A MATTER OF FAITH: THE TREATMENT OF BHASIN v. HRYNEW BY APPELLATE COURTS (Part I)

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1. Introduction

In *Bhasin v. Hrynew*, the Supreme Court of Canada took "two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just".[1] First, it recognized a "general organizing principle" of good faith contractual performance, which "underpins and informs . . . various rules in... various situations and types of relationships" that are found within the common law of contract.[2] Second, "as a further manifestation of this organizing principle of good faith", the court recognized a "duty of honest performance", describing this as "a common law duty which applies to all contracts to act honestly in the performance of contractual obligations".[3]

In the six years since, it would seem that "more words have been written about *Bhasin v. Hrynew* than any other case in the Canadian law of contracts".[4] An immense body of literature has emerged,[5] and

1. 2014 SCC 71, [2014] 3 S.C.R. 494, 379 D.L.R. (4th) 385 (S.C.C.) ("*Bhasin*") at para. 33.
2. *Ibid.*
3. *Ibid.*
4. D. Percy and D. Stollery, "Justice Jean E.L. Côté, The Court of Appeal, and the Changing Nature of Contract Law" (2019), 56 Alta L. Rev. 1263 at 1271.
5. The Canadian commentary includes: A. Bolieiro, "*Bhasin v. Hrynew* and the Principle of Good Faith in Contracts: Moving Toward a Modern View of Commercial Relationships" (2015), 33 Adv. J. 23; N. Finkelstein et al., "Honour Among Businesspeople: The Duty of Good Faith and Contracts in the Energy Sector" (2015), 53 Alta. L. Rev. 349; A. Gray, "Development of Good Faith in Canada, Australia and Great Britain" (2015), 57 Can. Bus. L.J. 84; G.R. Hall, "*Bhasin v. Hrynew*: Towards an Organizing Principle of Good Faith in Contract Law" (2015), 30 B.F.L.R. 335; C.D.L. Hunt, "Good Faith Performance in Canadian Contract Law" (2015), 74 Cambridge L.J.; J.D. McCamus, "The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law" (2015), 32 J. Con. L. 103; S. O'Byrne and R. Cohen, "The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015), 53 Alta. L. Rev. 1; Hon. J.T. Robertson, "Good Faith As An Organizing Principle in Contract Law: *Bhasin v Hrynew* – Two Steps Forward and One Look Back" (2015), 93 Can. Bar Rev. 811; A. Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*" (2015), 56 Can. Bus. L.J. 395; T. Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v. Hrynew* and the Organizing Principle of Good Faith in Common Law Canada" (2016), 58 Can. Bus. L.J. 1; N. Effendi et al., "*Bhasin v. Hrynew*: Towards Clarity and Coherence With Respect to Good Faith in Contractual Performance?" (2016), 46 Adv. Q. 94; M.P. Falco, "A Modest Change: Good Faith and the Duty of Honest Contractual Performance" (2016), 45 Adv. Q. 382; B. Kain and J.H. Nasseri, "Economic Duress After *Bhasin v. Hrynew*: Does the Organizing Principle of Good Faith Offer a New

as of the time of this writing, the decision has been cited in over 540 Canadian judicial decisions and 140 tribunal decisions,[6] along with a number of judgments rendered abroad.[7] These include six decisions

Framework?" (2016), Ann. Rev. Civil Lit. 43; C. Mummé, "Bhasin v. Hrynew: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?" (2016), 32 Int'l. J. Comp. Lab. L. & Ind. Rel. 117; B. Pasternak, "A 'First Look': The Canadian Courts' Treatment of Good Faith Contractual Performance Post-*Bhasin*" (2016), 19 Trinity C.L. Rev. 124; D.R. Percy, "The Emergence of Duty of Good Faith in the Canadian Law of Contracts" (2016), 22 J. Comm. Mag. and Judges Assn. 34; J. Young, "Justice Beneath the Palms: *Bhasin v. Hrynew* and the Role of Good Faith in Canadian Contract Law" (2016), 79 Sask. L. Rev. 79; D. Bertolini, "Decomposing Bhasin v. Hrynew: Towards an Institutional Understanding of the General Organizing Principle of Good Faith Performance" (2017), 67 U.T.L.J. 348; B. Crawford, "The New Contractual Principle of Good Faith and the Banks" (2017), 32 B.F.L.R. 407; J. Enman-Beech, "The Subjects of *Bhasin*: Good Faith and Relational Theory" (2017), 13 J.L. & Equal. 1; M. Goswami, "Coherence and Consistency in a System of Good Faith: Assessing and Explaining the Impact of *Bhasin v. Hrynew* on Canadian Contract Law" (2017), 77 S.C.L.R. (2d) 309; K. Maharaj, "An Action On the Equities: Re-Characterizing *Bhasin* As Equitable Estoppel" (2017), 1 Alta. L. Rev. 199; A. Swan, "Justice Tom Cromwell's Contracts Decisions: Starting from the Correct Place" (2017), 80 S.C.L.R. (2d) 333; S.M. Waddams, "Unfairness and Good Faith in Contract Law: A New Approach" (2017), 80 S.C.L.R. (2d) 309; P.R. Cotton-O'Brien, "Unpacking the Meaning of Good Faith in *Bhasin v. Hrynew*" (2018), 48 Adv. Q. 473; J. Enman-Beech, "Good Faith Between Public and Private" (2018), 84 S.C.L.R. (2d) 353; N. Reynolds, "The New Neighbour Principle: Reasonable Expectations, Relationality, and Good Faith in Pre-Contractual Negotiations" (2018), 60 Can. Bus. L.J. 94; J. Enman-Beech, "The Good Faith Challenge" [2019] J.C.L. 35; R. Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" [2019] J.C.L. 1; N. Reynolds, "Two Views of the Cathedral: Civilian Approaches, Reasonable Expectations, and the Puzzle of Good Faith's Past and Future" (2019), 44 Queen's L.J. 388; A. Swan and J. Adamski, "The Development of an Obligation to Perform in Good Faith", in P. Daly, ed., *Apex Courts and the Common* law (Toronto: University of Toronto Press, 2019); C. Valcke, "*Bhasin v. Hrynew*: Why a General Duty of Good Faith Would Be Out of Place in English Canadian Contract Law" [2019] J.C.L. 65; K. Maharaj, "Good for Everyone or Not Good at All: Clarity and Commitment in Contractual Good Faith" (2020), 96 S.C.L.R. (2d) 107; A. Swan, "It Matters How You Start to Think About a Contracts Problem" (2020), 98 S.C.L.R. (2d) 3.

6. These figures are based on a CanLII search of all Canadian databases conducted on September 14, 2020.
7. *Sino Iron Pty Ltd. v. Mineralogy Pty Ltd. (No. 2)*, [2014] WASC 444; *Canelli v. North Branford Board of Police Commissioners*, 2014 WL 7272550 (Conn. S.C., 2014); *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt*, [2015] EWHC 283 (Comm), varied [2016] EWCA Civ 789; *Mineralogy Pty Ltd. v. Sino Iron Pty Ltd. (No. 6)*, [2015] FCA 825; *Heli Holdings Limited v.*

by the Supreme Court of Canada itself, four of which substantively considered *Bhasin*'s impact upon matters of contract law and good faith:[8] (a) *Potter v. New Brunswick Legal Aid Services Commission*;[9] (b) *Churchill Falls (Labrador) Corp. v. Hyrdo-Québec*;[10] (c) *Uber Technologies Inc. v. Heller*;[11] and (d) *Atlantic Lottery Corp. Inc. v. Babstock*.[12]

The wealth of commentary on *Bhasin* is a welcome development. Nonetheless, it creates difficulties for the busy lawyer, judge or academic seeking to make sense of *Bhasin*'s current status in the law. The current article approaches this problem by providing an overview of how *Bhasin* has been treated by Canada's appellate courts. Such an overview may not only be of practical interest, but can be expected to yield important insights into how the organizing principle of good faith and its associated doctrines are developing in Canadian jurisprudence. After all, "[a]ppellate courts . . . 'operate at a higher level of legal generality'" than trial courts, and not only "ensure that 'the same legal rules are applied in similar situations'", but "also have a law-making function, which requires them to 'delineate and refine legal rules'".[13] It is at the appellate level that the true implications of *Bhasin* can be expected to emerge.

An assessment of how *Bhasin* has been treated within Canadian the appellate jurisprudence is also timely to undertake now. In the fall of 2019, the Supreme Court of Canada heard three appeals in which – for the first time since *Bhasin* – the organizing principle of good faith in the common law of contract was the principal focus of the arguments. This "Trilogy" of cases includes: (a) *Matthews v. Ocean Nutrition Canada Limited*[14] (an employment case alleging bad

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The Helicopter Line Ltd., [2016] NZHC 976; *Flynn v. Breccia*, [2017] IECA 74; *Morrissey v. Irish Bank Resolution Corporation Ltd.*, [2017] IECA 162; *Ben v. Chubb Life Insurance Co. Ltd.*, [2018] HKCA 209; *Clarence Property Corporation Limited v. Sentinel Robina Office Pty Ltd.*, [2018] QSC 95; *SCC (NZ) Limited v. Samsung Electronic New Zealand Ltd.*, [2018] NZHC 2780.

8. The Supreme Court has also cited *Bhasin* in two other cases with respect to the evolving nature of the common law: *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, 411 D.L.R. (4th) 434 (S.C.C.) at para. 36; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83, 417 D.L.R. (4th) 239 (S.C.C.) at para. 35.
9. 2015 SCC 10, [2015] 1 S.C.R. 500, 381 D.L.R. (4th) 1 (S.C.C.) ("*Potter*").
10. 2018 SCC 46, [2018] 3 S.C.R. 101, 428 D.L.R. (4th) 1 (S.C.C.) ("*Churchill Falls*").
11. 2020 SCC 16, 447 D.L.R. (4th) 179, 3 B.L.R. (6th) 1 (S.C.C.) ("*Uber*").
12. 2020 SCC 19, 447 D.L.R. (4th) 543, 53 C.P.C. (8th) 1 (S.C.C.) ("*Atlantic Lottery*").
13. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, 404 D.L.R. (4th) 258 (S.C.C.) at para. 35.

faith during constructive dismissal); (b) *C.M. Callow Inc. v. Zollinger*[15] (a commercial case alleging dishonest performance); and (c) *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*[16] (a commercial case heard together with *Callow*, alleging the bad faith exercise of contractual discretion). At the time of this writing, the court has yet to release its decisions in the Trilogy, and it is likely that some of the law discussed in this article will be reformulated once it does. Nonetheless, a review of the appellate jurisprudence that precedes the Trilogy will help bring the court's decisions within it into sharper focus, and allow for a greater appreciation of what those decisions ultimately achieve.

In light of the impending release of the Trilogy, this article is being published in two parts. This first part examines the 84 decisions in which Canadian appellate courts have considered *Bhasin* since its release. After outlining the decision in *Bhasin* itself, the discussion turns to how the subsequent appellate authorities have applied *Bhasin* to the most litigated issues, with a view to identifying the principal themes that emerge. The second part of the article will be published once the Trilogy is released, and will review the Supreme Court of Canada's reasons in those decisions.

2. The Decision in Bhasin

a. The Underlying Facts

Bhasin involved a breach of contract claim by the appellant, Mr. Bhasin, against the corporate respondent ("Can-Am"), a company that marketed education savings plans to investors. For over 10 years, Mr. Bhasin acted as one of Can-Am's most successful retail dealers, and carefully built up a dedicated sales force. While the relationship between the two had certain features that were similar to a franchise or employment contract, it was ultimately a commercial one. At the time of the dispute, the dealership agreement between the parties was for a three-year term – running from November, 1998 to November, 2001 – and would automatically renew unless either

14. 2018 CarswellNS 759 (S.C.C.), (heard October 8, 2019) (reserved), on appeal from 2018 NSCA 44, 48 C.C.E.L. (4th) 171, 2018 C.L.L.C. 210-053 (N.S. C.A.).
15. 2019 CarswellOnt 3192 (S.C.C.) (heard December 6, 2019) (reserved), on appeal from 2018 ONCA 896, 429 D.L.R. (4th) 704, 86 B.L.R. (5th) 53 (Ont. C.A.).
16. 2019 CarswellBC 1415 (S.C.C.) (heard December 6, 2019) (reserved), on appeal from 2019 BCCA 66, 431 D.L.R. (4th) 512, [2019] 5 W.W.R. 451 (B.C. C.A.).

party gave the other six months' notice of non-renewal. It was the exercise of this non-renewal right by Can-Am that led to the litigation.

The difficulty began when Mr. Hrynew, a new retail dealer who had considerable animosity with Mr. Bhasin, joined Can-Am. Mr. Hrynew ran a larger dealership than Mr. Bhasin, and was intent on acquiring the latter's business. When Mr. Hrynew's merger entreaties to Mr. Bhasin failed, he began to encourage Can-Am to force a merger between the two competitors. Around the same time, the Alberta Securities Commission ("ASC") raised concerns with Can-Am about its compliance issues. This led Can-Am to appoint Mr. Hrynew as its provincial trading officer ("PTO") in late 1999, a role that allowed him to audit the business of Mr. Bhasin, who objected on the ground that he did not wish to provide confidential information to a competitor.

For the next year and half, Can-Am repeatedly misled Mr. Bhasin. It falsely told him, for instance, that Mr. Hrynew as PTO was required to treat Mr. Bhasin's information confidentially, and that the ASC had rejected Can-Am's proposal to appoint an outside PTO. The primary deception occurred in August 2000, during a meeting at which Mr. Bhasin specifically asked Can-Am whether his merger with Mr. Hrynew was a "done deal". Rather than tell Mr. Bhasin that it was, the Can-Am representative responded "equivocally", even though Can-Am had already told the ASC earlier that same year that it did plan to merge their dealerships.[17]

The effect of Can-Am's dishonesty was that Mr. Bhasin did not act to retain the value of his agency when the opportunity existed (e.g., by moving his dealership to another company in August, 2000, when his sales force might have followed him). Instead, he remained with Can-Am until May, 2001, when Can-Am exercised its non-renewal right, purportedly in response to his continued refusal to provide Mr. Hrynew with access to his confidential information. When Mr. Bhasin's dealership agreement expired in November, 2001, most of his sales force was solicited by Mr. Hrynew, and he was forced to take a lower-paying position with one of Can-Am's competitors. In effect, his business was "expropriated".[18]

Mr. Bhasin sued Can-Am for breach of contract, Mr. Hrynew for inducing breach of contract, and both parties for unlawful means conspiracy. He was successful at trial before the Alberta Court of Queen's Bench, with Moen J. finding that the dealership agreement was subject to an implied term – which Can-Am breached – requiring

17. *Bhasin*, *supra*, footnote 1, at paras. 12 and 100.
18. *Ibid.*, at para. 109.

that decisions about whether to renew the contract be made in good faith.[19] In doing so, Justice Moen made repeated findings of dishonesty against Can-Am. However, her decision was set aside by the Alberta Court of Appeal, which held that there is no general duty of good faith and that one could not be implied into the parties' contract given the facially unfettered non-renewal provision and the presence of an entire agreement clause.[20] The Supreme Court of Canada granted leave to appeal in August, 2013, heard the appeal in February, 2014, and issued its unanimous decision allowing the appeal in November, 2014, in reasons written by Justice Cromwell.

b. The Law Articulated by the Supreme Court of Canada

The Supreme Court's decision in *Bhasin* must be understood within the context of the prior law on contractual good faith. Until *Bhasin*, "Canadian common law in relation to good faith performance of contracts [was] piecemeal, unsettled and unclear".[21] While courts had recognized a number of different contractual doctrines in which elements of good faith were present, they had not established a broader, principled approach, and there was considerable inconsistency in the jurisprudence. This left Canadian common law uncertain, incoherent, and out of step with reasonable commercial expectations, along with the approaches taken in closely aligned jurisdictions like Quebec and the United States.[22]

The primary debate at the time of *Bhasin* was whether there should exist "a general or 'stand-alone' duty of good faith in the performance of contracts", or whether there should be only "a limited role for good faith in certain contexts".[23] This debate was reflected in the arguments of the parties on the appeal. Whereas Mr. Bhasin's primary position was that the court should recognize "a general duty of good faith in contract", Can-Am asserted that a duty of good faith "arises only in certain classes of contract, such as employment contracts, and in contracts involving discretionary powers".[24]

19. *Bhasin v. Hrynew*, 2011 ABQB 637, 96 B.L.R. (4th) 73, [2012] 9 W.W.R. 728 (Alta. Q.B.), additional reasons 2011 ABQB 718, [2012] 9 W.W.R. 834, 209 A.C.W.S. (3d) 250.
20. *Bhasin v. Hrynew*, 2013 ABCA 98, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175 (Alta. C.A.), additional reasons 2013 ABCA 180, 362 D.L.R. (4th) 35, [2013] 11 W.W.R. 700.
21. *Bhasin*, *supra*, footnote 1, at para. 59.
22. *Ibid.*, at para. 41.
23. *Ibid.*, at paras. 37 and 39.

Justice Cromwell ultimately declined to accept either approach. Instead, while he was not prepared to accept a *general duty* of good faith – in the sense of a freestanding requirement with obligatory content of its own – he recognized that there is still a *general organizing principle* of good faith, which helps explain the "number of rules and doctrines that call upon the notion of good faith in contractual dealings".[25] Several features of this organizing principle should be noted here.

First, the basic concept embodied in the organizing principle of good faith is that "a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner", by "perform[ing] their contractual duties honestly and reasonably and not capriciously or arbitrarily" or "in bad faith".[26] The standard of behaviour which this contemplates is not, however, as strict as that imposed upon a fiduciary, who must subordinate its self-interest to that of its counterparty.[27] Instead, the organizing principle of good faith recognizes that "a party may sometimes cause loss to another – even intentionally – in the legitimate pursuit of economic self-interest",[28] provided that in so advancing its own legitimate interests the party does not fail to pay appropriate regard to those of the counterparty (e.g., by acting dishonestly or unreasonably towards it).

Second, the function of the organizing principle of good faith within the law of contract is to assist courts in "understand[ing] and develop[ing] the law in a coherent and principled way", by "stat[ing] in general terms a requirement of justice from which more specific legal doctrines may be derived".[29] The organizing principle is not itself a "a free-standing rule", or a duty that a party can breach.[30] Instead, it is "a standard that underpins and is manifested in more specific legal doctrines" of contract law, which courts may appeal to in difficult cases when deciding whether or how such doctrines should be recognized or applied.[31] In this respect, it is similar to two

24. *Ibid.*, at paras. 29 and 31.
25. *Ibid.*, at para. 42.
26. *Ibid.*, at paras. 63 and 65.
27. *Ibid.*, at paras. 65 and 86.
28. *Ibid.*, at para. 70.
29. *Ibid.*, at para. 64.
30. *Ibid.*, at para. 64.
31. *Ibid.*, at para. 64. This point is developed further in the seminal article cited by Cromwell J. here: R.M. Dworkin, "Is Law a System of Rules?", in R.M. Dworkin, ed., *The Philosophy of Law* (Oxford: Oxford University Press, 1977), 38.

other principles referenced by the *Bhasin* court: freedom of contract and commercial certainty.[32]

Third, because the organizing principle of good faith is a standard rather than a duty, it is not outcome-determinative. Instead, it may come into conflict with other organizing principles, like freedom of contract and commercial certainty, which can incline courts in different directions than the principle of good faith itself. It is crucial that judges consider these competing principles when deciding what, if anything, the principle of good faith dictates in a difficult case. As the *Bhasin* court cautioned, "[t]he principle of good faith must 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".[33]

Fourth, the comparative significance of good faith and these other principles is heavily dependent upon the context, consistent with the fact that any "organizing principle . . . may be given different weight in different situations".[34] The Supreme Court emphasized that "'appropriate regard' for the other party's interests will vary depending on the context of the contractual relationship", and that because "[g]ood faith may be invoked in widely varying contexts . . . this calls for a highly context-specific understanding of what honesty and reasonableness in performance require".[35] As an example, Cromwell J. pointed out that "the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange", since "longer term, relational contracts . . . depend on an element of trust and cooperation".[36] The special features of such long-term relational agreements mean that concerns about good faith will typically carry greater weight in this context – relative to concerns about freedom of contract or commercial certainty – than in a one-off transaction.

Fifth, because the implications of the good faith principle are so context-dependent, the Supreme Court held that most cases involving claims of good faith will be resolved "through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance".[37] It is only in truly difficult

32. *Bhasin*, *supra*, footnote 1, at paras. 34, 39, 66, 70-71, 74, 76, 79-82.
33. *Ibid.*, at para. 70.
34. *Ibid.*, at para. 64.
35. *Ibid.*, at paras. 65 and 69.
36. *Ibid.*, at paras. 60 and 69.

or novel cases that recourse to the general organizing principle of good faith itself will be required, as the law has already determined what good faith requires in most contexts through the existing doctrines themselves. In general therefore, "the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships".[38] This approach of "[t]ying the organizing principle to the existing law" not only ensures that the principle will be applied in a contextually sensitive way, but also "mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts",[39] thereby allowing good faith to be reconciled with other organizing principles in the law of contract and to develop in an incremental fashion consistent with the institutional limits of the courts.

Sixth, while the consequences of this approach are that "the existing law [is] the primary guide to future development", and that "[g]enerally, claims of good faith will not succeed if they do not fall within these existing doctrines", the *Bhasin* court nonetheless recognized that the existing list of good faith doctrines is "not closed".[40] Instead, in potentially the most significant passage of *Bhasin*, Cromwell J. stated that:

> [t]he application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.[41]

In this respect, he analogized the role that the principle of good faith plays within the law of contract to the role played by the principle of unjust enrichment within the law of restitution, where courts have "developed the law through application of an organizing principle without displacing the existing specific doctrines" of recovery that the principle has grown out of.[42] This "reconcile[s] the

37. *Ibid.*, at para. 66.
38. *Ibid.*, at para. 93.
39. *Ibid.*, at para. 71.
40. *Ibid.*, at paras. 66 and 69.
41. *Ibid.*, at para. 66.
42. *Ibid.*, at para. 68. A similar analogy may be drawn to the "neighbour principle" in *McAlister (Donoghue) v. Stevenson*, [1932] UKHL 100, [1932] A.C. 562, [1932] All E.R. Rep. 1 (U.K. H.L.): see N. Reynolds, "The New Neighbour Principle: Reasonable Expectations, Relationality, and Good

principl[e] with the established categories of recovery", but also "allow[s] the law to develop in a flexible way as required to meet changing perceptions of justice", as the principle "is capable . . . of going beyond" the established criteria in hard cases.[43]

Seventh, the existing doctrines of good faith contractual performance identified in *Bhasin* take two main forms. First, there are certain "situations in which a duty of good faith performance of some kind has been found to exist", based variously on "terms implied as a matter of law, terms implied as a matter of intention and terms arising as a matter of interpretation" (though the law is not always clear as to which of these explanatory frameworks applies).[44] Such "situational" duties arise in three main areas: "(1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties".[45] Second, there are also certain "classes of relationships that call for a duty of good faith to be implied by law", in order to "redress power imbalances".[46] Such "relational" duties include those arising in the employment, insurance and tendering contexts.[47] Finally, in addition to these situational and relational duties of good faith, Cromwell J. also recognized that considerations of good faith are manifest in a range of other doctrines that exist within contract law, not only at the contractual performance stage at issue in *Bhasin* itself, but also at the stage of contractual formation. These include unconscionability and the duty of disclosure imposed upon an insured when applying for insurance.[48] The Supreme Court was, however, careful not to ring-fence the existing doctrines of good faith to those specifically identified in *Bhasin*, instead calling this a "selective survey". More generally, the court also stated that "[i]t is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith".[49]

Eighth, Cromwell J. recognized a new doctrine under the organizing principle of good faith – the "duty of honest

Faith in Pre-Contractual Negotiations" (2018), 60 Can. Bus. L.J. 94 at 120-123.

