S.C.C. File No. 38463

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

**C.M. CALLOW INC.**

Appellant
(Respondent)

- and –

**TAMMY ZOLLINGER, CONDOMINIUM MANAGEMENT GROUP, CARLETON CONDOMINIUM CORPORATION NO. 703, CARLETON CONDOMINIUM CORPORATION NO.726, CARLETON CONDOMINIUM CORPORATION NO. 742, CARLETON CONDOMINIUM CORPORATION NO. 765, CARLETON CONDOMINIUM CORPORATION NO. 783, CARLETON CONDOMINIUM CORPORATION NO. 791, CARLETON CONDOMINIUM CORPORATION NO. 806, CARLETON CONDOMINIUM CORPORATION NO. 826, CARLETON CONDOMINIUM CORPORATION NO. 839, CARLETON CONDOMINIUM CORPORATION NO. 877**

Respondents
(Appellants)

A N D B E T W E E N:

S.C.C. File No. 38601

**WASTECH SERVICES LTD.**

Appellant
(Appellant)

- and –

**GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT**

Respondent
(Respondent)

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**FACTUM OF THE INTERVENER,**
**CANADIAN CHAMBER OF COMMERCE**
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW

1. The Canadian Chamber of Commerce (the "**Chamber**") focusses its submissions on the proper delineation of the duty of honest contractual performance and the organizing principle of good faith. The Chamber offers the following three submissions.

2. First, commercial certainty should continue to play a central role in the development of the principle of good faith in contracts. The development of the law of good faith should reflect the overarching aim of contracts: to allow two or more parties to predictably govern themselves by their own self-imposed rules. Commercial certainty is the keystone that guides the Chamber's more particularized submissions on the doctrine of good faith in contract.

3. Second, recognizing that the duty of honest contractual performance prohibits "active" non-disclosure advances the principle of commercial certainty. But to be consistent with this principle, the Chamber proposes that any such claim must have two elements: (i) the non-disclosure must be "active," *i.e.*, a claimant must show that there is an act or other positive conduct by the defendant that, together with non-disclosure, misleads its contractual counterparty; and (ii) it must be a deliberate effort to mislead: the claimant must show that the defendant had an intent to mislead or knowledge that the effect of the act combined with the non-disclosure would be to mislead the counterparty with respect to the performance of the contract.

4. With respect to the broader, overarching principle of good faith, these appeals are an opportunity for the Court to reinforce the commercial certainty *Bhasin* was intended to create. It is important to clarify that *Bhasin* did not create a new, free-standing obligation to have "appropriate regard" for a counterparty's "legitimate contractual interests." Instead, what *Bhasin* did was extend the existing cases of contractual good faith. Claims of good faith should generally be restricted to situations and relationships that either fall within existing doctrines or are analogous to them. Where the existing doctrines are found to be inadequate, the law prohibits only the bad faith performance of contractual duties; it does not impose an objective standard of behavior.

## PART II – POSITION ON APPELLANTS' QUESTIONS

5. As detailed below, the Chamber's position with respect to the appellant's first question in *Callow* is that the duty of honest contractual performance extends beyond lying to include active

non-disclosure. The Chamber takes no position with respect to the appellant's questions in *Wastech*, including the question of whether the arbitrator's conclusions about a breach of the duty of good faith are reviewable. Instead, the Chamber makes submissions on the general nature of the organizing principle of good faith.

## PART III – ARGUMENT

### A. Commercial certainty is central in considerations of the principle of good faith

6. Commercial certainty was a central consideration in this Court's decision to recognize an organizing principle of good faith and a derivative duty of honest contractual performance. This "modest, incremental step" was intended to remedy uncertainty in the Canadian common law.[1] Accordingly, the duty of honest contractual performance was intended to be "sufficiently precise that it [would] enhance rather than detract from commercial certainty."[2]

7. Unfortunately—as demonstrated by the issues addressed in this factum and in these appeals—the reading that some courts have given to *Bhasin* has confused the law of contract and has the potential to undermine the climate of legal certainty in which Canadians transact.

