Cassels

# Inside Insurance: Duty of Honest Performance in Contractual Relationships - Practical Implications for the Insurance Industry

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**Welcome to our *Inside Insurance* series, developed to provide topical, succinct, and practical insights that address real issues in-house counsel and other insurance and reinsurance industry executives face on a regular basis. As always, we are here to help.**

In December 2020, the Supreme Court of Canada revisited[1] the duty of honest performance doctrine (or duty of good faith doctrine), which it introduced in 2014[2] (the Doctrine). Much has been written about the Doctrine generally, and these two cases specifically, so we will skip a lengthy and complex analysis here.

What is important to appreciate is that the Doctrine obligates each party to a contract to perform their respective rights and obligations under that contract honestly. Practically, this means party A may not mislead party B materially, even where party A is exercising its rights and performing its obligations exactly as the contract provides. Furthermore, party A's failure to act honestly will lead to an increased risk of liability for damages for party B's loss of opportunity as a result of relying on Party A's misleading representations.

Let's explore this a little further in the insurance industry context as it relates to terminating services agreements.

Legal in-house counsel to insurers would do well to educate their clients about the importance of not misleading any counterparty to an outsourcing services agreement regarding the insurer's intention to not extend or renew the arrangement. For example, managing general agents to whom the insurer delegates underwriting authority (MGAs), third-party administrators (TPAs), and independent claims adjusters, to name a few.

## Advising Your Procurement Team

A focus on how to advise an insurer's procurement team is a good example of the ways in which in-house counsel can help their clients comply with the Doctrine.

The in-house counsel should coach their procurement team to not mislead TPAs, independent claims adjusters, and other vendors with whom they have a services agreement about the team's decision to not extend or renew the agreement. This is true even if the team intends to provide the vendor with the minimum termination notice period the agreement provides. The procurement team should be coached to inform the vendor of its decision, shortly after deciding it will not extend or renew the services agreement.

The team should also be guided to correct any assumptions the vendor has that the insurer will extend or renew the agreement after the decision to not renew or extend. These assumptions would be evident by the vendor's comments or actions. For instance, if the vendor indicates that it's hiring more personnel or buying more equipment to help service the insurer under the existing arrangement.

## Advising Your Programs Business Unit

In-house counsel should also coach their programs unit to not mislead MGAs to assume the existing outsourcing arrangement will be extended or renewed after the insurer has decided to not extend or renew the current arrangement. Otherwise, the same consequences discussed above would apply.

The prescription for the Doctrine: Honesty is always the best policy.

Our team has counselled several insurers and brokers with respect to their obligations under the Doctrine as it relates to the insurance and reinsurance industries. We would be pleased to assist you too in this regard.

Find other titles in our *Inside Insurance* series here.

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[1] *Callow Inc. v. Zollinger*, 2020 SCC 45.

[2] *Bashin v. Hrynew,* 2014 SCC 71.

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