43. *Bhasin*, *supra* footnote 1, at para. 67, quoting *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, 98 D.L.R. (4th) 140, 12 M.P.L.R. (2d) 229 (S.C.C.) at pp. 786 and 788 [S.C.R.].
44. *Bhasin*, *supra*, footnote 1, at paras. 47 and 52 (and para. 48).
45. *Ibid.*, at para. 47 (and paras. 49-51).
46. *Ibid.*, at paras. 44 and 53.
47. *Ibid.*, at paras. 44 and 54-56.
48. *Ibid.*, at paras. 42-46, 55 and 86.
49. *Ibid.*, at paras. 59 and 90.

performance" – which he developed in response to the inability of the existing doctrines to address the particular facts in *Bhasin*.[50] This new duty "means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract".[51] While "[t]he precise content of honest performance will vary with context", it "does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract" – as in the case of a fiduciary duty or an *uberrimae fidei* contract, in which parties may be unilaterally required to disclose material facts – but simply reflects the fact that "contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests".[52] The new duty is conceptually distinct from both the situational and relational duties of good faith, since it "should not be thought of as an implied term, but a general doctrine of contract law that . . . operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability".[53] Accordingly, unlike some of the situational or relational duties, "the parties are not free to exclude it" with a contractual provision (e.g., the entire agreement clause in *Bhasin*), though "the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements" and do so "in express terms".[54] Drawing upon the experiences with contractual good faith in both Quebec and the United States, the court concluded that the duty of honest performance would not "create uncertainty or impede freedom of contract".[55]

c. The Supreme Court's Application of the Law to the Facts

In applying this law to the facts of *Bhasin*, the court concluded that Can-Am breached the new duty of honest performance by "fail[ing] to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal".[56] Nevertheless, despite having stated that the duty of

50. *Ibid.*, at paras. 72 and 90.
51. *Ibid.*, at para. 73.
52. *Ibid.*, at paras. 77 and 86 (and para. 60).
53. *Ibid.*, at para. 74.
54. *Ibid.*, at paras. 75 and 77.
55. *Ibid.*, at para. 81 (and paras. 61, 79-80 and 82-88).

honest performance does not impose a duty of disclosure, the Supreme Court did not ground its finding of liability upon a positive misstatement by Can-Am. Instead, the court focused on the fact that Can-Am "responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a 'done deal'".[57] By doing so, the court signalled that the concept of "otherwise knowingly mislead[ing]" in the duty of honest performance prohibits more than simple "lie[s]", though in *Bhasin* itself, the outer limits of what it means to "knowingly mislead" were not explored. Because Can-Am's dishonesty "was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision", and caused Mr. Bhasin a loss, he was entitled to damages (which were calculated according to the contractual rather than tortious measure).[58] In effect, the Supreme Court treated his claim as being one for a lost opportunity – i.e., the ability "to retain the value of his business" at the time when he questioned Can-Am about a merger during the August, 2000 meeting – and quantified his damages based on "the value of the business around the time of non-renewal", which was $87,000.[59]

It is important to note that, despite allowing Mr. Bhasin's dishonest performance claim, the court rejected his further argument that Can-Am should be liable for the future income he would have earned until his projected retirement in nine years had he remained with Can-Am, which the trial judge awarded to him in the amount of $293,597. This additional claim was not based upon a breach of the duty of honest performance, but rather upon the allegation that Can-Am abused its discretion under the non-renewal clause by exercising it for the improper purpose of forcing a merger between Mr. Bhasin and Mr. Hrynew. Justice Cromwell declined to decide whether the situational duty of good faith that prohibits the abuse of contractual discretions could encompass such a claim, because under the law of contractual damages, even if Mr. Bhasin could establish that such a duty existed and had been breached, "Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract", so "no damages flow[ed] from this breach".[60]

56. *Ibid.*, at para. 108 (and paras. 94-103).
57. *Ibid.*, at para. 12 (and para. 100).
58. *Ibid.*, at paras. 88, 103 and 108.
59. *Ibid.*, at paras. 88 and 109-110.
60. *Ibid.*, at para. 90. In stating that Mr. Bhasin's damages had to be measured according to the "least onerous means of performance" for Can-Am,

3. Emerging Themes in Subsequent Appellate Jurisprudence

Canadian appellate courts have considered *Bhasin* in a wide range of settings since its release. While it is impossible to provide a complete account of this jurisprudence within the confines of the present article, several important themes have emerged. These may be grouped under the following broad topics: (a) the organizing principle of good faith; (b) the duty of honest performance; (c) the "situational" duties of good faith (e.g., the duty not to abuse discretionary contractual powers, the duty to cooperate and the anti-evasion duty); (d) the "relational" duties of good faith (e.g., employment and insurance); (e) the role of good faith at the pre-performance stages of contractual negotiations and formation; and (f) the remedies that are available when a duty of good faith is breached. Each of these topics is explored below.

a. The Organizing Principle of Good Faith

i. Confusion Among Intermediate Appellate Courts

Perhaps no issue arising out of *Bhasin* has given rise to greater confusion among Canadian appellate courts than the nature of the "organizing principle" itself. Many judges, no doubt used to viewing contractual performance through the lens of express and implied terms, have found it difficult to understand the concept of a general "principle" of good faith that is not itself a freestanding duty with obligatory legal content, but only an umbrella standard under which specific freestanding duties may be recognized. One encounters, for instance, statements that "[t]he *duty* of good faith is a *general* doctrine of contract law",[61] that "as a general organising *principle*, the *duty* of good faith must be adapted to the factual circumstances of each particular case",[62] that "the general 'good faith' *obligation* . . . was rejected by the Supreme Court as a universal *principle*",[63] that "it

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Cromwell J. likely had in mind *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, 235 D.L.R. (4th) 193 (S.C.C.), although he did not expressly refer to it here. The *Hamilton* case is discussed below, in the text accompanying footnotes 283-292.

61. *Canaccord Genuity Corp. v. Pilot*, 2015 ONCA 716, 391 D.L.R. (4th) 736, 340 O.A.C. 359 (Ont. C.A.) at para. 50, emphasis added.
62. *Northrock Resources v. ExxonMobil Canada Energy*, 2017 SKCA 60, 416 D.L.R. (4th) 321, 73 B.L.R. (5th) 44 (Sask. C.A.) at para. 29, emphasis added.
63. *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 408 D.L.R. (4th) 725, 64 B.L.R. (5th) 81 (Alta. C.A.) at para. 50, leave to appeal refused 2017 CarswellAlta 949, [2017] S.C.C.A. No. 76 (S.C.C.), emphasis added.

was a *violation* of the *principle* of good faith to proceed as the appellants did",[64] or that "Cromwell J. established certain *duties* that rest on parties to a contract . . . includ[ing] [that] (i) parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily; and (ii) a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner".[65] In reflection of this, some courts have also imposed duties under *Bhasin* without indicating whether they are doing so based on existing doctrine of good faith, or a new doctrine that is being recognized under the organizing principle.[66]

Other courts have taken a contrary – and, it is submitted, correct – approach. Such cases recognize that the organizing principle is not a freestanding duty,[67] and that good faith performance claims cannot succeed unless they fit within an existing doctrine or a new one recognized under the test set out in *Bhasin*.[68] It will be interesting to

64. *Ju v. Tahmasebi*, 2020 ONCA 383, 447 D.L.R. (4th) 349, 319 A.C.W.S. (3d) 340 (Ont. C.A.) at para. 23 (and para. 24), emphasis added.

65. *Quickie Convenience Stores Corp. v. Parkland Fuel Corp.*, 2020 ONCA 453, 2020 CarswellOnt 9574 (Ont. C.A.) at para. 41, emphasis added.

66. See, for instance, *Quickie Convenience Stores Corp. v. Parkland Fuel Corp.*, 2020 ONCA 453, 2020 CarswellOnt 9574 (Ont. C.A.) at para. 40, where the court applied *Bhasin* in holding that a consent-to-assignment right in a contract was subject to a duty not to withhold the consent unreasonably, for an improper or ulterior purpose. In doing so, the court did not purport to fit this duty within any of the existing doctrines of good faith recognized in *Bhasin*, nor explain whether it was recognizing a new doctrine under the organizing principle of good faith (though it is submitted that the result in *Quickie Convenience* was correct, and may be viewed as application of the existing duty not to abuse discretionary contractual powers: see the text accompanying footnotes 152-156 below). Similar findings that defendants breached contractual obligations of good faith, which are defensible in the result but did not contain any explanation of whether an existing or new doctrine of good faith was engaged, are found in other cases discussed below, e.g.: *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428, 423 D.L.R. (4th) 174, 79 B.L.R. (5th) 1 (Ont. C.A.) at paras. 17-19; *Lafarge Canada Inc. v. Bilozir*, 2018 ABCA 416, 299 A.C.W.S. (3d) 543, 2018 CarswellAlta 2970 (Alta. C.A.) at para. 5; *Ju v. Tahmasebi*, 2020 ONCA 383, 447 D.L.R. (4th) 349, 319 A.C.W.S. (3d) 340 (Ont. C.A.), at paras. 23-24.

67. See, e.g.: *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89, 381 D.L.R. (4th) 263, 37 B.L.R. (5th) 175 (B.C. C.A.) at para. 67-68, leave to appeal refused 2015 CarswellBC 3021, 2015 CarswellBC 3022, [2015] S.C.C.A. No. 163 (S.C.C.) ("*Bhasin* clarifies that good faith is not an implied term, but is an organizing principle that manifests in particular doctrines, such as the duty of honest contractual performance"); *Avalon Ford Sales (1996) Ltd. v. Evans*, 2017 NLCA 9, 2017 C.L.L.C. 210-028, 275 A.C.W.S. (3d) 779 (N.L. C.A.) at para. 31 (and paras. 32 and 34) ("[T]he finding . . . in *Bhasin* . . . [is] that good faith is an organizing principle and not a free-standing rule").

see whether the Supreme Court addresses this divide in the Trilogy, and provides more definitive guidance about the nature of the organizing principle of good faith.

ii. Additional Guidance from the Supreme Court of Canada

Despite the uncertainty among appellate courts regarding the organizing principle, the Supreme Court of Canada has already clarified several aspects of it since *Bhasin*. Six points in particular are noteworthy.

First, the Supreme Court's decision in *Potter* reaffirms *Bhasin*'s point that the organizing principle of good faith is more than just the sum of its existing doctrines, and is capable of assisting the law to develop beyond them in appropriate cases. At issue in *Potter* was the question of when an employer may be liable for constructive dismissal on imposing an administrative (*i.e.*, non-disciplinary) suspension upon a non-unionized employee. The Supreme Court held that where such a suspension is not acquiesced in by the employee nor authorized by an express provision of the employment contract, it cannot be implicitly authorized by the employment contract unless the employer provides the employee with a good faith and legitimate business justification for this.[69] If the employer fails to discharge the burden of demonstrating that it provided such reasons, then the administrative suspension will constitute a unilateral change in employment that amounts to a breach of the employment contract, so as to trigger the first part of the first branch of the constructive dismissal test.[70] In determining what

68. *Angus Partnership Inc. v. Salvation Army (Governing Council)*, 2018 ABCA 206, 422 D.L.R. (4th) 721, 90 R.P.R. (5th) 175 (Alta. C.A.) at paras. 69-71; *Veolia Water Technologies, Inc. v. K+S Potash Canada General Partnership*, 2019 SKCA 25, 440 D.L.R. (4th) 129, 93 B.L.R. (5th) 220 (Sask. C.A.) at paras. 56-57, leave to appeal refused 2019 CarswellSask 514, 2019 CarswellSask 515, [2019] S.C.C.A. No. 167 (S.C.C.); *Albo v. The Winnipeg Free Press et al*, 2020 MBCA 50, [2020] 6 W.W.R. 187, 318 A.C.W.S. (3d) 229 (Man. C.A.) at para. 49. A similar point was made in *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, 2019 BCCA 66, 431 D.L.R. (4th) 512, [2019] 5 W.W.R. 451 (B.C. C.A.), leave to appeal allowed 2019 CarswellBC 2094, [2019] S.C.C.A. No. 123 (S.C.C.), which is discussed below in the text accompanying footnotes 124-136.

69. *Potter*, *supra*, footnote 9, at paras. 45-48 and 84-98.

70. As set out in *Potter*, *supra*, footnote 9, at paras. 34 and 42, "[t]he first branch of the test for constructive dismissal . . . has two steps: first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract". By contrast, under "[t]he second branch . . . constructive dismissal consists of conduct that,

constitutes a good faith and legitimate business justification, Wagner J. (as he then was), writing for the majority, drew upon *Bhasin*:

> Mr. Potter was given no reasons for the suspension. It seems to me that, in most circumstances, an administrative suspension cannot be found to be justified in the absence of a basic level of communication with the employee. At a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright: *Bhasin v. Hrynew*, 2014 SCC 71 . . . at para. 66. Failing to give an employee any reason whatsoever for his suspension is, in my opinion, not being forthright.[71]

What is noteworthy about the *Potter* court's treatment of *Bhasin* is that Wagner J. did not rely upon the new duty of honest performance. Instead, he appealed to the broader standard of behaviour prescribed by the general organizing principle good faith itself, in order to establish the content of a separate legal doctrine, *i.e.*, the duty of an employer when imposing an administrative suspension upon a non-unionized employee. The decision in *Potter* thus demonstrates how the organizing principle, as distinct from the specific doctrines under it, can have an important role to play in understanding and developing the law.[72]

Second, despite the significant potential which the organizing principle has to assist courts in rationalizing contracts jurisprudence, the Supreme Court in *Atlantic Lottery* reiterated that the principle is only an explanatory standard, and is not a freestanding duty separate from its underlying doctrines whose breach can itself give rise to a legal remedy. The *Atlantic Lottery* appeal arose from a decision certifying a proposed class action against the defendant gaming regulator ("ALC"), in which the plaintiffs alleged that video lottery terminals ("VLTs") which ALC offered to the public were inherently dangerous and deceptive. As a result, the plaintiff sought disgorgement of the profits ALC earned from licensing the VLTs together with punitive damages on behalf of a class of VLT users.

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when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract". The finding of constructive dismissal in *Potter* was made under the first branch.

71. *Potter*, *supra*, footnote 9, at para. 99.

72. The Supreme Court recently recognized a similar point under the civilian contract law of Quebec. See *Churchill Falls*, *supra*, footnote 10, at para. 104 ("[G]ood faith is more than a series of distinct obligations; it is instead a broad principle that should be applied flexibly having regard to the particular circumstances of each case").

One of the issues addressed by the Supreme Court was whether the plaintiffs' pleading of an entitlement to punitive damages disclosed a reasonable cause of action to the extent that it was based upon the allegation that ALC breached a duty of good faith under its implied contract with them (a contract said to arise from ALC's offer of VLTs to the public). In finding that the claim for punitive damages should be struck, Brown J. for the majority confirmed that punitive damages for breach of contract may be based upon the breach of a contractual obligation of good faith – a point discussed in more detail below[73] – but held that no such cognizable claim had been pleaded by the plaintiffs, who simply alleged that ALC failed "to consider the interests of the Plaintiffs as at least equal to its own" by knowingly offering an inherently dangerous product:[74]

> As this Court explained in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, however, not every contract imposes actionable good faith obligations on contracting parties. While good faith is an organizing principle of Canadian contract law, it manifests itself in specific circumstances. In particular, its application is generally confined to existing categories of contracts and obligations . . . The alleged contract between ALC and the plaintiffs does not fit within any of the established good faith categories. Nor did the plaintiffs advance any argument for expanding those recognized categories.[75]

In short, a plaintiff who pleads that the defendant breached a contractual duty of good faith *in abstracto* will not raise a reasonable cause of action.[76] Instead, consistent with *Bhasin*'s decision not to recognize a *general duty* of good faith, the plaintiff must either plead

73. See the text accompanying footnotes 269-275.
74. *Atlantic Lottery*, *supra*, footnote 12, at para. 64.
75. *Ibid.*, at para. 65.
76. Nor will allegations of a lack of good faith or dishonesty in general, which are unconnected to the actual terms of the contract: *Saskatchewan v. Racette*, 2020 SKCA 2, [2020] 8 W.W.R. 84, 315 A.C.W.S. (3d) 276 (Sask. C.A.) at paras. 123 and 125, leave to appeal refused 2020 CarswellSask 229, 2020 CarswellSask 230, [2020] S.C.C.A. No. 46 (S.C.C.). And if no contract exists at all, but plaintiff pleads a lack of good faith anyway, the claim will fail, since the *Bhasin* duties are contractual ones and there is no tort of bad faith: *Scott & Associates Engineering Ltd. v. Finavera Renewables Inc.*, 2015 ABCA 51, 381 D.L.R. (4th) 519, [2015] 5 W.W.R. 420 (Alta. C.A.) at para. 31, leave to appeal refused 2015 CarswellAlta 2009, 2015 CarswellAlta 2010, [2015] S.C.C.A. No. 138 (S.C.C.); *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375, 274 A.C.W.S. (3d) 95, 2016 CarswellAlta 2308 (Alta. C.A.) at paras. 57-58, leave to appeal refused 2017 CarswellAlta 947, 2017 CarswellAlta 948, [2017] S.C.C.A. No. 52 (S.C.C.); *Facchini v. Canada (Attorney General)*, 2020 ONCA 454, 2020 CarswellOnt 9664 (Ont. C.A.) at para. 20.

the breach of a specific doctrine of good faith already recognized under the existing law, or plead facts that would permit the courts to recognize a new one. There is no claim for breach of the *organizing principle* of good faith standing on its own.

Third, the contextualism of the organizing principle of good faith emphasized in *Bhasin* was recognized once more by the Supreme Court in *Churchill Falls*. The appeal there involved a contract entered into in 1969, under which Hydro-Québec agreed to purchase most of the electricity produced by CFLCo for 65 years at fixed prices whether Hydro-Québec needed the electricity or not. This in turn allowed CFLCo to obtain the financing necessary to construct its power plant. By proceeding in this fashion, the parties intentionally allocated the benefits and risks of any fluctuation in electricity market prices to Hydro-Québec. After the contract was entered into, the electricity market changed, and Hydro-Québec was able to sell the electricity to third parties at a substantial profit. CFLCo argued that this required Hydro-Québec to renegotiate the fixed price in the contract and reallocate its profits under, *inter alia*, the general duty of good faith imposed by arts. 6, 7 and 1375 of the *Civil Code of Québec* ("*C.C.Q.*").

As part of this argument, CFLCo asserted that the duty of good faith imposed upon Hydro-Québec was particularly onerous due to the fact that the contract between the parties was a "relational" one, as opposed to a mere transactional exchange. Justice Gascon, writing for the majority of the Supreme Court, ultimately rejected CFLCo's claim, including the allegation that the contract was a relational one (which he characterized as a contract that is not only long-term and between interdependent parties, but also one which – unlike the contract in *Churchill Falls* itself – does not define the parties' primary obligations over the duration of the term with precision). Nonetheless, Gascon J. accepted that, where a contract is a relational one, the good faith obligations that parties owe under it will be amplified pursuant to *Bhasin*:

> As this Court noted in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 60, the cooperation required by relational contracts is, in the end, more active than the cooperation required by transaction-based contracts . . .
>
> . . . . .
>
> [A]lthough the parties' relationship reflects a certain interdependence and the Contract is of long duration, these facts alone do not indicate that their agreement has a relational element that would justify imposing heightened duties of good faith on them. [77]

Fourth, *Churchill Falls* also confirms another important feature of the organizing principle of good faith from *Bhasin*, which is that the standard it contemplates is lower than that imposed upon a fiduciary. In particular, Gascon J. held that under *Bhasin*, good faith does not prevent a party from relying upon the express terms of a contract to advance its own legitimate interests, only from doing so in a way that *inappropriately* (e.g., unreasonably) disregards the legitimate interests of the counterparty (which was not the case in *Churchill Falls* itself):

> [A] party must, in meeting the requirements of good faith, also be able to satisfy his or her own interests. As this Court pointed out in *Bhasin*:
>
> > While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases . . .
>
> This statement applies equally to the duty of good faith in Quebec civil law.
>
> Thus, the duty of good faith does not negate a party's right to rely on the words of the contract unless insistence on that right is unreasonable in the circumstances.
>
> . . . Hydro-Québec is not deviating from the standard of a reasonable contracting party, and it is considering CFLCo's legitimate contractual interests, given that it is not preventing CFLCo from receiving the benefits conferred on the latter under the Contract.[78]

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77. *Churchill Falls*, *supra* footnote 10, at paras. 65 and 69 (and para. 123). See also para. 112, where Gascon J. said in relation to standard of behaviour required by the Quebec duty of good faith that "[t]he form this standard takes therefore necessarily depends on the clauses and the nature of the contract at issue". The same point has been recognized by post-*Bhasin* common law courts: *Angus Partnership Inc v. Salvation Army (Governing Council)*, 2018 ABCA 206, 422 D.L.R. (4th) 721, 90 R.P.R. (5th) 175 (Alta. C.A.) at para. 76.