8. It does not have to be this way. This Court has long recognized "the need to preserve certainty in commercial relations."[3] The Ontario Court of Appeal has noted that "[c]ommercial contracts are normally designed, at least in part, to maximize certainty."[4]

9. The Alberta Court of Appeal has described the importance of commercial certainty in the law of contract as follows:

> The overarching aim of contracts is to let two or more parties predictably govern themselves by their own self-imposed rules. … Commerce needs predictability. So do ordinary Canadians about to commit their future earnings and life savings, especially to acquire a house. Indeed, usually certainty and predictability are more important than fairness in any particular contract.[5]

10. And there need not be any tension between certainty and fairness in elaborating a clear standard of good faith that businesses must meet in their contractual relationships. For example,

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[1] *Bhasin v. Hrynew*, 2014 SCC 71, paras. 41, 73 [*Bhasin*].
[2] *Bhasin*, 2014 SCC 71, para. 34.
[3] *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, para. 52.
[4] *Oceanic Exploration Co. v. Denison Mines Ltd.* (1999), 127 O.A.C. 224, para. 38 (C.A.).
[5] *Ko v. Hillview Homes Ltd.*, 2012 ABCA 245, paras. 2-4.

in principle, the duty of honest contractual performance enhances both certainty and fairness, which this Court noted in *Bhasin* brings "certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations" and gives "due weight to the importance of private ordering and certainty in commercial affairs."[6]

11. In these appeals, the Court has an opportunity to turn principle into practice and articulate clear, predictable standards for the organizing principle of good faith. The Chamber directs each of its below submissions to the aim of enhancing commercial certainty.

**B. Prohibiting "active" non-disclosure enhances commercial certainty**

12. From a commercial perspective, there is no functional difference between lying and active non-disclosure. What matters is whether the conduct is "dishonest" and misleading. As one English authority noted, quoted by this Court in *Bhasin*, "[a] paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust."[7] It is dishonesty, no matter the form, that erodes this trust. Thus, it is dishonesty itself that matters.

13. This is reflected in the Court's articulation of the duty of honest contractual performance. It "means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."[8] In other words, the duty extends beyond lying to other forms of misleading conduct. It privileges substance over form.

14. This duty of honest performance enhances commercial certainty because it codifies parties' existing understanding of how they do business. As this Court held in *Bhasin*, "[a] reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. … It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations."[9]

15. Nonetheless, the principle of commercial certainty requires that claims of active non-disclosure—and the concomitant obligations they create—be clearly delineated. First, parties

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[6] *Bhasin*, 2014 SCC 71, paras. 62, 66.
[7] *Bhasin*, 2014 SCC 71, para. 57, quoting *Yam Seng Pte Ltd. v. International Trade Corporation Ltd.*, [2013] EWHC 111, para. 135.
[8] *Bhasin*, 2014 SCC 71, para. 73 [emphasis added].
[9] *Bhasin*, 2014 SCC 71, paras. 80-81.

should not be held liable for non-disclosure, without more, where there is no duty to disclose in the first place. As this Court held in *Bhasin*, the duty of honest contractual performance does not impose a general duty of disclosure.[10] "But the situation is quite different … when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract."[11] In such circumstances, there may be a duty to disclose information where failure to do so would amount to active deceit.[12] Framed in negative terms, to violate the duty of honest contractual performance, non-disclosure must at least be accompanied by an act or other positive conduct by the defendant that, together with non-disclosure, misleads its contractual counterparty. This could include, for example, a representation.

16. Second, parties should not be held liable for active non-disclosure under the duty of honest contractual performance unless they have the requisite mental element of dishonesty. In *Bhasin*, this Court held that the duty is violated only when one party "lies" (connoting an intent to deceive) or "knowingly" misleads (denoting knowledge of the misleading effect) regarding matters directly linked to the performance of the contract.[13] Thus, to be found liable for active non-disclosure, the defendant must have the intent to mislead or the knowledge that the effect of the act, combined with the non-disclosure, will be to mislead its counterparty with respect to the performance of the contract.

