

# Supreme Court of Canada to Hear Two New Cases on Good Faith in Contract

November 21, 2019

Five years after its landmark decision in *Bhasin v Hrynew*, 2014 SCC 71, the Supreme Court of Canada is scheduled on December 6, 2019 to hear two new cases on good faith in contract. The Supreme Court in *Bhasin* introduced to Canadian jurisprudence the **general organizing principle of good faith in contract**. This is not a “free-standing rule”, but rather “a standard that underpins and is manifested in more specific legal doctrines”, exemplifying the idea that a contracting party should have appropriate regard to its **counterparty’s legitimate interests**.<sup>1</sup> Flowing from this is a common law duty of honest contractual performance. The Court held that this duty means parties may not lie to or mislead each other about the performance of the contract, but does not otherwise equate to a duty of loyalty or disclosure. *Bhasin* has been widely cited in case law and discussed in academic commentary. The two upcoming appeals provide a ripe opportunity for the Supreme Court to address further issues arising out of its earlier decision.<sup>2</sup>

## Decisions under Appeal

The two appeals that bring the Supreme Court back to the notion of good faith in contract law are expected to clarify the parameters of good faith as a general organizing principle and the specific scope of the duty of honest contractual performance. Each of the cases under appeal deals with circumstances beyond those addressed by the Supreme Court in *Bhasin*, and raises important practical issues.

In *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2019 BCCA 66, a decision from the British Columbia Court of Appeal, the question is whether **a contractual duty of good faith applies to restrict a party’s exercise of discretion in the absence of a contractual term**. *Wastech Services Ltd.* (“Wastech”) and the **Greater Vancouver Sewerage and Drainage District** (“Metro”) were parties to a 20-year contract for the disposal of sewage waste from the Vancouver regional district. The contract gave Metro the discretion to allocate waste between certain disposal facilities, and contained detailed provisions for certain payment adjustments in specific circumstances.<sup>3</sup> In 2011, Metro exercised this discretion in a manner that reduced its costs, but also impacted **Wastech’s profits**.

The dispute proceeded to arbitration. Wastech argued that there should be a term **implied into the contract that limited Metro’s power to re-direct waste between the facilities without adjusting the rates it paid to Wastech, or otherwise compensating Wastech.** However, the evidence was that the parties had made the decision not to include such a term in the contract, and, as such, the arbitrator refused to imply the term Wastech sought. Despite making this finding, the arbitrator then held that Metro breached its duty of good faith because, in the exercise of its discretion for allocating waste, **it did not have appropriate regard to Wastech’s interests. The British Columbia Supreme Court overturned the arbitrator’s decision as it improperly expanded the concept of good faith beyond its scope. The British Columbia Court of Appeal upheld the lower court’s decision, stating:**

Since the arbitrator had rejected the implied term as something the parties had **intentionally excluded... he erred here in failing to apply the right test - namely whether Wastech had a legitimate expectation arising out of the Agreement that Metro would not exercise its discretion in the way it did. The answer to that question had to lie not in the financial effect of the re-allocation on Wastech, but in the Agreement. Only then could an expectation to this effect be described as “contractual”**<sup>4</sup>.

The Court of Appeal held that **“this fact substantially took away from the argument in support of a breach of the duty of good faith.”**<sup>5</sup>

The second decision on appeal is the Ontario Court of Appeal’s decision in *C.M. Callow Inc. v Zollinger*, 2018 ONCA 896. In this case, the appellant condominium corporations formed a Joint Use Committee (“JUC”) to make decisions relating to the condominium corporations’ shared assets. C.M. Callow Inc. (“Callow”) and the condominium corporations entered into two maintenance contracts, one for summer maintenance and one for winter maintenance, respectively. The winter maintenance contract provided for **early termination by the condominium corporations on ten days’ notice. In March or April of 2013, JUC decided to terminate the winter contract, but did not provide Callow with notice of termination until September 2013, so as to avoid jeopardizing Callow’s work under the summer contract. Meanwhile, in the summer of 2013, Callow unilaterally performed free extra work, of which JUC was aware, with the hope that it would incentivize the condominium corporations to renew the two contracts upon their expiry. Nevertheless, in September of 2013, the condominium corporations terminated the winter maintenance contract on notice and Callow sued for breach of contract.**

The trial judge found that the condominium corporations breached the contractual duty of honest performance. The Ontario Court of Appeal allowed the appeal on the basis that the trial judge had effectively modified the contractual right to terminate the contract and went beyond what the duty of honest performance requires or permits. The Court of Appeal held that there was no unilateral duty of disclosure, and that the duty of honest performance did not modify or otherwise limit the right to terminate the winter maintenance contract in accordance with its terms.

## Implications

These important cases at the Supreme Court raise issues about the scope of good faith in contract post-Bhasin. The Wastech case raises the issue of how the general organizing principle of good faith manifests itself in the exercise of contractual discretion. The Callow case challenges the extent of any duty to disclose a decision to

terminate a contract. We anticipate that the Supreme Court’s decisions in these cases will provide further clarity on the application of the principles outlined in Bhasin and the impact of good faith on Canadian contract law.

<sup>1</sup> Bhasin v Hrynew, 2014 SCC 71 at paras 64-65.

<sup>2</sup> [Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District, Supreme Court of Canada File No. 38601](#) and [C. M. Callow Inc. v Zollinger, Supreme Court of Canada File No. 38463](#).

<sup>3</sup> Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District, 2019 BCCA 66 [**Wastech**] at paras 20-29.

<sup>4</sup> Wastech at para 68 (emphasis in original).

<sup>5</sup> Wastech at para 69 (emphasis in original).

By

[Peter D. Banks, Tiffany Bennett](#)

Expertise

[Disputes](#), [Appellate Advocacy](#), [Contract Disputes](#), [Public Policy & Government Relations](#), [United States](#)

---

## **BLG | Canada’s Law Firm**

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### **BLG Offices**

#### **Calgary**

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### **Ottawa**

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### **Vancouver**

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

#### **Montréal**

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

#### **Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.