Mr. Callow occurred outside of official channels when they saw each other around the property.[214] In the words of Lord Denning, however, "representations made during a casual conversation in the street; or in a railway carriage; or an impromptu opinion, given offhand; or 'off the cuff'… are excluded from the principle of *Hedley Byrne*."[215] The context and content of the alleged misrepresentations in *Callow* were more akin to such a casual conversation than a formal, deliberate event to

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205 *Callow,* ONSC, *supra* note 20 at para 23.
206 *Hercules, supra* note 138 at para 43.
207 *Ibid.*
208 *Ibid.* It is worth noting, though, that Mr. Callow would not be able to satisfy all of the criteria (as will be discussed in the following sections).
209 *Ibid.*
210 *Callow* ONSC, *supra* note 20 at para 65.
211 *Ibid* at para 65.
212 *Callow* SCC Hearing, *supra* note 68.
213 *Callow, supra* note 1 at para 97.
214 *Ibid* at para 224 (Justice Côté emphasized in her dissent that the JUC members did not speak on behalf of Baycrest).
215 *Howard Marine v Ogden & Sons*, [1978] QB 574 at 591 (CA) Lord Denning, cited in Klar, *supra* note 142, ch 7 at 247.

seriously discuss the Future Contract, given that the parties spoke briefly on the premises and via email without the specific purpose of negotiating the Future Contract.[216]

The contrast between *Callow* and *VK Mason Construction v Bank of Nova Scotia* bolsters this point.[217] In *Mason,* the bank made representations in a formal letter to a third party (Mason) to induce him into entering a construction contract with one of its clients.[218] However, this letter contained insufficient information.[219] The bank assured Mason that the client had adequate financing to meet its payments, even though the bank's loan would not cover the construction costs.[220] According to the SCC, Mason foreseeably relied on this assurance and was not adequately informed.[221] Given the bank's representations in the letter, which formally assured Mason of the client's sufficient finances for construction, the SCC found Mason's reliance to be foreseeable and reasonable.

There was no such formality in the context of Baycrest's representations. Not only were the JUC members' emails and conversations casual, but they also never assured Mr. Callow that the Future Contract would occur.[222] Further, unlike in *Mason,* where the letter was written specifically to assure Mason of its client's financial condition, the conversations in *Callow* were not planned, nor did they have the specific purpose of discussing the Future Contract.[223] Rather, Mr. Callow initiated the emails and conversations to keep the JUC abreast of his progress and indicate his interest in the Future Contract.[224] Unlike the bank's letter in *Mason,* Baycrest's comments were informal responses to Mr. Callow's prompts.[225] If Mr. Callow had been invited to a formal Board meeting with the purpose of discussing the Future Contract—as he had been invited to discuss snow removal complaints in January of 2013[226]—then the nature of the occasion might have been appropriate to ground a claim. Given the casual nature of their conversations, and the fact that they were pre-contractual, Anglo-Canadian contract law would likely not find Mr. Callow's reliance to be reasonable.[227]

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216 *Callow* FOR, *supra* note 43 at 106ff; *Callow* ONSC, *supra* note 20 at para 8 (these conversations were nothing like the formal meeting they had on 14 January 2013 to discuss snow removal complaints prior to Zollinger joining the JUC).

217 *VK Mason Construction Ltd v Bank of Nova Scotia*, [1985] 1 SCR 271, 16 DLR (4th) 598 [*Mason*].

218 *Ibid* at 277.

219 *Ibid* at 284.

220 *Ibid* at 277.

221 *Ibid* at 284.

222 *Callow* FOR, *supra* note 43 at 106ff.

223 *Ibid.*

224 *Ibid.*

225 *Ibid.*

226 *Callow,* ONSC, *supra* note 20 at para 8.

227 *Martel* stands for the proposition that there is no pre-contractual duty to negotiate, and in that case the communications were much more formal than in *Callow*. It bears noting that *Martel* was decided 21 years ago and the law pertaining to pre-contractual behaviour may change, given the current SCC's emphasis on moral contractual behaviour. Given that the judges are moving in a more expansionist direction, good faith could one day be extended to contractual formation, as is the case in Québec: *Bhasin*, supra note 4 at para 83.