17. This two-part test for claims of active non-disclosure is consistent with commercial certainty in two ways. First, requiring an act or positive conduct avoids the imposition of a general duty of disclosure that interferes with parties' contractual bargains "or require[s] a party to forego advantages flowing from the contract."[14] Parties remain free to pursue their economic self-interest by withholding information of which the other side did not bargain for disclosure. Second, requiring actual knowledge or intent ensures that businesses cannot be held liable, on the basis of an externally imposed and uncertain standard, for withholding information they did not

[10] *Bhasin*, 2014 SCC 71, para. 73.
[11] *Bhasin*, 2014 SCC 71, para. 87 [emphasis added].
[12] See, *e.g.*, *Alevizos v. Nirula*, 2003 MBCA 148, paras. 24-27, 38; *Abel v. McDonald*, [1964] 2 O.R. 256, para. 9 (C.A.).
[13] *Bhasin*, 2014 SCC 71, para. 73.
[14] *Bhasin*, 2014 SCC 71, para. 73.

believe they needed to disclose. This mental element also accords with requirement under the duty of good faith, discussed further below, that parties not act "in bad faith."[15]

## C. The Court should delineate the organizing principle of good faith

18. The *Wastech* appeal illustrates the confusion that has arisen from two statements in *Bhasin* that appear, on their face, to be incongruous. On the one hand, *Bhasin* states that under the organizing principle of good faith, "a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner."[16] On the other hand, *Bhasin* emphasizes that "[a] party to a contract has no general duty to subordinate his or her interest to that of the other party," and that, "[i]n commerce, a party may sometimes cause loss to another—even intentionally—in the legitimate pursuit of economic self-interest."[17] To resolve the resulting confusion, "[t]he appropriate starting point is an analysis of what *Bhasin* actually says."[18]

### *(i) No duty to have "appropriate regard" for "legitimate contractual interests"*

19. The first step is to recognize that Justice Cromwell did not purport to create a free-standing duty to have "appropriate regard" to a counterparty's "legitimate contractual interests." He said only that "[t]he organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner."[19] The organizing principle of good faith, and thus this notion it exemplifies, "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines … about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance."[20] The notion of "appropriate regard" for "legitimate contractual interests" was never intended to be either free-wheeling or free-standing.

20. The Court in *Bhasin* found it appropriate to recognize a duty of honest contractual performance because of three pillars: (i) "a duty that is just"; (ii) a duty "that accords with the

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[15] *Bhasin*, 2014 SCC 71, para. 65.
[16] *Bhasin*, 2014 SCC 71, para. 65.
[17] *Bhasin*, 2014 SCC 71, paras. 86, 70.
[18] *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, para. 44 [*Styles*].
[19] *Bhasin*, 2014 SCC 71, para. 65 [emphasis added].
[20] *Bhasin*, 2014 SCC 71, paras. 64, 66 [emphasis added].

reasonable expectations of commercial parties"; and (iii) a duty that "is sufficiently precise that it will enhance rather than detract from commercial certainty."[21] Requiring parties to have regard to "legitimate contractual interests," instead of the terms of the contract itself, would undermine each of these three pillars. Each is explored below.

21. ***A duty that is just.*** As Justice Cromwell warned in *Bhasin*, "[t]he development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or 'palm tree' justice."[22] This itself would be a form of injustice. It would invite parties to attempt to avoid the effects of clearly worded contracts, to which they agreed, by "ask[ing] the court to retrospectively include [a contractual term] on the basis that such a term might be 'reasonable' or 'fair'."[23] It is for this reason that "*Bhasin* does not invite judicial examination of the rights granted by contracts to determine if they are 'fair', or whether the consequences of performance are more or less advantageous to either party than that party might have hoped or desired."[24]

22. Contractual unfairness is appropriately addressed by existing doctrines at law and equity: on the one hand, unconscionability, which prevents one contracting party from taking undue advantage of the other,[25] and on the other hand terms implied by law, which "redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts … by filling in gaps in the written agreement of the parties."[26] Each doctrine has evolved to require parties to meet stringent tests in order to avoid undue judicial interference with the freedom of contract. Short of these extraordinary remedies, Canadian businesses should be able to exercise the contractual rights they negotiated, provided they abide by their duty of honest performance discussed above.

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[21] *Bhasin*, 2014 SCC 71, para. 34.
[22] *Bhasin*, 2014 SCC 71, para. 70.
[23] *Styles*, 2017 ABCA 1, para. 65.
[24] *Styles*, 2017 ABCA 1, para. 53. See also *Bhasin*, 2014 SCC 71, para. 70.
[25] *Bhasin*, 2014 SCC 71, para. 43. See also *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, para. 38; *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710, p. 712 (B.C.C.A.).
[26] *Bhasin*, 2014 SCC 71, para. 44. See also *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, p. 457, McLachlin J.; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, pp. 1008-1010, McLachlin J., concurring.