78. *Churchill Falls*, *supra*, footnote 10, at paras. 117-119. See also paras. 107, 110 and 113:

> [B]ecause good faith serves to protect the equilibrium of a contract, it cannot be used to violate that equilibrium and impose a new bargain on the parties. Moreover . . . good faith is not synonymous with either charity or distributive justice . . . The concept of good faith has its own boundaries and its own logic, and its scope cannot be expanded to include the possibility of penalizing a party whose conduct has not been unreasonable, or a duty to renegotiate the principal obligations of a contract in all circumstances . . . [B]ecause good faith is a standard associated with the parties' conduct, it cannot be used to impose obligations that are completely unrelated to their conduct.
>
> The fact that the organizing principle of good faith does not require a

Fifth, the fact that the Supreme Court in *Churchill Falls* relied upon *Bhasin* in delineating the content of the duty of good faith under arts. 6, 7 and 1375 *C.C.Q.* suggests that courts in common law Canada and Quebec are likely to place increasing reliance upon each other's contracts jurisprudence, a trend evidenced in *Bhasin* itself.[79] This growing dialogue between common and civil law has its limits, since *Bhasin* recognized only an *organizing principle* of good faith performance, whereas arts. 6, 7 and 1375 *C.C.Q.* impose a *general duty* of contractual good faith. Nonetheless, it is evident that the Supreme Court is willing to draw upon the experiences of each jurisdiction in developing the laws of the other, and similar outcomes may often be expected from them. The Supreme Court seemed to allude to this in another post-*Bhasin* contracts case, *Jean Coutu Group (PJC) Inc. v. Canada (A.G.)*,[80] where it applied the Quebec law of rectification to reach the same result as in a companion case – *Canada (A.G.) v. Fairmont Hotels Inc.*[81] – where the common law rectification doctrine was applied. In doing so, Wagner J. (as he then was) observed:

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contracting party to disregard its own interests in favour of its contracting partner (e.g., by forbearing from exercising its rights without compensation) has been emphasized by several post-*Bhasin* cases decided under Canadian common law: see *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 408 D.L.R. (4th) 725, 64 B.L.R. (5th) 81 (Alta. C.A.) at para. 57, leave to appeal refused 2017 CarswellAlta 949, 2017 CarswellAlta 950, [2017] S.C.C.A. No. 76 (S.C.C.); *Northrock Resources v. ExxonMobil Canada Energy*, 2017 SKCA 60, 416 D.L.R. (4th) 321, 73 B.L.R. (5th) 44 (Sask. C.A.) at paras. 29 and 42; *Willowbrook Nurseries Inc. v. Royal Bank of Canada*, 2017 ONCA 974, 419 D.L.R. (4th) 17, 79 B.L.R. (5th) 232 (Ont. C.A.) at paras. 34 and 38, additional reasons 2018 ONCA 21, 288 A.C.W.S. (3d) 427, 2018 CarswellOnt 187; *Continental Steel Ltd. v. CTL Steel Ltd.*, 2018 BCCA 82, 420 D.L.R. (4th) 621, [2018] 7 W.W.R. 1 (B.C. C.A.) at para. 42; *Angus Partnership Inc. v. Salvation Army (Governing Council)*, 2018 ABCA 206, 422 D.L.R. (4th) 721, 90 R.P.R. (5th) 175 (Alta. C.A.) at para. 75; *Telsec Developments Ltd. v. Abstak Holdings Inc.*, 2020 ABCA 40, 443 D.L.R. (4th) 539, 99 B.L.R. (5th) 177 (Alta. C.A.) at para. 52, leave to appeal refused 2020 CarswellAlta 1289, 2020 CarswellAlta 1290, [2020] S.C.C.A. No. 81 (S.C.C.).

79. See also: *Dunkin' Brands Canada Ltd. v. Bertico inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, 2015 CarswellQue 3066 (C.A. Que.) at para. 74, leave to appeal refused 2016 CarswellQue 1813, 2016 CarswellQue 1814, [2015] S.C.C.A. No. 230 (S.C.C.); *Quigley c. Placements Banque Nationale Inc.*, 2018 QCCA 27, 2018 CarswellQue 62, EYB 2018-289170 (C.A. Que.) at para. 52, leave to appeal refused 2018 CarswellQue 10491, 2018 CarswellQue 10492, [2018] S.C.C.A. No. 148 (S.C.C.).

80. 2016 SCC 55, [2016] 2 S.C.R. 670, 405 D.L.R. (4th) 417 (S.C.C.) ("*Jean Coutu*").

81. 2016 SCC 56, [2016] 2 S.C.R. 720, 404 D.L.R. (4th) 201 (S.C.C.).

> [A]s in the case of good faith under the civil law and the common law of contracts, this is another example of the two legal systems achieving convergence despite their distinct origins and principles.[82]

Sixth, the Supreme Court's decision in *Uber* demonstrates how the other organizing principles in the law of contract recognized in *Bhasin* – i.e., freedom of contract and commercial certainty – may come into conflict with the principle of good faith, and incline even senior appellate judges in the same case in separate directions based on their valuation of the underlying context.[83] Like *Atlantic Lottery*, the *Uber* appeal involved a proposed class action, which alleged violations of employment standards legislation by Uber on behalf of Uber's drivers. Prior to certification, Uber moved to stay the class action based on a clause in its standard form agreement with the drivers, which required them to resolve any dispute with it through mediation and arbitration in the Netherlands, pursuant to Netherlands law, under International Chamber of Commerce Rules that the motion judge had found required them to pay associated fees of US$14,500. An 8-1 majority of the Supreme Court dismissed Uber's stay motion on finding the arbitration clause to be invalid, but the reasons provided by the different members of the court are of interest.

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82. *Jean Coutu*, *supra*, footnote 80, at para. 52. It is interesting that the Supreme Court did not make express reference to *Bhasin* in this passage. Nor did it refer to *Bhasin* in two other companion cases where it considered the contractual duty of good faith under the civil law of Quebec, despite drawing upon common law jurisprudence (referenced in *Bhasin* itself) about the implied duties of good faith that are owed in the tendering context: *Ferme Vi-Ber inc. c. Financière agricole du Québec*, 2016 SCC 34, [2016] 1 S.C.R. 1032, 403 D.L.R. (4th) 579 (S.C.C.) at para. 50; *Lafortune c. Financière agricole du Québec*, 2016 SCC 35, [2016] 1 S.C.R. 1091, 403 D.L.R. (4th) 625 (S.C.C.) at para. 25. Given the court's silence about *Bhasin* itself in these Quebec-law decisions, one may question how far the harmonization of the civilian and common law approaches to good faith will be pursued.

83. A similar phenomenon may be witnessed when comparing the majority and dissenting judgments in *Churchill Falls*. Whereas the majority denied CFLCo's good faith claim after finding that the contract was not a relational one, Rowe J. held that it was the "epitome" of a relational contract, and therefore imposed heightened duties of good faith that required Hydro-Québec to cooperate with CFLCo in establishing a mechanism for the allocation of extraordinary profits. Interestingly, the majority suggested that the duty of good faith was an exception to the "consensualism" and "binding force of contracts" and the "autonomy of the will": *Churchill Falls*, *supra*, footnote 10, at paras. 102-103 and 137. In doing so, it may be taken to have recognized that good faith sometimes works in opposition to the organizing principle of freedom of contract.

Justices Abella and Rowe, writing for seven of the judges, held the arbitration clause was unconscionable. In their view, the inequality of bargaining power necessary to satisfy the first branch of the unconscionability test was satisfied by the fact that the plaintiff's agreement with Uber was a non-negotiated, standard form contract, whose full financial and legal implications the plaintiff could not be expected to fully understand, and they held it irrelevant whether Uber lacked actual or even constructive knowledge of the plaintiff's vulnerability. From there, Abella and Rowe JJ. went on to hold that the second branch of the unconscionability test (an improvident bargain) was also met, since the fees the arbitration clause required the plaintiff to pay were close to his annual income and disproportionate to the size of a reasonably foreseeable arbitration award. In taking this approach, the seven judges may be seen to have accorded greater weight to the organizing principle of good faith in the context of adhesionary contracts than to the competing principles of freedom of contract and commercial certainty[84] since *Bhasin* characterized unconscionability as one of the manifestations of the good faith principle.[85] (though as discussed further below, the *Uber* majority missed an excellent opportunity to provide guidance about how the good faith principle operates at the contractual formation stage).[86]

This approach may be contrasted with the one taken by Brown J. (concurring), who would have held the arbitration clause invalid based on the entirely separate doctrine of public policy. In a compelling judgment, Brown J. criticized Abella and Rowe JJ. for vastly expanding the scope of the unconscionability doctrine without providing meaningful guidance as to when it may apply. In his view, "accept[ing] that a standard form contract denotes the degree of inequality of bargaining power necessary to trigger the application of unconscionability" sets the threshold much too low, and is inconsistent "with our liberal conception of freedom of contract, a value that accords great respect to individual autonomy".[87] As well,

84. *Uber*, *supra*, footnote 11, at paras. 88-89. At para. 89, the majority stated that "[t]he many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable are well documented".
85. See the text accomanying footnote 48 above.
86. See the text accompanying footnotes 248-258 below. The *Uber* majority cited *Bhasin* for the proposition that the purpose of unconscionability as the protection of vulnerable persons in transactions with others, but did not further explore the implications of *Bhasin* for the unconscionability doctrine: *Uber*, *supra*, footnote 11, at para. 60.
87. *Uber*, *supra*, footnote 11 at para. 162.

he held that jettisoning any constructive knowledge component will undermine "the countervailing interests of commercial certainty and transactional security".[88] According to Brown J., the result of Abella and Rowe JJ.'s approach was that "unreasoned intuition and *ad hoc* judicial moralism . . . will rule the day," contrary to *Bhasin*'s direction that "[c]ourts must not develop contract doctrines that invite '*ad hoc* judicial moralism or 'palm tree' justice'".[89] Justice Côté, in dissent, would have found the arbitration clause valid under both the unconscionability and public policy doctrines, but agreed with Brown J.'s criticism of the unconscionability reasons given by Abella and Rowe JJ. Like him, she relied upon the contractual organizing principles beyond good faith that were also emphasized in *Bhasin*:

> As Brown J. observes, a lower threshold for finding that there is inequality of bargaining power risks exposing the terms of every standard form contract to review in order to ensure that they are substantively reasonable . . . This would be an unwelcome development, as it would undermine private ordering and commercial certainty, which are important considerations in the law of contracts: see *Bhasin*.[90]

The divergent approaches taken by the three sets of judges ultimately reflect a different appreciation of the weight to be given to competing organizing principles in the law of contract in the context of standard form contracts of adhesion. For Abella and Rowe JJ., the special features of such agreements create heightened concerns of unconscionability (a doctrine which *Bhasin* tied to the principle of good faith), whereas for Brown and Côté JJ., those features are not sufficient to displace the importance which the common law accords to freedom of contract and commercial certainty. This underscores both the vibrancy, and the nuance, of the framework established in *Bhasin*.

b. The Duty of Honest Performance

Apart from the Supreme Court's recognition of the organizing principle of good faith, the most important aspect of *Bhasin* was its decision to introduce the duty of honest performance as one of the specific obligations in which the principle manifests. A considerable amount of post-*Bhasin* litigation has concerned claims under this new duty, and three major issues have emerged. First, to what extent is it correct to say that the duty does not impose a requirement of disclosure? Second, what is the effect of the statement in *Bhasin* that

88. *Ibid.*, at para. 166.
89. *Ibid.*, at paras. 152-153.
90. *Ibid.*, at para. 257.

the dishonesty must relate to "matters directly linked to the performance of the contract"? Third, in cases where a breach of the duty is established, what approach should be taken to determining whether it caused the plaintiff's loss? Each of these is explored below.

i. Non-Disclosure

One of the most significant flash points relating to the duty of honest performance is the extent to which it can be engaged by a defendant's non-disclosure. The Supreme Court in *Bhasin* was careful to note that the duty does not impose a positive requirement to disclose material facts, akin to the duty that exists in fiduciary relationships or under *uberrimae fidei* contracts like insurance. Nonetheless, the court did not limit the duty to direct lies, stating instead that it means that "parties must not lie *or otherwise knowingly mislead each other*" when performing their agreement.[91] Further, on the facts of *Bhasin* itself, the court found the critical dishonesty occurred when Can-Am "equivocated" in response to a question by Mr. Bhasin about its intentions to force a merger between Mr. Hrynew and himself.[92] Accordingly, there would seem to exist some scope for the duty of honest performance to apply in situations of non-disclosure.

Many appellate cases decided since *Bhasin* have confirmed that the duty does not impose a requirement to disclose facts simply because the other party might find them to be material.[93] Nor does it

91. *Bhasin*, *supra*, footnote 1, at para. 73, emphasis added.

92. *Ibid.*, at para. 100 (and para. 12). See also para. 101, where the court said that [w]hen Mr. Bhasin complained about Mr. Hrynew's conflict of interest ... Can-Am in effect blamed the Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was not truthful. Can-Am failed to mention that it had proposed to appoint a non-resident of Alberta who was clearly not qualified according to the Commission's criteria (emphasis added).

93. *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89, 381 D.L.R. (4th) 263, 37 B.L.R. (5th) 175 (B.C. C.A.) at paras. 73-76, leave to appeal refused 2015 CarswellBC 3021, 2015 CarswellBC 3022, [2015] S.C.C.A. No. 163 (S.C.C.); *Bank of Montreal v. Javed*, 2016 ONCA 49, 344 O.A.C. 237, 263 A.C.W.S. (3d) 168 (Ont. C.A.) at para. 12, leave to appeal refused *Shah v. Bank of Montreal*, 2016 CarswellOnt 9666, 2016 CarswellOnt 9667, [2016] S.C.C.A. No. 106 (S.C.C.); *Angus Partnership Inc v. Salvation Army (Governing Council)*, 2018 ABCA 206, 422 D.L.R. (4th) 721, 90 R.P.R. (5th) 175 (Alta. C.A.) at para. 73. See also *Eureka Farms Inc. v. Luten*, 2016 ONCA 969, 63 B.L.R. (5th) 173, 274 A.C.W.S. (3d) 655 (Ont. C.A.) at paras. 3 and 7-8. Interestingly, some courts have suggested that, in light of the fact that *Bhasin* does not impose a requirement of disclosure under the duty of

require one contracting party to advise the other about the clear terms of the agreement, nor to inform the other party that the latter has the opportunity to exercise a contractual right.[94]

An interesting illustration of this limitation is provided by the decision of the British Columbia Court of Appeal in *Continental Steel Ltd. v. CTL Steel Ltd.*[95] The parties in that case were engaged in a joint venture in which the plaintiff funded the defendant's purchase of steel, following which the parties would divide the profits made on the steel's resale on a 50/50 basis. As part of this arrangement, the plaintiff made a number of loans to the defendant over a period of 22 years, but the contracts between them did not specify how the defendant's repayments were to be accounted for, and the defendant never gave the plaintiff any clear instructions about how to allocate them. By the time their relationship ended, many of the debts were in danger of being statute-barred, and if one eliminated those older debts on limitation grounds, the total amounts paid by the defendant covered its entire remaining indebtedness. Despite the fact that the plaintiff had previously allocated many of the payments in its accounting records, it had not clearly communicated those allocations to the defendant, and it decided to re-allocate them in preparation for its lawsuit against the latter (a decision that was contrary to generally accepted accounting practices). The plaintiff did this so that part payment of the older debts would be made, and the statutory limitation periods for them reset through their "confirmation" by the defendant.

Before the court, the defendant argued that "permitting a creditor to amend its accounts and allocate funds received from the debtor but not to inform the debtor until as late as trial . . . would offend the principle of honest performance enunciated . . . in *Bhasin v. Hrynew*", since this would "permit creditors to 'conceal their books' from their debtors and to 'make whatever clever and tricky attributions they may wish'".[96] However, this argument was rejected by the Court of Appeal. Justice Newbury, who delivered the unanimous reasons of

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honest performance, it is now an open question whether the statutory duty of good faith performance that franchisors owe to franchisees is similarly limited: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2016 ONCA 24, 344 O.A.C. 222, 264 A.C.W.S. (3d) 94 (Ont. C.A.) at paras. 31, 57 and 67, leave to appeal refused 2016 CarswellOnt 15334, 2016 CarswellOnt 15335, [2016] S.C.C.A. No. 105 (S.C.C.).

94. *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator*, 2020 ONCA 430, 2020 CarswellOnt 9200 (Ont. C.A.) at paras. 60-62 and 64-65.

95. 2018 BCCA 82, 420 D.L.R. (4th) 621, [2018] 7 W.W.R. 1 (B.C. C.A.).

96. *Ibid.*, at para. 42.

the court, noted that the common law rules about the allocation of debts "give *the debtor* the first right to instruct where its payments will be credited", and that "[i]t is only if it fails to do so that the creditor becomes entitled to allocate".[97] Since the defendant-debtor in *Continental Steel* never exercised its right to instruct the plaintiff-creditor how the debts should be allocated, and did not bargain for such a provision in the contract, it could not be said that the plaintiff was under an obligation to disclose its reallocation decisions prior to litigation. As Newbury J.A. put it, "[o]wing no fiduciary duty to the debtor (see *Bhasin*), the creditor is free to allocate in such a way as to maximize its own interests".[98]

Despite such cases, an important issue remains regarding whether a party can be liable for breaching the duty of honest performance when it does not simply fail to disclose a material fact, but engages in what may be termed "active non-disclosure",[99] *i.e.*, where its silence creates a misleading impression when it is combined with some *positive* representation or action in which it also engages. Imposing liability in such caes is consistent with the Supreme Court's finding of dishonesty on the facts of *Bhasin*, and some post-*Bhasin* appellate cases suggest that the duty may be engaged where active non-disclosure occurs.[100] However, the Ontario Court of Appeal appeared to reject this proposition in *C.M. Callow Inc. v. Zollinger*.[101] As an appeal from *Callow* is currently on reserve at

97. *Ibid.*, emphasis in original.
98. *Ibid.*
99. This was the terminology used in *Lavrijsen Campgrounds Ltd. v. Reville*, 2015 ONSC 103, 38 B.L.R. (5th) 157, 248 A.C.W.S. (3d) 710 (Ont. S.C.J.) at para. 16.
100. *Energy Fundamentals Group Inc. v. Veresen Inc.*, 2015 ONCA 514, 388 D.L.R. (4th) 672, 46 B.L.R. (5th) 175 (Ont. C.A.) at paras. 13 and 47-50; *RPC Limited Partnership v. SNC-Lavalin ATP Inc.*, 2018 ABCA 423, 96 C.L.R. (4th) 140, [2018] A.J. No. 1466 (Alta. C.A.) at paras. 5-8, 10, 12, 15 and 21-22. The ability to make positive misrepresentations through active non-disclosure has long been recognized in other contexts (e.g., tort), where it has been distinguished from the broader duty to disclose material facts that is imposed in *uberrimae fidei* contracts such as insurance and in fiduciary relationships: *Coaks v. Boswell* (1886), L.R. 11 App. Cas. 232 (U.K. H.L.) at pp. 235-236, per Earl Selborne; *Aaron's Reefs Ltd. v. Twiss*, [1896] A.C. 273 (U.K. H.L.) at pp. 287 and 293-294; *Banque canadienne nationale c. Soucisse*, [1981] 2 S.C.R. 339 at pp. 356-357, 43 N.R. 283, 15 A.C.W.S. (2d) 309 (S.C.C.); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at pp. 122-124 and 127-131, 99 D.L.R. (4th) 626, 45 C.C.E.L. 153 (S.C.C.); *HIH Casualty & General Insurance Ltd. v. Chase Manhattan Bank*, [2003] UKHL 6, [2003] 1 All E.R. (Comm) 349, [2003] 2 Lloyd's Rep. 61 (U.K. H.L.) at paras. 71-72, per Lord Hoffmann.
101. 2018 ONCA 896, 429 D.L.R. (4th) 704, 86 B.L.R. (5th) 53 (Ont. C.A.), leave

the Supreme Court of Canada, it may be of interest to set out the reasoning in the Court of Appeal's decision.

The dispute in *Callow* related to a contract for winter maintenance services under which the plaintiff was to provide snow removal services to the defendant condominium corporations from 2012-2014. The contract provided that it could be terminated by the defendants without cause if they gave the plaintiff 10 days' notice. During the spring of 2013, the defendants decided to terminate the contract later that year, but did not inform the plaintiff about this until the fall of 2013. The reason for the delay was that the defendants did not wish to jeopardize the plaintiff's performance of a related summer maintenance services contract, under which the plaintiff was to provide landscaping services from 2012-2013. However, the defendants did not merely fail to disclose their termination decision to the plaintiff over the summer of 2013. Instead, they "actively deceived" it by representing that the winter contract was likely to be renewed in 2014, and they even accepted free landscaping work from the plaintiff that they knew was being provided in the hopes of securing that winter contract renewal.[102] The defendants were aware that the plaintiff was under the impression, during the summer of 2013, that the contract would be renewed the following year, but deliberately said nothing about the termination decision until the fall. As a result, the plaintiff missed the window to bid on other winter maintenance contracts for the 2013-2014 season, and he sued for breach of contractual duties of good faith.

The trial judge found the defendants liable for breaching the duty of honest performance, but her decision was set aside by the Court of Appeal. Writing *per curiam*, the court concluded that the trial judge's findings "may well suggest a failure to act honourably, but they do not rise to the high level required to establish a breach of the duty of honest performance".[103] First, the court held that "[i]t is clear from *Bhasin* that there is no unilateral duty to disclose information relevant to termination", and that the defendants "were free to terminate the winter contract with the [plaintiff] provided only that they informed him of their intention to do so and gave the required notice".[104] Second, while the court did accept that "[c]ommunications between the parties may have led [the plaintiff] to believe that there would be a new contract" – *i.e.*, that the plaintiff

to appeal allowed 2019 CarswellOnt 10869, 2019 CarswellOnt 10870, [2019] S.C.C.A. No. 13 (S.C.C.) ("*Callow*").

102. *Ibid.*, at para. 15.

103. *Ibid.*, at para. 16.

104. *Ibid.*, at para. 17.

had been misled about a *renewal* in the future – this was legally irrelevant, because those communications did not relate to *termination* of the existing contract, and the duty of honest performance only "required that the parties be honest with each other concerning matters 'directly linked to the performance of the contract' – that is, linked to the winter contract then in effect".[105]

What is missing in the Court of Appeal's analysis is the recognition that, by actively misleading the plaintiff that the winter services contract would be renewed in 2014, the defendants also naturally induced the plaintiff to infer that the contract would not be prematurely terminated in 2013, before such a renewal could occur. That inference was one which related to the performance of the existing contract itself and its termination right, not merely the renewal of it in the future. However, the defendants said nothing to correct this inference, despite knowing the plaintiff had drawn it from their own positive acts. Against this backdrop, the Court of Appeal's reliance on the principle in *Bhasin* that "there is no unilateral duty to disclose information relevant to termination" seems misplaced.

In addition to active non-disclosure, allegations of dishonest performance have also been made where, as in *Bhasin* itself, the plaintiff asks the defendant questions about its intentions. This occurred in *Telsec Developments Ltd. v. Abstak Holdings Inc.*,[106] where the defendant agreed to purchase land from the plaintiff, subject to a later amendment imposing the condition that the defendant obtain a development permit from a municipality by a specified date. The defendant applied for the permit, but was denied on somewhat dubious grounds, and the defendant subsequently filed a strong appeal with the Subdivision and Development Appeal Board. One day before the hearing, however, the defendant abruptly withdrew its appeal – telling the plaintiff only that "something has come up business wise" – and it took the position that the agreement was terminated because the permit had not been met and it was not prepared to waive it. The plaintiff sued, and a majority of the Court of Appeal agreed with the trial judge that the defendant breached a duty to use best or reasonable efforts in pursuing the appeal.

