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A lie by any other name?

In what circumstances is a failure to disclose a breach of the duty of honesty?

A recent decision of the Ontario Superior Court, *Lavrijsen Campgrounds Ltd. v. Reville*, 2015 ONSC 103, provides an occasion to reflect on this issue, arising from the Supreme Court of Canada's ruling in *Bhasin v. Hrynew*, 2014 SCC 71. In *Bhasin*, the Court recognized the "general organizing principle of good faith" in contract law, and held that there is:

... a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

In *Lavrijsen*, Justice Kent uses the phrase "active non-disclosure" to describe the defendant's conduct in that case, which he concludes breached the duty of honesty.

Lavrijsen concerned an agreement to sell and purchase shares in an operator of a campground. The agreement required the seller to disclose to the purchaser the amounts of prepaid camper rentals and deposits, which would be credited to the purchaser at closing. The vendor purported to discharge this obligation by providing a document which the Court found was inadequate to enable the purchaser to determine the amounts in question. Nonetheless, the parties proceeded to close the transaction. A year later, on reviewing the corporation's records, the purchaser realized that the actual prepaid amounts had been substantially higher than it was given credit for.

Justice Kent found that the defendant "selectively disclosed partial information and actively withheld information concerning prepaid rentals". The defendant's "active non-disclosure" constituted intentional misrepresentation, and was a breach of the contract. The court relied on *Bhasin*, which it stated eliminated any distinction between active non-disclosure and intentional misrepresentation.

Although the expression "active non-disclosure" does not appear in *Bhasin*, and the court in *Lavrijsen* did not define it, the term appears to point to this fact: since the defendant was required to disclose all prepayments, the defendant in effect represented that its inadequate disclosure was complete, which

was false. It followed that the defendant was dishonest in the *Bhasin* sense.

It seems, then, non-disclosure of a material fact is a breach of the duty of honesty if it has the same effect as a lie in the particular circumstances.