23. ***Reasonable expectations of commercial parties.*** After *Bhasin*, commercial parties expect that the principle of good faith will "be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest." Critically, this includes the freedom to "sometimes cause loss to another—even intentionally—in the legitimate pursuit of economic self-interest."[27]

24. The notion that claims of good faith should be adjudicated by reference to "legitimate contractual interests" sits in clear tension with this expectation. It requires courts to look beyond the words of the contract read as a whole and in the context of the surrounding circumstances to identify "legitimate contractual interests" that lie beyond the terms but are somehow worthy of legal protection. This risks imposing extracontractual obligations on parties that are inconsistent with the contractual terms they negotiated and to which they agreed.

25. Even if the purpose of contract law could be characterized as the protection of the parties' reasonable expectations (which is disputed),[28] these expectations "are to be found in the wording of the contract, not in the court's perception of what is 'fair' in the abstract."[29] The application of this principle was illustrated in *Mesa Operating*, where the Alberta Court of Appeal enforced the parties' reasonable expectations only insofar as they were created by the contract itself, shared by the parties, and consistent with the express terms agreed upon.[30] In the final analysis, however, the words of the contract retain their primacy.[31] Like "reasonable expectations," "legitimate contractual interests" cannot become a guise for implying contractual terms that are inconsistent with the words of a contract and the parties' objectively manifested intentions.[32]

26. A requirement to have "appropriate regard" for "legitimate contractual interests" bears more resemblance to the statutory oppression remedy than to legal rights and remedies under the

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[27] *Bhasin*, 2014 SCC 71, para. 70.
[28] See, *e.g.*, Angela Swan, Jakub Adamski and Annie Y. Na, *Canadian Contract Law*, 4th ed., (Markham, Ont.: LexisNexis, 2018), §1.3, and the commentary cited thereat.
[29] *Styles*, 2017 ABCA 1, para. 63.
[30] *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.*, 1994 ABCA 94, para. 19.
[31] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 57 [*Sattva*]; *Styles*, 2017 ABCA 1, paras. 63-64.
[32] *Styles*, 2017 ABCA 1, para. 63. See also *Sattva*, 2014 SCC 53, para. 57; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*, 2007 SCC 55, para. 34 [*Jedfro Investments*].

common law of contract. The oppression remedy "protects the legitimate expectations of shareholders,"[33] largely because their rights are poorly defined and open to abuse.[34] The same protection is generally not needed for contractual parties because they have the ready ability to define their rights and protections.[35] Contractual counterparties do not expect protections for either interests or expectations beyond the limited ambit that legislatures have provided under the oppression statutes.

27. ***Commercial certainty.*** Unlike the duty of honest contractual performance, the concept of "legitimate contractual interests" is not "clear and easy to apply."[36] The phrase first appeared in *Bhasin* and has confused rather than clarified the law of contract. In particular, it is not clear (i) whether "legitimate contractual interests" are coextensive with "reasonable expectations" as traditionally understood in the law of contract and (ii) where these interests are to be found, if not in the express terms of the contract. "The danger lies in imposing 'legitimate contractual interests' that are contrary to the plain wording of the contract, or that involve the imposition of subjective expectations and interpretations on the contract."[37]

28. Most importantly, the "legitimate contractual interest" standard makes it difficult for parties to know at the time of negotiation how these interests will be assessed at the time of alleged breach. All in all, the concept of "legitimate contractual interests" creates more questions—and therefore more litigation—than answers. Below, the Chamber proposes an alternative way forward that provides a sounder basis for adjudicating claims of good faith.

### *(ii) Limits on the doctrine of good faith*

29. The greatest advancement in terms of commercial certainty would be to provide the metes and bounds of the doctrine of good faith. The Chamber proposes two principled limits.

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[33] *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177, para. 68 (C.A.). See also *Mennillo v. Intramodal inc.*, 2016 SCC 51, para. 84, McLachlin C.J., concurring.
[34] *Rea v. Wildeboer*, 2015 ONCA 373, paras. 14, 17, 19.
[35] *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, paras. 60, 62, 65-66; *Finness Yachting Inc. v. Menzies*, 2016 BCCA 360, para. 49; *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103, para. 74.
[36] *Bhasin*, 2014 SCC 71, para. 80.
[37] *Styles*, 2017 ABCA 1, para. 45. See also *Sattva*, 2014 SCC 53, para. 57; *Jedfro Investments*, 2007 SCC 55, para. 34.