In addition, however, the Court of Appeal also upheld the trial judge's finding that the defendant breached the duty of honest performance, by misleading the plaintiff about its reason for

105. *Ibid.*, at para. 18.

106. 2020 ABCA 40, 443 D.L.R. (4th) 539, 99 B.L.R. (5th) 177 (Alta. C.A.), leave to appeal refused 2020 CarswellAlta 1289, 2020 CarswellAlta 1290, [2020] S.C.C.A. No. 81 (S.C.C.).

abandoning the appeal. The defendant's true rationale for doing so was that it had acquired confidence it could obtain an alternative site for the same development that it planned to build on the plaintiff's land, and it even approached the municipality to propose that the appeal be discontinued in exchange for approval of the alternative development site. Importantly, the plaintiff had questioned the defendant about its interest in the alternative land after the two parties had entered into their agreement, but the defendant replied that it was only considering the land as a "backup". The trial judge found this answer "came perilously close to misleading", since the defendant was actively engaged in discussions to purchase the alternative land from a third party at the time it was given, and it continued to hold out to the plaintiff that it was pursuing the appeal while those discussions with the third party advanced. Against this backdrop, the majority of the Court of Appeal agreed with the trial judge that the defendant "strung [the plaintiff] along and then abandoned the appeal at the eleventh hour on a pretext", and that this was dishonest performance.[107] The ruling in *Telsec* illustrates that, after *Bhasin*, contracting parties should be careful in how they answer (if at all) questions that their counterparties raise about their intentions.

ii. Dishonesty About Matters Directly Linked to the Performance of the Contract

A further issue that arises after *Bhasin* concerns the meaning of its statement that breaches of the duty of honest performance must be "about matters directly linked to the performance of the contract".[108] The court provided little guidance on this requirement in *Bhasin* itself, merely noting that the "dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision".[109] In other cases however, it may be expected to play a more prominent role, as occurred in the *Callow* decision reviewed above.[110]

Another such case is the decision of the Manitoba Court of Appeal in *Albo v. Winnipeg Free Press a Division of FP Canadian Newspapers Limited Partnership*.[111] The plaintiff there was a history

107. *Ibid.*, at paras. 53-54 and 59.
108. *Bhasin*, *supra*, footnote 1, at para. 73.
109. *Ibid.*, at para. 103.
110. See the text accompanying footnotes 101-105.
111. 2020 MBCA 50, [2020] 6 W.W.R. 187, 318 A.C.W.S. (3d) 229 (Man. C.A.).

professor who agreed to collaborate with the defendant newspaper publisher on a series of articles. During the negotiations for the contract, the defendant informed the plaintiff that it would not be publishing a book for profit. Several months later, after the series of articles was completed, the defendant was approached by a third party to publish it as a book, and elected to do so, without informing the plaintiff about this. When the plaintiff sued the defendant on the basis that its non-disclosure of the book deal was a breach of the duty of honest performance, the Court of Appeal denied his claim. In doing so, it noted that under *Bhasin*, "dishonesty has to be 'directly linked to the performance of the contract'", but the alleged dishonesty in this case "occurred *after* the contract had been performed".[112] Accordingly, the claim could not succeed.

The Supreme Court of Canada's decision in *Atlantic Lottery* might also, it is submitted, be viewed as a case in which the "direct link" requirement from *Bhasin* was applied, although the requirement was not expressly referred to in the majority's reasons. As discussed above,[113] the plaintiffs in *Atlantic Lottery* alleged that ALC breached an implied duty of good faith by not considering the plaintiffs' interests as equal to its own when it knowingly offered inherently dangerous VLTs for use by the public. The danger was said to arise from the fact that the VLTs gave a false impression of the probability of winning, and could lead to dependency, addiction and suicidal ideation through their intentionally "deceptive" nature. Justice Brown, writing for the majority, found it was plain and obvious that these allegations did not engage the duty of honest performance, though he did not provide a specific rationale for this conclusion.[114] By contrast, the dissenting reasons of Karakatsanis J. held that the plaintiffs did plead a breach of the duty of honest performance, since "the pleadings are replete with allegations of dishonesty – that VLTs are 'inherently deceptive', 'give a false impression of the odds of winning', 'manipulate' consumers, and contain a 'stop' button that is 'deceitful' – and allege ALC's full knowledge of that deception".[115] It is possible that the reason why the majority rejected the dissent's reasoning on this point is that it did not view ALC's offering of a

112. *Ibid.*, at para. 50, emphasis in original. At para. 58, the court also noted that the defendant had not acted with any ulterior purpose, since "the book . . . was only published because of a coincidence that occurred after the contract had been performed and not because of some earlier duplicity designed to prejudice the plaintiff's interests".

113. See the text accompanying footnotes 74-75.

114. *Atlantic Lottery*, *supra*, footnote 12, at paras. 64-66.

115. *Ibid.*, at para. 133.

deceitful product to involve a form of dishonesty that was not sufficiently "linked to the performance of the contract". Instead, the alleged dishonesty only inhered in the product that was offered under the contract.

iii. Causation

A final question that may arise in cases involving the duty of honest performance concerns whether the defendant's dishonesty was the cause-in-fact of the plaintiff's loss. In *Bhasin*, the Supreme Court found that causation was made out, because "[t]he trial judge specifically held that but for Can-Am's dishonesty, Mr. Bhasin could have acted so as to 'retain the value in his agency'".[116] In other words, framed in the language of the test for damages in contract law – *i.e.*, that "the plaintiff is to be put in the position it would have been in had the contract been performed as agreed"[117] – the Supreme Court in *Bhasin* held that if Can-Am *had* acted honestly, by informing Mr. Bhasin that it had decided to merge his dealership with Mr. Hrynew at the time when he directly asked it about this, then Mr. Bhasin might have taken steps to prevent the mass solicitation of his sales force by Mr. Hrynew that later ensued when Can-Am exercised its non-renewal right.

The causation inquiry will not, however, be so clear in all cases, a point that is illustrated by the British Columbia Court of Appeal's decision in *Water's Edge Resort Ltd. v. Canada (A.G.)*.[118] The plaintiff there was party to a 45-year lease with the Crown, which provided that the annual rent would be redetermined by the Crown every five years. If the plaintiff disagreed with the redetermination, the lease permitted it to challenge the amount in the Federal Court, but stated that it could not do so until it paid all rent then due, and that any failure to do so would enable the Crown to terminate. Owing to pressure from its institutional lenders, the plaintiff began to renegotiate the terms of the lease with a view to obtaining a 99-year term. It declined to pay the outstanding rent while the renegotiations were ongoing – during a period in which it also objected to the Crown's redetermination of the rent – since the property would not be financially feasible unless the lease was amended in the manner its lenders desired. The Crown eventually

116. *Bhasin*, *supra*, footnote 1, at para. 109.

117. *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12, 99 D.L.R. (4th) 577, 14 C.C.L.T. (2d) 233 (S.C.C.) at p. 37 [S.C.R.], reconsideration / rehearing refused (1993), 14 C.C.L.T. (2d) 233 (note), 5 C.L.R. (2d) 173 (note), 1993 CarswellBC 3074 (S.C.C.).

118. 2015 BCCA 319, 55 R.P.R. (5th) 1, 644 W.A.C. 39 (B.C. C.A.).

terminated the lease for the plaintiff's failure to pay, and the plaintiff brought an action alleging the Minister acted in bad faith by not disclosing all of the property appraisals it had conducted in redetermining the rent, nor its valuation methodology. The action was dismissed in a trial decision rendered before *Bhasin*, but on appeal, the plaintiff argued that the Crown's rent redetermination and non-disclosure breached the new duty of honest performance.

In dismissing the appeal, Newbury J.A. for the unanimous court found that it was unnecessary to determine whether a duty of good faith under *Bhasin* had been breached by the Crown. This was because any such breach did not cause the termination of the lease. Unlike in *Bhasin*, where the Supreme Court found that "but for" Can-Am's dishonesty, Mr. Bhasin could have acted to retain the value in his agency, the court held that the plaintiff in *Water's Edge* would not "still have its interest in the Lease 'but for' the assumed breach of the *Bhasin* duties by the Ministry".[119] Instead, assuming the Crown had provided the plaintiff with all of its appraisals and its valuation methodology, the plaintiff would have continued to insist upon a 99-year term during the renegotiations in order to obtain financing from its lenders, and these conditions were not acceptable to the Minister.[120] Therefore, "*even if* the *Bhasin* obligations had been law at the time of trial and the Ministry had been found to have breached them, the same result – the termination of the Lease by the Ministry – would have followed".[121]

Water's Edge demonstrates an important practical limitation upon the duty of honest performance. Even in cases where a defendant lies or otherwise knowingly misleads the plaintiff about matters directly linked to the performance of the contract, the plaintiff may still be prevented from recovering expectation damages for this if it cannot show that the dishonesty was the "but for" cause of its loss. Plaintiffs deciding whether to bring claims for the duty of honest performance should consider whether they can satisfy this causation requirement.

c. Situational Duties of Good Faith Performance

In addition to the organizing principle of good faith and the new duty of honest performance, *Bhasin* is also noteworthy for its confirmation of several existing duties of good faith. Three of these duties relate to "situations" in which a good faith performance

119. *Ibid.*, at paras. 31 and 40.
120. *Ibid.*, at paras. 41-42.
121. *Ibid.*, at para. 43, emphasis in original.

obligation has been held to exist, most often as a term implied in fact in order to give business efficacy to the agreement (though sometimes, confusingly, as a term implied in law or one divined through the process of contractual interpretation).[122] These three duties have historically produced much of the litigation relating to contractual good faith, and were said to arise in *Bhasin* as follows:

(1) where the parties must cooperate in order to achieve the objects of the contract;
(2) where one party exercises a discretionary power under the contract; and
(3) where one party seeks to evade contractual duties".[123]

The case law since *Bhasin* confirms that these "situational" duties of good faith performance continue to play an important role in Canadian contract law.

i. Abuse of Discretionary Contractual Powers

The duty to exercise discretionary contractual powers in good faith has been considered in several appellate cases since *Bhasin*. Perhaps the most extensive analyses of it is the decision of the British Columbia Court of Appeal in *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*[124] While an appeal from this decision is currently on reserve at the Supreme Court of Canada, it is interesting to consider the approach taken by the Court of Appeal, as it demonstrates several of the underlying tensions in the law.

The *Wastech* case concerned a complex long-term commercial agreement in which the appellant, Wastech, agreed to dispose of waste provided by the respondent municipal district ("Metro"). The monthly payments which Metro made to Wastech for its services and expenses differed depending on whether the waste was disposed of through long-haul or short-haul routes. A critical feature of the contract was that it proposed a target operating ratio (the "OR") of 0.89, being an aspirational (but not guaranteed) figure which would be reached if Wastech's operating costs in a given year were 89% of its revenues (the remaining 11% being Wastech's profit). The agreement did not prevent Metro from re-allocating the waste as

122. *Bhasin*, *supra*, footnote 1, at paras. 47-53.
123. *Ibid.*, at para. 47.
124. 2019 BCCA 66, 431 D.L.R. (4th) 512, [2019] 5 W.W.R. 451 (B.C. C.A.), leave to appeal allowed 2019 CarswellBC 2094, 2019 CarswellBC 2095, [2019] S.C.C.A. No. 123 (S.C.C.) ("*Wastech*").

between short-haul and long-haul routes – but in fact contemplated that routine adjustments would occur – and only required Metro to pay adjustments up to a financial limit where it re-allocated the waste in way that prevented Wastech from meeting the OR. When Metro chose to re-allocate a substantial amount of waste from a long-haul to a short-haul site, it resulted in an OR of 0.96 after the contractual adjustments, thereby reducing Wastech's target profits from 11% to 4% for the year in question.

Wastech brought a claim under the contractual arbitration provision, arguing that: (a) the contract contained an implied term requiring additional adjustments or compensation by Metro where its re-allocation of waste deprived Wastech of the opportunity to meet the OR; and (b) alternatively, Metro breached an implied contractual duty of good faith in re-allocating the waste as it did. The latter claim involved the allegation that Metro had abused a discretionary contractual power contrary to *Bhasin*.[125] At first instance, the arbitrator rejected Wastech's argument that the contract contained the implied term it contended for, finding this to be inconsistent with the parties' deliberate choice during contractual negotiations not to include such a further adjustment in the agreement. Nonetheless, the arbitrator still concluded that Metro had breached its duty of good faith by failing to give appropriate regard to Wastech's "legitimate contractual expectation" that it would not exercise its re-allocation discretion in a material way that deprived Wastech of the opportunity to meet the OR. The arbitrator characterized this as "dishonesty" for the purposes of *Bhasin*, even though he found that Metro's conduct had been honest and reasonable from its own point of view. Metro then successfully appealed the arbitrator's award to the British Columbia Supreme Court, and that decision was affirmed by the Court of Appeal, though for reasons somewhat different than the Chambers Judge. In dismissing the appeal, Newbury J.A. for the unanimous court made three important points:

(a) The duty not to abuse contractual discretions is only engaged by the counterparty's legitimate *contractual* interests or expectations. Since the arbitrator declined to imply a term requiring additional adjustments or compensation by Metro when it re-allocated the waste (with the parties having expressly considered and rejected this term during negotiations for the agreement), Wastech could have no interest or expectation

125. *Ibid.*, at paras. 11, 16, 35, 40, 45 and 66.

"founded in the contract" that Metro failed to appropriately regard in exercising its re-allocation discretion.[126]

(b) *Bhasin* did not recognize "a stand-alone civil wrong of 'disregard of contractual interests'" that would be breached whenever a party exercised a contractual discretion without "appropriate regard" for such interests of the counterparty. That would elevate the organizing principle of good faith into an independent legal duty. Consistent with the fact that only the specific doctrines of good faith recognized under the organizing principle can create enforceable rights and obligations, Wastech needed to demonstrate that Metro "had 'nullified' or 'eviscerated' the Agreement 'in the sense that it immediately deprived Wastech of all or substantially all of the benefit for which it bargained'", since that is the standard the pre-*Bhasin* case law required to demonstrate a breach of the situational duty not to abuse a discretionary contractual power.[127] Wastech failed to do this.

(c) The organizing principle of good faith in *Bhasin* is "concerned substantially with conduct that has at least a subjective element of improper motive or dishonesty", in the sense that there must be "malice, untruthfulness, ulterior motive . . . 'intentional conduct equivalent to fraud' . . . [or] conduct . . . so reckless that 'absence of good faith can be deduced and bad faith presumed'". This standard could not be established in *Wastech* itself, since the arbitrator found that Metro acted honestly and reasonably from its own subjective point of view. It was an error for the arbitrator to call Metro's conduct "dishonest" based merely on the fact that the exercise of its re-allocation discretion was allegedly at odds with the legitimate contractual expectations of Wastech, "without any subjective element of dishonesty, improper motive (under which . . . [is] include[d] 'seeking to undermine' the interests of the other party), or bad faith as understood in existing law".[128]

The first two points made by Newbury J.A. are generally uncontroversial as a matter of law (although some may question whether they were properly applied to the facts of *Wastech* itself). It is clear that *Bhasin* held the organizing principle of good faith is only engaged by conduct that is contrary to a legitimate "contractual" interest, and it was extremely careful to distinguish this principle

126. *Ibid.*, at paras. 67-69 and 74.
127. *Ibid.*, at paras. 66, 70 and 74.
128. *Ibid.*, at paras. 71-74.

from a stand-alone duty such as may exist under the recognized doctrines in which it is manifest.

Nonetheless, the third proposition is more controversial. To the extent that Newbury J.A. intended to suggest that the situational duty not to abuse discretionary contractual powers can only be violated by conduct that is contrary to subjective standards of good faith (e.g., dishonesty or improper motive), it is contrary to a well-established line of pre-*Bhasin* case law – reflected in the seminal decision of *Greenberg v. Meffert*[129] – which holds that this duty can also be violated, in certain cases, by conduct contrary to objective standards (*i.e.*, unreasonableness).[130] This is reflected in *Bhasin* itself, which: (a) cited *Greenberg* and other case law that imposed reasonableness obligations upon the exercise of contractual discretions;[131] (b) formulated the organizing principle as being "that parties generally must perform their contractual duties honestly *and reasonably* and not capriciously or arbitrarily";[132] (c) noted that "[i]n many of its manifestations, good faith requires more than honesty on the part of a contracting party";[133] and (d) made a point of referring to the fact that good faith in Quebec and the United States includes obligations of reasonableness rather than just subjective requirements like "honesty in fact" and "act[ing] without malicious intent".[134]

The suggestion in *Wastech* that the duty not to abuse contractual discretions may not include objective constraints of reasonableness draws in part from the Alberta Court of Appeal's earlier, post-*Bhasin* decision in *Styles v. Alberta Investment Management Corp.*,[135] which the *Wastech* court referred to as a case that

129. *Greenberg v. Meffert* (1985), 18 D.L.R. (4th) 548, 7 C.C.E.L. 152, [1985] O.J. No. 2539 (Ont. C.A.) at paras. 18-26, leave to appeal refused [1985] 2 S.C.R. ix (note), 30 D.L.R. (4th) 768 (note), 56 O.R. (2d) 320 (note) (S.C.C.). Interestingly, the decision in *Greenberg* was cited in *Wastech* itself: see *Wastech*, *supra* footnote 124, at para. 11.

130. For an illuminating discussion of this case law, see G.R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (Toronto: LexisNexis Canada Inc., 2016) at 312-318. See also *Filice v. Complex Services Inc.*, 2018 ONCA 625, 428 D.L.R. (4th) 548, 49 C.C.E.L. (4th) 210 (Ont. C.A.) at para. 38, additional reasons 2018 ONCA 763, 49 C.C.E.L. (4th) 228, 296 A.C.W.S. (3d) 325.

131. *Bhasin*, *supra*, footnote 1, at paras. 44 and 73.

132. *Ibid.*, at para. 63, emphasis added.

133. *Ibid.*, at para. 89.

134. *Ibid.*, at paras. 83-84.

135. 2017 ABCA 1, 408 D.L.R. (4th) 725, 64 B.L.R. (5th) 81 (Alta. C.A.), leave to appeal refused 2017 CarswellAlta 949, 2017 CarswellAlta 950, [2017] S.C.C.A. No. 76 (S.C.C.) ("*Styles*").

"directly rejected the proposition that there is a more general principle of 'reasonable exercise of discretion' in contractual performance".[136] In *Styles*, the plaintiff employee was terminated without cause, and brought a wrongful dismissal claim seeking damages for alleged bonus entitlements under the defendant employer's long term incentive plan (the "LTIP"). The LTIP involved a complicated formula in which employees would be allocated notional "grants" each year, but only be paid a bonus after a four-year cycle in which the preceding four years of grants could be calculated. As a result, no bonus rights vested until after four years, and the LTIP stated that a participant would not be eligible for payment unless they were "actively employed" at that time.

The plaintiff in *Styles* was dismissed before he had been employed for four years, and the trial judge found no evidence that the dismissal took place in bad faith to avoid triggering his LTIP entitlement. Nonetheless, she awarded the plaintiff damages for the LTIP bonus anyway, holding that under *Bhasin*, it was appropriate to recognize a "common law duty of reasonable exercise of discretionary contractual powers", which like the duty of honest performance, arises as a general doctrine of law rather than an implied term and cannot be contractually excluded by the parties. The trial judge then found there were two discretionary contractual powers the defendant failed to exercise reasonably: (a) a power to deny employees the grants underlying the bonus formula when they are not actively employed, based on a provision in the LTIP that said those grants "may be forfeited"; and (b) the power to terminate employees without cause. The judge effectively concluded that these discretions were exercised unreasonably because the defendant offered no reasonable explanation for its decision to terminate the plaintiff when it did, so as to deprive him of a bonus payment under the LTIP. In doing so, she found the provisions of the LTIP itself to be contrary to the parties' reasonable expectations, stating that it was contradictory to require active employment on the four-year vesting date when the employer was seeking to attract key talent.

On appeal, the trial decision was overturned, with Slatter and O'Ferrall JJ.A. delivering joint majority reasons that addressed the impact of *Bhasin* upon a wide range of topics. Perhaps the most interesting aspect of their decision, however, relates to the issue of objective constraints upon contractual discretions. In point of fact, the majority ultimately found that there was no discretion at issue in *Styles*: (a) the statement in the LTIP that grants "may" be forfeited

136. *Wastech*, *supra*, footnote 124, at para. 56 (and para. 58).

did not mean the defendant could make an election about this under the contract itself, because the LTIP required the employee be actively employed as condition precedent to the payment of a bonus;[137] and (b) the ability of an employer to dismiss an employee without cause could not be described as a discretion either, because this would be inconsistent with the common law rule – reaffirmed in *Bhasin* – that an employer's duty of good faith does not extend to their reasons for without cause termination upon reasonable notice (as this would deprive it of the ability to determine the composition of its workforce).[138] Given these conclusions, which it is submitted were correct, the majority's subsequent discussion of objective constraints on contractual discretions was strictly *obiter*.

In a lengthy discussion, however, the majority went on to express its view that contractual discretions are not subject to an obligation of reasonableness. In asserting this position, the court noted that "[t]he concepts of 'dishonesty, arbitrariness, and capriciousness' on the one hand, and 'unreasonableness' on the other hand have distinct meanings in law", and that *Bhasin*'s recognition that the former set of standards may constrain certain forms of contractual behaviour could not be taken to mean that the latter one does as well.[139] Instead, the majority stated:

> When a contract gives one party a discretion on how to perform, that is a method of risk allocation between the parties to the contract. They have contracted and agreed that the party with the discretion will have an element of power over how performance is to be accomplished. This may be because all of the possible situations surrounding performance are impossible to predict, meaning that one party or the other has to have some flexibility at the time of performance. Alternatively, it may simply be part of the bargain: one party was only prepared to enter into the contract on the basis that it was given an element of discretion as to how it will actually perform. Whatever the reasons, if one party is given a discretion it should be allowed to exercise that discretion without being second-guessed by the courts with the benefit of hindsight.[140]

In many cases involving discretionary contractual powers, the approach taken in *Styles* will be the correct one. It is likely to be rare that such discretions will legitimately be limited by obligations of reasonableness. Nevertheless, to suggest – as the *Styles* court appears to do – that contractual discretions are *never* subject to

137. *Styles*, *supra*, footnote 135, at paras. 24-30 and 42.
138. *Ibid.*, at paras. 31-42. This latter aspect of *Styles* is discussed more fully in the text accompanying footnotes 208-214 below.
139. *Ibid.*, at paras. 58-59.
140. *Ibid.*, at para. 60.

duties of reasonableness is to put the proposition too high. The law contains several examples, with *Greenberg* being paramount among them, of courts finding that discretionary contractual powers are subject to objective standards of good faith. It is submitted that, just as the trial judge in *Styles* was incorrect to suggest that contractual discretions are always subject to a mandatory duty of reasonableness, so too was the Court of Appeal incorrect to suggest that they are never subject to an implied reasonableness requirement. As the Supreme Court observed in *Bhasin*, "[i]n many of its manifestations, good faith requires more than honesty on the part of a contracting party", though "[i]n other contexts, this Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts".[141] The question of whether an objective or subjective standard of good faith applies is therefore essentially one of context.