It is worth noting that the strength of Mr. Callow's claim would have been different if Baycrest had initially represented its intention to form the Future Contract, but, over time, that representation became untrue and Baycrest never disclosed this change. In this situation, Baycrest would have had a duty to disclose and Mr. Callow's reliance would have been reasonable: this scenario occurred in *de Groot v St Boniface Hospital.*[228] In *de Groot,* the plaintiff surgeon applied for general and specialized surgical privileges at the defendant hospital.[229] The hospital, after telling him that he would be granted both privileges, decided to only grant specialized privileges.[230] Yet, it did not inform Dr. de Groot of this change until he arrived at the hospital to start working.[231] By then, he had already left a position in South Africa and moved to Manitoba in reliance on the hospital's representations.[232] Although the hospital initially told Dr. de Groot the truth, the trial judge held it liable for negligent misrepresentation because it failed to tell Dr. de Groot about the change.[233] In particular, Dr. de Groot's reliance on the representations was reasonable because he had been led to believe "in a state of facts that [was] obviously material to his future conduct"[234] through extensive communications.

Outside of the employment context, the English case *With v O'Flanagan* is also relevant.[235] In *O'Flanagan*, the parties entered into formal negotiations for the sale of a medical practice.[236] At negotiations, the vendor truthfully represented the practice's revenues; however, by the time the contract was signed five months later, the vendor had fallen ill and the practice had dwindled.[237] Prior to signing the contract, the purchasers discovered that a *locum tenens* was managing the practice.[238] Even though they raised this concern, the vendor never informed them about the loss in revenues following his original representations.[239] When the purchasers ultimately took possession of the practice, they discovered that it was nearly non-existent.[240] They successfully sued for rescission of the contract.[241] The English Court of Appeal emphasized that the impugned representation was a continuing one, and that it was made to induce the purchasers to enter into the contract.[242] Even though the representation was truthful before the contract's formation, the court held the vendor liable for failing to communicate the changed circumstances to the purchasers.[243]

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228 *De Groot v St Boniface General Hospital,* [1994] 6 WWR 541, 1994 CanLII 16687 (MBCA) [*de Groot*].
229 *Ibid* at para 6.
230 *Ibid* at para 10.
231 *Ibid* at para 12.
232 *Ibid* at para 23.
233 *Ibid* at para 34.
234 *De Groot v. St. Boniface Hospital,* [1993] 6 WWR 707, 1993 CanLII 14741 (MBQB) at para 17.
235 [1936] Ch 575 [*O'Flanagan*].
236 *Ibid* at 576.
237 *Ibid.*
238 *Ibid* at 577.
239 *Ibid.*
240 *Ibid.*
241 *Ibid* at 576.
242 *Ibid* at 578.
243 *Ibid.*

In *Callow,* however, the JUC never indicated that they would sign the Future Contract.[244] Unlike in *de Groot* and *O'Flanagan*, there was no representation that was once true but later changed. As such, the JUC members' words of gratitude and encouragement were insufficient to reasonably ground reliance. If Baycrest or one of the JUC members had communicated that the Future Contract would take place, then voted to terminate him, and then failed to disclose this change, then it would have breached the standard of care and Mr. Callow's reliance would have been reasonable. But these were not the facts in *Callow.* The parties never held a formal meeting to discuss the Future Contract, nor did they ever posture their position regarding the Future Contract. As such, Justice Côté's observation that there was no duty to correct Mr. Callow's misapprehension is relevant to this analysis.

Overall, Mr. Callow's reliance was not reasonable and could not ground a claim in negligent misrepresentation. Mr. Callow formed an impression based on two JUC members' vague responses to his attempts to gauge their interest in the Future Contract. It would fly in the face of Anglo-Canadian contract law to require negotiating (or even casually conversing) parties to be completely transparent about their objectives or to anticipate how their counterparties will react.[245] Finally, with respect to the specific context of *Callow,* "there is nothing unlawful or unfair about accepting a contractor's incentives offered in the hopes of securing a new contract."[246] This, in and of itself, should not ground a finding of reasonable reliance.

