



Paul-Erik Veel
416-865-2842
pveel@litigate.com

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The Duty of Good Faith Does Not Extend to Pre-Contractual Conduct

Since it was recognized a little over a decade ago in *Bhasin v Hrynew*, the contours of the organizing principle of good faith and the duty of honest performance in contract law have been gradually clarified by Canadian courts. Most recently, in *Ocean Pacific Hotels Ltd v Lee*, the British Columbia Court of Appeal considered whether the duty of good faith applied to pre-contractual conduct. In particular, the question in this case was whether an employer's conduct before an employment agreement was finalized could be scrutinized under the duty of honest performance. Answering that question with a resounding no, the Court of Appeal's decision provides critical insight into the evolving boundaries of good faith obligations in Canadian contract law.

Background and Discussion

Ocean Pacific Hotels Ltd operates the Pan Pacific Hotel in Vancouver. During the COVID-19 pandemic, Ocean Pacific faced significant financial challenges and stopped scheduling shifts for certain employees indefinitely. To address concerns over continued employment and benefits, the employer presented affected employees with "Casual Agreements," allowing them to retain extended health benefits, subject to insurer approval. However, the benefits were later terminated by the insurer, and employees alleged that Ocean Pacific misrepresented the security of those benefits during negotiations. The plaintiffs commenced a proposed class proceeding against Ocean Pacific and moved to certify the proceeding as a class action.

One of the legal issues in the case was whether the duty of honest performance could apply to representations made before an agreement was formally executed. The employees argued that Ocean Pacific had a duty to disclose the uncertainty of the benefit coverage, while the employer contended that the duty of honest performance applies only to conduct after a contract has been agreed to.

The British Columbia Supreme Court certified the case as a class action, allowing employees to advance their claim that Ocean Pacific breached its duty of honest performance by failing to disclose material information about the health benefits during the negotiation of the Casual Agreements. The

chambers judge found that the allegations raised a novel but arguable question about whether pre-contractual conduct could fall under the duty of honest performance.

Ocean Pacific appealed, and the British Columbia Court of Appeal allowed the appeal with respect to the duty of honest performance. In its decision, following an extensive review of the case law, the British Columbia Court of Appeal rejected the chamber judge's expansive interpretation of the duty of honest performance. The Court reaffirmed that, as established in *Bhasin* and further clarified in *CM Callow Inc v Zollinger*, the duty of honest performance applies to the performance of an existing contract, not to negotiations leading up to a contract.

The Court of Appeal noted at paragraph 72:

...I would conclude the duty of honest performance in contract does not extend to dishonesty that was intended to influence the other party to enter into the contract. If it were not so, the organizing principle of good faith established in *Bhasin* would expand remedies for breach of contract exponentially. It would permit claims for breach of the duty of honest performance to be brought whenever a contracting party alleged that the other party made false or misleading representations during the course of contract negotiations.

The Court emphasized that existing doctrines, such as fraudulent and negligent misrepresentation, already provide protection against deceptive pre-contractual conduct. The Court held as follows:

I am also of the view there is no need to expand the contractual duty of honest performance to apply to dishonest conduct during pre-contractual negotiations which is intended to induce a party to enter into a contract. The law concerning the torts of negligent and fraudulent misrepresentation is well-developed and provides an adequate remedy in this situation.

Takeaways

While the Supreme Court of Canada has steadily expanded good faith obligations in contract law, *Ocean Pacific* signals that courts remain cautious about extending these duties too far. The British Columbia Court of Appeal's decision in *Ocean Pacific* reinforces a clear boundary in Canadian contract law: the duty of good faith and honest performance applies only to existing contractual relationships, not to pre-contractual negotiations. This ruling provides clarity for businesses and employers, ensuring that pre-contractual discussions remain governed by traditional principles of misrepresentation rather

than an overarching duty of good faith.