The Ontario Court of Appeal recognized the contextual nature of this assessment in the post-*Bhasin* case of *Willowbrook Nurseries Inc. v. Royal Bank of Canada*.[142] The plaintiff in *Willowbrook* was a customer of the defendant banker, and the parties had a long-standing arrangement under which the defendant allowed the plaintiff to exceed its line of credit each winter by an overdraft amount set by the parties' mutual agreement that fall or winter. The overdraft would typically be paid the following spring or summer. When the plaintiff failed to pay most of its 2007 overdraft by the end of 2008, and then requested a new seasonal overdraft from the defendant (along with a debt restructuring and separate term loan request), the defendant refused due to concerns about the plaintiff's finances, and transferred the plaintiff's account into its "Special Loans" department. Thereafter, the defendant requested detailed information and appraisals from the plaintiff before it would provide overdrafts in excess of agreed limits, and forecast that the plaintiff's bank fees and interest charges would increase.

Frustrated with this situation, the plaintiff changed banks, and sued the defendant for breach of contractual duties of good faith on two main grounds. First, it alleged that the defendant's refusal to advance additional credit and to place its account in Special Loans amounted to a change in its prevailing course of lending conduct that required reasonable notice, pursuant to the rule established in *Thermo King Corp. v. Provincial Bank of Canada*.[143] Second, the

141. *Bhasin*, *supra*, footnote 1, at para. 89.

142. 2017 ONCA 974, 419 D.L.R. (4th) 17, 79 B.L.R. (5th) 232 (Ont. C.A.), additional reasons 2018 ONCA 21, 288 A.C.W.S. (3d) 427, 2018 Carswell-Ont 187 ("*Willowbrook*").

plaintiff argued that substantially the same conduct represented an exercise of the defendant's discretionary contractual powers in a way that was not objectively reasonable.

The Ontario Court of Appeal rejected both arguments, in reasons written by Justice Pardu. With respect to the first argument, although Pardu J.A. noted that "a bank's duty to give reasonable notice of a change to a prevailing course of overdraft lending conduct existed at common law well before the Supreme Court's *Bhasin* decision", she accepted that "Cromwell J.'s discussion in *Bhasin* regarding the good faith principle is nonetheless instructive as to the content and limits of the duty to provide reasonable notice in this case".[144] However, the court concluded that the rule in *Thermo King* was not violated by the defendant on the *Willowbrook* facts, since it was the plaintiff itself who had departed from the parties' prevailing lending practice by failing to repay the 2007 overdraft the next year.[145] In Pardu J.A.'s view, the plaintiff's argument amounted to the submission that "reasonable notice meant that [the defendant] had to continue to agree to advance new money during the alleged reasonable notice period".[146] She rejected this position emphatically, stating that "*Bhasin* does not require a lender in these circumstances to lend new money".[147]

As to the plaintiff's second argument, Pardu J.A. accepted that contractual discretions may in some cases be subject to objective standards of good faith.[148] However, she contrasted the facts before the court with those at issue in *Greenberg*, where an employer's "sole discretion" to pay a commission to its former salesperson was held to be subject to a requirement that it be exercised reasonably, noting that there, "[t]he parties could not reasonably have intended that the employer could arbitrarily deny commission".[149] In *Willowbrook* itself, by comparison, the discretion took the form of a bank's ability to decide whether to lend its customer more money beyond what the parties had previously agreed to. Unlike in a case "concern[ing] a bank's contractual discretion to realize upon its security, or to require repayment of a loan where it might well be appropriate to examine the reasonableness of those decisions", Pardu J.A. held that

143. (1981), 130 D.L.R. (3d) 256, 34 O.R. (2d) 369, 12 A.C.W.S. (2d) 56 (Ont. C.A.), leave to appeal refused (1982), 130 D.L.R. (3d) 256n, 42 N.R. 352, [1982] S.C.C.A. No. 251 (S.C.C.).
144. *Willowbrook*, *supra*, footnote 142, at para. 27.
145. *Ibid.*, at paras. 31-32.
146. *Ibid.*, at para. 33 (and para. 38).
147. *Ibid.*, at para. 34.
148. *Ibid.*, at paras. 40-43.
149. *Ibid.*, at para. 41 (and para. 40).

"[i]t is inapt to subject a bank's decision whether to lend substantial new credit to an existing customer who is at the end of their credit limit to an objective reasonableness analysis", since "[t]he choice whether to lend new money is at heart, a subjective business decision to be made by a bank".[150] Further, she noted that not this was not "a case where a bank acted dishonestly by promising additional financial support while secretly planning a receivership".[151]

Subsequent to *Willowbrook*, the Ontario Court of Appeal, relying on *Bhasin*, found that a discretionary contractual power was subject to an implied constraint of reasonableness in *Quickie Convenience Stores Corp. v. Parkland Fuel Corporation*.[152] The appellant in that case wished to sell a third party 15 gasoline service stations located across its chain of convenience stores, which received their fuel from the respondent. To complete the transaction, the appellant needed to assign a number of contracts it had with the respondent, which took the form of both leases, and credit/debit card agreements. Nearly all of the contracts contained clauses that prohibited the appellant from assigning them without the respondent's consent, and apart from one of the leases, they did not expressly prohibit the consent from being withheld unreasonably. When the appellant sought the respondent's consent to the assignment, the respondent refused, even though there was no evidence that the prospective purchaser's performance of the contracts would present the respondent with any financial or other risk. Instead, the refusal was driven by the respondent's attempt to force the appellant to agree to a five-year extension of the agreements before the assignment took place. The appellant sued, arguing that the respondent's decision to withhold its consent was unreasonable.

The difficulty for the appellant was that, while the leases were subject to a provision in s. 23(2) of Ontario's *Commercial Tenancies Act*[153] which prohibits a landlord from "unreasonably" withholding its consent to the tenant's assignment of the lease, the credit/debit card agreements were not. On appeal however, Nordheimer J.A. for a unanimous court allowed the appellant's claim. Relying on *Bhasin*, he held "a provision in a contract that requires one party to consent to the assignment of the contract by the other party" carries with it

150. *Ibid.*, at paras. 43-44.

151. *Ibid.*, at para. 44.

152. 2020 ONCA 453, 2020 CarswellOnt 9574 (Ont. C.A.) ("*Quickie Convenience*"). As noted at footnote 66 above, the court in *Quickie Convenience* did not overtly identify the case as one which fell into the *Bhasin* category of discretionary contractual powers, but it is submitted that the decision fits neatly into that line of cases.

153. R.S.O. 1990, c. L.7.

"an implicit understanding that consent to an assignment will not be withheld unreasonably", which will be breached where the consent is withheld "for an improper or ulterior purpose".[154] Because "the respondent was attempting to leverage its refusal to consent to force the appellant to agree to a five year extension of their contractual arrangements", which was "something to which it was not otherwise entitled", Nordheimer J.A. concluded that it was "unreasonable or improper".[155] In his words, "[i]t reflected bad faith dealing" and was "not unlike the conduct in which the defendants engaged in *Bhasin*".[156]

Another post-*Bhasin* appellate case that considered the how the organizing principle of good faith may affect the notion of "reasonableness" in a contractual consent right is that of the Alberta Court of Appeal in *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*.[157] The facts were highly complex, but involved a number of related agreements under which the plaintiff acquired a working interest in leases the defendant held in an oil and gas resource development known as Eyehill Creek. The relevant contract provided that if one of the parties chose to sell their respective working interest to a third party, and the other party declined to exercise a right of first refusal over it, then the first party still could not proceed with the third party sale absent the other party's consent. However, unlike the credit/debit card agreements in *Quickie Convenience*, the contract in *IFP* expressly provided that "consent shall not be unreasonably withheld", and went on to offer a contractual definition of "reasonableness", stating that it would be "reasonable" for a party

154. *Quickie Convenience*, *supra*, footnote 152, at para. 40. It is arguably incorrect to equate unreasonableness with acting for an improper or ulterior purpose. The latter involves a subjective standard that is most commonly associated with as acting in "bad faith", whereas unreasonableness requires acting for reasons that do not bear objective scrutiny.

155. *Ibid.*, at paras. 42-44.

156. *Ibid.*, at para. 43. It is not entirely clear that the court's analogy to *Bhasin* here is apt. As discussed in the text accompanying footnote 60 above, the Supreme Court in *Bhasin* declined to consider whether the claim could have succeeded on the basis that Can-Am abused its non-renewal discretion by exercising it for the improper purpose of forcing Mr. Bhasin to merge with Mr. Hrynew, since Mr. Bhasin would not have suffered any contractual damages from this. Instead, the *Bhasin* court grounded the award of damages on Can-Am's breach of its duty of honest performance.

157. 2017 ABCA 157, 70 B.L.R. (5th) 173, [2017] 12 W.W.R. 261 (Alta. C.A.), additional reasons 2017 ABCA 269, 70 B.L.R. (5th) 281, [2018] 1 W.W.R. 116, leave to appeal refused 2018 CarswellAlta 665, 2018 CarswellAlta 666, [2017] S.C.C.A. No. 303 (S.C.C.) ("*IFP*").

to withhold its consent "if it reasonably believe[d] that the disposition would be likely to have a material adverse effect on it, its working interest or operations to be conducted hereunder". When the defendant chose to farm out its working interest to a third party without the plaintiff's consent, the plaintiff sued for breach of contract, and the defendant responded by arguing that the plaintiff's consent had been unreasonably withheld. However, the defendant's submission was rejected by a majority of the Court of Appeal, which allowed the plaintiff's claim for breach of the consent right in reasons written by Fraser C.J.A. (though no damages were ultimately awarded for this given the highly speculative nature of the opportunity that the defendant's farmout agreement caused the plaintiff to lose).

The basis for the majority's decision that the plaintiff acted reasonably in refusing its consent was that its commercial objective in entering into the agreement was to extract oil using a "thermal production" method. As a result, Fraser C.J.A. found that both the plaintiff and defendant had a reasonable expectation that neither would substantially nullify the ability to pursue that objective. But the third party to whom the defendant farmed out its working interest wished to extract the oil through "primary production", which is inconsistent with a thermal project. Citing *Bhasin*, Chief Justice Fraser held this to be contrary to the defendant's "minimum good faith obligation under the Contract not to engage in primary production . . . in a manner which would substantially harm [the plaintiff's] interests in pursuing a thermal project contrary to the original objective of the Contract", which "necessarily precluded farming out its interest to a third party who would do the same".[158] As a "corollary" to this, she concluded that the plaintiff's refusal to consent to the farmout agreement was itself reasonable, since the limits that the duty of good faith placed upon how the defendant could affect the plaintiff's interests in Eyehill Creek "informed why it was reasonable" for the plaintiff to conclude that the farmout agreement would have a material adverse effect upon those interests.[159]

Claims that a defendant breached the situational duty not to abuse a discretionary contractual power have also been made in relation to the exercise of termination clauses, as in the previously discussed decision in *Callow*. The Ontario Court of Appeal awarded the plaintiff damages for such a claim in *Mohamed v. Information Systems Architects Inc.*[160] (though without expressly categorizing it

158. *Ibid.*, at para. 194.
159. *Ibid.*, at para. 195.

as an abuse of discretion case). The plaintiff in *Mohamed* left his full-time job to act as a consultant with the defendant, under a contract that permitted termination by the defendant if it "determine[d] it is in [its] best interest to replace the [plaintiff] for any reason". The agreement provided for the plaintiff to work on a project with a third party for a fixed term of six months, subject to the aforesaid termination clause. The third party's own agreement with the defendant provided that the latter would not send it any consultant who had a criminal record without the third party's consent, but the defendant assigned the plaintiff to the third party anyway, after the plaintiff had informed it that he had a dated criminal record from high school. Approximately one month into his assignment, the third party discovered the plaintiff's criminal record, and asked the defendant to replace him. The defendant then exercised the termination clause without attempting to secure the third party's agreement to the plaintiff's continuation with the project, and without offering him any other project as a replacement.

The Court of Appeal affirmed the lower court decision to allow the plaintiff's summary judgment motion and grant him damages. The unanimous reasons were written by Feldman J.A. Citing *Bhasin*, she held that "although the [defendant] had a facially unfettered right to terminate the contract, it had an obligation to perform the contract in good faith and therefore to exercise its right to terminate the contract only in good faith".[161] Justice Feldman went on to conclude that "[b]ecause the [plaintiff] disclosed his criminal record to the defendant] right at the beginning . . . the [defendant's] reliance on the criminal record to terminate the contract one month later was not a good faith exercise of its rights under the termination clause", particularly given its failure to pursue further negotiations with the third party or offer the plaintiff a replacement position.[162]

Mohamed is important in confirming that some duties of good faith may be breached even when the defendant acts in a manner that is consistent with the express contractual terms.[163] Where the duty in

160. 2018 ONCA 428, 423 D.L.R. (4th) 174, 79 B.L.R. (5th) 1 (Ont. C.A.) ("*Mohamed*").

161. *Ibid.*, at paras. 17-18.

162. *Ibid.*, at para. 19. Interestingly, the court in *Callow* later purported to distinguish *Mohamed* on its facts: see *Callow*, *supra* footnote 101, at para. 20.

163. For another case which recognized this, see *Directcash ATM Management Partnership v. Maurice's Gas & Convenience Inc.*, 2015 NBCA 36, 387 D.L.R. (4th) 50, 45 B.L.R. (5th) 214 (N.B. C.A.) at para. 29 ("[A]lthough the respondent [in *Bhasin*] was in literal compliance with the right of first refusal clause, the Court found that strict compliance was no defence to conduct amounting to bad faith in contractual relationships"). See also the text

question is one that constrains the exercise of discretionary contractual powers, then it is reasonable to conclude that it may operate in situations where a defendant is acting in compliance with its strict rights. Otherwise, it is difficult to understand what practical role the duty would play.

ii. The Duty to Cooperate

In addition to the duty not to abuse discretionary contractual powers, post-*Bhasin* appellate cases have also considered the situational duty identified by the Supreme Court to cooperate in achieving the objectives of the contract. An interesting decision which appeared to involve this duty, albeit without acknowledging it directly, is that of the Ontario Court of Appeal in *Ju v. Tahmasebi*.[164] It involved agreements for the sale of a property which the vendors were required to sever into two lots. The contracts provided that the purchaser was to pay an initial deposit of $100,000 at the time they were entered into, along with a second deposit of $100,000 "after the seller provides City or OMB severance approval to the buyer's lawyer". The vendors did not obtain severance approval until nearly two years after the agreements were signed, and then waited for another six months to inform the purchaser of this (on the same day the vendors transferred the severed lot), having ignored numerous requests from the purchaser for an update in the interim. The vendors then set a closing date of 60 days, and when the purchaser – who was out of the country – requested an extension of 45 days, the vendors refused and demanded the second deposit "ASAP". Two weeks later, when the purchaser had yet to make payment, the vendors terminated the agreements on the basis that her failure to do so was a repudiation.

The Court of Appeal had little difficulty in concluding that "it was a violation of the principle of good faith to proceed as the [vendors] did: ignore the [purchaser's] repeated requests for an update for

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accompanying footnotes 230-235 below. To a certain extent, there is a tension between such cases and those cited at footnote 78, where courts have held that the good faith principle does not require a party to forbear from exercising its contractual rights. However, as noted in the *Churchill Falls* quote accompanying that footnote, "the duty of good faith does not negate a party's right to rely on the words of the contract *unless insistence on that right is unreasonable in the circumstances*" (emphasis added). Thus, as recognized in *Mohamed* and *Directcash*, certain duties that exist under the organizing principle may restrict parties from acting in accordance with the literal terms of their contact.

164. 2020 ONCA 383, 447 D.L.R. (4th) 349, 319 A.C.W.S. (3d) 340 (Ont. C.A.).

many months, withhold critical information about the city approval, and then demand immediate payment by an arbitrarily set date when the [purchaser] said she was not in a position to pay because she was out of the country and needed an indulgence".[165] Interestingly, as it did in *Quickie Convenience*, the court said the vendors' lack of good faith arose not from any dishonesty but from the fact that they "had acted unreasonably".[166]

The duty to cooperate also seemed to be at issue (again without an acknowledgment of this) in the brief but interesting decision of the Alberta Court of Appeal in *Lafarge Canada Inc. v. Bilozir*.[167] The defendant in that case granted the plaintiff an option. The contract provided that the option could be exercised through the plaintiff's delivery of a notice to the defendant, once certain conditions were met. Several different methods of notice were permitted under the agreement, including delivery by "hand". When the conditions necessary for the option to be exercised were satisfied, and the plaintiff found itself unable to deliver notice by the other contractual methods, it attended the defendant's residence to effect hand delivery. However, the defendant – who was under the mistaken impression that the plaintiff had no further contractual rights – refused to answer the door, despite knowing that the plaintiff was attempting to deliver a letter to it. In those circumstances, the Alberta Court of Appeal held that the notice should be deemed to have been effectively delivered. Citing *Bhasin*, Slatter J.A. for the unanimous court observed that "a party who is being given notice of exercise of an option cannot actively obstruct service of that notice", and that "[b]y refusing to answer the door and take the letter, the [defendant] was wilfully blind to the [plaintiff's] legitimate efforts to exercise the option".[168] He therefore affirmed the decision below, which found that "the [defendant's] refusal to answer the door amounted to a failure to discharge his obligations under the contract in good faith".[169]

While the duty to cooperate has thus proven to have practical importance in the wake of *Bhasin*, it is not unbounded, and like all good faith doctrines its application will depend upon the context. The decision of the Ontario Court of Appeal in *2260695 Ontario Inc. v. Invecom Associates Ltd.*[170] is instructive here. The applicant

165. *Ibid.*, at para. 23 (and para. 11).
166. *Ibid.*, at para. 24.
167. 2018 ABCA 416, 299 A.C.W.S. (3d) 543, 2018 CarswellAlta 2970 (Alta. C.A.).
168. *Ibid.*, at para. 5.
169. *Ibid.*

entered into an agreement of purchase and sale to acquire some properties from the respondents. A clause in the agreement provided that the applicant could waive certain conditions in its favour by providing written notice to the respondents on a specified date, failing which a further clause provided that the conditions would be deemed satisfied and the closing would proceed. The parties agreed to extend the date for waiving the conditions to 5:00 pm on April 15, and at 2:00 pm on that date the applicant sent the respondents a draft amending agreement that proposed to extend the date yet again. The respondents did not reply to the applicant until midnight, at which point they informed him they would not agree to an extension. The applicant then took the position that the deal was at an end, and refused to close, and the respondents sought a declaration that they were entitled to retain his deposit on the basis that he defaulted by not closing after he failed to waive the conditions by 5:00 pm on April 15.

The Ontario Court of Appeal, affirming the decision below, allowed the respondents' claim. In a short *per curiam* judgment, it rejected the applicant's argument, which was based on *Bhasin*,[171] that the respondents breached a duty of good faith by not replying to his draft extension agreement until after 5:00 pm. According to the court, the applicant's failure to act within the time for waiving its conditions could not be laid at the feet of the respondents. Emphasizing that "these were sophisticated parties who entered into a sophisticated agreement with the assistance of counsel", the court endorsed the application judge's statement that "[t]here is no failure of good faith and nothing dishonest in leaving it to the purchasers to look after their own interests when the terms of the agreement are known to all".[172] In effect therefore, the court held that the respondents' duty to cooperate with the applicant to enable him to fulfil his obligations under the agreement was relatively minimal in the context of a commercial agreement between sophisticated parties, and was not triggered in circumstances where the applicant failed to avail itself of its own rights.

Another post-*Bhasin* appellate decision that rejected a claim for breach of the duty to cooperate is that of the British Columbia Court of Appeal in *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*[173] The plaintiff in *Alim* entered into an agreement with the defendant vendors to purchase two adjoining rental properties for a combined

170. 2017 ONCA 70, 81 R.P.R. (5th) 167, 275 A.C.W.S. (3d) 208 (Ont. C.A.).
171. *Ibid.*, at para. 17.
172. *Ibid.*, at para. 18.
173. 2016 BCCA 84, 51 B.L.R. (5th) 1, 66 R.P.R. (5th) 1 (B.C. C.A.).

price of $10 million (the "Kingsway" and "MacPherson" properties). Each property was subject to a separate right of first refusal, or "ROFR", in favour of the individual tenant, and the purchase agreement contained a condition precedent requiring that the vendors receive notice from both of the tenants that their ROFRs would not be exercised. The vendors gave the tenants notice of the plaintiff's offer, and while the MacPherson tenant declined to exercise its ROFR, the Kingsway tenant chose to do so, while also purporting to accept the vendors' "offer" to purchase the MacPherson property. The vendors then entered into an agreement to sell both properties to the tenant, and notified the plaintiff that the condition precedent could not be fulfilled. The plaintiff brought an action against the vendor for specific performance, and alleged, *inter alia*, that the vendor breached its duty to use reasonable efforts to fulfill the condition precedent.[174]

Justice Tysoe, delivering the unanimous judgment of the Court of Appeal, noted that the duty of honest performance introduced in *Bhasin* had already "been recognized for some time in connection with the fulfillment of conditions precedent contained in contracts", and in the real property context, meant that "the vendor is under 'a duty to act in good faith and to take all reasonable steps to complete the sale'".[175] Nonetheless, he rejected each of the arguments the plaintiff made for why the duty was breached.

The plaintiff's first argument was that the vendors failed to allocate a separate price of $7.3 million to the Kingsway property in the ROFR notice it provided to the tenant, but instead contained a combined price of $10 million for both properties. In dismissing this suggestion, Tysoe J.A. noted that the plaintiff's own purchase offer did not contain a separate allocation between the properties, and the vendors had not acted unreasonably by simply providing the tenant with that offer (although tenant could have requested a separate

174. It is noteworthy that the agreement between the plaintiff and the vendors in *Alim* provided that the condition precedent could be unilaterally waived by the vendors if it was not fulfilled: *ibid.*, at para. 16. However, it appears that no argument was made by the plaintiff that the vendors' decision not to waive the condition was an abuse of their contractual discretion.