First, the categories of good faith should generally be restricted to existing categories or those analogous to them. Second, the doctrine should be largely concerned with bad faith, focusing on whether a party has sought to perform its contractual duties in bad faith.

30. ***Categories of good faith.*** *Bhasin* developed the law of good faith "without displacing the existing specific doctrines,"[38] and "accepting the existing law as the primary guide to future development."[39] Thus, "[g]enerally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed."[40]

31. While the list may not be closed, commercial certainty urges that it not be left open-ended. Indeed, Justice Cromwell recognized that the application of the organizing principle of good faith to particular situations should be developed only where (i) "the existing law is found to be wanting," (ii) "the development may occur incrementally in a way that … gives due weight to the importance of private ordering and certainty in commercial affairs," and (iii) "the ramifications of the development are 'not incapable of assessment'."[41] The way to achieve this is to restrict claims of good faith to situations and relationships that either fall within existing doctrines or are analogous to them, as the lower courts attempted to do in *Bhasin*.[42]

32. ***Bad faith.*** In those cases where the existing doctrines are found to be inadequate, the development of the law of good faith should be properly circumscribed by focusing not on the identification of "legitimate contractual interests" to which a party has failed to pay "appropriate regard"—an exercise bound to result in the "reverse engineering" of contracts[43]—but on whether a party has sought to perform its contractual duties "in bad faith," as defined by analogy to the existing doctrines. This accords with the Court's injunction in *Bhasin* that the principle of good faith "merely requires that a party not seek to undermine [the other party's] interests <u>in bad</u>

[38] These include, for example, the duty of an employer not to dismiss an employee in a manner that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive": *Honda Canada Inc. v. Keays*, 2008 SCC 39, para. 57 [*Keays*].

[39] *Bhasin*, 2014 SCC 71, paras. 68-69.
[40] *Bhasin*, 2014 SCC 71, para. 66.
[41] *Bhasin*, 2014 SCC 71, paras. 40, 66.
[42] *Bhasin*, 2014 SCC 71, paras. 23, 27.
[43] *Styles*, 2017 ABCA 1, para. 56.

faith."[44] It is also consistent with the principle of commercial certainty, as "[t]he only workable definition of good faith is that it denotes the absence of bad faith."[45] Dishonesty, including by way of "active" non-disclosure, is a form of bad faith.[46]

33. It is important to clarify that an obligation to perform contracts in good faith—*i.e.*, in the absence of bad faith—does not import an obligation to behave reasonably in an objective sense.[47] For example, although "the courts have required that discretionary powers not be exercised in a manner that is 'capricious' or 'arbitrary'," [48] a "discretion may be exercised 'unreasonably', 'subjectively', 'idiosyncratically' or 'selfishly' without it following that the discretion has been exercised arbitrarily or dishonestly. What is objectively 'unreasonable' may make sense to a particular contracting party with unorthodox business or non-business objectives."[49] Arbitrary or capricious conduct, on the other hand, connotes bad faith, as "bad faith can encompass recklessness in the sense that the conduct at issue is so inexplicable that it suggests an absence of good faith."[50]

## PART IV – SUBMISSIONS CONCERNING COSTS

34. The Chamber will not seek costs and asks that no costs be awarded against it.

## PART V – PERMISSION TO PRESENT ORAL ARGUMENT

35. The Court granted the Chamber permission to present oral argument not exceeding five minutes at the hearing of the appeals.

November 15, 2019

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Jeremy Opolsky / Winston Gee
Counsel for the Intervener, Canadian Chamber of Commerce

[44] *Bhasin*, 2014 SCC 71, para. 65 [emphasis added].
[45] See Swan et al., *Canadian Contract Law*, 4th ed., §4.210, and the commentary cited thereat.
[46] *Keays*, 2008 SCC 39, para. 57; *Bhasin*, 2014 SCC 71, paras, 86-87.
[47] Swan et al., *Canadian Contract Law*, 4th ed., §8.306; *Styles*, 2017 ABCA 1, para. 59.
[48] *Bhasin*, 2014 SCC 71, para. 89.
[49] *Styles*, 2017 ABCA 1, para. 59.
[50] *Bennett v. Bennett Environmental Inc.*, 2009 ONCA 198, para. 30.

## PART VI – TABLE OF AUTHORITIES

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