### v. Detrimental Reliance and Damages

It is unlikely that Mr. Callow would satisfy all of the prior requirements; however, it is undeniable that he detrimentally relied upon his conversations with the JUC members. In particular, by the time the contract had been terminated in the fall of 2013, Mr. Callow had not pursued any other business opportunities and lost a year's worth of work (valued at $80,383.70).[247] Further, Mr. Callow had leased machinery for the agreement (valued at $14,835.14), which he would not have leased if he had known that the contract would be terminated.[248] Thus, Mr. Callow had sufficient proof that he detrimentally relied upon Baycrest's representatives' statements; however, he likely could have mitigated his damages by bidding on other projects or exploring other opportunities. While it could be argued that it was too late for mitigation, it is important to emphasize that Mr. Callow only bargained for 10 days' notice in a scenario of termination.[249] If that was insufficient, why did he not bargain for

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244 *Callow* FOR*, supra* note 43 at paras 106ff.

245 *Martel, supra* note 2 at 105.

246 *Callow* FOR, *supra* note 43 at paras 110ff.

247 After expenses, Mr. Callow's profit would have been $64,306.96 had Baycrest not terminated the contract: *Callow* ONSC, supra note 20 at paras 80ff.

248 *Ibid* at para 81.

249 As per section 9 of the contract, Baycrest needed only provide 10 days' notice: *ibid* at para 49.

more at the outset? Also, there is no evidence to indicate that the contract stopped him from exploring other opportunities prior to receiving news about the termination.[250] Regardless, it is doubtful that a court would reach this stage of the negligent misrepresentation analysis.

## CONCLUSION

I have taken the stance that *Callow* was incorrectly decided. While the facts in *Callow* engaged the organizing principle of good faith and the duty of honesty, there was much more to the picture. The Supreme Court blended the analysis and assessed it only through the lens of contract law. That said, when one disentangles the complex factual matrix in *Callow*, it becomes clear that a two-part approach was necessary to come to a correct conclusion that could effectively guide lower courts.

The complicating factor in *Callow* was that the parties, who were already involved in a contractual relationship, casually discussed the potential for renewing a contract in the future. Thus, there were two parallel legal analyses that the judiciary should have undertaken. First, the courts should have carried out a contractual legal analysis, namely, to assess whether Baycrest's statements pertained to the performance of the Current Contract and breached the duty of honesty. Given that these statements did not discuss the Current Contract, the second analysis should have assessed the representations in relation to the Future Contract through the lens of tort law. Specifically, the tort of negligent misrepresentation would have allowed the courts to gauge whether Baycrest's representations were negligent, and whether Mr. Callow's detrimental reliance upon these representations was reasonable. This analysis would have remained loyal to Anglo-Canadian contract law's persistent rejection of a pre-contractual duty of good faith, in addition to the applicability and scope of the organizing principle. Further, if no relief was called for on the basis of the tort of negligent misrepresentation either, it must be assumed that the right outcome according to Anglo-Canadian common law would have been one in which Mr. Callow lost the appeal (as per Justice Côté's reasoning).

The SCC's fragmented decision in *Callow* is likely to cause a great deal of confusion in contract law. Not only did it impose contractual rights and obligations in relation to a non-existent contract, but its reasoning regarding the contents and appropriate analysis of the duty of honesty was confounding in its own right. Consequently, the SCC's decision in *Callow* is likely to trigger insecurity between contracting parties both at the proverbial bargaining table and in their general communications about potential future endeavours. *Callow* is also likely to cloud the law pertaining to disclosure requirements in relation to termination clauses. Given that Baycrest did provide Mr. Callow with 10 days' notice, contracting parties are likely to be uncertain about whether they will also be held liable for failing to immediately disclose their decision to terminate.

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250 Although the contract itself has not been made available online, none of the judges deciding the case referred to any such covenants and none of the transcripts reproduced in the facta before the SCC indicated such legal constraints.

Going forward, the SCC's approach to the duty of honesty is overly expansive and is likely to result in commercial uncertainty. While the SCC refuted this concern, insisting that the scope of the duty of honesty is controlled by its direct link to the performance of the contract's terms, its words do not match the outcome because Baycrest's comments did not have a direct link to the Current Contract. Consequently, the SCC's analysis of the duty of honesty in *Callow* is incomplete and likely to inject greater uncertainty into the law pertaining to good faith. It remains to be seen how future courts will assess the nexus between express contractual terms and contracting parties' belief that their expectations will be protected by the organizing principle and its manifest duties. In short, *Callow* has only intensified the very concern that has plagued *Bhasin*'s legacy. The saga continues.