175. *Ibid.*, at para. 63. It was not strictly accurate for the Court of Appeal to suggest that the "duty of honest performance" pre-existed *Bhasin* in the conditions precedent context. The duty of good faith which exists in that context is a separate, situational duty to cooperate, and arises from an implied term rather than a general doctrine of contract law that is incapable of exclusion by the parties. This aspect of *Alim* is an example of the courts' continuing confusion over the nature of the organizing principle of good faith articulated in *Bhasin*.

allocation for the Kingsway property had it wished).[176] Second, Tysoe J.A. found there was no merit to the plaintiff's further argument that the defendants failed to disclose the fact that, prior to the tenant's exercise of its ROFR, the tenant had previously indicated that it was indeed likely to exercise that right. The tenant had the contractual ability to exercise the ROFR, and the vendors' duty to the plaintiff "did not extend to taking steps to prevent or persuade [the tenant] from exercising its contractual right".[177] Finally, Tysoe J.A. also rejected the allegation that the vendors should have informed the tenant that its exercise of the ROFR was improper, since the ROFR only extended to the Kingsway property and not the MacPherson property as well. The Court of Appeal held that the tenant's exercise of the ROFR was perfectly valid in relation to the Kingsway property itself, and that was the only thing needed to cause the condition precedent in the plaintiff's agreement with the vendor to become incapable of fulfilment.[178]

Alim and *Invecom* demonstrate that the duty to cooperate is not without limits, particularly in the context of agreements between sophisticated parties capable of looking after their own interests. It is noteworthy in this regard that even in Quebec – which *Bhasin* said recognizes a "very broad conceptio[n] of the duty of good faith"[179] – the situational duty to cooperate is also subject to restrictions. This is illustrated by the Supreme Court of Canada's decision in *Churchill Falls*.

As noted previously,[180] *Churchill Falls* involved a claim in which CFLCo alleged that Quebec's civilian duty of good faith required Hydro-Québec to renegotiate the parties' contract so as to reallocate the profits it earned under it through third party sales of the electricity supplied by CFLCo. The basis for the claim was that market prices for electricity had increased well above the fixed term prices the parties had agreed, in 1969, that Hydro-Québec would pay to CFLCo for a 65-year term. Justice Gascon for the majority recognized that the duty of good faith in arts. 6, 7 and 1375 *C.C.Q.* does impose a duty to cooperate, which "means, for example, that one party must look out for the other party's interests by acting in a reasonably conciliatory and proactive manner when receiving and performing prestations under the contract".[181] He went on to note

176. *Ibid.*, at para. 66.
177. *Ibid.*, at para. 67.
178. *Ibid.*, at para. 68.
179. *Bhasin*, *supra*, footnote 1, at para. 85.
180. See the text accompanying footnotes 77-82.
181. *Churchill Falls*, *supra*, footnote 10, at para. 115.

that "[t]he purpose of the duty to cooperate is thus to give the contract, as it exists, the broadest scope possible", and can thus be viewed "as a simple implementation of Pothier's maxim that . . . 'obligating oneself to do something means obligating oneself to do it effectively'".[182] In this respect, the duty may be analogized to the common law duty to cooperate recognized in *Bhasin*, which Cromwell J. held may require a party to "take all reasonable steps" to achieve the objects of the contract (e.g., by obtaining a regulatory approval necessary to complete the transaction when the contract is silent about which party bears responsibility for this, but the party in question is the only one legally able to do so).[183]

Despite recognizing the existence of this duty to cooperate, however, Gascon J. limited its scope, holding that it did not go so far as to require a party to renegotiate the contract in order to reallocate a previously agreed-to scheme of profits under it, and thereby "undermine the contract's paradigm".[184] Instead, while Gascon J. acknowledged that "Quebec courts have sometimes required contracting partners to make slight changes to their contracts", he noted that they have not required a party to renegotiate the fundamental terms of an agreement simply because external circumstances (rather than that party's own act) have made those terms less favourable for the counterparty than was originally foreseen.[185] Thus, Gascon J. concluded that "[t]he duty to cooperate with the other contracting party does not mean that one's own interests must be sacrificed".[186] A similar restriction almost certainly exists upon the common law duty to cooperate identified in *Bhasin*, given the more narrow approach to good faith that is taken in the Canadian provinces outside Quebec.

iii. Evasion of Contractual Obligations

The final situational duty identified in *Bhasin* – *i.e.*, the duty not to evade one's contractual obligations – was on display in the Saskatchewan Court of Appeal's ruling in *Northrock Resources v ExxonMobil Canada Energy*.[187] The dispute in that case arose out of some rights of first refusal ("ROFRs") that the principal defendant had granted to the plaintiff over 10% of its oil and gas interests in the province. The ROFRs prohibited the defendant from disposing of its

182. *Ibid.*, at para. 120.
183. *Bhasin*, *supra*, footnote 1, at para. 49.
184. *Churchill Falls*, *supra*, footnote 10, at para. 120.
185. *Ibid.*, at paras. 116, 121-124 and 138.
186. *Ibid.*, at para. 128.
187. 2017 SKCA 60, 416 D.L.R. (4th) 321, 73 B.L.R. (5th) 44 (Sask. C.A.).

interests without first allowing the plaintiff the opportunity to acquire them. However, the prohibition upon disposition was not a general one, and instead contained several exceptions (e.g., a sale of all or substantially all of the plaintiff's interests in the province), including one that permitted a disposition by the defendant to its affiliates. The defendant, acting for tax reasons rather than out of a deliberate intention to defeat the ROFRs, undertook a multi-stage "busted butterfly" transaction, in which it disposed of its interests to two of its affiliates, and then sold their shares to a third party. The plaintiff sued, arguing that the transaction breached the defendant's duty of good faith by avoiding its obligations under the ROFR.

The Court of Appeal, per Caldwell J.A., unanimously rejected the plaintiff's claim. In doing so, he dismissed the suggestion that the ROFR should be interpreted as extending to the plaintiff's transaction by its terms, noting that it was silent about whether the defendant was precluded from selling an affiliate's shares to a third party where it took advantage of the affiliate-disposition exception.[188] For present purposes, the more interesting aspect of the case was Caldwell J.A.'s further rejection of the plaintiff's arguments grounded in good faith after *Bhasin*. Those arguments largely revolved around the submission that a ROFR grantor cannot deal with its property in a way that may appear to comply with the express language of the ROFR if the overall *effect* is to frustrate the ROFR's purpose, even where the ROFR grantor did not act with the *intention* of evading the ROFR grantee's rights. Justice Caldwell found this submission was inconsistent with the pre-*Bhasin* case that law had considered the scope of the duty of good faith which arises in relation to the structuring of third-party transactions under ROFRs.[189]

In the view of the court, that law only went so far as to establish that, where the third party transaction does not trigger the ROFR by its express terms, then "a breach of the duty of good faith in the context of a right of first refusal may arise where a party has lied or misled another party or is found to have structured a transaction for the purpose of avoiding the right of first refusal".[190] He found this approach to be consistent with the organizing principle of good faith in *Bhasin*, since accepting the plaintiff's argument would mean "that the duty of good faith will trigger a right of first refusal *whenever it is not otherwise triggered*".[191] This would amount to "a duty of *fidelity*,

188. *Ibid.*, at paras. 14-22 and 35-40.
189. *Ibid.*, at paras. 28-31.
190. *Ibid.*, at para. 48.
191. *Ibid.*, at para. 42, emphasis in original.

not of good faith, because it mandates that one party to a contract put the other party's interests ahead of its own interests", which "is of course, entirely inconsistent with the scope of the duty recognised in *Bhasin*".[192]

While *Northrock* suggests that claims based on the anti-evasion duty may be difficult to establish, other cases demonstrate that *Bhasin* still creates the potential for such relief. The decision of the British Columbia Court of Appeal in *Brule v. Rutledge*[193] is illuminating here. The plaintiff, Brule, entered into an agreement with the defendant, Briggs, which provided that the two parties would share finder's fees for mining transactions. The agreement contemplated that Briggs would identify potential mining properties, and the plaintiff would locate and introduce potential investors to the property owners, with the finder's fees forming a percentage of any transaction that resulted. The plaintiff located a potential investor, Rutledge, and introduced him to Briggs, and Briggs and Rutledge then met with the owners of a mining property.

After Rutledge introduced additional investors to the owner, a term sheet was entered into which included the payment of a finder's fee to Briggs, but Briggs did not disclose his finder's fee agreement with Brule to Rutledge or to the property owners, and informed the plaintiff that he would have to negotiate his own finder's fee with Rutledge. The plaintiff unsuccessfully engaged in such negotiations with Rutledge, and brought a claim against Briggs, Rutledge and the other investors. The claim against Briggs was founded on the allegation that Briggs breached his duty of good faith to protect the plaintiff's claim to a finder's fee in presenting a proposal to a property owner that emanated from an introduction the plaintiff had made.

While the claim was initially dismissed on a no-evidence motion, the Court of Appeal permitted it to proceed. Justice Wilcock observed that "[t]here was at least a *prima facie* case that Briggs was precluded from carrying on business as if he had no contractual obligation to Brule and without regard to the obligation to perform that contract in good faith".[194] Citing *Bhasin*, which had not yet been released at the time of the lower court ruling, Wilcock J.A. observed that "[i]t will remain for the trial judge to determine whether the Finder's Fee Agreement may be read, in accordance with that organizing principle, in such a manner as to oblige Briggs to submit finder's fee agreements which include Brule to property owners,

192. *Ibid.*, emphasis in original.
193. 2015 BCCA 25, 629 W.A.C. 144, 70 B.C.L.R. (5th) 291 (B.C. C.A.).
194. *Ibid.*, at para. 53.

when negotiating any type of financial transaction in relation to the mining properties arising from an introduction made by Brule".[195] In effect therefore, the Court of Appeal perceived merit in Brule's suggestion that Briggs had acted contrary to good faith by seeking to evade his contractual obligations under the finder's fee agreement.

d. Relational Duties of Good Faith Performance

In addition to the three situational duties examined above, the Supreme Court in *Bhasin* noted that "common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law".[196] Such "relational" duties are conceptually distinct from most (if not all) of the situational ones, since they do not consist of terms that are implied to give business efficacy to an agreement, or that arise from interpretation, but are instead "implied by law [to] redress power imbalances in certain classes of contracts".[197] The principal types of relational duties identified in *Bhasin* that have been addressed in the subsequent appellate jurisprudence are those which arise in the employment and insurance contracts.[198] Each is explored below.

i. Employment

The only post-*Bhasin* case in which the Supreme Court of Canada has addressed the organizing principle of good faith in a relational

195. *Ibid.*, at paras. 56-57.

196. *Bhasin*, *supra*, footnote 1, at para. 53.

197. *Ibid.*, at para. 44. This distinction between duties of good faith implied by law to redress power imbalances, and those implied to give business efficacy to agreements, has been reiterated in the post-*Bhasin* case law: see, eg., *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89, 381 D.L.R. (4th) 263, 37 B.L.R. (5th) 175 (B.C. C.A.) at paras. 66-67, leave to appeal refused 2015 CarswellBC 3021, 2015 CarswellBC 3022, [2015] S.C.C.A. No. 163 (S.C.C.).

198. In addition to employment and insurance, *Bhasin* also identified tendering agreements as ones which give rise to a relational duty of good faith, and it observed that franchise agreements are subject to a statutory duty of good faith as well: *Bhasin*, *supra*, footnote 1, at paras. 4, 46 and 56. To date there has been less appellate consideration of these relational duties after *Bhasin* than in the case of employment and insurance, but examples may be found in *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2016 ONCA 24, 344 O.A.C. 222, 264 A.C.W.S. (3d) 94 (Ont. C.A.), leave to appeal refused 2016 CarswellOnt 15334, 2016 CarswellOnt 15335, [2016] S.C.C.A. No. 105 (S.C.C.) (franchising), and *Elan Construction Ltd. v. South Fish Creek Recreation Assn.*, 2016 ABCA 215, 60 B.L.R. (5th) 198, 53 C.L.R. (4th) 189 (Alta. C.A.), additional reasons 2016 ABCA 220, 56 C.L.R. (4th) 91, [2016] 11 W.W.R. 438 (tendering).

setting is the employment decision of *Potter*. As discussed previously,[199] the court in *Potter* relied on the standard of behaviour prescribed by *Bhasin*'s organizing principle in finding that an employer who administratively suspends a non-unionized employee, without giving the employee good faith legitimate business reasons for this, will breach the employment contract for the purposes of the first part of the first branch of the constructive dismissal test (assuming the suspension is not expressly authorized by the contract, nor acquiesced in by the employee). The interesting feature of this is that, as recognized in *Bhasin* itself, the relational duty of good faith owed by an employer to an employee has traditionally been limited to "an implied term of good faith governing the manner of termination".[200] This duty means that "the employer should not engage in conduct that is 'unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive' when dismissing an employee", but does "not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce".[201]

The Supreme Court in *Potter* did not address the apparent inconsistency between holding that good faith requires an employee to provide legitimate business reasons when it administratively suspends an employee, but not when it openly terminates him or her. Instead, the court simply held that for "an employer [to] refuse to provide work to an employee . . . for just any reason", without providing the employee with a legitimate business justification for this, is "inconsistent with the employer's duty of good faith and fair dealing that has been gaining acceptance at common law".[202]

It is possible the Supreme Court will seek to clarify this point in its forthcoming judgment in *Ocean Nutrition*, which also raises issues about good faith in the employment context. As in *Potter*, the dispute in *Ocean Nutrition* involved a claim for constructive dismissal. However, the principal issue considered by the majority of the Nova Scotia Court of Appeal was not the employer's liability (the finding of constructive dismissal being affirmed), but rather the extent of the damages payable to the employee for this. Most of the $1.1 million award made by the trial judge related to the amounts that were payable to the employee under an LTIP, or long term

199. See the text accompanying footnotes 69-72.
200. *Bhasin*, *supra*, footnote 1, at para. 54.
201. *Bhasin*, *supra*, footnote 1, at para. 54.
202. *Potter*, *supra*, footnote 9, at para. 84.

incentive plan, if the employer was sold at a time when he was "a full-time employee of" it.

The LTIP was a contractual document that provided it would cease to have effect "if the employee ceases to be an employee . . . regardless of whether the Employee resigns or is terminated, with or without cause". In addition, the LTIP stated that it did "not have any current or future value other than on the date of the [sale] and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation". Despite these provisions, the trial judge awarded the employee the amounts he would have been entitled to under the LTIP had he remained an employee at the date of the sale, since the employer was sold during the 15-month reasonable notice period he should have received before his dismissal.

The majority of the court, per Farrar J.A., held that the employee was not entitled to the amounts under the LTIP, because this "fl[ew] in the face of the very clear and unambiguous wording of the Agreement".[203] Justice Farrar did note that "[t]his may have been a different case if the hearing judge had concluded that [the employer] had orchestrated [the employee's] termination to avoid any liability it might have under the [LTIP]", but no such finding had been made.[204] He further emphasized that the trial judge had not found any bad faith by the employer sufficient to justify an award of punitive damages.[205]

By contrast, Justice Scanlan in dissent would have awarded the employee the value of the LTIP, based largely on the ground that the employer had acted dishonestly and in bad faith when constructively dismissing the employee.[206] In his view, "[t]he dismissal . . . [was] not a termination as contemplated in the LTIP nor in accordance with the law of employment contracts", since "[n]either contract referred to management being able to lie and deceive within the context of the employment relationship and directly or indirectly profiting from their deceit and lies".[207] It will be interesting to see whether the Supreme Court accepts this reasoning. Given that the LTIP did not purport to exclude the *duty* of honest performance – as Can-Am had

203. *Ocean Nutrition Canada Ltd. v. Matthews*, 2018 NSCA 44, 48 C.C.E.L. (4th) 171, 2018 C.L.L.C. 210-053 (N.S. C.A.) at para. 88, leave to appeal allowed 2019 CarswellNS 60, 2019 CarswellNS 61, [2018] S.C.C.A. No. 331 (S.C.C.).
204. *Ibid.*, at para. 89.
205. *Ibid.*, at para. 122.
206. *Ibid.*, at paras. 161-210.
207. *Ibid.*, at para. 171.

unsuccessfully argued was the effect of the entire agreement clause in *Bhasin* – but only excluded certain amounts from the employee's *damages award*, it may find that the LTIP should be applied according to its terms.

One of the cases the majority in *Ocean Nutrition* relied upon in finding the employee could not claim the amounts under the LTIP was the decision of the Alberta Court of Appeal in *Styles*, which was previously discussed.[208] As noted, the *Styles* court similarly declined to award an employee amounts payable under an LTIP when he was dismissed without cause before the LTIP bonus vested, since the LTIP prohibited payment to employees who were not actively employed.

Like the majority in *Ocean Nutrition*, the majority in *Styles* noted that there was no evidence the employee had been deliberately terminated at the time when he was for the purpose of depriving him of the LTIP payment.[209] The majority also emphasized the importance of giving effect to the LTIP's unambiguous language, stating that "[t]he respondent contracted for Long Term Incentive Plan bonuses that would only vest if he stayed employed for at least four years, and nothing in *Bhasin* entitles him to anything more".[210] The court in *Styles* therefore concluded – rightfully, it is submitted – that "[i]f [the plaintiff] wished to earn some bonuses under the Plan in the eventuality that he was terminated without cause within four years, it was incumbent for him to negotiate such a provision", and "[n]ot having done so, he cannot now ask the court to retrospectively include such a term on the basis that such a term might be 'reasonable' or 'fair'".[211]

A point of particular interest that emerges from *Styles* is the manner in which the majority dealt with the plaintiff's argument that the defendant breached a duty of good faith by exercising its purported "discretion" to dismiss him without cause in an objectively unreasonable way. The *Styles* court held that pursuant to *Bhasin,* an employer's duty of good faith exists "only with respect to the 'manner of termination'", and "does not 'extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce'".[212] The majority went on to hold "[i]f the employer does not have to explain the decision, the court has

208. See the text accompanying footnotes 135-141.
209. *Styles*, *supra*, footnote 135, at paras. 13 and 65.
210. *Ibid.*, at para. 54.
211. *Ibid.*, at para. 65.
212. *Ibid.*, at paras. 36 and 46.

no mandate to examine the basis or reasonableness of the reasons for termination", since "[t]hat would contradict the very concept of being allowed to terminate the relationship upon reasonable notice or compensation in lieu thereof, without further explanation".[213] It thus affirmed the basic rule that an employer may terminate without cause upon giving reasonable notice or payment in lieu, stating that "[t]he the rule is not that there can be termination without cause so long as there is payment in lieu of notice, plus compensation for 'legitimate contractual expectations'".[214]

Another important appellate case which recognizes that the employer's duty of good faith remains restricted to the termination context after *Bhasin* – while also illustrating how the organizing principle itself may inform this duty – is that of the Newfoundland and Labrador Court of Appeal in *Evans v. Avalon Ford Sales (1996) Ltd.*[215] The plaintiff employee in *Evans* had worked at the defendant car dealership for 15 years, and risen to the level of its commercial fleet manager. After he made an inventory mistake, he participated in a tense meeting with the owner of the dealership and his direct supervisor, at which he suffered a medically diagnosed stress reaction in response to the owner's criticism. He went home early, but returned later that evening and spoke to his supervisor, who unsuccessfully tried to calm him down. The plaintiff gave his keys to his supervisor and left the office after stating "I'm done". The supervisor informed the owner that the plaintiff had resigned, and the owner – who was upset with him for abandoning the dealership during a busy period, and suspected he was going to work for a competitor – refused to answer the plaintiff's phone calls. When the two later met, the owner again criticized the plaintiff, and when the plaintiff sought emotional support and provided the owner with a doctor's note in support of his request to take a stress leave, the owner tore up the note and told him to leave the premises. The plaintiff sued for constructive dismissal and, alternatively, wrongful dismissal after an involuntary resignation.

The Court of Appeal, per Harrington J.A., ultimately affirmed the lower court's decision to allow the claim, but did so for different reasons than the trial judge. The trial judge had found that the plaintiff's resignation was involuntary and equivocal. However, she went on to hold that the employer was liable, not for wrongful dismissal, but for constructive dismissal. She did so on the basis that the defendant was under an implied duty of good faith to allow the

213. *Ibid.*, at para. 36.
214. *Ibid.*, at para. 38.
215. 2017 NLCA 9, 2017 C.L.L.C. 210-028, 275 A.C.W.S. (3d) 779 (N.L. C.A.).

plaintiff additional time to reconsider whether to resign (despite her finding of fact that the plaintiff did not voluntarily resign at all), and held that its failure to do so breached a fundamental term of the employment contract so as to trigger the constructive dismissal test.[216]

On appeal, Harrington J.A. held that while "all contracts, including employment contracts, are subject to the organizing principle of good faith and fair dealing" after *Bhasin*, "the implied term of good faith established by these precedents extends to the manner of termination only", and "the breach of the employer's duty of good faith at this point [the point of termination] in the employee-employer relationship does not give rise to a cause of action that is separate from the action for wrongful dismissal".[217] The duty imposed by the trial judge was inconsistent with this. Once an employer communicates a genuine acceptance of a genuine resignation, then there is no dismissal, whether wrongful or constructive.[218] As a result, there can be no good faith liability on the employer's part for wrongful or constructive dismissal damages for having not given the employee a grace period before accepting their genuine resignation.[219] To hold otherwise, Harrington J.A. held, would be to "imply a free-standing term of good faith into the parties' employment contract", which was not "consistent with the finding of the Supreme Court of Canada in *Bhasin* . . . that good faith is an organizing principle and not a free-standing rule".[220]

At the same time, Harrington J.A. recognized that the organizing principle of good faith in *Bhasin* has utility not only in permitting the recognition of new doctrines of good faith in the future, but also in "interpret[ing] existing doctrines" of good faith and "evaluat[ing] how the actions of the parties fit into" them.[221] In this regard, he noted that where an employer unreasonably accepts equivocal acts by the employee as a resignation, and then treats the employment as terminated (as the trial judge found the defendant did here), then a wrongful dismissal will occur and the employer may breach its existing duty of good faith in the manner of termination (on the ground that the termination was "unduly insensitive").[222] And in considering whether the employer's decision to accept equivocal

216. The constructive dismissal test is summarized at footnote 70 above.
217. *Ibid.*, at paras. 17, 19 and 32.
218. *Ibid.*, at paras. 30 and 33.
219. *Ibid.*, at para. 31.
220. *Ibid.*, at paras. 31-32.
221. *Ibid.*, at paras. 19 and 33.
222. *Ibid.*, at paras. 21, 25-27 and 36-37.

employee acts as a resignation is reasonable or not, Harrington J.A. found that the organizing principle of good faith should inform the approach taken by the courts. In his words:

> [T]his is precisely the type of situation where the overarching duty of good faith takes effect and influences the interpretation of the established doctrines of "resignation" and "reasonableness". Particularly where there has been a lengthy employment relationship and the employer is aware that the employee has a sensitive disposition and may be emotionally and financially vulnerable, the employer cannot, without clarification, reasonably conclude that the employee's intention is to resign solely on the basis of the employee's statement "I quit".[223]

Accordingly, Harrington J.A. concluded that "the trial judge did not err in finding that the duty of good faith could be applied to inform a finding of what, in the context of this employment relationship, would have been reasonable circumstances which had to exist for Avalon to conclude that Evans resigned".[224]

The decision in *Evans* provides an interesting example of a court taking a nuanced approach to the organizing principle of good faith. Rather than equating the principle with a freestanding duty, or using it to impose unwieldy obligations that are inconsistent with the existing law, the *Evans* court invoked the principle as an explanatory aid to assist in delineating the scope of a recognized doctrine of good faith in a difficult case. This is the function that the Supreme Court in *Bhasin* suggested the organizing principle should serve.

ii. Insurance

Along with the employment context, appellate courts have also considered the impact of *Bhasin* upon relational duties of good faith in insurance disputes. The decision of the Manitoba Court of Appeal in *3746292 Manitoba Ltd. v. Intact Insurance Co*.[225] is noteworthy here. The plaintiff made a claim with the defendant insurer after suffering a fire loss on its property. The insurer hired an independent adjuster to investigate the plaintiff's claim, along with a consultant. The consultant advised the adjuster that the loss suffered on the plaintiff's portion of property was approximately $1.65 million, which the adjuster reported to the insurer. Shortly thereafter, however, the adjuster provided the plaintiff's own consultant with a repair estimate of only $755,031. No explanation was given for the difference between the estimate the insurer had received and the

223. *Ibid*., at para. 26.
224. *Ibid*., at para. 36.
225. 2018 MBCA 59, 81 C.C.L.I. (5th) 25, 47 C.C.L.T. (4th) 171 (Man. C.A.).

amount it suggested to the insured, and the insured did not learn about the initial consultant's estimate until after it settled its claim with the insurer for $1.4 million. The plaintiff commenced an action seeking punitive damages for the insurer's breach of is duty of good faith in dealing with its claim, and the insurer moved for summary judgment. However, the insurer's motion for summary judgment was denied, in a decision affirmed by the Court of Appeal.

In permitting the insured's claim to proceed to trial, Mainella J.A. for the unanimous court drew heavily upon *Bhasin* in describing the insurer's duty of good faith. While noting that "[b]efore *Bhasin*, the courts had accepted that there was an obligation of good faith placed on an insurer to dispose of insurance claims openly, honestly and without unreasonable delay", which "applies to both 'the manner in which it investigates and assesses the claim and to the decision whether or not to pay it'",[226] he also relied upon *Bhasin*'s organizing principle of good faith in deciding how the duty applied to the facts before the court. According to Mainella J.A., *Bhasin* means that "an insurer cannot use its economic advantage or the insured's economic weakness to obtain a favourable settlement", and that "[t]he reasonable expectation of an insured making a valid claim is that an insurer will be diligent, fair and refrain from unjustified conduct that has the effect of denying or delaying the benefits of the insurance contract".[227] He concluded by noting that, in light of *Bhasin*, "an insurer unfairly engaging in the practice of lowballing would not be performing its contractual duties 'honestly and reasonably', but would be acting 'capriciously or arbitrarily'".[228] Since the insurer did not lead evidence explaining the discrepancy between the estimate it had received and the amount it suggested to the insured, there was a genuine issue for trial about whether the insurer had acted in bad faith by "unreasonably leverag[ing] its bargaining position to settle the claim by lowballing the cost of repairs during the lengthy claims process".[229]

The Nova Scotia Court of Appeal's judgment in *Industrial Alliance Insurance and Financial Services Inc. v. Brine*[230] also demonstrates the influence of *Bhasin* in the insurance context. The insured there was paid long term disability benefits by the insurer

226. *Ibid.*, at paras. 22-23.
227. *Ibid.*, at paras. 26-27.
228. *Ibid.*, at para. 28.
229. *Ibid.*, at para. 34.
230. 2015 NSCA 104, 392 D.L.R. (4th) 575, 54 C.C.L.I. (5th) 1 (N.S.C.A.), additional reasons 2016 NSCA 3, 262 A.C.W.S. (3d) 595, 2016 CarswellNS 45, leave to appeal refused 2016 CarswellNS 399, 2016 CarswellNS 400, [2016] S.C.C.A. No. 18 (S.C.C.).

when he was diagnosed with severe depression after the termination of his employment. The litigation was precipitated by the insurer's discovery that the insured had also received retroactive lump sum disability benefits under this pension plan, resulting in an overpayment by the insurer. Around the time that it made this discovery, the insurer decided to discontinue rehabilitation counselling services which it had provided to the insured. The insurer had not been required under the policy to offer the rehabilitation services to the insured, and the insured's psychiatrist recommended that it not do so until the insured reached a better level of improvement. However, the insurer chose to provide the services anyway.

The insurer later discontinued the services on the basis that the insured was not improving sufficiently to participate in them, and had recently qualified for the Canada Pension Plan, making a return to work unlikely. In doing so, the insurer disregarded the report of an independent medical examiner it commissioned who opined that the insured's symptoms did not prevent him from returning to work. It also did not attempt to seek any further information about the insured's condition from his psychiatrist, his rehabilitation counsellor or the insured himself. The insured alleged that the decision to discontinue the rehabilitation services was a breach of the insurer's duty of good faith.

The Court of Appeal agreed with the insured. Significantly, it rejected the insurer's argument that it could owe no duty of good faith in discontinuing the services merely because it was under no contractual obligation to offer them in the first place. Noting that the insurer's duty of good faith and the duty of honest performance recognized in *Bhasin* are "sibling duties [that] stem from the same root – what Justice Cromwell termed 'the organizing principle of good faith'", the court stated that "[f]rom that common perspective, *Bhasin* helps us to understand the scope of the insurer's implied duty".[231] Analogizing to *Bhasin*, the court pointed out that there, "the contract literally gave Can-Am unfettered discretion to terminate the contract by notice", so "[i]f Can-Am's literally unfettered power to terminate had been a complete defence, Mr. Bhasin's claim would have failed".[232] But the Supreme Court in *Bhasin* had allowed the claim, signalling that "[t]he contract's explicit acknowledgement of the discretion and its directed consequence did not exclude the implied standard that must accompany the exercise of the discretion".[233] In the same way, though the insurance policy in

231. *Ibid.*, at para. 95.
232. *Ibid.*, at paras. 96 and 99.

Industrial Alliance "did not restrict [the insurer's] unfettered discretion whether to provide, and therefore terminate . . . [the] rehabilitation services", the insurer owed the insured an implied duty that went beyond strict compliance with the contractual terms.[234] In the court's words:

> *Bhasin*'s broad organizing principle and its outgrowth duties do not just tack an extra sanction onto the breach of an explicit contractual term. Neither are the duties of honest dealing in *Bhasin*, or good faith in the insurance context, just executive summaries of the contract's written terms. They are independent implied contractual obligations that derive from the existence of the contract. Whether National Life breached its duty of good faith is not predicated on the condition precedent that National Life breached an explicit provision of the Policy.[235]

While *Industrial Alliance* and *Intact Insurance* suggest that the organizing principle of good faith has significant potential to inform the obligations of insurers, other courts have been careful not to unduly extend those obligations in the wake of *Bhasin*. In *Usanovic v. Penncorp Life Insurance Company (La Capitale Financial Security Insurance Company)*,[236] the Ontario Court of Appeal considered whether the duty required the defendant insurer to inform the plaintiff insured of the limitation period for bringing a claim against it at the time when it terminated his disability benefits. The insurer in *Usanovic* had not done so, and the insured's subsequent action against it was dismissed on summary judgment due to the expiry of the intervening limitation period. While the insured argued on appeal that the insurer's non-disclosure was contrary to its duty of good faith, this submission was rejected by Strathy C.J.O. for a unanimous court.

Of interest is the fact that the insured in *Usanovic* openly acknowledged that no Canadian court had imposed such a duty upon insurers.[237] Instead, while some provinces other than Ontario have passed legislation requiring insurers to inform insureds of limitation periods when denying their claims, the insured accepted that a duty of this kind has not been recognized at common law. In

233. *Ibid.*, at para. 99.
234. *Ibid.*, at paras. 97, 100 and 102.
235. *Ibid.*, at para. 101. At paras. 103-105, the court went on to conclude that the insurer breached its duty by relying upon improper considerations to discontinue the insured's rehabilitation services.
236. 2017 ONCA 395, 68 C.C.L.I. (5th) 17, (*sub nom.* Usanovic v. La Capitale Life Insurance) [2017] I.L.R. I-5975 (Ont. C.A.), leave to appeal refused 2017 CarswellOnt 20346, [2017] S.C.C.A. No. 295 (S.C.C.).
237. *Ibid.*, at para. 33.

substance then, the insured was arguing that the court should recognize a new doctrine under the organizing principle of good faith, although its appeal did not appear to be framed precisely in those terms.

In rejecting the insured's argument, Strathy C.J.O. accepted that, in light of *Bhasin*, "[t]here is no doubt that parties to an insurance contract owe each other a duty of utmost good faith", and that the insurer's duty to deal fairly with an insured's claim – while not a fiduciary duty – is "based on the recognition that the insured is typically in a vulnerable position when making a claim".[238] Nonetheless, Strathy C.J.O. found that imposing the new requirement suggested by the plaintiff would "effectively judicially overrule the provisions of the *Limitations Act, 2002* by making notice given by an insurer to an insured the trigger for the limitation period, rather than discoverability of the underlying claim", which "would defeat the purpose of the statute and bring ambiguity, rather than clarity, to the process".[239] In his view, "the court should not impose consumer protection measures on insurers, outside the terms of their policies that the legislature has not seen fit to require".[240]

The *Usanovic* decision is important in demonstrating how considerations outside the law of contract, such as proper respect for the choices made by the legislature, may influence the court's decision whether to recognize a new doctrine of good faith (or substantially expand an existing one) under *Bhasin*'s organizing principle. In *Bhasin* itself, Cromwell J. cautioned that developments under the organizing principle may only occur "incrementally in a way that is consistent with the structure of the common law of contract".[241] To this it may be added that such developments must also be incremental and consistent with the applicable legislative framework, particularly in an area of contract law so heavily regulated as insurance.

e. Pre-Contractual Doctrines of Good Faith

The Supreme Court in *Bhasin* repeatedly stated that it was addressing the concept of good faith in contractual "performance", and did not suggest that its analysis applied to cases in which parties unsuccessfully engage in negotiations towards an agreement. Nonetheless, the *Bhasin* court did include several doctrines within

238. *Ibid.*, at paras. 25 and 27.
239. *Ibid.*, at para. 46.
240. *Ibid.*, at para. 45.
241. *Bhasin*, *supra*, footnote 1, at para. 66.

its survey of the organizing principle that apply during contractual formation where an agreement is reached, and one of the parties later seeks to set aside that agreement (e.g., unconscionability, and the duty of disclosure imposed upon an insured when applying for insurance). Since *Bhasin* was decided, there has been uncertainty regarding how far the organizing principle of good faith may extend beyond contractual performance to include disputes arising at earlier stages in the contracting process. The discussion that follows examines the appellate cases that have considered this question, both in relation to failed contractual negotiations, and attempts to set aside concluded agreements due to misconduct during contractual formation.[242]

i. Failed Contractual Negotiations

There appear as yet to exist no common law appellate case after *Bhasin* which the application of the organizing principle to failed contractual negotiations has been examined in substantial depth. Nonetheless, the post-*Bhasin* case law suggests that courts are unlikely to receive such claims with enthusiasm – even where negotiations arise against the backdrop of a previous agreement between the parties that is itself enforceable[243] – and there are some decisions in which appellate courts have rejected attempts to extend to the duty of honest performance into pre-contractual negotiation disputes.[244]

242. The distinction between misconduct during negotiations towards a failed agreement, and misconduct during the formation of a concluded agreement, is well established in the law, and has resulted in different doctrinal responses. See, e.g., *Martel Building Ltd. v. R.*, 2000 SCC 60, (*sub nom.* Martel Building Ltd. v. Canada) [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1 (S.C.C.) at para. 70 ("[T]he doctrines of undue influence, economic duress and unconscionability provide redress against bargains obtained as a result of improper negotiation. As well, negligent misrepresentation, fraud and the tort of deceit cover many aspects of negotiation which do not culminate in an agreement").

243. See *Brule v. Rutledge*, 2015 BCCA 25, 629 W.A.C. 144, 70 B.C.L.R. (5th) 291 (B.C. C.A.) at paras. 49-50, where the court cited case law suggesting that its previous decision in *Empress Towers Ltd. v. Bank of Nova Scotia* (1990), 73 D.L.R. (4th) 400, 48 B.L.R. 212, 14 R.P.R. (2d) 115 (B.C. C.A.), leave to appeal refused [1991] 1 S.C.R. vii, 79 D.L.R. (4th) vii, [1990] S.C.C.A. No. 472 (S.C.C.) – which had implied a duty to negotiate in good faith into a renewal clause in a five-year lease that permitted termination if the parties could not agree upon the market rental rate – "should be regarded as confined to its very narrow set of facts, and not as authority for a general proposition that the duty to bargain in good faith exists whenever a negotiation takes place within an existing contract".

An important question that may arise is whether the court should characterize particular disputes as relating to contractual "negotiations", rather than performance, at all. This can create difficult issues where the matter involves the renewal of an agreement. In *Bhasin*, the Supreme Court treated Can-Am's breach as one which occurred at the stage of contractual performance, even though it involved the exercise of a contractual power to decline to renew the agreement. The court did not regard this as a question of contractual negotiations, and it is submitted that the reason for this is because the dealership agreement provided that it would automatically renew unless the right invoked by Can-Am was exercised. As such, there was nothing for the parties to negotiate about in order for the contract to continue, making the non-renewal right much closer to a termination power.

Where the contract does not provide for automatic renewal, however, but makes a renewal conditional upon the parties' agreement about new contractual terms, then it would seem that a dispute which arises in relation to the renewal is better characterized as one relating to negotiations rather than performance. This appears to have recognized by the New Brunswick Court of Appeal in the post-*Bhasin* decision of *Algo Enterprises Ltd. v. UPM-Kymmene Miramichi Inc.*[245] The parties in that case had a 15-year relationship by which the plaintiff would cut and deliver wood for the defendant pursuant to logging contracts written each year, with some of the underlying details in them changing over time (e.g., price or quantity). The contract during their last year contained a clause which provided that "it shall continue from year to year *by mutual agreement* of both parties".

After the defendant informed the plaintiff that it would not continue the relationship for another year, the plaintiff brought a claim for breach of a duty of good faith performance, which it first pleaded arose from the defendant's refusal to "renew" the contract, but then later pleaded arose from its decision to "terminate" it. The Court of Appeal rejected the claim on the basis that the contractual renewal right was an unenforceable agreement to agree, since it required the "mutual agreement of the parties" in order for a renewal to occur.[246] Unlike in *Bhasin* therefore, the contract was not an

244. *Alkin Corporation v. 3D Imaging Partners Inc.*, 2020 ONCA 441, 321 A.C.W.S. (3d) 268, 2020 CarswellOnt 9203 (Ont. C.A.) at paras. 7-8 and 11.
245. *Ibid.*, at paras. 13, 37 and 46-48..
246. *Algo Enterprises Ltd. v. UPM-Kymmene Miramichi Inc.*, 2016 NBCA 35, 87 C.P.C. (7th) 227, [2016] N.B.J. No. 149 (N.B. C.A.) at paras. 13, 37 and 46-48.

automatically renewing one, so the plaintiff's complaint was not about contractual performance but rather about the defendant's conduct during negotiations (and since the plaintiff had amended its claim to allege only a lack of good faith during performance, it could not succeed).

ii. Contractual Formation

The significance of *Bhasin* to disputes about contractual formation has caused the courts greater difficulty than its relevance to failed contractual negotiations. Some appellate cases have suggested that *Bhasin* has no role at the formation stage,[247] but it is submitted that this is incorrect given Cromwell J.'s inclusion of unconscionability and the insured's duty of disclosure among the doctrines that manifest the organizing principle of good faith. However, the degree to which the organizing principle may inform contractual formation doctrines has yet to be fully explored by the courts.

As mentioned earlier,[248] the Supreme Court of Canada missed an excellent opportunity to clarify the implications of *Bhasin* at the contractual formation stage in *Uber*. The majority of the *Uber* court undertook an extensive analysis of the unconscionability doctrine, and made what the minority perceived to be substantial revisions to it. These include the majority's assertion that "[u]nconscionability ... can be established without proof that the stronger party knowingly took advantage of the weaker", because "[s]uch a requirement improperly emphasizes the state of mind of the stronger party, rather than the protection of the more vulnerable" and "unconscionability focuses on the latter purpose".[249]

In doing so, the majority made no attempt to reconcile this principle with its earlier recognition in *Bhasin* that "[c]onsiderations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability", which it said "is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other".[250] Instead, the *Uber* majority only referred to *Bhasin* once, at the end of a string citation of prior Supreme Court decisions that it relied on for the proposition that "the purpose of unconscionability [is] the

247. *Larizza v. Royal Bank of Canada*, 2018 ONCA 632, 296 A.C.W.S. (3d) 70, 2018 CarswellOnt 11406 (Ont. C.A.) at paras. 13-15.
248. See the text accompanying footnotes 83-90.
249. *Uber*, *supra*, footnote 11, at paras. 84-85.
250. *Bhasin*, *supra* footnote 1, at para. 43.

protection of vulnerable persons in transactions with others".[251] This is surprising, particularly given that other appellate cases have considered *Bhasin* in connection with unconscionability.[252]

If, as *Bhasin* suggests, unconscionability is a doctrine that involves considerations of good faith, in which courts seek to prevent a stronger party from "taking undue advantage" of a weaker one, then surely the stronger party's state of mind is a matter of significance. This is not to suggest, as Brown J. points out in his concurring reasons in *Uber*, that unconscionability requires "wrongdoing" in the traditional common law sense of "conduct rising to the level of intention, actual fraud, dishonesty, or active overreaching", but it is to say that "the stronger party [must] have at least constructive knowledge of the weaker party's vulnerability"[253] (a concept long associated with the notion of "equitable fraud" that underpins unconscionability and related contractual formation doctrines).[254]

As Brown J. goes on to note, the idea of unconscionability requires that "the defendant exploi[t] the plaintiff's vulnerability",[255] or as the Supreme Court put it earlier in *Hodgkinson v. Simms*, "the doctrine of unconscionability is triggered by abuse of a pre-existing inequality in bargaining power between the parties".[256] It is nonsensical to speak of such "exploitation" or "abuse" without some type of mental fault element by the defendant, and the presence of one provides "an explanation as to why the defendant should suffer the consequences of the plaintiff's vulnerability".[257] Further, "[w]here the relationship between plaintiff and defendant is contractual, equity's interest in protecting those who are vulnerable must be balanced against the countervailing interests of commercial certainty and transactional security", and a knowledge requirement avoids the situation in which "[c]ontracting parties are left to wonder whether an unknown state of vulnerability will

251. *Uber, supra* footnote 11, at para. 60.
252. See *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, 98 C.P.C. (7th) 1 (N.L.C.A.) at para. 18.
253. *Uber*, *supra* footnote 11, at paras. 164-165. A similar point is made by Côté J., at para. 287.
254. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, 209 D.L.R. (4th) 318 (S.C.C.) at paras. 31, 38-39 and 50; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, 437 D.L.R. (4th) 383, 39 C.P.C. (8th) 229 (S.C.C.) at paras. 52-54.
255. *Uber*, *supra* footnote 11, at para. 165.
256. [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161, 57 C.P.R. (3d) 1 (S.C.C.) at p. 406 (and p. 480) [S.C.R.] (emphasis added).
257. *Uber*, *supra*, footnote 11, at para. 166.

someday open up their agreement to review on grounds of 'fairness'".[258]

It would have been preferable for the majority to address these concerns by openly considering the doctrine of unconscionability as a manifestation of the organizing principle of good faith. Whether the majority accepted Brown J.'s criticisms or not (and it is submitted that they should have), this would have at least required it to explain why the standard of behaviour it prohibited is consistent with the one identified in *Bhasin*, and gives due weight to freedom of contract and commercial certainty across the various contexts in which it may be applied. Rather than do so, however, the majority's decision arguably opens the door to an uncertain discretion to set aside standard form contracts when they contain terms which individual judges view as substantively unfair. Its failure to address the implications of *Bhasin* for this is puzzling, and suggests a broader effort to decouple unconscionability from its roots in equitable fraud.

One post-*Bhasin* case that does address the organizing principle's relationship to unconscionability is that of the Ontario Court of Appeal in *Bank of Montreal v. Javed*.[259] The defendant in that case provided a guarantee to the plaintiff bank to secure the indebtedness of a company of which he was a director. After the guarantee was given, the defendant resigned as a director and ceased to have an active role with the company. The bank made a demand for payment under the guarantee when the company defaulted on the loan. Before the default occurred, the defendant had requested that the bank provide it with information about the company's business account, but the bank refused on the basis that the defendant was no longer an authorizing signing officer and the company had withdrawn its authorization to disclose information to him.

The defendant argued that, by refusing to provide the information to him, the bank had acted unconscionably. In doing so, he acknowledged that his unconscionability argument "seeks to extend the test beyond the inception of the relationship", since as the motion judge observed, "[the defendant's] factum suggests that 'unconscionability was not present at the outset, it crept into the relationship as soon as [he] resigned as a director of the Corporation'".[260] As support for this argument, the defendant

258. *Ibid.*, at paras. 166-167.

259. 2016 ONCA 49, 344 O.A.C. 237, 263 A.C.W.S. (3d) 168 (Ont. C.A.), leave to appeal refused *Shah v. Bank of Montreal*, 2016 CarswellOnt 9666, 2016 CarswellOnt 9667, [2016] S.C.C.A. No. 106 (S.C.C.).

260. *Ibid.*, at para. 8.

relied on *Bhasin*, "assert[ing] that the effect of *Bhasin* is to extend the test for unconscionability from an assessment of the equities of an agreement or transaction, to the assessment of a party's performance of its obligations under the agreement".[261]

The defendant's argument was unanimously rejected by the Court of Appeal. Justice Lauwers, who delivered the reasons of the court, explained that "*Bhasin* does not provide any basis for the appellants' argument that the Supreme Court extended the common law test for unconscionability".[262] Instead, "*Bhasin* recognized a duty of honest performance".[263]

The outcome reached by the Court of Appeal in *Javed* is undoubtedly correct. The Supreme Court's decision in *Bhasin* was concerned with honesty and good faith at the stage of contractual performance, and did not suggest that the contractual formation doctrine of unconscionability now applies at the performance stage as well. That said, it is noteworthy that Lauwers J.A. made no reference to the fact that *Bhasin* identified the law's aversion to unconscionability during contractual formation as a manifestation of the organizing principle of good faith. It is also interesting to note that, prior to *Bhasin*, the Ontario Court of Appeal had itself suggested that unconscionability imposed a *lower* standard than good faith (and that good faith, in turn, imposed a lower standard that a fiduciary one).[264] However, by holding that *Bhasin* does not extend an unconscionability standard into contractual performance, since the duty of honest performance governs such issues instead, the Court of Appeal could be taken to have suggested that unconscionability imposes a higher standard than the doctrines of good faith itself. It would have been preferable if the court had simply stated that unconscionability is a doctrine that is restricted to the contractual formation stage.

A final case of note, which suggests a potentially greater role for *Bhasin* in contractual formation, is the decision of the Ontario Court of Appeal in *2484234 Ontario Inc. v. Hanley Park Developments Inc.*[265] While the facts are relatively complicated, they arose out of an agreement in which the respondent sold the applicant certain lands

261. *Ibid.*, at para. 11.
262. *Ibid.*, at para. 12.
263. *Ibid.*
264. *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 226 D.L.R. (4th) 577, 38 B.L.R. (3d) 42, 64 O.R. (3d) 533 (Ont. C.A.) at para. 68, additional reasons (2006), 269 D.L.R. (4th) 152, 19 B.L.R. (4th) 19, 2006 CarswellOnt 2627.
265. 2020 ONCA 273, 3 B.L.R. (6th) 253, 150 O.R. (3d) 481 (Ont. C.A.), additional reasons 2020 ONCA 293, 319 A.C.W.S. (3d) 378, 2020 CarswellOnt 6219.

containing a proposed subdivision. In order for the subdivision to be approved by the relevant municipality, the applicant was required to build an access road to connect the lands to another property (the "Adjacent Property") that was also owned by the respondent, so the applicant sought to purchase the Adjacent Property from the respondent as well. In a letter from the respondent's lawyer to the applicant, the respondent agreed to convey Parts 1-4 of the Adjacent Property (and provide a temporary easement over them in time for the original purchase agreement to close) in order "to facilitate the development of the proposed subdivision". The letter further said that the respondent's engineer had advised that Parts 1-4 "will be sufficient for the road which is to be built to access the subdivision".

Shortly thereafter, the parties formalized the conveyance and easement of the Adjacent Property in another agreement (the "Transfer Agreement"). However, before the due date for the conveyance arrived, the applicant discovered that Parts 1-4 of the Adjacent Property were insufficient to build the required access road, and that Part 5 was also required. The respondent, despite having always been aware of this, never informed the applicant of its unilateral mistake, and subsequently refused to transfer Part 5 to it by the date fixed for the conveyance. The applicant therefore moved for rectification of the Transfer Agreement to add Part 5 of the Adjacent Property to it, on the basis that it inaccurately recorded the antecedent agreement expressed in the letter from the respondent's lawyer.

The Court of Appeal unanimously granted the applicant's rectification request, in reasons written by Zarnett J.A. In doing so, Justice Zarnett considered a number of legal issues, principal among them being whether the antecedent agreement actually contained a term that required the respondent to convey and grant an easement over Part 5 of the Adjacent Property. Even though no such term was expressly set out in the letter from the respondent's lawyer, Zarnett J.A. held that it was implied in the parties' antecedent agreement, properly construed, in part because the letter stated that the respondent had received professional advice from its engineer that Parts 1-4 of the Adjacent Property were "sufficient" for the access road.

Interestingly, Justice Zarnett characterized this implied term as amounting to a representation and warranty by the respondent, which was not qualified by any suggestion that the respondent held a different view than that asserted by its engineer. Noting that "[p]arties to an agreement are under a duty of honest performance, under which they must not mislead each other about matters relevant

to the contract: *Bhasin*", Justice Zarnett concluded that "[i]n light of that duty, the unqualified reference in the antecedent agreement to the respondent having received advice of sufficiency must be taken as meaning the advice was accurate in the respondent's view", since "[o]therwise there would be no reason to include it and the reference to such advice would be misleading".[266]

What is interesting about *Hanley Park* is that the Court of Appeal did not apply *Bhasin* to the respondent's performance of its obligations under the Transfer Agreement after it was entered into. Instead, the court used the duty of honest performance to interpret the meaning of an implied representation and warranty the respondent gave during the formation of antecedent agreement, based on an assumption the duty created about the respondent's behaviour at the time when the contractual formation took place. While it could perhaps be said that the court was concerned with the respondent's honest performance of the prior agreement for the sale of the proposed subdivision, which ultimately led to the antecedent agreement, the court did not frame its analysis in those terms. Instead, the court appeared to perceive a role for *Bhasin*'s duty of honest performance at the time when a contract is being entered into (which is not unlike that traditionally occupied by the contractual formation doctrine of fraudulent misrepresentation).[267] This suggests that the application of *Bhasin* to the contractual formation stage is likely to be the subject of further development by the courts.

f. Remedies

The doctrines of good faith recognized in *Bhasin* may give rise to a variety of different remedies. However, important legal questions about those remedies exist. Post-*Bhasin* appellate courts have

266. *Ibid.*, at para. 63.

267. For an arguably similar approach, see *Angus Partnership Inc v. Salvation Army (Governing Council)*, 2018 ABCA 206, 422 D.L.R. (4th) 721, 90 R.P.R. (5th) 175 (Alta. C.A.) at paras. 7, 12, 17, 23-24, 35, 39 and 73-74, where the court held that a real estate vendor was not required by the duty of honest performance to disclose an alleged (but ultimately unsubstantiated) title defect to the prospective purchaser before the parties entered into the purchase agreement. The court based this finding on the fact that *Bhasin* does not impose a duty of disclosure, and the purchase agreement subsequently entered into specifically addressed the vendor's disclosure obligations and did not extend to the matter in question. However, the court did not question the purchaser's more fundamental assumption that the duty of honest performance could impose obligations during the contractual formation stage.

addressed some of the more pressing issues in this area, including those relating to punitive damages, disgorgement, the "minimum performance rule" in assessing expectation damages, and the mitigation of damages. The discussion below explores this jurisprudence.

i. Punitive Damages

The Supreme Court of Canada's decision in *Atlantic Lottery* is the most significant post-*Bhasin* development with respect to remedies for lack of good faith in contractual performance. As noted above,[268] the majority in that case struck out a claim for punitive damages which the plaintiffs brought against ALC for allegedly offering inherently dangerous and deceptive VLTs to the public, in violation of contractual duties of good faith that did not fall within any of the categories that had been recognized in *Bhasin*. In doing so, however, Brown J. confirmed that the "independent actionable wrong" necessary to ground a claim for punitive damages in a breach of contract case may "be awarded where the defendant breaches a contractual obligation of good faith"[269] (with the dissent finding that such a breach had been pleaded by the plaintiffs, in the guise of the duty of honest performance).[270]

This aspect of *Atlantic Lottery* could have important implications in future cases. While the Supreme Court of Canada has previously recognized that the violation of a good faith duty can support a claim for punitive damages in the breach of contract setting, it has largely done so only in connection with certain relational duties[271] – namely, the duty an insurer owes to an insured when dealing with its claim,[272]

268. See the text accompanying footnotes 74-76 and 113-115.

269. *Atlantic Lottery*, *supra*, footnote 12, at para. 63.

270. *Ibid.*, at paras. 132-134.

271. *Cf. Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408, 178 D.L.R. (4th) 385, 15 P.P.S.A.C. (2d) 61 (S.C.C.) at paras. 26-29, where the court awarded punitive damages where a creditor breached its implied obligation to provide reasonable notice before enforcing its security rights under a demand loan. While not formally decided as a "good faith" case, *Got* may arguably be viewed as one in which the creditor was found to breach the situational duty not to abuse discretionary contractual powers.

272. *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257 (S.C.C.) at para. 79; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, 271 D.L.R. (4th) 1 (S.C.C.) at para. 63. The availability of punitive damages where an insurer breaches its duty of good faith in dealing with the insured's claim was reaffirmed in *3746292 Manitoba Ltd. et al v. Intact Insurance*, 2018 MBCA 59, 81 C.C.L.I. (5th) 25, 47 C.C.L.T. (4th) 171 (Man. C.A.) at para. 29, subject to the caveat that "[n]ot every breach of the duty of good faith will warrant punitive damages", since

and more controversially, the duty an employer owes to an employee in the manner of their dismissal.[273] This is reflected in *Bhasin* itself, where Cromwell J. did not suggest that a breach of the duty of honest performance could lead to punitive damages,[274] and only referred to punitive damages in connection with the relational duty that exists in the insurance context.[275] By suggesting that punitive damages may now be available for the breach of additional duties of good faith, such as the duty of honest performance, *Atlantic Lottery* could open the door to increased liability in contract.

ii. Disgorgement

While *Atlantic Lottery* suggests an increased ability to seek punitive damages in breach of contract cases, it also appears to have closed another door that had been creeping open with respect to relief for contractual bad faith: the remedy of disgorgement. As noted by the *Atlantic Lottery* court, "[t]he ordinary form of monetary relief for breach of contract is an award of damages, measured according to the position which the plaintiff would have occupied had the contract been performed".[276] Nonetheless,

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they "are exceptional . . . [and] are reserved for situations where an insurer's conduct departed 'markedly from ordinary standards of decency'". See also *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104, 392 D.L.R. (4th) 575, 54 C.C.L.I. (5th) 1 (N.S. C.A.) at para. 186, additional reasons 2016 NSCA 3, 262 A.C.W.S. (3d) 595, 2016 CarswellNS 45, leave to appeal refused 2016 CarswellNS 399, 2016 CarswellNS 400, [2016] S.C.C.A. No. 18 (S.C.C.) ("In *Bhasin* . . . the Court cited the insurer's duty of good faith and said: 'The breach of this duty may support an award of punitive damages'").

273. *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362, 294 D.L.R. (4th) 577 (S.C.C.) at para. 62. *cf. Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1, 3 C.B.R. (4th) 1 (S.C.C.) at paras. 79 and 108-109; *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, 200 D.L.R. (4th) 385 (S.C.C.) at paras. 72-77 and 88-89.

274. It is perhaps noteworthy here that the trial judge in *Bhasin*, despite making multiple findings of dishonesty against Can-Am and holding it to be in breach of a contractual duty of good faith, declined to award punitive damages to Mr. Bhasin on account of this, due in large part to the "commercial" nature of the parties' relationship: *Bhasin v. Hrynew*, 2011 ABQB 637, 96 B.L.R. (4th) 73, [2012] 9 W.W.R. 728 (Alta. Q.B.) at paras. 514-518 and 525, additional reasons 2011 ABQB 718, [2012] 9 W.W.R. 834, 209 A.C.W.S. (3d) 250, reversed 2013 ABCA 98, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175 (Alta. C.A.), additional reasons 2013 ABCA 180, 362 D.L.R. (4th) 35, [2013] 11 W.W.R. 700, reversed in part 2014 SCC 71, [2014] 3 S.C.R. 494, 379 D.L.R. (4th) 385 (S.C.C.). This aspect of the trial decision was not challenged in the subsequent appeals.

275. See *Bhasin*, *supra*, footnote 1, at para. 55.

previous cases – building on developments in England[277] – had recognized that defendants may in exceptional cases be required to disgorge profits that are earned through a breach of contract with the plaintiff, even though the plaintiff does not itself suffer a corresponding loss.[278] Some of these cases also suggested that the bad faith of the defendant may be particularly relevant to such an award, including the majority of the Newfoundland and Labrador Court of Appeal in *Atlantic Lottery* itself.[279]

At the Supreme Court of Canada, the same factor was noted by the dissent in suggesting that the plaintiff's disgorgement claim for breach of contract should not be struck.[280] However, the majority, per Brown J., overturned the Court of Appeal, and established a test for contractual disgorgement in which the defendant's good or bad faith plays no overt role. Instead, Brown J. held that "disgorgement for breach of contract is available only where other remedies are inadequate and only where the circumstances warrant such an award".[281] This test requires asking "whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity", which must generally "resemble those interests that have been protected in the past" through contract awards measured by the defendant's gain.[282] Under this approach, the fact that the defendant may have acted contrary to a contractual duty of good faith would appear to have little, if any, relevance to future claims for disgorgement relief.

276. *Atlantic Lottery*, *supra*, footnote 12, at para. 50.
277. In particular, *Attorney General v. Blake* (2000), [2000] UKHL 45, [2001] 1 A.C. 268, [2000] 4 All E.R. 385 (U.K. H.L.). See also *One Step (Support) Ltd. v. Morris-Garner*, [2019] A.C. 649 (U.K. S.C.).
278. *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, 211 D.L.R. (4th) 385 (S.C.C.) at paras. 25 and 30; *Waterman v. IBM Canada Ltd.*, 2013 SCC 70, (*sub nom.* IBM Canada Limited v. Waterman) [2013] 3 S.C.R. 985, 366 D.L.R. (4th) 287 (S.C.C.) at para. 36.
279. *Atlantic Lottery Corporation Inc.-Société des loteries de l'Atlantique v. Babstock*, 2018 NLCA 71, 53 C.C.L.T. (4th) 12, 29 C.P.C. (8th) 1 (N.L. C.A.) at paras. 113, 127, 129-130 and 132, reversed 2020 SCC 19, 447 D.L.R. (4th) 543, 53 C.P.C. (8th) 1 (S.C.C.). See also *Banque de Montréal c. Ng*, [1989] 2 S.C.R. 429, 62 D.L.R. (4th) 1, 28 C.C.E.L. 1 (S.C.C.), where the court allowed an employer's claim for profits earned by an employee in breach of his contractual duty of good faith under the *Civil Code of Quebec*.
280. *Atlantic Lottery*, *supra*, footnote 12, at para. 124.
281. *Ibid.*, at para. 53.
282. *Ibid.*, at paras. 53 and 58.

iii. The Minimum Performance Rule

Another important decision regarding the remedies available for breach of a duty good faith in contractual performance is the Ontario Court of Appeal's judgment in *Atos IT Solutions v. Sapient Canada Inc.*[283] The defendant in that case was found to have breached a duty of good faith when exercising a "for cause" termination right in the contract. Nonetheless, the contract also provided the defendant with a "termination for convenience" right that it could have used to cancel some (but not all) of its obligations towards the plaintiff. The defendant argued that, in light of this alternative termination right, its damages to the plaintiff should be limited to those which were limited to the lower amount provided for in the contractual formula applicable to it.

The defendant's submission was based upon the Supreme Court of Canada's decision in *Hamilton v. Open Window Bakery*, a pre-*Bhasin* decision which had held that "in cases where a defendant who wrongfully repudiated a contract had alternative modes of performing the contract", then damages are calculated using the mode of performance "which is the least profitable to the plaintiff, and the least burthensome to the defendant".[284] As discussed previously,[285] this same "minimum performance" rule seems to have been invoked by Cromwell J. in *Bhasin*, although the Supreme Court's comments there were somewhat cryptic and did not reference *Hamilton* by name. The plaintiff in *Atos* objected to this, arguing that the *Hamilton* principle must be read subject to *Bhasin*, and does not apply where a defendant breaches a contractual duty of good faith.

The plaintiff's position was rejected by the Court of Appeal, in unanimous reasons written by Brown J.A. Despite accepting that *Bhasin* was "not definitive" about whether the minimum performance rule applied in cases of bad faith, Brown J.A. noted that there were suggestions in *Bhasin* that it did (specifically, the court's reasoning in declining to consider Mr. Bhasin's claim that Can-Am exercised its non-renewal discretion for the improper purpose of forcing a merger with Mr. Hrynew).[286] Further, Brown J.A. noted that "*Bhasin* focused on the issue of the performance of

283. 2018 ONCA 374, 82 B.L.R. (5th) 251, 140 O.R. (3d) 321 (Ont. C.A.), leave to appeal refused 2019 CarswellOnt 4343, [2018] S.C.C.A. No. 218 (S.C.C.) ("*Atos*").

284. *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, 235 D.L.R. (4th) 193 (S.C.C.) at para. 11.

285. See the text accompanying footnote 60 above.

286. *Atos*, *supra*, footnote 283, at para. 48.

contracts . . . [and] did not purport to alter the existing principles concerning the proper measure of expectation damages in the event of a breach of contract".[287] He therefore concluded that the minimum performance rule had not been overtaken by *Bhasin*.

It is important to note, however, the rationale which the Supreme Court gave in *Hamilton* when recognizing the minimum performance rule. Justice Arbour stated that the rule does not apply to claims in tort, where "the inquiry into what would have been but for the tort is appropriate", an inquiry that permits the plaintiff to establish that the tortfeasor may not have acted in the way least burdensome to itself as a matter of fact.[288] She distinguished this from claims in contract, since "[c]ontractual obligations are voluntarily assumed by parties" and "[t]he failure to perform certain promised positive contractual obligations in contract law is conceptually distinct from the breach of unpromised negative obligations to not harm another's interests in tort law".[289] Given these different doctrinal foundations, she concluded that a "tort-like analysis: was not appropriate when assessing damages in breach of contract claims".[290] Rather, she held that "in breach of contracts with alternative performances . . . it is not necessary that the non-breaching party be restored to the position they would likely, as a matter of fact, have been in but for the repudiation", but only "to the position they would have been in had the contract been performed".[291]

In *Bhasin*, however, the Supreme Court held that the duty of honest performance "operates irrespective of the intentions of the parties" and that "the parties are not free to exclude it".[292] Accordingly, the consensual paradigm that *Hamilton* perceived as differentiating breach of contract claims from those in tort does not appear to apply with the same force to the duty of honest performance. It will be interesting to see whether subsequent appellate cases take the same approach as *Atos*, or come to view the minimum performance rule is inapplicable to dishonest performance claims.

iv. Mitigation of Damages

A final point that appellate courts have considered in relation to a defendant's lack of good faith in contractual performance is the

287. *Ibid.*, at para. 47.
288. *Ibid.*, at paras. 16 and 19.
289. *Ibid.*, at para. 15.
290. *Ibid.*
291. *Ibid.*, at para. 17.
292. *Bhasin*, *supra*, footnote 1, at paras. 74-75.

impact this may have upon the plaintiff's duty to mitigate its damages. The Ontario Court of Appeal's decision in *Mohamed* is instructive here. As noted previously,[293] the defendant in *Mohamed* was found to have abused its contractual termination right to cancel the plaintiff's fixed term contract. In awarding the plaintiff damages for this, Feldman J.A. held that he should receive the entire amount he would have been entitled to for the duration of the six-month fixed term, with no duty to mitigate.

In reaching this conclusion, Feldman J.A. drew an analogy to prior jurisprudence from the Ontario Court of Appeal which holds that fixed term employees who are terminated without cause are not required to mitigate their damages unless their employment contract provides otherwise. While the plaintiff in *Mohamed* was an independent contractor rather than an employee, and while Feldman J.A. was not prepared to hold that the principle from the employment case law would apply to all fixed term contracts involving independent contractors, she concluded that it was appropriate to apply the principle to the agreement before the court. In doing so, she placed significant emphasis upon the organizing principle of good faith:

> [a]lthough the contract does not provide for what damages would flow from a failure to terminate in good faith, based on the specific terms and circumstances of this contract, it is reasonable to infer that the parties intended that if the power to terminate was not exercised in good faith, then damages for breach would be based on the wages owed for the remaining term of the agreement, without a duty to mitigate.[294]

Mohamed suggests that courts may be willing to interpret remedial doctrines in a way that is favourable to plaintiffs where a defendant fails to act in good faith, and there is some scope in the law as to how the doctrines should apply. In a difficult case, where the existing jurisprudence does not dictate a particular outcome, the fact that the defendant acted contrary to the requirements of good faith may be a factor that inclines the court against it.

4. Conclusion

A review of Canada's appellate jurisprudence since *Bhasin* suggests that the organizing principle of good faith and the specific duties that exist under it have played an important role in contractual disputes. In many cases, the concepts enunciated in *Bhasin* have been

293. See the text accompanying footnotes 160-163 above.
294. *Mohamed*, *supra*, footnote 160, at para. 29.

central to the court's decision to find for the plaintiff (e.g., *Potter*, *Telsec*, *Quickie Convenience*, *IFP*, *Mohamed*, *Ju*, *Lafarge*, *Brule*, *Evans*, *Intact Insurance*, *Industrial Alliance* and *Hanley Park*), though there are certainly other cases in which arguments founded on *Bhasin* were unsuccessful (eg., *Churchill Falls*, *Atlantic Lottery*, *Continental Steel*, *Callow*, *Albo*, *Water's Edge*, *Wastech*, *Styles*, *Willowbrook*, *Invecom*, *Alim*, *Northrock*, *Ocean Nutrition*, *Usanovic*, *Algo*, *Javed* and *Atos*). It would thus appear that the early predictions by some commentators that *Bhasin* will have a negligible impact on contracts jurisprudence are unfounded. No doubt, claims based on a lack of good faith have been – and will continue to be – asserted in many cases in which they add little to the express terms of the contract, and will not substantively alter the defendant's potential for liability. However, this does not mean that all such claims are doomed to fail. In appropriate cases, they may succeed, and in doing so they can play a pivotal role in the development of the law. The appellate cases decided subsequent to *Bhasin* confirm this fact.

That said, it is evident that a number of different approaches to *Bhasin* are being taken by appellate courts. Some judges clearly perceive a greater potential than others for *Bhasin* to enhance the law of contracts, and underlying concerns about the impact that good faith duties may have upon freedom of contract and commercial certainty continue to exist. At the far ends of the spectrum, two competing philosophies appear to have emerged.

On the one hand, certain judges have been quite cautious – perhaps even sceptical – about what the organizing principle can accomplish. The following comments of the Alberta court in *Styles* capture this sentiment well:

> Applying the "organizing principle of good faith" involves a difficult balancing exercise. Contracting parties are generally entitled to perform (and expect performance of) the contract in accordance with its terms. They are entitled to act in their own best interests . . . But at some point they cannot perform certain contracts in a way that seeks to "undermine [legitimate contractual] interests in bad faith" . . . 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. As a result, this "organizing principle" should only be applied to situations where it has previously been invoked, although there is a limited ability to extend the law.
>
> . . . . .

> . . . *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.
>
> As it was aptly put in *Addison* . . .:
>
> > The duty of good faith performance of contractual obligations recently affirmed by the Supreme Court of Canada in *Bhasin* [is not a licence] to invent obligations out of whole cloth divorced from the actual terms of the contract between the parties.[295]

On the other hand, some judges have emphasized the critical role that good faith plays in Canadian commerce. In the same year that *Styles* was decided, the same court, with a differently constituted panel, observed:

> Ensuring that contractual obligations are discharged in good faith and in accordance with the reasonable expectations of the parties is essential to the economic well-being of this country.
>
> . . . . .
>
> . . . If companies, and that includes sophisticated corporations, cannot rely on other companies with whom they contract to conduct themselves in a manner faithful to the parties' contractual intentions, then that is not only hurtful to the company left with the problem. It is also harmful to the citizens of this country. Business craves certainty; it is understandably risk averse. Canadians lose if companies have to look over their shoulder to ensure that they are not being stabbed in the contractual back, especially where investments are measured in millions, if not billions, of dollars. Who would choose to invest under these circumstances? . . . This is contrary to society's enlightened collective self-interest.[296]

At bottom, the difference between these views reflects opposing beliefs about the wisdom of *Bhasin* and the project of reforming the common law of contract that it began. While many judges agree with the approach that *Bhasin* stakes out, others remain unconvinced. The degree of "faith" that appellate courts have in *Bhasin* itself has proven to be the defining leitmotif of the jurisprudence. It will be interesting to see what impact the Supreme Court's decisions in the Trilogy have on this fundamental debate.

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295. *Styles*, *supra*, footnote 135, at paras. 45 and 53-54.
296. *IFP*, *supra*, footnote 157, at paras. 2-3.